PROSECUTION v. MUGESERA

[Rwanda COURT OF APPEAL – RP/GEN 00003/2019/CA (Rugabirwa, P.J, Kaliwabo, J and Tugireyezu, J.) 25 September 2020]

Constitution –Judiciary – Independence of the Judiciary – The Judiciary is independent because it is different from the Legislature and the Executive, and in exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power or authority – The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 140, paragraph 2; Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service, article 33, paragraph one and 2.

Constitution – Rights to legal counsel – None should use rights to legal counsel to delay due process of the trial as well as the interests of justice.

The Convention on the Prevention and Punishment of the Crime of Genocide – International Crimes – The prosecution – The prosecution of the International Crimes does not need that those crimes appear in domestic laws because they are already prohibited in international customary law, therefore, laws instituting crimes against humanity should not be considered as laws instituting new crimes, rather, it is the affirmation of what is in international customary law.

Laws of crimes against humanity – International Crimes – Serious and violent crimes or when they were committed against a large number of people, this is the reason of treating them as

crimes committed against international community or which inflicted values of mankind.

Laws of crimes against humanity – International Crimes – Incitement to commit Genocide – Crime of persecution – hatred speech – When a principal offence was demonstrated, there is no need of considering as an offence different acts which contributed to the commission of that offence.

Evidence law – The value of testimony – Testimony produced after a long time shall be considered in its own quality though witnesses use their own words in reporting what they heard or what they were told.

Facts: This case started before the High Court, Chamber of International Crimes and Transnational Crimes, the accused was charged with various crimes which originate from his speech delivered in a meeting of a political party MRND which took place in former Gisenyi Prefecture, Kabaya Sub-Prefecture on 22/11/1992 and various speeches delivered in meetings in different areas of the country, these include his speech at Nyamyumba on 06/07/1992. The Court rendered the judgment and found him guilty of complicity in genocide because of inciting to commit genocide, persecution as crime against humanity and inciting ethnic hatred publicly and directly. The Court also held that he is not guilty of conspiracy to commit genocide and being accomplice of those who committed Genocide because of giving orders and distributing machetes, and therefore, the Court sentenced him to life imprisonment.

The accused appealed to the Supreme Court but his appeal was transferred to the Court of Appeal after judicial reform. He appealed stating that the High Court erred on facts and on laws because it disregarded that he should not be prosecuted for the

offences charged because crimes were committed while he was no longer in Rwanda since he exiled to Canada in 1992, that the court affirmed that it lacks jurisdiction but it disregarded it and heard his case, that the Court disregarded that he should have been presumed as innocent till the case is closed(*violation du principe de la présomption d'innocence*), he adds that the Court failed to hear discharging witnesses, that it deprived him rights to defence and responding to sentences requested by the Prosecution stating that he was not assisted by a legal counsel, he argues that those rights are provided by the Constitution of the Republic of Rwanda, he adds that the Court rendered the judgment basing on the law which does not exist because it violated the principle of non- retroactivity of the penal law, that the Court found him guilty relying on the speech presumed to have been delivered at Kabaya, the speech was on the audio tape which is not original, that the Court disregarded that if it considered that speech in its full content and not put it in general context, the Court would have found not guilty the orator, because he was calling for election in the country, and also, the Court disregarded that he did not commit a crime because the speech he delivered in different areas of the country which he named Speech of Four Corns of Satan (*Discours de quatre cornes de satan*) which does not incite to genocide, rather the speech contains message of avoiding pride, treason and arrogance, it also contains the daily weapons for which every member of MRND had to have which are election, heroism and love. Therefore, he prays to be acquitted because he did not commit a crime.

The Prosecution contends that the accused's statements that he should not be prosecuted for the offences charged with, that he is charged with crimes committed while he was no longer in Rwanda, this ground of appeal lacks merit because the crimes he is charged with were committed when he was still in Rwanda in

1992, when he delivered the speech which contains acts of crimes.

With regard to the Court's determination that it lacks jurisdiction and it keeps hearing the case, the Prosecution states that it is not true because the High Court did not hold that it lacks jurisdiction to hear the accused's case, rather in its decision of 25/04/2013, the Court decided that it has jurisdiction to try the case, the Court further found his claim filed to the Court being not in compliance with the Rwandan law because the claim does not relate to the jurisdiction of courts based on the ground of the claim, territorial jurisdiction, period and party to the case, and that it is not an objection based on the disqualification of judges of that court so that his case be transferred to other courts of Rwanda.

With regard to the principle for which he states that it was violated, that he should have been presumed as innocent until the case is closed *(violation du principe de la présomption d'innocence*), the Prosecution states that this ground of the accused's appeal should not mainly be admitted because it is not in limits of the appeal because that ground was not heard on first instance since it does not appear among objections examined by that court as indicated in the appealed judgment. The Prosecution further states that as an alternative, that ground of the accused's appeal has no merit because he did not prove that the speech delivered by authorities, statements or film, had influenced the appealed judgment because the accused did not state that it was done by the High Court, rather he was arguing that the statements were made by various authorities and different media.

Concerning the accused's statements that his rights provided by the Constitution of the Republic of Rwanda for defending himself in hearing and rights of responding to sentences requested by the Prosecution because he was not being assisted by a legal counsel,

the Prosecution states that the High Court decided to proceed with the hearing without a legal counsel for the accused because he and his counsel wanted to delay the hearing deliberately, and he failed to prove wrong that decision of the High Court whereby the Court explained that the accused and his Counsel voluntarily delay the hearing, till when the High Court decided to proceed with the hearing because the fact that the Counsel for the accused does not appear in the hearing, it does not affect the accused's rights to legal counsel and defence, the Prosecution further states, the fact that the accused did not react on sentences requested by the Prosecution was due to his negligence and that of his Counsel of appearing in hearing, because of that, the High Court had adjourned the hearing thirteen (13) times within three (3) months, thus that Court did not err because the accused was given reasonable time to exercise his rights but he failed to manage that time, thus, that ground of appeal should not be considered.

With regard to the accused's statement that the Court refused to hear discharging witnesses, the Prosecution states that the High Court asked all parties to produce identification of their witnesses, their addresses and how they will be interrogated, and also, the High Court reminded it several times because the accused who was stating that he has discharging witnesses, he failed to comply with what he was asked until he was given deadline but he also kept failing to do so. The Prosecution argues that, the fact that the accused did not produce identification of witnesses; he should not blame the Court because he deprived himself of those rights.

The fact that the accused argues that the Court rendered the judgment basing on the law which does not exist, because the Court violated the principle of non- retroactivity of the penal law, the Prosecution states that this ground of the accused's appeal has

no merit because the Convention on the Prevention and Punishment of the Crime of Genocide enumerates acts of Genocide as well as punishable acts, the Prosecutions adds, the fact that Rwanda is silent about sentencing, it does not affect the rest of other provisions of the Convention. The Prosecution further states, since Rwanda ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the Crime of Genocide is provided in Rwandan laws, thus, acts for which the accused is prosecuted that they were committed in 1992, already, they were acts of Genocide pursuant to Rwandan law. The Prosecution also states that the crime of Genocide is a serious crime on international level, that Rwanda enacted a law punishing genocide and massacres perpetrated in Rwanda from 01 October 1990 to 31 December 1994, in the preamble of this law, the legislator stated that in 1975 Rwanda ratified the Convention on the Prevention and Punishment of the Crime of Genocide, thus there was a need enacting a law punishing the perpetrators of acts constituting this crime, which is the law of 1996.

Concerning the statements of the accused that the Court convicted him basing on the speech considered as the one delivered at Kabaya, the accused argues that it is on the audio tape which is not original, the Prosecution states that the Court did not err in affirming that the audio tape that contains the speech delivered by the accused at Kabaya because it is an element of evidence which should be useful in this case because even the Supreme Court of Canada relied on it when the Court decided in administrative case that he is not authorized to reside in that country because of the crimes for which he was suspected, the Prosecution adds that the speech on that audio tape was not altered as confirmed by the expert Peter Fraser, and also, the accused did not produce any proof that the speech was altered, except stating it only, the Prosecution further states the High

Court convicted the accused basing on that audio tape and other elements of evidence which are found in the case file such as statements of witnesses who were in the meeting at Kabaya, and that their testimony should be considered because they corroborate with content of the speech.

Held: 1. The Judicial Authority is independent because it is different from the Legislature and the Executive, and in exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power or authority, therefore, this objection of the accused that he should not be tried by Rwandan courts under pretext that he has conflicts with Rwanda is with no merit.

2. None should use rights to legal counsel to delay due process of the trial as well as the interests of justice; therefore, this ground of appeal that the accused was deprived right to legal counsel requesting to quash the judgment lacks merit.

3. The prosecution of the International Crimes does not need that those crimes appear in domestic laws because they are already prohibited in international customary law, therefore, laws instituting crimes against humanity should not be considered as laws instituting new crimes, rather, it is the affirmation of what is in international customary law, thus, the ground of appeal which refers to the fact that crimes were not provided in domestic laws has no merit.

4. Serious and violent crimes or when they were committed against a large number of people, this is the reason of treating them as crimes committed against international community or which inflicted values of mankind, therefore, the reason of the accused's appeal that he was sentenced in violation of the principle of non- retroactivity of the law has no merit.

5. When a principal offence was demonstrated, there is no need of considering as an offence different acts which contributed to the commission of that offence, thus, the High Court should not have found the accused guilty of fuelling hatred based on ethnicity while he was also convicted for incitement to commit genocide and crime against humanity as persecution.

6. Testimony produced after a long time shall be considered in its own quality though witnesses use their own words in reporting what they heard or what they were told, thus the ground of the accused's appeal that the High Court convicted him for the speech delivered at Kabaya basing on false accusations (testimony), this ground of the appeal lacks merit.

Appeal has no merit,
Court fees are transferred to the public treasury.

Statutes referred to:

The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 140, paragraph 2.

Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, article 94.

N° 08/2013/OL of 16/06/2013Organic Law modifying and complementing Organic Law N° 31/2007 of 25/07/2007 relating to the abolition of the death penalty as modified and complemented to date, article 5bis.

Organic Law Nº 02/2013/OL of 16/06/2013 modifying and complementing Organic Law N° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts as modified and complemented to date (which was inforce at that time), article 18.

Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code, article 20, 83, 105, 120 litera 8, 121 and 132 litera 3.

Statute of International Criminal Court for Rwanda, article 3

Rome Statute (International Criminal Court), article 7.2

Statute of International Military Court, article 6

The Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948, article 3

Law N° 47/2013 of 16/06/2013 relating to transfer of cases to the Republic of Rwanda, article 18.

Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 2,3, 5,62 and 66.

Decree Law N° 21/77 of 18/08/1977 instituting the penal code (which was inforce at that time), article 393.

Decree Law N° 08/75 of 12/02/1975, relating to public and direct incitement to commit Genocide (which was inforce at that time).

Case laws referred to:

Mugesera v Canada, N° 2005 S.C.R. 40, rendered on 28/06/2005 by the Supreme Court of Canada.

Prosecution v Ntakirutimana, the judgment RPA 0197/10/CS rendered on 21/11/2014 by the Supreme Court.

Prosecution v Musema, ICTR-96-13-T rendered on 27/01/2000, paragraphs 19, 20 and 21

ICTR-99-52-A rendered on 28/11/2007

ICTR-96-4- T/Peine/leg/fra, Procureur c/ Akayesu Jean Paul

Prosecution vs Nahimana, ICTR-99-52-T.

Supreme Court of Canada, file Nº 30025, the Accused v. Canada (Minister of Citizenship and Immigration), parag. 68

Prosecution v. Bikindi, ICTR-2001-72-T, 2nd December 2008, para.32
Prosecution v. Muvunyi, ICTR-00-55A-T, 11th February 2010, para. 56, 58, 91-94
Prosecution v Vujadin Popovic, 2ICTY-05-88-A.
Prosecution v Ngeze, ICTR- 99-52-A
Croatia v. Serbia, International Court of Justice, Judgment of 03/02/2015, para 87.

Authors cited:

Stanton, G. H. (2013). 10 Stages of Genocide. Retrieved April 22, 2016, from Genocide watch net: http://www.genocidewatch.org/genocide/tenstagesofgenocide.html , in report of 2019 of the Senate of Rwanda on the denial or revisionism of Genocide perpetrated against Tutsi, acts which are committed abroad, pp 29-33

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Following the speech delivered in the meeting of MRND[1] held in the former Prefecture of Gisenyi, Sub-prefecture of Kabaya on 22/11/1992, and the speeches allegedly delivered in different meetings held in various parts of the Country including the speech allegedly delivered in the meeting held in Nyamyumba on 06/07/1992, the Public Prosecution accused

[1]National Republican Movement for the Development and Democracy

Mugesera Léon of the offences against the State security, the incitement to the hatred between the citizens and the incitement of MRND militants to kill the Tutsi, but he was not arrested because he had taken refuge in Canada, where he pleaded in the cases related to the permanent residence in that State due to the charges against him including the incitement to kill and commit genocide, the incitement to the hatred and the crimes against humanity, but up to 2012, he was refused such rights, therefore he was transferred to plead in Rwanda.

[2] When Mugesera Léon was transferred in Rwanda, the Public Prosecution accused him before the High Court, the Special Chamber hearing the international and transnational crimes[2] for having committed the charges mentioned in the indictment.

[3] During the hearing, the High Court examined different objections raised by Mugesera Léon and decided on allotting the time to Mugesera Léon, the equipment and facilities for the case preparation and the right to be assisted. The High Court also examined the objection related to the charges against Mugesera Léon as the suspect transferred by another State and it was decided that he was accused of the crimes committed before 1994, thus he was not transferred by the International Criminal Tribunal for Rwanda (ICTR). It also examined the objection related to the hearing suspension due to the negotiation initiated between Mugesera Léon and the Public Prosecution in relation to the assistance provided to the indigent accused, the High Court ruled that it could not suspend the hearing as there was no evidence of such negotiation.

[2]Referred to as the High Court

[4] The High Court examined the objection raised by Mugesera Léon in relation to the hearing suspension due to the appeal filed against the previous cases, it decide that such appeal could not suspend the hearing, because those cases were jointly appealed with the hearing on the merits, concerning the adjournment of the hearing due to the ground of the sickness, it was decided to present the medical leave issued by a doctor. The Court also decided on the objection related to the refusal or acceptance of some evidence produced during the criminal case, whereby the Public Prosecution requested to firstly confirm if the speech it submitted to the High Court was the one Mugesera Léon delivered at Kabaya on 22/11/1992, and that there were the documents that Mugesera Léon would not continue to use for the purpose of the case, the Court ruled that the examination and appreciation of the evidence are conducted during the case hearing, and in the criminal matters all evidence which are not prohibited by the law are admitted.

[5] The High Court also examined another objection raised by Mugesera Léon related to the right to be heard by the judge legally assigned to the party, it was decided that the fact that one of the judges who started to hear the case has been appointed to other duties, leading to the bench change is not contrary to the law, and the change of the judge who started to hear the case does not deprive Mugesera Léon of the right to be heard by the judge legally assigned to him and it does not give room to the reopening of the hearing, given that the law provides that when a judge is replaced by another, the hearing resumes from where it was stopped.

[6] The Court also upheld that among the protected witnesses, some of the Public Prosecution's witnesses should be

removed from the list approved by the Court for different grounds including the sickness, their unavailability in the place of residence they mentioned, and the invalidation of the statements made during the investigation which are not signed. The High Court also ruled that the fact that Mugesera Léon did not provide the requirements for the appearance of the defence witnesses including the complete identification, the place of residence and the matter he wished that they should be interrogated about it, could not suspend the case hearing.

[7] Regarding the hearing on the merits, the High Court rendered the judgment n^0 RP 0001/12/CCI on 15/042016 and ruled that Mugesera Léon is convicted of the crime of being accomplice of the genocide perpetrators for having publicly and directly incited to commit genocide, persecution as the crime against humanity and the crime of incitement to the hatred on basis of ethnic group, and it also decided that he was not convicted of the crime of conspiracy to commit genocide and being accomplice of the genocide perpetrators for having given orders and weapons and it sentenced him to the life imprisonment.

[8] Mugesera Léon filed the appeal against that judgment in the Supreme Court submitting that the High Court committed error of fact and error of law as it did not consider that he should not be prosecuted for the crimes of which he is accused as they have been allegedly committed when he was not in Rwanda because he took refuge in Canada in 1992, it ruled that it had not the jurisdiction to adjudicate his case, but it violated the principle that he should be presumed innocent until conviction, it disregarded to hear the defence witnesses, it deprived him of the rights entitled to him by the Constitution of the Republic of

Rwanda to defend himself on the hearing of 14/10/2015 and to reply on the penalties requested against him by the Public Prosecution as he was not assisted by a counsel, it rendered the judgment on basis of the law which did not exist and it violated the principle of non-retroactivity of the criminal law, it convicted him on basis of the tape which was not original, it convicted him on basis of the speech allegedly held in Kabaya recorded on that tape, it disregarded the fact that if it did not divide it up into parts and it analysed it in its general context, it would note that the one who delivered the speech did not commit an offence because he claimed for the elections in the country, and it did not consider that he did not commit the crime because the speeches delivered in various parts of the country he called the speech of four satanic horns (*Discours de quatre cornes de satan*) did not incite to commit genocide, rather they conveyed the message of avoiding dishonour, treason, the arrogance and pretension, also they included the fundamentals daily required for the MRND partisan including election, the heroism and the patriotism. He prayed to be declared innocent given that he did not commit any crime, however, after the restructuring of the court jurisdiction, his appeal was transferred to the Court of Appeal pursuant to the article 105 of the law N^0 30/2018 of 02/06/2018 determining the jurisdiction of the courts for adjudication[3], it was recorded on N^0 RPA/GEN 00003/2019/CA.

[9] The case was heard twelve (12) times, Mugesera Léon assisted by Counsel Rudakemwa Jean-Félix and the Public

[3] Article 105 of the Law n^0 30/2018 of 02/06/2018 determining the jurisdiction of the courts provides that "From the day this Law comes into force, except cases already under trial, all cases that are no longer in the jurisdiction of the court seized are transferred to the court with jurisdiction in accordance with the provisions of this Law".

Prosecution represented by Dushimimana Claudine together with Habineza Jean-Damascène, National Prosecutors.

II. ANALYSIS OF THE LEGAL ISSUES

A. REGARDING THE FUNDAMENTAL ISSUES AND RIGHTS OF WHICH MUGESERA LÉON HAS BEEN ALLEGEDLY DEPRIVED

1. Whether Mugesera Léon could not be charged of the crimes related to genocide and the crimes against humanity committed in 1994 when he was not residing in Rwanda.

[10] Mugesera Léon avers that the Public Prosecution could not charge him of the crimes related to genocide above mentioned including the incitement to commit genocide given that when the genocide was perpetrated in Rwanda in 1994 by the incumbent Government, he was not in Rwanda, rather he was in exile in Canada in 1992 for safeguarding his life, but he was not engaged in political activities in Canada because he did not adhere to any political party for recovering the power in Rwanda, rather he was a lecturer at the University as asserted by Counsel Stanislas Mbonampeka who then was the Minister of Justice. He also supports that he cannot be charged of the crime of genocide because he did not participate in the unrest which happened in Gisenyi, Ruhengeri and Byumba Prefectures because the Government of Rwanda had dismissed him on 03/02/1993.

[11] He sustains that on basis of the article 111 of the Law N^{o} 027/2019 of 19/09/2019 relating to the code of criminal procedure which provides that *the benefit of doubt is given in favour of the accused* and the article 12 of the Law N^{0} 22/2018 of

29/04/2018 relating to the civil, commercial, labour and administrative procedure[4], he should be declared innocent because the Public Prosecution did not produce an evidence indicating that he was in Rwanda in 1994, when the genocide against Tutsi was committed.

[12] The representative of the Public Prosecution submits that the ground of appeal of Mugesera Léon is not founded given that the charges against him above mentioned were committed when he was in Rwanda in 1992, by the time he held the speech constituting the offences with which he is accused.

DETERMINATION OF THE COURT

[13] The casefile indicates that Mugesera Léon raised the objection in the High Court supporting that it has no jurisdiction to hear his case about the offences with which he is accused above mentioned, given that they were not under the jurisdiction of the International Criminal Tribunal for Rwanda (ICTR)[5] because they have been committed before 1994, meaning on 22/11/1992, concerning the speech allegedly held at Kabaya, and on 06/07/1992 concerning the meetings he allegedly held at Nyamyumba.

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[4]The article 12 of the Law N^{0}22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that "The claimant must prove a claim, failing which the respondent wins the case.

[5]Article 1 of the Statute of International Criminal Tribunal for Rwanda provides that "The International Criminal Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed between 1 January 1994 and 31 December 1994.

[14] The High Court took a decision on that objection on 24/12/2012, it ruled that the objection raised by Mugesera Léon on the Tribunal competence ratione temporis is not grounded, given that it has the competence to hear his case because he has not been transferred by ICTR and the convention between the Republic of Rwanda and Canada does not stipulate that he would be prosecuted only for the crime of genocide and other serious violations of international humanitarian law committed between 01/01/1994 and 31/12/1994.

[15] The casefile also indicates that before the Court, Mugesera Léon and Counsel Rudakemwa Jean Félix who assists him sustained that he could not be prosecuted for the charges of which he is accused, because by the time of their commission in 1994 he was not in Rwanda, rather he was in exile in Canada, where he was lecturer in the University.

[16] The Court finds that, by the fact that the Rwandan law provides that the Rwandan courts have the jurisdiction to hear the case about the crime of genocide and crimes against humanity committed between 01/10/1990 and 31/12/1994 and the crimes above mentioned against which Mugesera Léon is charged by the Public Prosecution had been allegedly committed on 22/11/1992, it is evident that the High Court did not commit any error when it decided that it has the jurisdiction to hear his case about those crimes because they have been allegedly committed when was still in Rwanda on 22/11/1992, meaning within the time provided under the law[6].

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[6]Organic Law nº 08/96 of 30 August 1996 complemented by the Organic Law nº 40/2000 of 26/01/2001 establishing Gacaca Courts as repealed and modified by the Organic Law nº 16/2004 of 19/06/2004 establishing Gacaca Courts competent to prosecute and hear the cases of the perpetrators of the

[17] The Court however finds that the issue of determining if Léon has committed or not those crimes should be analysed in other paragraphs of this case.

2. Whether the High Court had decided that it does not have the jurisdiction to hear the case of Mugesera Léon, but it did not consider that fact and heard his case.

[18] Mugesera Léon avers that he requested the High Court not to hear the case Nº RP 0001/12/CCI which opposes him with the Public Prosecution because it would not grant to him fair trial as he is the enemy of the Republic of Rwanda because he denounced the armed forces of Uganda when they attacked Rwanda in 1990, but on 25/04/2013, the Court took a decision and ruled that it does not have the jurisdiction to hear his case, but it did not stop the hearing and it did not indicate to him the court which has the jurisdiction to hear his case as provided under the article 1666 of the Lawnº 30/2013 of 24/05/2013 relating to code of criminal procedure, rather it decided that the hearing would be resumed on 29/04/2013.

[19] He also sustains that even if he is not inimical to the Rwandan judges, however he notes that if the Rwandan courts would adjudicate his case while the Judiciary is one of the organs of the Republic of Rwanda of which he is the enemy, the Republic of Rwanda would become the judge and the party in the same judgment, and that issue is contrary to the article 151, paragraph 1 of the Constitution of the Republic of Rwanda of

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crimes of genocide and other crimes against humanity committed between 01 October 1990 and 31 December 1994 as modified and complemented by the Organic Law nº 13/2008 of 19/05/2008 and the Organic Law nº 02/2013/OL of 16/06/2013 modifying and complementing the Organic Law nº 51/2008 of 09/09/2008.

2003 revised in 2015 which provides that "nobody may be a judge in his or her own case".

[20] He explains that the evidence indicating that he is the enemy of the Republic of Rwanda so that it cannot grant to him a fair trial include the list prepared in January 1994 and signed by KANYARENGWE who was the chairman of RPF[7] who mentioned that Mugesera Léon is the enemy of RPF as long as he is its opponent, and Gérard GAHIMA who was the Prosecutor General drafted a document indicating that it is not himself who established the list, rather it has been prepared for political purpose, Counsel Stanislas MBONAMPEKA who was the Minister of Justice himself mentioned that Mugesera Léon was the enemy of RPF and this has been supported by UWIZEYIMANA Evode who had written a letter indicating that Mugesera Léon could not be granted a fair trial in Rwanda, even the United Nations Organisation to which a claim had filed by Canadian Counsels was not satisfied with the decision taken by that country to transfer him in Rwanda.

[21] Counsel Rudakemwa Jean – Félix who assists him, sustains that normally the Rwandan courts have the jurisdiction to hear the claim filed by Mugesera Léon concerning the fact that he cannot be tried by the Rwandan courts while he is the enemy of the Republic of Rwanda, but he notices that the High Court committed errors because it ruled that he has not the jurisdiction to adjudicate the case, but it disregarded it and heard the case n° RP 0001/12/CCI on appeal instance, while it should indicate the other Court which has the jurisdiction to hear the case as provided under the law. He requests this Court to order the transfer of this

[7] Front Patriotique Rwandais

case to the High Court to decide on the Court which has the jurisdiction to hear the case as provided under the law.

[22] The representative of the Public Prosecution sustains that the High Court did not rule that it does not have the jurisdiction to hear the case of Mugesera Léon and it continued with the hearing, rather in its decision of 25/04/2013 it ruled that it has the jurisdiction to hear his case in consideration of the charge filed against him by the Public Prosecution and it indicated the legal provisions which served as basis for taking such decision including the Constitution of the Republic of Rwanda and the Organic Law determining the jurisdiction of courts and it observed that the claim filed to it was a claim not provided under the Rwandan law because it does not concern the jurisdiction of courts regarding the subject matter, the territory, the time or the party, and it is not the claim to disqualify the judges of that Court for transferring the case in other Rwandan courts.

[23] It maintains that the fact that there is no law granting to the High Court the jurisdiction to transfer Mugesera Léon in other countries for hearing his case means that Court did not have the obligation to indicate to him another court to hear his own claim filed to it above mentioned or to hear his case.

DETERMINATION OF THE COURT

[24] The article 24 of the Organic Law N° 02/2013/OL of 16/06/2013 modifying and complementing the Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts as modified and complemented to date in application by the time when Mugesera Léon appeared in the High Court provides that "The special chamber of the High Court

has the jurisdiction to hear on the first instance the crime of genocide and other crimes against humanity".

[25] The indictment included in the casefile indicates that the Public Prosecution accused Mugesera Léon in the High Court requesting to hear his case about various offences including the crime of genocide, the crime against humanity and incitement to hatred, and the claim was registered to nº RP 0001/12/CCI.

[26] The casefile indicates that by the time of the case hearing, Mugesera Léon filed the claim that the case nº RP 0001/12/CCI could not be heard by the Rwandan courts because he is the enemy of the Republic of Rwanda, rather it should be transferred in other countries for being granted fair trial.

[27] In its decision of 25/04/2013, the High Court explained that it has the jurisdiction to adjudicate the case Public Prosecution versus Mugesera Léon, but he filed before the Court a particular claim as it is not a claim for disqualifying the judges, and it does require the transfer of the case in other Rwandan courts, also it does not intend to indicate that the Court does not have the territorial jurisdiction, on the subject matter, the time and the party to hear such case, rather it requests to rule that the case should not be heard by Rwandan courts because the Judiciary is one of the organs constituting the Republic of Rwanda with which he has a problem so that he thinks that it cannot grant to him a fair trial, and it decided that it does not have the jurisdiction to examine the claim of Mugesera Léon relating to the fact that such case should not be adjudicated by the Courts of the Republic of Rwanda given that there is no law[8] that confers

[8] The High Court sustains that in those laws, including the Constitution of the Republic of Rwanda of 4th June 2003 as revised till now, in its article 149;

to the Court the jurisdiction requesting it to transfer the case in other courts which do not sit in Rwanda.

[28] The Court finds that, in its decision above mentioned, the High Court did not rule that it has the jurisdiction to adjudicate the case Nº RP 0001/12/CCI of Mugesera Léon concerning the charges against him, rather what it decided is the analysis of the claim filed to it related to the fact that the case should be transferred to the Courts which do not sit in Rwanda as above explained.

[29] The Court finds however that the High Court could not decide that it has not the jurisdiction to analyse the claim of Mugesera Léon above mentioned, rather it could rule that it is not grounded given that he did not indicate the procedure in which the claim filed by the Public Prosecution above mentioned should be removed from the jurisdiction of the Rwandan courts while the charges against him fall under the jurisdiction of the High Court as provided under the article 14 of the Organic Law above mentioned.

Organic Law N°09/2013/ol of 16/06/2013 repealing the Organic Law n° 11/2007 of 16/03/2007 concerning the transfer of cases to the republic of Rwanda from The International Criminal Tribunal for Rwanda and from other states, as modified and complemented by the Organic Law Nº 03/2009 of 26/05/2009, in its article 2; Organic Law N° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of Courts, as modified and complemented by the Organic Law Nº 04/2009/OL of 29/07/2009 in its articles 89, 90, 120, 171,176 and 178; and Law N° 13/2004 of 17/5/2004 Law relating to the code of criminal procedure, as modified and complemented by the Law Nº 20/2006 of 22/04/2004, in its article 154.
]

[30] The Court finds that the Rwandan courts have the jurisdiction of hearing the case nº RP 0001/12/CCI the Public Prosecution versus Mugesera Léon as noticed by the High Court, it is evident that the appealed case could not be declared unfounded because it was adjudicated by the Court which has the jurisdiction, meaning that Mugesera Léon should not be transferred in Canada as he claimed.

[31] Furthermore, the Court finds that the statement of Mugesera Léon that the Rwandan courts could not grant to him a fair trial as he has a problem with the Republic of Rwanda is not founded, given that pursuant to the article 140, paragraph 2 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 the Judiciary is independent because it is separate from the Legislature and the Executive, and in exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power or authority as provided in the article 33, paragraph 1 and 2, of the Law Nº 10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, therefore, the appeal of MUGESERA Léon lacks merit.

3. Whether the principle of presumption of innocence entitled to Mugesera Léon has been adjudicated on the first instance so that he could take it as a ground for appeal in this case.

[32] Mugesera Léon avers that the principle of presumption of innocence provided under the article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, the article 7, paragraph 1, b, of African Charter on Human and People's Rights, the article 11 of the Universal Declaration of Human rights and the article 14, paragraph 2 of the International

Covenant on Civil and Political Rights was not respected by different authorities, the Radios and different newspapers because they have already tried him as the perpetrator of the crime of genocide before the Court adjudicates his case, however according to that principle, he should be presumed innocent pending the final judgment.

[33] He submits that in 2016 and 2019, various authorities held statements and made different declarations sustaining that Mugesera Léon committed the crime of genocide because in his speech held at Kabaya he allegedly said that the Tutsi should be killed and thrown in Nyabarongo for returning to their home country in Ethiopia. Among those authorities there are the Director of Mpanga Prison where he is detained when he was screening a movie on the former President Habyarimana Juvénal in 2016, Senator Tito Rutaremera, Mrs Mureshyankwano, Former Governor of the Southern Province, Mrs Mukasonga Solange, Former Mayor of Nyarugenge District, the Mayor of Nyanza, the Executive Secretary of the National Commission for the Fight against Genocide, Mr Ngoga Martin who was the Prosecutor General, also Radio Rwanda and KT Radio mentioned his name in their programmes and his name was indicated on the list of the suspects of the crime of genocide even if Gérard Gahima who was the Prosecutor General submitted that the list was drafted for political purpose. He also sustains that his speeches are kept in Gisozi Genocide Memorial, and they mention his name in the lessons provided by Teachers to their students.

[34] He supports that in the case Nº ICTR–2005–89-R 11 bis Prosecutor versus Munyagishari Bernard rendered on 06/06/2012, the International Criminal Tribunal for Rwanda, in

paragraphs 47, 50, 51, 54 and 55, upheld the principle of presumption of innocence pending the final judgment, even a Lecturer in Canadian University submits that when the media denounce a person incriminating him, in that case the principle of presumption of innocence does not apply, meaning that the judge can base on that issue to decide that such person committed a crime.

[35] He adds that by the fact that the High Court disregarded the principle of presumption of innocence, this Court should set aside the appealed judgment and declare him innocent or transfer him in Canada to be tried there because he was not expelled as a person not eligible to live on its territory, rather that country transferred him in Rwanda on basis of the convention of 18/02/2009 including the guarantees provided by Rwanda to Canada to grant to him a fair trial, but such was not the case given that various authorities and different newspapers in Rwanda considered him as a genocide perpetrator while he did not exhaust the judicial proceedings. Also, the statements they made on him above mentioned had influenced the High Court Judges because he was convicted on basis of the four (4) paragraphs of his speech held at Kabaya.

[36] The Court asked to Mugesera Léon if the issue related to the fact that he should be presumed innocent had been adjudicated on the first instance so that he could consider it as a ground for appeal, he replies that such issue was adjudicated at the beginning of his case versus the Prosecutor General, Mr Ngoga Martin because the paragraph 18 relating to the principle that he should be presumed innocent was read to him, also he wrote a letter to him requesting issues concerning that principle and a copy of such letter was given to Mrs Mukasonga Solange

and the National Commission to Fight against the Genocide, meaning that he has evidence of his claim, but he cannot produce evidence held at Gisozi Genocide Memorial and the messages communicated everywhere in the country mentioning his name as the genocide perpetrator.

[37] Counsel Rudakemwa Jean – Félix who assists him supports that the principle of presumption of innocence as upheld in the case of Munyagishari Bernard above mentioned prohibits injustice for a person, the fact that such principle was not applied to Mugesera Léon as above mentioned ; he must be transferred in Canada for being tried there. He also avers that such issue was adjudicated in the High Court, if it is deemed necessary ; they would submit to the Court the statement indicating where it was adjudicated, even if the High Court did not include it in the judgment copy.

[38] The representative of the Public Prosecution maintains that primarily the ground of appeal of Mugesera Léon that the High Court disregarded the principle of his presumption of innocence cannot be admitted given that it is not in the scope of the appeal as it was not adjudicated on the first instance because it is not indicated in the objections examined by the Court as mentioned in the copy of the appealed judgment.

[39] He also avers that subsidiarity on basis of the article 3 of the Law nº 15/2004 of 12/06/2004 relating evidence and their production provides that "Each party shall prove the truth of his/her claim", this ground of appeal of Mugesera Léon is not founded given that he did not produce any evidence indicating that the statements held by the Authorities above mentioned, the messages provided and the movie screened above mentioned had affected the appealed judgment because he did not maintains that

it has been done by the High Court, rather he supported himself that it was done by different Authorities, the newspapers and different Radio stations.

[40] He adds that this Court cannot rely upon the case of Munyagishari Bernard above mentioned given that the latter has been transferred in Rwanda by the International Criminal Tribunal for Rwanda, but Mugesera Léon was not transferred by that Tribunal, rather he had been transferred by Canada when it expelled him from its territory.

DETERMINATION OF THE COURT

[41] The Article 18, paragraph 1 of the Law N° 47/2013 of 16/06/2013 relating to transfer of cases to the Republic of Rwanda provides that ***"****both the prosecution and the accused have the right to appeal against any decision taken by the High* Court *upon one or all of the following grounds : 1º an error on a question of law invalidating the decision ; 2º an error of fact which has occasioned a miscarriage of justice".*

[42] In the cases adjudicated by the International Criminal Tribunal for Rwanda (ICTR), and the Appeal Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY), including the case nº ICTR –96-13-A rendered on 16/11/2001 Prosecutor vs Alfred Musema, the Tribunal upheld that "*the appellant cannot raise in the appeal the ground that he/she should have filed on the first instance because the appeal had not instituted to hear the case de novo as ruled by the Appeal*

Chamber as provided under its Statute[9]*"*, meaning that a party who has any claim must indicate to the Trial Chamber the existing objections first and foremost for allowing the Chamber to examine if there are the solutions provided Under the Law and Statute concerning those objections, but that party cannot remain silent on the matter only to return on appeal to seek a trial de novo[10]. In that case, the Appeal Chamber recalled the decision it took in the case Kambanda Jean in which it ruled that "*the fact that the Appellant made no objection before the Trial Chamber to the Registry's decision means that, in the absence of special circumstances, he has waived his right to adduce the issue as a valid ground of appeal. For the explanations above mentioned and there are no special circumstances for examining this ground of appeal, the Appeal Chamber decided that it is not founded*[11]*".*

[43] The Court finds that, in the High Court, Mugesera Léon did not raise the objection that the principle of presumption of innocence was not respected by various authorities or the public, given that such objection is not mentioned in the objections he raised and on which it decided as indicated in paragraphs 6, 7 and 8 of the case nº RP 0001/12/CCI appealed as above explained.

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[9] The case of Akayezu, the copy of the judgment in the appeal, paragraph 177, where it was transcribed the conclusions of the Appeal Chamber of ICTY in the decision taken in *Tadic case*, paragraph 41, and in the copy of the case of *Furundzija* in the appeal, paragraph 40.

[10] *Tadic case*, the copy of the judgment in appeal, paragraph 55.

[11] Kambanda case, the copy of judgment in appeal, paragraph 25, and the copy of the judgment in appeal in Akayezu case, paragraph 113. The principle of waiving the right was upheld many times by the Appeal Chamber of ICTY in the following cases: Celebic case, the copy of the judgment in appeal, paragraph 640; *Furundzija case*, the copy of the judgment in appeal, paragraph 174.

[44] The Court finds that, rather when that Court held the hearing about the objection on determining if the nº RP 0001/12/CCI could be adjudicated on 19/11/2012 or adjourned, Mugesera Léon submitted that the reason why the Prosecutor General Mr Ngoga Martin and the Prosecutors he supervises forced him to appear before the court at that date is that they did not take into consideration the principle that he should be presumed innocent, rather they had already adjudicated his case as indicated by the statements he read in one newspaper, and he requests the Public Prosecution to respect such principle pending the final adjudication of the case nº RP 0001/12/CCI. That Court ruled on 20/11/2012 and decided that the hearing of that case was adjourned on 17/12/2012, but it did not take a decision on the claim of Mugesera Léon that he should be presumed innocent pending the final judgement as it did not consider it as the claim he filed to it about which it should take a decision.

[45] The Court finds that primarily the fact that Mugesera Léon did not file to the High Court the claim that the principle of presumption of innocence has been violated by the media and the authorities at different levels above mentioned as a special claim that it should examine and rule on, it indicates that he cannot file it as a ground of appeal in this case, given that he does not criticize the appealed judgement as long as he did not indicate to this Court a special reason which led him not to file such claim at the first instance.

[46] On a subsidiary basis, even if this Court can consider that Mugesera Léon has filed to the High Court the claim related to the fact that the principle of presumption of innocence has been violated by the Public Prosecution or the media and the authorities at different levels above mentioned, it cannot benefit

to him in this case, given that he does not demonstrate the influence of the statements held by those organs on the adjudication of the appealed judgment rendered by the High Court.

[47] Moreover, the Court finds that the statement of Mugesera Léon that the Rwandan Courts cannot grant to him a fair trial because the principle of presumption of innocence was violated by the comments made by the public authorities above mentioned is baseless, given that, as above explained, the judges are independent in exercising the judicial functions as they adjudicate the cases in full independence on basis of the law[12] and evidence included in the casefile, but they do not adjudicate the cases on basis of the comments held by the public as Mugesera Léon pretends to make it the case. This has been upheld by the International Criminal Tribunal for Rwanda in the case Nº ICTR -2005-89- R 11 bis rendered on 06/06/2012, Prosecutor versus Bernard Munyagishari, in which it explained that the comments made by the media and public authorities would not impact on the rights of the accused because the Rwandan judges have enough knowledge and experience so that they are capable of separating comments made by public officials from evidence presented in the courtroom. It also upheld that it expected that nothing would violate the principle mentioned by Munyagishari Bernard that the presumption of innocence was not respected[13], and it ruled for his transfer in Rwanda.

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[12] "The article 33, paragraph 2 of N°10/2013 of 08/03/2013 Law governing the Statutes of Judges and judicial personnel provides that "In the exercise of their duties, judges shall be subject to the law and be independent without receiving injunction from authority or any administration".

[13] With regard to comments made by the media and public authorities, the Chamber is of the view that judges are trained and experienced professionals capable of separating comments made by public officials from evidence

[48] Basing on the explanations given above, the Court observes that the Rwandan Courts have the jurisdiction to hear the case of Mugesera Léon, given that they have the competence to grant to him a fair trial on basis of the evidence included in the casefile as above explained, so that it is evident that his claim that he should be tried in Canada is not grounded.

4. Whether the High Court had deprived Mugesera Léon of the right of legal representation in the hearing of 14/10/2015 and to rejoin to the penalties requested by the Public Prosecution.

[49] Mugesera Léon avers that he has been deprived of the right of legal representation in the hearing of 14/10/2015 in the High Court because it decided to conclude the hearing and declare that the pronouncement would be on 15/04/2016 while it clearly noted that he was not assisted, thus it disregarded the legal provisions including the Constitution of the Republic of Rwanda of 2003 revised in 2015 in its article 18 which provides that the defence and legal representation are inviolable rights and the article 19, paragraph 1 which provides that everyone has the right to be tried when the hearing is held in public and he/she is granted the right of legal representation. He Also submits that the High Court did not respect the articles 150 and 153 of the Law Nº 30/2013 of 24/5/2013 relating to the code of criminal procedure which provided that the hearing should be held in public and in full independence by fulfilling the right to the legal counsel as

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presented in the courtroom. Accordingly, these comments, in and of themselves, do not violate the right of the Accused (…) At this stage, the Chamber is not concerned that the Accused's presumption of innocence would not be protected". Case nº ICTR -2005-89- R 11 bis, Prosecutor versus Bernard MUNYAGISHARI, rendered on 06/06/2012, para 54 and 55.

also stipulated by the International Covenant on Civil and Political Rights ratified by Rwanda.

[50] Mugesera Léon requests that by the fact that the case nº RP 0001/12/CCI has been adjudicated by disregarding his fundamental right of being assisted, it should be set aside as ruled in the case n° RPA 0043/09/CS rendered by the Supreme Court on 18/11/2011, Public Prosecution versus Habufite Vincent, where it observed that the party has been deprived of the right of legal representation and it ordered that the judgment should be reviewed by the Supreme Court, but he realized that, instead of being adjudicated by the Court of Appeal, his case should be returned in the High Court for being heard by another bench in order not to deprive him of the appeal instance.

[51] He sustains that he has been deprived of his right of rejoining to the penalties requested against him by the Public Prosecution, when the High Court roughly concluded the hearing without being granted the opportunity to rejoin them as provided under the code of criminal procedure then applied, therefore he requests to be redressed in his right.

[52] The Public Prosecution avers that the High Court decided to resume the hearing without the counsel of Mugesera Léon because the accused and Counsel Rudakemwa Jean-Félix who assisted him deliberately intended to delay the trial, but he did not criticize the decision of the High Court, where it explained that Mugesera Léon and Counsel Rudakemwa Jean-Félix who assists him intentionally delayed the hearing until when the High Court took the decision on 14/10/2015 to resume the hearing without the Counsel of Mugesera Léon, because it observed that the fact that Counsel Rudakemwa Jean-Félix did not participate

in the hearing does not violate the right of Mugesera Léon of defence and legal representation.

[53] The Public Prosecution sustains that the fact that Mugesera Léon did not rejoin to the penalties requested against him by the Public Prosecution was due to the fact that himself and Counsel Rudakemwa Jean-Félix who assisted him manifested their bad faith of not participating in the hearing, so that the High Court suspended the hearing 13 times within a period of almost three (3) months, thus no error was committed by that Court, given that Mugesera Léon was granted enough time for safeguarding his rights, but he did not correctly spend that time, therefore his ground for appeal is unfounded.

DETERMINATION OF THE COURT

[54] The casefile indicates that in the paragraph 6 of the appealed judgment, the High Court made a decision on 14/10/2015 in the interlocutory judgment concerning the right of Mugesera Léon for legal representation and it declared that his right for legal representation should not be a way of delaying the good administration of justice.

[55] The casefile also indicates that the hearings were adjourned since the hearing starting on 2109/2012, during the hearing of 23/07/2015 Mugesera Léon was notified that during the following hearing he would conclude on his case by rejoining to the penalties requested against him by the Public Prosecution, but on 30/07/2015 he appeared without the counsel because Counsel Rudakemwa Jean-Félix who assists him notified by writing that he was sick and the hearing was adjourned on 03/08/2015, on the same date Counsel Rudakemwa Jean-Félix

did not appear without indicating the reason of his absence, the hearing was adjourned on 07/09/2015, on that date the hearing was adjourned on 10/09/2015 due to the fact that Counsel Rudakemwa Jean-Félix uploaded a medical certificate granting him a leave until 20/09/2015 and the Court declared that it had to analyse the issue related to the recurrent medical leave.

[56] On 10/09/2015, Mugesera Léon again appeared without the counsel and the High Court, after conducting the investigation, observed that the certificate on which Counsel Rudakemwa Jean-Félix based on for requesting the medical leave, he requested it for delaying the case[14], but for the good administration of justice, the Court decided that the hearing should resume on 15/09/2015. Rudakemwa Jean- Félix notified in writing to the High Court supporting that it should not resume the hearing disregarding that such certificate granted to him a medical leave until 20/09/2015, he sustains that the right of Mugesera Léon of defence and legal representation provided under the article of 25 of the International Covenant on Civil and Political Rights and the article 18, paragraph 3 of the Constitution of the Republic of Rwanda above mentioned was violated.

[57] On 15/09/2015, Mugesera Léon appeared before the Court assisted by Counsel Rudakemwa Jean – FélixJean Félix , the latter supported that he was still sick, he could not plead, rather he appeared to provide explanations about the medical leave and the High Court, basing on the article 15, paragraph 2 of the Law nº 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which provides

[14] See the decision of 10/09/2015 related to the adjournment of the judgment due to the medical leave granted to Counsel Rudakemwa Jean- Félix (pages 4415 -4416).

for the punishment for the intentional delay of a case, charged Counsel Rudakemwa Jean – Félix of a fine of five hundred thousand Rwandan francs (500,000 Frw), given that it observed that Mugesera Léon and Counsel Rudakemwa Jean – Félix had the intention of delaying the case, therefore, the hearing was adjourned on 21/09/2015 for allowing Mugesera Léon to return for submitting his conclusion on the case.

[58] On 21/09/2015, Mugesera Léon appeared before the Court assisted by Counsel RUDAKEMWA Jean – Félix, and he requested for the adjournment of the hearing of the case because he was sick, but the Court decided to resume the hearing because he did not produce a medical leave, he accepted the resumption of the hearing, but he again requested the High Court to wait for the decision of the Supreme Court on the appeal he filed related to the witness he wished to be interrogated. The High Court averred that the appeal could not suspend the hearing on basis of the provision of the article 1[15] and 162 of the Law nº 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which provides that "*the appeal against an interlocutory judgement shall be made only jointly with the final judgement* (…), and Counsel Rudakemwa Jean – Félix sustained that he could not rejoin to the penalties requested against his client, because he did not have an occasion to hold

[15] The High Court sustained that the provision of the article 162 the Law nº 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure should serve as basis pursuant to the provision of the article 1 of the Law nº 21/2012 of 14/06/2012 which provide that It shall also apply to all other cases in the absence of specific laws governing such procedures, unless the principles provided for by this Law cannot apply to other cases.

discussions with him as his medical leave was followed by the judicial recess, the hearing was adjourned on 22/09/2015 for examining if the wish of Mugesera Léon to be granted the time to provide the conclusion was grounded.

[59] On 22/09/2015, the High Court observed that even if the grounds on which Mugesera Léon and Counsel Rudakemwa Jean – Félix based for requesting to be granted the time to prepare the conclusion are not founded, Mugesera Léon should be granted additional time to prepare the case, the hearing was adjourned on 28/09/2015, on that date, the High Court provided the timetable of the hearing indicating that the hearing would be held on 29/09/2015, on 01/10/2015, on 05/10/2015 and on 06/10/2015.

[60] On 29/09/2015, Mugesera Léon appeared before the Court without the counsel, he sustained that he was sick and Counsel Rudakemwa Jean – Félix who assisted him, by the letter he wrote he supported that he would never appear in the hearing as long as the discussions with the Ministry of Justice on the legal aid were still ongoing, and in the hearing on 30/09/2015, the Court decided to adjourn the hearing on 05/10/2015, it summoned the Ministry of Justice and it requested Counsel Rudakemwa Jean Félix to participate in the hearing, on that date the Public Prosecution, the Ministry of Justice represented by Counsel Umwari Marie Claire and Counsel Mbonera Théophile, Mugesera Léon assisted by Counsel Rudakemwa Jean Félix appeared before the Court. After hearing the explanations provided concerning the legal aid needed for the assistance of Mugesera Léon, it observed that there were no discussions between the Ministry of Justice and the counsel of Mugesera Léon, rather he did not fulfil the requirements for being granted

the legal aid, it decided that the hearing would be resumed on 12/10/2015.

[61] On 12/10/2015, Mugesera Léon appeared before the Court without the counsel and it was evident that Rudakemwa Jean – Félix who assists him had signed on the act indicating the hearing adjournment, and the Court, basing on the article 15 of the Law relating to the civil, commercial, labour and administrative procedure charged Rudakemwa Jean – Félix of a fine of five hundred thousand Rwandan francs (500,000 Frw) for the intentional delay of the case, the hearing was adjourned on 14/10/2015 for the Court to decide if the hearing would be resumed, but on the date on which the hearing was adjourned Mugesera Léon appeared before the Court without the counsel and the Court decided that the hearing would be resumed because the absence of Counsel Rudakemwa Jean – Félix in the hearing does not violate the principle of defence and legal representation of Mugesera Léon as he was assisted in other hearings.

[62] The Court of Appeal finds that, even if the accused has the right to the legal representation as provided under the article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 and the article 14, d, of the International Covenant on Civil and Political Rights ratified by Rwanda on 12/02/1975[16], this right should not be a manoeuvre to delay the good administration of justice, because on 27/07/2015 when Mugesera

[16] Everyone charged with a criminal offence shall have the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Léon was requested to provide the conclusion and to rejoin to the penalties requested against him by the Public Prosecution, the hearing was adjourned thirteen (13) times for the reasons pertaining to him and his Counsel Rudakemwa Jean – Félix as explained herein above, most of them intended to delay the case, and Counsel Rudakemwa Jean – Félix was charged for that as indicated, but he did not change his behaviour, therefore this Court observes that the High Court did not commit any error when on 14/10/2015 it decided to resume the hearing without the counsel of Mugesera Léon, given that his counsel was notified of the hearing of 12/10/2015, and on that date he did appear before the Court and the hearing was adjourned on 14/10/2015, on that date he did not appear before the Court, the decision taken by the High Court cannot be considered as depriving Mugesera Léon of his right of legal representation and re-joining to the penalties requested against him by the Public Prosecution as he contends, because his rights should not delay the good administration of justice as indicated herein above.

[63] The Court finds that the same decision had been taken by the Supreme Court in the case nº RPA 0197/10/CS rendered on 21/11/2014 in which parties were the Public Prosecution and Ntakirutimana Jean Claude where it observed that Ntakirutimana Jean Claude was not deprived of the right to legal representation given that, on basis of his conduct and his Counsel, they manifested bad faith for the adjudication of the judgement after being adjourned 13 times, therefore it ruled that the right to defence should not be confused, nor violate the others 'rights, nor delay the good administration of justice[17]; such decision coincides with the ruling of the International Criminal Tribunal

[17] Case n° RPA 0197/10/CS rendered by the Supreme Court on 21/11/2014, Parties: Public Prosecution versus Ntakirutimana Jean Claude.

for Rwanda in the case Prosecutor vs Alfred Musema, in which it upheld that the conduct of the counsel of Alfred Musema including his absence during the hearing and his lack of cooperation which hinder the good administration of the hearing and the interest of justice, it also upheld that at the current step of the hearing he sustained that he could not plead guilty or not without his counsel, this did not violate the right to legal representation, if he remained silent because his counsel is absent, the Tribunal would consider that he did not plead guilty[18].

[64] The Court also observes that the fact that Mugesera Léon and Counsel Rudakemwa Jean – Félix who assists him rely on the case n° RPA 0043/09/CS[19] between the Public Prosecution and Habufite Vincent rendered by the Supreme Court on 18/11/2011 and they request that the case nº RP 0001/12/CCI rendered by the High Court should be set aside because it disregarded his fundamental right to legal representation granted by the law is not founded, given that in Pte Habufite Vincent case, the Supreme Court quashed the judgement rendered by the Military High Court because that Court committed an error of depriving Pte Habufite Vincent of the right of seeking a counsel, therefore the Supreme Court set aside such judgement, and it examined afresh the hearing about the charge against Pte Habufite Vincent, however in this case Mugesera Léon was not deprived of his right to legal representation, but it is himself and his counsel who infringed upon the good administration of the hearing and the interest of justice as explained herein above.

[18] Case n° ICTR-96-13-T, Prosecutor vs Alfred Musema rendered by ICTR on 27/01/2000, paragraphs 19, 20 and 21.
[19] Rwanda Law report, book II, 2012.Nº 13,pp.15-23.

[65] The Court also observes that the statement of Mugesera Léon that he had been deprived of his right of re-joining to the penalties requested against him by the Public Prosecution when the Court promptly concluded the hearing without being granted the opportunity to rejoin about them is not grounded, given that, as explained herein above, Counsel Rudakemwa Jean – Félix who assisted him did not appear in the hearings held on 13/07/2015, on 30/07/2015, on 03/08/2015, on 07/09/2015, on 10/09/2015, on 29/09/2015, 30/09/2015, on 06/10/2015, and on 12/10/2015 up to the date when the High Court decided on 14/10/2015 to resume the hearing without the counsel of Mugesera Léon, given that the fact that Counsel Rudakemwa Jean – Félix did not appear in the hearings did not violate the right of Mugesera Léon to legal representation and defence. This Court also observes that it is himself who refused to take the opportunity granted to him to rejoin to the penalties requested against him by the Public Prosecution.

[66] Basing on the explanations provided herein above, the Court of Appeal observes that the ground of appeal provided by Mugesera Léon that the High Court deprived him of his right to legal representation in the hearing of 14/10/2015 and to rejoin to the penalties requested against him by the Public Prosecution is not founded.

5. Whether the High Court violated the principle of the non-retroactivity of the criminal law

[67] Mugesera Léon, assisted by Counsel Rudakemwa Jean – Félix, in his submissions and in his pleading, supports that the High Court committed an error of relying on the article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948, but this article does not provide for

penalties, because by the Decree-Law of 12/02/1975, Rwanda recognized that such Convention is incorporated in its laws, but it reserved itself about the article 9 concerning the penalties, thus the crime of genocide against the Tutsi committed in 1994 cannot be punished pursuant to that Convention.

[68] Mugesera Léon also sustains that the High Court based on the Organic Law Nº 16/2004 of 19/06/2004 establishing organisation, competence and functioning of Gacaca Courts and the Organic Law Nº 01/2012/OL of 02/05/2012 instituting the penal code, while those laws have been enacted after the commission of the crimes with which he is accused, this is contrary to the principle of non-retroactivity of the criminal law, and to the article 130, paragraph 6 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[69] The Public Prosecution avers that the ground of appeal of Mugesera Léon is unfounded given that the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948, in its article 2, enumerates the acts constituting the crime of genocide and in its article 3 it enumerates the punishable acts, the fact that Rwanda reserved itself about the article 9 concerning the punishment does not affect the other articles of the Convention. It also sustains that from 1975 when Rwanda ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the crime of genocide is provided under the Rwandan Laws, therefore, the acts with which Mugesera Léon is accused for having committed them in 1992 were constituting the crime of genocide pursuant to the Rwandan laws.

[70] The Public Prosecution supports that the crime of genocide is a serious crime at the international level, Rwanda established the Decree-Law Nº 08/1996 of 30/08/1996 punishing

the crimes of genocide committed between 01/10/1990 and 31/12/1994, and in its preamble, the legislator expounded that in 1975 Rwanda ratified the Convention on the Prevention and Punishment of the Crime of Genocide, consequently it was necessary to enact a law punishing the perpetrators of the acts constituting such crime and it is the law of 1996.

DETERMINATION OF THE COURT

a) Regarding the crime of incitement to commit genocide

[71] The Court finds that the crime of incitement to commit genocide with which Mugesera Léon is accused is one of the acts of genocide provided under the article III, c, of the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948 incorporated by Rwanda through the Decree-Law N° 08/75 of 12/02/1975, the rationale of prosecuting and punishing the crime of genocide is based on the fact that, apart from the fact that persecuting the minority on basis of colour, racial, ethnical or linguistic discrimination is totally contrary to the human values, it has legal implications. The Supreme Court of Israel, in the case between the Prosecution and Adolph Eichmann, observed that nobody can pretext that the international grave crime he committed is not provided under the domestic law as a ground for not being prosecuted because they "must be seen today as acts that have always been forbidden by customary international law - acts which are of a `universal' criminal character and entail individual criminal responsibility[20]".

[20] Prosecutor v Adolphe Eichmann, Appeal Judgment, para 11.

[72] The Court finds that in that case, the Court explained that in the framework of administering fair trial, it is not appropriate to punish someone for an act that was not a crime by the time of its commission, but such principle should not apply to the grave crimes, given that when those crimes are perpetrated, the values conveyed by that principle are automatically denied given that the accused cannot contend that, when he was committing those crimes, he did not know that it was a violation of other important values set by the customary international law, therefore the principle of *nullum crimen nulla poena sine lege* should not apply to those crimes[21], especially the Court recalled that the International Military Tribunal of Nuremberg did not rely on the principle of *nullum crimen nulla poena sine lege*, because the perpetrators of Holocaust did not ignore that they were committing crimes, rather they expected to be protected by the Nazi laws in case of military victory for not being prosecuted. It upheld that "*in repudiating the relevance of the ethical content of the principle of nulla poena to the parallel crimes of which the major war criminals were convicted in Nuremberg is also apposite here: "...the ethical import of the maxim is confronted by the countervailing ethical principles supporting the courts and sentences. Killing, maiming, torturing and humiliating innocent people are acts condemned by the value-judgments of all civilized men, and punishable by every civilized municipal legal system.... All this was known to the accused when they acted, though they hoped, no doubt, to be protected by the law of a victorious Nazi state from punishment. If, then, the rules applied at Nuremberg were not previously rules of positive international law, they were at least rules of positive ethics accepted by civilized men*

[21] Prosecutor v Adolphe Eichmann, Appeal Judgment, para 8.

everywhere, to which the accused could properly be held in the forum of ethics[22]."

[73] The Court finds that in the case between Serbia and Croatia, the International Court of Justice recalled that from 1951 it continued to assert that the Convention on the Prevention and Punishment of the Crime of Genocide embodies the principles that are part of customary international law: « *The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law. That was emphasized by the Court in its 1951 Advisory Opinion. "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and the spirit and aims of the United Nations (resolution 96 (I) of the General Assembly, 11 December 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)* »[23] **.**

[74] The Court finds that this guideline had been taken by the United Kingdom House of Lords in the paragraph 17 of Augusto Pinochet case where it expounded that, even if the accused

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[22] Prosecutor v Adolphe Eichmann, Appeal Judgment, para 8.

23 Croatia v. Serbia case, International Court of Justice, Judgment of 03/02/2015, para. 87.

supported that there is no evidence indicating that the torture committed by the state was a crime before the Torture Convention of 1984, there is "*no doubt that long before the Torture Convention of 1984, state torture was an international crime in the highest sense…"*[24], this indicates that the international crimes should not necessarily be incorporated in domestic laws to be prosecuted and punished.

b) Persecution as the crime against humanity

[75] The Court finds that the crime of persecution is mainly committed by distressing the persons for their nature. Such discrimination is committed with the intent of violating the fundamental human rights. The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for former Yugoslavia expounded that the persecution is one of the crimes provided under the customary international law as constituting the crime against humanity[25].

[76] The Court finds that the Tribunals upheld that for long time the crimes against humanity have always been forbidden and punished by the customary international law, especially in the Erdomivic case, the International Criminal Tribunal for former Yugoslavia ruled that "*Isolated offences did not fall within* the *notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime . . . into a crime against humanity . . . Only crimes which by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at*

[24] Ex Parte Pinochet [1999] 2 All ER 97 at 17.

[25] Nahimana Ferdinand case, 28/11/2007, paragraph 985, Brdanin case, 2/04/2007, paragraph 296, Simic case, 28/11/2006, paragraph 177.

different times and places, endangered the international community or shocked the conscience of mankind . . ."[26]

[77] The Court finds this point is one of the issues which motivated the tribunals to uphold that the current laws providing for the crimes against humanity should not be considered as establishing new crimes, rather they emphasized the existing provisions. This guideline has been recalled by the European Court of Human Rights in the case Korbely vs Hungary, where it decided that "As regards the elements of the crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the international law definition of this crime…"[27]

[78] The Court also finds that in explaining the civilians in punishing the crimes against humanity, the International Criminal Tribunal for former Yugoslavia upheld that on basis of the customary international law, the persons hors de combat can be included in the victims of those crimes when they constitute the crimes above mentioned even if they are not members of the civilian population[28]. Concerning the crime of persecution, that Court upheld that it "*consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (actus reus); and was carried out deliberately with the*

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[26] Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemović* Appeal Judgement, para. 22 (quoting *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 179).

[27] Korbely v Hungary (App no 9174/02), 19/09/2008; Streletz, Kessler and Krenz v Germany (App. No 34044/96, 355532/97 and 44801/98) of 22/03/2001.

[28] See Mrkšić and Šljivančanin case, para. 35 (citing Blaškić case, para. 113).

intention to discriminate on one of the listed grounds, specifically race, religion or politics (mens rea)."[29]

[79] It also reiterated it in Dorđević case by upholding that "the crime of persecutions requires that an act or omission – not a crime – which infringes upon a fundamental right laid down in customary international law, be committed with discriminatory intent…"[30]

[80] The Court thus finds that there is no doubt that Rwanda as a country governed by the customary international law and the international conventions to which it acceded or it ratified since the period of the independence, this means that the perpetrators of the crimes provided under the customary international law and the international conventions cannot take as pretext the fact that the qualifications of the crimes they committed were not included in the Decree-Law Nº 21/77 of 18/08/1977 instituting the penal code applied by the time of the commission of the crimes, given that such understanding would amount to the minimization of the crimes committed, by removing them from the international law governing them and considering them as the common crimes provided under the domestic law.

[81] The Court finds that the crime of incitement to commit genocide and the persecution as constituting the crime against humanity are both crimes based on the discrimination, therefore, when Léon was convicted of both crimes as international crimes, it was not necessary for the High Court to decide that he was convicted of the crime of the incitement to hatred based to the ethnic group provided and punished by the article 393 of Decree-

[29] Krnojelac Appeal case, para. 184 and 185.
[30] Dorđević Appeal case, para 557, 693 and 876.

Law nº 21/77 of 18/07/1977 instituting the penal code, given that the discrimination or the incitement to hatred based to the ethnic group are acts of the incitement to commit genocide and persecution as constituting the crime against humanity. This guideline coincides with the decision of the International Criminal Tribunal for former Yugoslavia, where in Kuranac et al. it upheld that when the principal crime has been pointed out, it is not necessary to consider as crime various acts that led to the commission of that crime[31].

[82] The Court finds that Rwanda, basing on the customary international law, the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948 to which it acceded by the Decree-Law Nº 08/75 of 12/02/1975, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26/11/1968 to which it acceded by the Decree-Law of 16/04//1975 through the Fundamental Law of 18/01/1996, recalled that in the amendment of the article 12, paragraph 4 of the Constitution of 10 June 1991, "*the acts that were not punished under the domestic law by the time of their commission shall be prosecuted before the courts if, by the time of their commission, the legal norms recognized by the countries qualified them as crimes*", such amendment recalled that nobody could take as pretext the domestic law to contend that he could not be punished for the crimes he committed that are forbidden by the international law.

[83] The Court finds that, concerning the penalties, the article V of the Convention on the Prevention and Punishment of the Crime of Genocide provides that "*The Contracting Parties undertake to enact, in accordance with their respective*

[31] Kuranac et al. appeal case, para. 153.

Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III" , this article constitutes one of the tools of international law on which Rwanda relied for amending the article 12 of the Constitution of the Republic of Rwanda of 10 June 1991[32], also it enacted the Organic Law Nº 08/96 of 30/08/1996 governing the punishment of the crime of genocide and the crimes against humanity committed between 1/10/1990 and 31/12/1994, the law which was replaced by the Organic Law Nº 16/2004 of 19/06/2004 establishing the organisation, competence and functioning of Gacaca Courts, this law was replaced by the Organic Law Nº 01/2012/OL of 02/05/2012 instituting the penal code, where in its article 762 it provides that unless otherwise provided, the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 shall be punishable by penalties provided under this Organic Law, the provision of the article 762 of that Organic Law has been reiterated by the article 335, paragraph 2 of the Law No 68/2018 of 30/08/2018 determining offences and penalties in general[33] which is currently applied.

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[32] Article 12 of the Constitution of the Republic of Rwanda of 10/06/1991 was amended on 18/01/1996 and it included the paragraph 4 which provides that " the acts that were not punished under the domestic law by the time of their commission shall be prosecuted before the courts if, by the time of their commission, the legal norms recognized by the countries qualified them as crimes".

[33] The article 335 of the Law No 68/2018 of 30/08/2018 determining offences and penalties in general provides that "However, the genocide crimes and other crimes against humanity committed between October 1, 1990 and December 31, 1994 is punishable in accordance with penalties provided for under this Law unless legal provisions otherwise provide".

[84] The Court finds that, apart from the fact that the High Court committed an error of basing on the Organic Law nº 16/2004 of 19/06/2004 establishing Gacaca Courts in sentencing Mugesera, the sentence of life imprisonment imposed to Mugesera Léon pursuant to the article 5 bis of the Organic Law nº 08/2013 of 16/06/2013 modifying and complementing the Organic Law n° 31/2007 of 25/07/2007 relating to the abolition of the death penalty as modified and complemented to date, read together with the Organic Law Nº 01/2012/OL of 02/05/2012 instituting the penal code above mentioned herein, which replaced the death penalty which was provided under the article 312 of the Decree-Law nº 21/77 of 18/08/1977 instituting the penal code which was provided for the acts of murder resulting from the speeches held at Kabaya and Nyamyumba inciting the population to commit genocide as he was convicted by the High Court, therefore the allegation of Mugesera Leon that the High Court sentenced him to a penalty not provided under the Rwandan law is not grounded.

[85] The Court finds that this idea that the penalties to the crime of genocide were provided under the Rwandan law had been adduced in Akayesu Jean Paul case by the International Criminal Tribunal for Rwanda[34].

[34] The Prosecutor versus Jean Paul Akayesu, Case N⁰ ICTR-96-4-T/sentence, Decision of 2 October1998, para.16: "In this regard, the Chamber nevertheless recalls that by enabling legislation, Rwanda acceded to the Genocide Convention of 12 February 1975. Therefore, as the Chamber stated in its judgement, criminal liability for the crime of genocide existed in Rwanda in 1994, when the crimes with which AKAYESU is charged were committed and the perpetrators of such crimes could indeed be charged before the appropriate Rwandan courts.

[86] The pleading of Mugesera Léon that he could not be sentenced for the crime of genocide because Rwanda reserved itself on the article IX concerning the sentence provided for the crime of genocide, the Court observes that it is not grounded given that the article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provides that "*Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute*", it is evident that such article is not linked to the punishment of the accused of the crime of genocide or the acts provided under the article III of the Convention, rather it concerns the judicial action against the State in case it fails to prevent the genocide or one of the acts provided under the article III.

[87] The Court finds that this guideline has been highlighted by the International Court of Justice in Croatia v. Bosnia[35] case, where it upheld that the article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provides for its jurisdiction to examine, enforce and fulfil the Convention, especially concerning the obligations of the States accused of genocide or any other act provided under the article III of that Convention, and, as it recalled in the Bosnia and Herzegovina versus Serbia case in 2007[36], the article IX only concerns the jurisdiction of the International Court of Justice in genocide

[35] Croatia v Serbia case, International Court of Justice, Judgment of 03/02/2015, para. 85.

[36] *Bosnia and Herzegovina v. Serbia and Montenegro*, International Court of Justice, Judgment of 26/02/2007.

matters, meaning that when Rwanda reserved itself to the article IX in ratifying the Convention it precluded as a State to be accused of the crime of genocide before the International Court of Justice[37], such does not exclude that the individuals who committed the genocide in Rwanda should be prosecuted and punished for it, as explained herein above, their punishment is based on the article VI, not the article IX of that Convention.

[88] Basing on the explanations above provided herein, the Court finds that the ground of appeal of Mugesera Léon that he has been sentenced by disregarding the principle of non-retroactivity of criminal law is not founded.

6. Whether the High Court refused to hear the defence witnesses of Mugesera Léon

[89] Mugesera Léon, by means of his submission and pleading, sustained that the High Court seriously deprived him of his defence right provided under the Constitution, it refused to hear the defence witnesses. He submits that among those witnesses who were not heard there are the fact witnesses, character witnesses and expert witnesses.

[90] Mugesera Léon supports that the Public Prosecution, which normally has more powers than the accused has been granted enough time to identify and select the prosecution witnesses, but he was not granted the time nor means to identify and discuss with his defence witnesses, rather he was requested to provide the list and the issues of their testimony, disregarding

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[37] *Democratic Republic of Congo v Rwanda case*, International Court of Justice, Application of 28/05/2002, para. 72

the fact that he would firstly meet the defence witnesses whom he wished to meet.

[91] Mugesera Léon requested this Court to set aside the appealed judgment and be returned in Canada, because he was tried in violation of the principle of equality of arms and the fundamental right to fair trial granted to him by the Constitution of the Republic of Rwanda and the Conventions it ratified.

[92] The Public Prosecution avers that the High Court requested both parties to provide the identification of their witnesses, the issues of their testimonies, their residence and the procedure for their interrogation, and the High Court reminded it several times, as Mugesera Léon who supported that he has the defence witnesses did not meet the requirements by 30/6/2014, when he was given the deadline which he did not meet. The Public Prosecution sustains that the fact that Mugesera Léon did not provide the identification of the defence witnesses does not entail the liability of the High Court because it is himself who deprived of that right.

DETERMINATION OF THE COURT

[93] The article 66 of the Law Nº 15/2004 of 12/06/2004 relating evidence in matters and its production provides that "the issues for which a party requests a witness he/she shall briefly expound them without further details. In case the Jurisdiction observes that they are necessary, valid and admissible, it can on its own initiative order to provide the witnesses for those issues".

[94] The Court finds that Mugesera Léon who supported that he had the defence witnesses, was requested by the High Court

through the letter of 06/11/2012 to provide the complete identification of the witnesses he wished to be interrogated, the place of the interrogation and the issues of their testimony, this has been reminded to him in the hearing held on 18/01/2013, on 30/06/2014 and on 14/01/2015, but he did not meet the requirements up to the conclusion of the judgement on 24/06/2020.

[95] The Court finds that the pleading ground of Mugesera Léon that he should be granted the means to firstly identify and agree with the defence witnesses before providing their list is not valid, given that he should himself know the issue on which each one could defend him, and the Court would summon them in case it deems it necessary, and it is not necessary to hold discussions with them on the defence issues, due to his failure to provide the list, this Court itself concurs with the High Court that Mugesera Léon did never indicate the defence witnesses, therefore he was not deprived of the right of the witnesses to be heard.

[96] The Court finds that Mugesera Léon who did not fulfil his obligations for finding the exculpatory evidence cannot take it as pretext of the appeal ground. This has been noted by the International Criminal Tribunal for Rwanda in NGEZE Hassan case for the issue of a witness he did not request to be summoned on the first instance while he was aware that he would need him, it upheld that "*However, with respect to the availability of the proffered evidence at trial, the Appeals Chamber agrees with the Prosecution that the Appellant failed to exercise the due diligence required for the evidence to be admissible on appeal. (…) The Appellant must demonstrate that the "proffered evidence was not available to him at trial in any form" and that he had made use of all mechanisms of protection and compulsion*

available under the Statute and the Rules to bring the evidence before the Trial Chamber. In the present case, the Appellant has not shown why he could not call [Witness ABC1][38]". The same has been noted by the International Criminal Tribunal for former Yugoslavia in the case of Vujadin Popovic who did not use the legal procedure for that Court to analyse the exculpatory evidence[39].

[97] The Court observes that the explanations provided in the previous paragraphs indicate that Mugesera Léon was not deprived of his right of bringing the defence witnesses ; therefore, this ground of appeal is not founded.

7. Whether the High Court erred in ruling that the speech entitled "the Speech of four satanic horns" is not an exculpatory evidence for Mugesera Léon

[98] Mugesera Léon avers that the High Court should not take into account the accusation of the Public Prosecution, rather it should consider the content of the speech he made everywhere he went, the speech he entitled *"the Speech of four satanic horns*" because he delivered its message everywhere he held meetings, there is no act constituting a crime of incitement to commit genocide included in that speech he admits, rather the words used in it are related to the avoidance of the contempt, the insolence, the vanity and the treachery, also it mentioned the instruments to be daily maintained by every partisan of MRND including the election, the bravery, the love, thus such speech does not have any link with hating and killing the Tutsi, rather it indicates that

[38] The Prosecutor V. NGEZE Hassan, ICTR-99-52-A

[39] ICTY-05-88-A, The Prosecutor vs Vujadin Popovic, para. 8, 9 and 10.

Mugesera Léon is not a murderer, and he does not hate the Tutsi, rather he is a kind person.

[99] He further sustains that he does not have such speech, it is not the speech held at Kabaya, but he made it elsewhere the meetings were held, he does not know where he made it and the period he held it, the fact that he does not have it does not mean that it does not exist, rather it should be claimed from the Public Prosecution which sent it in Canada and it was used in the judgment rendered in Canada on 08/09/2003, as mentioned from the paragraphs 155 to 162, the fact that there is another judgment of the Supreme Court of Canada which invalidated the previous decision does not exclude that there is such exculpatory evidence constituted by that speech.

[100] The Public Prosecution avers that in the paragraph 109 of the appealed judgment, the High Court upheld that the explanations provided by Mugesera Léon on the speech of four satanic horns are unfounded, given that it observed that there is another speech held at Kabaya and Nyamyumba inciting the Rwandans to commit genocide, and he himself admitted in this Court that the speech of four satanic horns is not the one made at Kabaya, he does not know the period nor the place he held it, therefore the Court of Appeal does not have any possibility to examine his ground of appeal related to the speech he does not have himself.

[101] The Public Prosecution also sustains that there are witnesses charging him to have held the speeches at Kabaya and Nyamyumba inciting the Rwandans to commit genocide, therefore, the High Court did not err because it relied on the article 119 of the law n°15/2004 of 12/06/2004 relating evidence and its production and it considered the evidence produced, and

the Court of Appeal should not rely on the judgement which analysed the speech of four satanic horns on the first instance as there is the judgment of the Supreme Court of Canada rendered on 28/06/2005 which invalidated the previous decision.

DETERMINATION OF THE COURT

[102] The article 3 of the Law n°15/2004 of 12/06/2004 relating evidence and its production provides that each party shall prove the truthfulness of his/her allegation.

[103] The casefile indicates that in the paragraph 109 of the appealed judgment the High Court expounded that nothing indicates that the speech of four satanic horns conveys the message of avoiding the contempt, the insolence, the vanity and the treachery and the instruments to be daily maintained by any partisan of MRND including the election, the bravery, the love, he held everywhere he went, because it noted that there is another speech made at Kabaya and Nyamyumba conveying the message inciting to commit genocide.

[104] The casefile also indicates that during the hearing held in the Court of Appeal on 06/02/2020 Mugesera Léon supported that that speech of four satanic horns is not the one he made at Kabaya, he does not have it, he does not know the place nor the period he made it.

[105] The Court observes that the speech called "*the speech of four satanic horns*", which Mugesera Léon supports that it contains the words related to the avoidance of the contempt, the insolence, the vanity and the treachery and the instruments to be daily maintained by any partisan of MRND including the

election, the bravery and the love, is not the one he made at Kabaya and everywhere the meetings were held, as he himself admitted in the Court of Appeal, he does not have it, he does not know where he made it, nor the dates on which he made it, thus, it cannot be considered as exculpatory evidence as he sustains it because it is not related with the evidence on which the High Court relied in convicting him including the speech of which he is accused he made at Kabaya and the meeting he chaired at Nyamyumba, and he does not demonstrate that such speech contradicts that evidence.

[106] The Court observes that the speech called "the speech of four satanic horns" does not benefit to Mugesera Léon in this judgment because it is not the one on which the High Court relied in convicting him for the crimes with which he is accused, rather he was prosecuted and convicted on basis of the speech he held at Kabaya and the meeting he chaired at Nyamyumba as above explained.

B. REGARDING THE CASE ON THE MERITS

1. Whether the High Court erred in deciding that it is Mugesera Léon who made the speech made at Kabaya on 22/11/1992 and whether it should be considered as evidence in this judgment.

[107] Mugesera Léon submits that the High Court should not convict him on basis of the speech held at Kabaya on 22/11/1992 given that it was not original due to the fact it was altered as asserted by Peter Fraser during the cross-examination of 23/06/1995. He explains that Rwanda submitted to Mrs Diane Clément who was the Canadian Prosecutor in charge of Citizenship and Immigration a tape on which the speech held at Kabaya was recorded, she gave it to the expert called Peter Fraser

for analysis, and the latter, after putting it in a specialized machine, noted that it was not original, but later, he went to the Citizenship and Immigration Service where he got the tape nº 1 and the tape nº 3, he mixed them using a specialized machine bought in the United States of America, he obtained one tape, after erasing it he concluded that it did not constitute an evidence to be produced before the Court as it was not original.

[108] He supports that, even if he forgot the speech he made at Kabaya on 22/11/1992, he has the right to say something about the speech on which his conviction is based because it is an incriminating evidence produced by the Prosecution and the High Court relied on it in convicting him for a crime he did not commit, so that he understands that he could not confess that it is himself who held it because the article 14, g of the International Covenant on Civil and Political Rights of 16/12/1966 and the article 14, 7º of the Organic Law nº 11/2007 of 16/03/2007 concerning transfer of cases to the Republic of Rwanda provide that nobody shall be compelled to testify against himself or to confess guilt, rather the Prosecution should produce the incriminating evidence as provided under the law.

[109] He also sustains that the High Court did not respect the article 122 of the Law nº 15/2004 of 12/06/2004 relating evidence and its production which provides for the origin of evidence[40], its

[40] The article 122 of the Law nº 15/2004 of 12/06/2004 relating evidence and its production provides that "A party who wishes to produce an evidence related to a tangible item shall indicate its source to prove its link with the subject-matter, the accused and the offence. To that effect, he/she shall demonstrate that such evidence was seized or originated from the facts, he/she shall indicate that it was not altered because of being manipulated by several persons and subjected to the research".

mode of formation and its obtaining, the article 123 of that Law[41] prohibits the evidence alteration, the article 124 of the Law above mentioned[42] provides that the person who recorded the sounds or took photos should be present, because it convicted him on basis of the speech made at Kabaya on 22/11/1992 without demonstrating the conditions of its transmission between different persons from Kabaya where it was held for the first time to ORINFOR and the conditions of its transfer to the Prosecutor General who sent it in Canada.

[110] He explains that he filed a claim to the High Court to know the one who recorded the speech held at Kabaya and its transmission and it noted that it was really an issue, then it submitted to ORINFOR a letter of 25/06/2014, requesting it to inform it on the origin of the tape and the person who recorded it, and by its letter of 27/06/2014, the Director General of ORINFOR, which became RBA, replied that such tape was found in its archive, but he did not know the names of the person who recorded it and the person who brought it there, and there is no audio-visual speech and he confirmed that it is not Murutampunzi Boniface who recorded and brought it in ORINFOR, rather he

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[41] The article 123 of the Law nº 15/2004 of 12/06/2004 above mentioned provides that " In case a person, an item or evidence indicating the facts are not those submitted to the Court for observation, the photos or pictures indicating the facts shall indicate without any alteration the picture they had by the time when the subject-matter occurred. The same is required for the sounds that had been recorded by means of trapping to be produced as evidence".

[42] The article 124 of the Law nº 15/2004 of 12/06/2004 above mentioned provides that "In order to prove that there is no alteration, there shall be the testimony of the person who recorded the sound or took moving or not moving photos, or who pictured in any manner or who was present by the occurrence of the facts".

took it from the ORINFOR archive and gave it to Nyirantabashwa Ange for making its copy which after was sent to Canada. He sustains that such Court erred in convicting him on basis of such tape without indicating the person who recorded it and the names of the persons who manipulated it and signed the statement that they got it from Kabaya to the Prosecutor General, rather he notes that its manipulation is only limited at Kabaya.

[111] Mugesera Léon further explains that he was in the meeting organized by MRND held at Kabaya on 22/11/1992, he made a speech there, but it is not the speech recorded on the tape given to the High Court by the Public Prosecution on basis of which the appealed judgment was rendered against him because he made an oral speech which was unwritten, because he spontaneously made it on the request of the Prefet Banzi Wellars who was seated together with him. He supports that the fact that he firstly outlined the principal points to develop in the speech does not constitute evidence indicating that he had drafted the speech. Also, that speech was never recorded on the tape by MRND nor himself, however he does not remind it due to the elapsed period, therefore the statement of the Public Prosecution that the original speech is archived in Rwanda Broadcasting Authority (former ORINFOR) is not true, because Peter Fraser asserted that the speech recorded on the tape he was given originated from the tape or "CD"[43] kept in RBA (ORINFOR) archive is not original, rather it has been altered as above explained.

[112] He requests the Court not to convict him on basis of the speech held at Kabaya recorded on the tape that is not original because it is not the evidence that indicates beyond reasonable

[43] CD = Compact Disc.

doubt that he committed the crime as required in criminal matters, rather during the administrative case he held in Canada, the evidence on which it was based was not weighty in comparison to the one required in this criminal case.

[113] The representative of the Public Prosecution sustains that the High Court did not err in deciding that the tape on which it is recorded the speech held by Mugesera Léon in the meeting of 22/11/1992 at Kabaya is a supporting evidence in this judgment given that the Supreme Court of Canada based its ruling on it in the administrative case when it decided that Mugesera Léon is not entitled to stay in that country due to the crimes of which he is suspected as asserted by the expert called Peter Fraser who affirmed that the speech recorded on that tape was not altered, but Mugesera Léon did not produce any evidence indicating that it was altered apart from alleging it only, meaning that he did not meet the conditions of the article 3 of the Law nº 15/2004 of 12/06/2004 relating evidence and its production which provides that each party shall prove the truthfulness of his/her allegation and the article 85, paragraph 3 of the Law nº 30/2013 of 24/05/2013 relating to the code of criminal procedure which provides that "*where evidence to support the offence is presented, the accused must produce the evidence indicating that he/she is innocent"*.

[114] He also avers that the High Court convicted Mugesera Léon with the crime on basis of the tape and other evidence contained in the casefile including the testimonies of the witnesses who were attending the meeting at Kabaya who heard the speech he held constituting the crimes of which he is accused and their testimonies should be taken into consideration because they concord with the speech on the tape, but Mugesera Léon did

not produce any evidence that contradict with the incriminating evidence.

[115] Concerning the transfer of the speech made at Kabaya recorded on the tape, the representative of the Public Prosecution submits that in the paragraph 13 and the following paragraphs of the appealed judgment, the High Court expounded the modalities of the tape transfer, where it explained that Mugesera Léon having made the speech on 22/11/1992, after only four (4) days, the Public Prosecution issued an arrest warrant, it submitted a letter to ORINFOR requesting the tape on which the speech was recorded, and it transmitted it by asserting that it has been recorded by Radio Rwanda on 22/11/1992 in the context of collection and dissemination of information, and the original tape on which that speech is recorded is kept in its archive as it is its property, it handed it to the Public Prosecution a copy in the context of criminal action. He also supports that on 22/05/1995, Murutampunzi Boniface who was journalist at Radio Rwanda confirmed that it is himself who took the tape from its archive and handed it to Nyirantabashwa Ange who was a technician at Radio Rwanda for making a copy, and the High Court examined all the evidence and noticed that the speech made by Mugesera Léon at Kabaya on 22/11/1992 recorded on the tape or "CD" should be considered as evidence because it is original, but Mugesera Léon and his counsel did not indicate the defects contained in those explanations, given that they did not demonstrate the conditions of the speech alteration, meaning the additions, the deletions or the modifications and who modified it.

[116] He adds that Mugesera Léon did not improvise the speech held at Kabaya, rather he prepared it as remarked on the tape or "CD" as the High Court explained it, it also examined its

duration, the fact that before beginning it, he firstly indicated that he would develop four (4) principal points contained in it, and then after, he developed a point by point up to the conclusion, but even if Mugesera Léon did not prepare the speech, that cannot exclude his criminal liability.

DETERMINATION OF THE COURT

[117] The article 119 of the Law Nº 15/2004 of 12/06/2004 relating evidence and its production provides that *''in criminal matters, the evidence are based on all modalities of the facts and the legal provisions, provided that the parties have been given the opportunity to be present for cross-examination. The Court irrefutably substantiates that all incriminating or exculpatory evidence are genuine and admissible*"

[118] The article 121 of the Law above mentioned provides that "*The Court can rely on the audio recorded by means of any appropriate tools or the video recorded by means of a camera recording the moving visual images". The article 127 of the same Law provides that "A party who produces an evidence based on the recorded audio must proffer a witness who was present by the time of recording the audio or who can identify the person who produced it. The Court can appoint an expert to examine if the audio belongs to the person who allegedly produced it"*.

[119] In the casefile there is a statement of 17/01/1996 indicating that Mugesera Léon admitted before the arbitrator in

Canada that the topics and the sounds recoded on the tape which he heard are exactly genuine with the speech he made[44].

[120] The casefile also indicates that in the paragraph 46 of the judgment nº 2005 S.C.R. 40, adjudicated by the Supreme Court of Canada on 28/06/2005[45], the parties being Mugesera Léon versus Canada (M.C.I), that Court expounded that the taped speech of Mugesera Léon had been transcribed by Thomas Kamanzi who had been used as expert, and during the hearing before the arbitrator in Canada on 17/01/1996, it has been demonstrated that the transcription of the tape (composite nº 4) included in the casefile corresponds in all points with the speech held by Mugesera Léon, as Mugesera Léon admitted it himself during the pre-trial conference held on 30/01/1997, as also indicated in the judgment adjudicated by "Section of Immigration Appeal" (SAI) in paragraph 135.

[121] The explanations above mentioned are also provided in the paragraph 14 of the appealed judgment, where the High Court explained that the expert Peter Fraser, who was used by the

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[44] The arbitrator asked to M. Mugesera the following question: (…) given the topic or topics you developed, the sound we heard, can we say that it exactly reflects the speech you held? Mugesera Léon replied to him that:
"Yes, yes, it exactly reflects that speech; from the beginning it is understandable".

[45] The speech of M. Mugesera had been taped and transcribed. During the hearing before the arbitrator, it has been demonstrated that the transcription of the tape ("composite nº 4") included in the case file corresponds in all points with the speech made. M. Mugesera has officially admitted it during the pre-trial conference held on 30 January 1997 (Judgement of SAI, para.135). The arbitrator maintained the version of M. Kamanzi. The issue of the choice of the translated text had been repeatedly discussed, but during the final hearings, the respondents agreed that the translation of M. Kamanzi accurately reflected the Kinyarwanda text".

arbitrator in Canada, pointed out that the taped speech is the one that Mugesera Léon held at Kabaya because it was not modified as expounded in the judgment rendered by the Supreme Court of Canada above mentioned.

[122] Also in the paragraphs 15 and 19 of the appealed judgment, the High Court upheld that it compared the taped speech sent in Canada and the speech recorded on "compact disc" (CD) and the transcription submitted to it by the Public Prosecution, and basing on the judgments rendered by the Canadian Courts above mentioned, it observed that the speech submitted to it by the Public Prosecution is the one that Mugesera Léon held in the MRND meeting of 22/11/1992, as he admitted it in the Canadian Courts, therefore, the High Court decided that such speech taped and recorded on "compact disc" (CD) constitutes an evidence in that case, given that it was lawfully obtained as provided under the article 127 of the Law above mentioned herein.

[123] The casefile also indicates that in this Court Mugesera Léon admitted that he was in the meeting held at Kabaya on 22/11/1992, he made a speech before many citizens who participated in that meeting, during the hearing, he submitted that even if he did not remember the speech he gave, he could analyse the speech which served for his accusation, he so did and contextualized it.

[124] The Court finds that the fact that the expert called Peter Fraser confirmed that the taped speech (composite nº 4) exactly corresponds with the original speech given by Mugesera Léon and Mugesera Léon admitted it in Canada on 17/01/1996 and on 30/01/1997, where he admitted that the taped speech he heard corresponds with the speech given in the meeting held at Kabaya

on 22/11/1992 and before this Court Mugesera Léon admitted that he participated in that meeting and he gave a speech and he analysed that speech and he contextualized it, undoubtedly indicates that such speech taped and recorded on "compact disc" (CD) is an evidence that such speech was made by Mugesera Léon of which he is accused in this judgment because it was lawfully obtained as above mentioned as upheld by the High Court.

[125] The Court observes that the statement of Mugesera Léon that the High Court could not convict him on basis of the tape above mentioned, due to the fact that Peter Fraser confirmed that it was not original because it had been modified is unfounded, because it is not true, given that during the cross-examination of 23/06/1995, Peter Fraser ascertained that the taped speech (composite nº 4) corresponds with the original speech held by Mugesera Léon[46] as emphasized by the arbitrator[47].

[126] The Court also observes that the statement of Mugesera Léon that the High Court should not convict him on basis of the taped speech above mentioned because it did not indicate who recorded it and the modalities of its transfer from Kabaya to the Prosecutor General is not founded, given that, apart from the fact that Mugesera Léon himself admitted that it is himself who gave it as above explained, in the paragraphs 17 and 18 of the appealed judgment, the High Court upheld that after the speech was held

[46] "(…) then tape number 4 would in all probability be what was given in the original speech. Probability. (…) It's my opinion that this and this would be the same".

[47] "We have an expert here in the field who conducted analysis and who told us that, basing on the balance of probabilities, the tape number 4 would be the transcription of the original speech".

in the meeting at Kabaya on 22/11/1992, it was recorded by Radio Rwanda in the context of collecting and disseminating the information, and that tape is kept in its archive and on 27//11/1992, ORINFOR brought to the Prosecution a copy of the tape, and authorized it to use it for its job purpose. That Court also explained that on 22/05/1995, Murutampunzi Boniface, who was a journalist at Radio Rwanda from November 1992 admitted that on the request of his Director in the presence of the representative of the High Commission of Canada to Rwanda in Kigali, he took from the ORINFOR archive the original tape on which the speech was recorded, he gave it to Nyirantabashwa Ange who was a technician at Radio Rwanda for making a copy, as the latter admitted it.

[127] Basing on the explanations above provided, the Court observes that the High Court did not err in deciding that the speech recorded on the tape and the compact disc (CD) received from the Public Prosecution, as annexed to this judgment, should be considered as an evidence in the case, as it was lawfully obtained, because Mugesera Léon did not produce any contradicting evidence, therefore, this ground of appeal is uncorroborated.

2. Whether the High Court erred in convicting Mugesera Léon on basis of untruthful testimonies.

2.1 Regarding the witnesses accusing him for the speech he held at Kabaya.

[128] Mugesera Léon criticized the fact that the High Court relied on the witnesses who do not tell the truth and some witnesses who do not have the knowledge of the facts on which they testify, he explains his critique about the ordinary witnesses and the expert witnesses.

[129] Regarding the ordinary witnesses, Mugesera Léon criticized the fact that the High Court on its initiative, opted for hearing only 28 witnesses among 48 witnesses on which the Public Prosecution relied in accusing him, he should be given the opportunity to cross-examine the testimonies of all witnesses because all statements in the casefile are taken into account in the case analysis without considering the fact that the witnesses had been summoned or not to appear before the Court.

[130] In criticizing the testimonies of the witnesses on which the High Court relied, Mugesera Léon sustains that some of the prosecution witnesses lied that they were in the meeting held at Kabaya on 22/11/1992, while they never appeared there, others express their emotions and they use the words not included in the speech for which he is accused to have made that day, there are others who plotted for telling lies due to their common religious affiliation or their family relationship, others allegedly accused him that the speech he held had been the trigger of killing the Tutsi residing in that region, but they cannot produce an evidence of the relationship between the persons killed due to the speech for which he is accused to have made at Kabaya.

[131] Mugesera Léon supports that the witnesses who contended that they heard the speech made at Kabaya on Radio Rwanda lied because Higiro Jean Marie Vianney who was opponent of the incumbent regime and who was the employee on Radio Rwanda submitted that such speech was never aired on Radio Rwanda.

[132] Mugesera Léon criticized the testimony of Hategekimana Iddi who supported that he was present in the meeting held at Kabaya and he heard Mugesera Léon saying that any Tutsi should pass by Nyabarongo, but this phrase does not appear in the speech

for which he is accused, that witness sustained that following the speech held by Mugesera Léon there were the Bagogwe who were killed, but this is contradicted by Lt Ruzibiza Abdoul who explained on Radio Voice of America on 02/05/2004 that the Bagogwe were killed by Inkotanyi, and the person who was Minister of Justice in 1992 himself admitted that no one was killed following the speech held by Mugesera Léon.

[133] Mugesera Léon criticized Gashikazi Rajhab who lied that he was present in the meeting held at Kabaya and he heard his speech, then after in his testimony he sustained that he never heard the word "election" while this word appears 17 times in the speech for which he is accused.

[134] Mugesera Léon further criticized other witnesses who incriminate him for the phrases which do not appear in the speech of which he is accused, but who sustain that they heard it, others were told them by those who participated in the meeting at Kabaya. Those include Nyirabagirishya who supports that she was told that Mugesera Léon said that the Tutsi are cockroaches, Uwimana Salama who submitted that she heard Mugesera Léon saying that no Tutsi should escape them from the cell and the sector, Ntawuruhunga Hassan supported that Mugesera Léon said that the Hutu should eliminate the Tutsi in Sectors and Communes.

[135] Mugesera Léon also criticized the High Court to have relied on the testimonies of the persons tried for perjury. Those include PME tried in the case Nº RP 320/R3/2001 by the Intermediate Court of Gisenyi on 13/09/2002 for murder and perjury and PMK tried in the case Nº RP 0075/TGI/NYGE by the Intermediate Court of Nyarugenge on 16/11/2009 for perjury in the Court.

[136] Mugesera Léon pleaded by supporting that what indicates that the witnesses lied against him is that, in various cases, there are others who gave false testimonies and then after admitted it by sustaining that they did so because the Public Prosecution promised them the pardon for the penalties pronounced by the courts. Those are Nyabyenda Jean Marie who gave testimony in Mwigimba Jean Baptiste case and Baziga Emmanuel together with Hakizimana De Gaulle who admitted that they gave false testimonies against Bandora.

[137] Concerning the expert witnesses, Mugesera Léon criticized the testimony given by Ruzindana Matthieu (who holds PhD in Linguistics with focus on Phonology) and Ntakirutimana Evariste considered as experts in defining the terms the "snake" (*inzoka* in Kinyarwanda) and "cockroaches" (*inyenzi* in Kinyarwanda), apart from lacking academic competences in Lexicology, they have no room to assert that the terms "snake" and "cockroaches" mean the Tutsi, rather some of so-called experts went to Arusha for subsistence. He criticizes the fact that the High Court relied on their testimonies, but it never summoned them for hearing their testimonies, and for him to be granted the right of cross-examination.

[138] Mugesera Léon also criticizes the High Court to have relied on the letter alleged to the witness Rumiya Jean, while this expert in History cannot certify the facts occurred at Kabaya while he had not been there, also before the Court in Canada, the latter supported that, during the genocide, Mugesera Léon had left MRND, he thought that he joined FPR, therefore the letter alleged to Rumiya Jean should not have any value.

[139] Mugesera Léon submits that the High Court should take into consideration the findings of the experts who had been in

Rwanda because they have enough knowledge of the facts they related, including General Romeo Dallaire, who appeared before the UN General Assembly on 30/03/1994 asserting that there was no problem in Rwanda, thus, he could not ignore to mention the turmoil caused by the speech of Mugesera Léon in case of its occurrence, also in its book entitled *Shake hands with the devil*, he did not mention any issue related to Mugesera Léon. He also submits that the experts including Eric GILLET and Alison DES FORGES conducted a thorough investigation in Rwanda in 1993 ; both did not mention that the speech made by Mugesera Léon occasioned the genocide.

[140] The Public Prosecution avers that the High Court did not err in convicting Mugesera Léon on basis of the testimonies given by the witnesses because they concur on the principal topics constituting the speech made by Mugesera Léon at Kabaya which incited to commit genocide including: qualify the Tutsi snakes and accomplices of the invaders of the Country; to cut off their necks; to make them pass by the shortcut in Nyabarongo; the error committed in 1959 by letting the Tutsi to go away and their children are attacking the Country; they also concur on the fact that, following that speech, the killing of the Tutsi residing in that region immediately began.

[141]] The Public Prosecution also argues that the High Court relied on the quality of the testimonies given, even if the witnesses could use different terms in relating what they heard themselves or it's a hearsay, also after more than 20 years, a witness cannot repeat the statements using the same terms with those used by Mugesera Léon, the High Court decided on basis of the various cases adjudicated by the International Criminal

Tribunal for Rwanda, and it requests the Court to make ruling in that guideline.

[142] The Public Prosecution expounded that Mugesera Léon cannot rely on the relationship between those who accuse him requesting to invalidate their testimonies, because the fact that some of them have the relationship with the persons killed and some of the persons who accuse him had been convicted by the courts, rather he should criticize the quality of the testimonies given against him, and he failed to do so as upheld by the High Court, also up to date, he does not rebut the testimonies given against him, as the facts that they assured coincide with the contents of the speech of which he is accused to have delivered at Kabaya.

[143] Regarding the witnesses so-called experts by Mugesera Léon, the Public Prosecution maintains that there are no experts used in the appealed judgment, rather the testimonies given by these experts in various judgments adjudicated by the International Criminal Tribunal for Rwanda (for example, in Akayesu case and Nyiramasuhuko Pauline et al. case) and the testimony given in the judgment against Mugesera Léon tried in Canada, those testimonies served for defining some terms contained in the speech made by Mugesera Léon at Kabaya inciting the citizens to commit genocide. It sustains that some terms particularly defined on basis of the context in which they were used are "cockroaches", "*accomplices of the* invaders *of the Country*", the terms which were used by those who incited to the intent of genocide, but they avoided to explicitly mention the Tutsi, and these terms are in the speech of which Mugesera Léon is accused, in which he mentioned that it is these persons whose the necks could be cut off, they should be killed and pass by the

shortcut in Nyabarongo for returning in their home country "Ethiopia".

DETERMINATION OF THE COURT

[144] The Article 18 of the Law N° 47/2013 of 16/06/2013 relating transfer of cases to the Republic of Rwanda provides that "*Both the prosecution and the accused have the right to appeal against any decision taken by the High Court upon one or all of the following grounds : 1º an error on a question of law invalidating the decision ; 2º an error of fact which has occasioned a miscarriage of justice*".

[145] Article 65 of the Law Nº15/2004 of 12/06/2004 relating the evidence and its production provides that "it is the Court which only weights that the testimonies of the witnesses are in line with the subject-matter, accurate and should be admitted or rejected".

[146] The Court finds that the High Court did not err in opting for hearing 28 witnesses instead of hearing all witnesses interrogated by the Prosecution, given that it is the Court which examines the testimonies of the witnesses and decides about the testimonies that are in line with the nature of the case and the facts, it was not in the interest of the justice and the parties to summon the witnesses who do not have the knowledge of the subject-matter, and who could not help the Court to attain the

truthfulness need as provided under the Articles 2[48] and 65[49] of the Law N°15/2004 of 12/06/2004 relating evidence and its production.

[147] The Court finds that the grounds on which Mugesera Léon relied to criticize the witnesses interrogated about the speech for which he is accused to have held at Kabaya on 22/11/1992 and those grounds have been examined by the High Court on the first instance as indicated in the judgment it rendered, from the paragraph 67 to 69, where he mentioned that the witnesses held the contradictory statements because they related the facts to which they did not witness, there are the terms of which they accuse him which are not included in the speech of which he is accused to have made at Kabaya and they do not mention the principal statements included in the speech submitted to the Court, there are some witnesses who pleaded guilty and admitted the charges, they falsely accuse him for exonerating themselves, others falsely accuse him on basis of their relationship with the persons killed.

[148] The Court finds that, in the paragraph 71 of the appealed judgment, the High Court exactly motivated its decision of relying on the testimonies of the witnesses mentioned in the judgment, where it indicated that their testimonies are consistent, given that, even if they related the facts in their own words, the

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[48] The Article 2 of the Law above mentioned herein provides that the evidence in the case is the procedure used to point out the truthfulness of the facts.

[49] The Article 65 of the Law above mentioned herein provides that it is the Court which only weights that the testimonies of the witnesses are in line with the subject-matter, accurate and should be admitted or rejected.

facts they relate are similar to the speech made by Mugesera Léon at Kabaya as heard on the "CD" and its transcription. It also observed that the manner in which the witnesses related what they heard themselves or hearsaid indicates that they relate what they know because all recount the principal topics which convey the message inciting to commit the genocide including qualifying the Tutsi as cockroaches, accomplices of the country invaders, they should cut off their necks and pass by the shortcut through Nyabarongo to return in Ethiopia from where they came, the mistake committed in 1959 is that they let them run away and their children had invaded the country. It also observed that the witnesses recount on the fact that the speech of Mugesera Léon triggered the attacks in which many Tutsi were killed in Gisenyi and the vicinity, while others' houses were destroyed.

[149] The Court also observed that the testimonies on which relied the High Court had been correctly analysed, given that, apart from comparing them with what it heard on the "CD", in the paragraph 75 of the appealed judgment, it noted that the testimonies of the witnesses are similar to the articles of the newspapers which reported the speech of Mugesera Léon and its effects including Umurangi N^{o} 14 of 10/12/1992 which reported that Mugesera Léon held at Kabaya a speech that they should cut off the Tutsi necks and throw them in Nyabarongo, Rwanda Rushya N^{o} 34 of December 1992 which reported that Mugesera Léon stated in the meeting at Kabaya that there are the Ethiopian Rwandans which should pass by Nyabarongo for quickly getting there, Isibo of 24-31 December 1992 which reported that the statements of Mugesera Léon at Kabaya had been implemented by Interahamwe and Impuzamugambi at Kibirira on 28/12/1992, Kinyamateka N^{o} 387 published in February 1993 reported about

the speech of Mugesera Léon given at Kabaya implicitly inciting the residents of Gisenyi to kill their opponents[50].

[150] The Court also observes that, in weighing the testimonies given, the High Court noted that their statements were similar to those of the experts including the International Commission on Human Rights which, in its report of 07-21/10/1993, pointed out the speech of Mugesera Léon as the person who seriously incited to the atrocity, Rumiya Jean, a University lecturer, who sent to Mugesera Léon an open letter of 02/12/1992 denouncing his speech which incited to kill the Tutsi and the MRND opponents and Philip Reyntjens, a University lecturer, who wrote that the speech held by Mugesera Léon at Kabaya in 1992 was triggering, because it incited to kill the Tutsi and the politicians opponent to the regime which was in power.

[151] The Court observes that the High Court did not err in its analysis because it examined the substance of the testimonies that were given by comparing them with the statements they made and other evidence available before giving the testimonies as explained in the previous paragraphs, especially the statements they made are similar to the taped speech of Mugesera Léon for which he is accused and also recorded on "CD" and which had been transcribed. The High Court also clearly expounded that the fact that some of witnesses are relative, others have common religious affiliation, others may have discussed together before giving the testimonies cannot exclude the Court from relying on their testimonies because they are consistent and similar to other evidence produced by the Public Prosecution.

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[50] Paragraph 75 of the appealed judgment Nº RP 0001/12/CCI.

[152] The Court also observes that, as indicated in the paragraph 72 of the appealed judgment, in invalidating the grounds on which Mugesera Léon relied by supporting that the High Court could not rely on the testimonies of some witnesses who made the statements dissimilar to the speech for which he is accused and others who did not repeat the terms mainly used in that speech, the High Court based on the judgments rendered by the International Criminal Tribunal for Rwanda including Bikindi Simon[51] and Muvunyi Tharcisse[52] cases which upheld that the testimonies given after a long time are considered for their substance, even if the witnesses used their own words in relating what they heard themselves or hearsaid.

[153] The Court of Appeal concurs with the guideline above mentioned given that the witnesses heard or hearsay the speech for which Mugesera Léon is accused to have made at Kabaya, each one, after a long time, retained in his mind the statement which affected his heart, and in explaining it, he can use his own terms, the Court has the duty to assert that the testimony given is in line with the nature of the subject-matter and accurate, this has been done by the High Court in comparing the testimonies given and other evidence submitted to it included in the case file above mentioned herein.

[154] Concerning the statement of Mugesera Léon that there are prisoners who falsely gave the testimonies because they have been promised the sentence reduction, where he mentioned the example of those who admitted that they falsely witnessed

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[51] ICTR-2001-72-T, The Prosecutor vs. Bikindi Simon, 2nd December 2008, para.32.

[52] ICTR-00-55A-T, The Prosecutor vs. Muvunyi Tharcisse, 11th February 2010, para. 56, 58, 91-94.

including Bandora and Mwigimba, the Court observes that, apart from the fact that he did not produce the evidence to that effect, he does not demonstrate its link with his case under litigation.

[155] The Court observes that, concerning the expert witnesses who are criticised by Mugesera Léon, that Ntakirutimana Evariste and Ruzindana Mathias provided the definition of the words "*inyenzi*" (cockroaches) and "*ibyitso*" (accomplices) by relating them with the Tutsi, while they allegedly do not have enough knowledge of the lexicology. The Court observes that the experts mentioned in this paragraph have been used by the International Criminal Tribunal for Rwanda in Muvunyi Tharcisse and Nyiramasuhuko Pauline[53] cases, in which they indicated that these terms have been used by the politicians who did not wish that the foreign countries could discover the intention they had against the Tutsi.

[156] The Court observes that, in his pleading in the High Court, Mugesera Léon relied on the definition provided by the expert Kamanzi Thomas who stated in the Canadian Court that the term "*inyenzi*" (cockroaches) means "*inyeshyamba*" (rebels), the term "*ibyitso*" (accomplices) does not mean the Tutsi, rather it means those who accepted to cooperate with the enemies who attacked Rwanda, and "inzoka" (snake) can mean a crafty. The Court also observes in the High Court, Mugesera Léon pleaded by sustaining that the words do not have the meaning, they have the use (*les mots n'ont pas de sens, ils ont des emplois*[54]*).*

[157] The Court observes that, in the paragraph 42 of the appealed judgment, it is the High Court which provided the

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[53] ICTR- 98-42-2183/01 adjudicated by ICTR on 14/12/2015.
[54] Paragraph 34 of the appealed judgment Nº RP 0001/12/CCI.

definitions of « *inyenzi n'ibyitso byazo », « inzoka », « abohereje abana babo mu Nkotanyi », « abemerewe gusohoka mu gihugu mu 1959 »* by contextualizing those terms in the periods in which the Tutsi lived, they were killed simply because they cooperated with Inkotanyi who had attacked Rwanda, it ruled that those terms denoted the Tutsi, the Court of Appeal concurs with the conclusion taken by the High Court because it analysed those terms by contextualizing them on basis of the testimonies given by Kadogo Hachim, Nyirabagirishya Raphaël, PME, Ngerageze Muhamudu, Ntawuruhunga Hassan, and Hategekimana Iddi who asserted that they considered that speech as inciting to the killing of the Tutsi, because after the meeting, they began to kill, loot and destroy the Tutsi houses[55]. It also observes that concerning the fact that the term *"inyenzi*" used in the speech of Mugesera Léon for which he is accused means the Tutsi, the Court concurs with the author Susan Benesch[56] who analysed the use of this term in different periods of Rwandan history.

[158] The Court observes that the appeal ground of Mugesera Léon, who criticises the fact that the High Court relied on the testimonies of the experts who do not have knowledge, is not founded, given that the High Court did not use them as witnesses

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[55] Paragraph 78 of the appealed judgment Nº RP 0001/12/CCI.

[56] The term "inyenzi" was coined in the 1960s to refer to Tutsi rebel fighters who conducted night time attacks in Rwanda and then disappeared before daylight into neighboring countries. In the early 1990s the term referred to the Tutsi rebels of the RPF, but it also came to mean perceived enemies of the Hutu government, and later any Tutsi person, "*inyenzi*" was a leitmotif of MUGESERA's speech. Since the meaning of the word changed dramatically over time, it cannot be understood without asking: **what did it mean to a particular audience at a particular moment?"** (Susan Benesch: "Vile crime or inalienable right: Defining incitement to commit genocide" in Virginia Journal International Law, p. 486).

in the judgment it adjudicated, rather it carried out its proper analysis of the terms as explained in the previous paragraph, it emphasized the definition it provided to the terms above mentioned on basis of the definitions provided by the experts Ruzindana Mathias and Ntakirutimana Evariste used by the International Criminal Tribunal for Rwanda in which they explained that the terms "*inyenzi n'ibyitso byazo*" (cockroaches and their accomplices) were used to mean the Tutsi by using the implicit statement to not enable the foreign countries to discover the intention of the regime that was in power in persecuting the Tutsi.

[159] It also observes that in emphasizing the definition it gave to the terms « *inyenzi n'ibyitso byazo* » (cockroaches and their accomplices) and the term "*inzoka*" (snake) it based on the document of 21/09/1992 from the Military High Command taken into account in the report of the experts[57] which also mentions that the enemy evoked in that period was a Tutsi residing in the Country, this gives the substance to the definition of the terms provided by the Court.

[160] The Court also observes that the definitions provided by Ruzindana Mathias and Ntakirutimana Evariste on the terms "*inyenzi n'ibyitso byazo*" (cockroaches and their accomplices) are similar to the definitions of the Supreme Court of Canada which defined the word "*inyenzi*" (cockroaches) used in the speech of Mugesera Léon for which he is acused has the origin in the attacks of the Tutsi refugees waged in 1960 for the purpose of their repatriation, Mugesera Léon used it with connotation to the term "Inkotanyi" when he stated that those who attacked

[57] Report of the International Commission of Investigation on Human Rights Violations in Rwanda from 01/10/1990, p. 63.

Rwanda do not deserve the qualification of Inkotanyi, rather they deserve to be qualified as "*inyenzi*" (cockroaches), even if he stated that the *inyenzi* accomplices should be killed for avoiding the mistake committed in 1959 by letting them flee, by contextualizing these terms in the periods they were used when more than 2,000 Tutsi were killed between 1990 and 1993, it concludes that "*inyenzi n'ibyitso byazo*" (cockroaches and their accomplices) mentioned mean the Tutsi.[58].

[161] The Court observes that concerning the insufficient knowledge evoked by Mugesera Léon on the experts used by the International Criminal Tribunal for Rwanda, he does not have any basis, given that the definition they provided to the term "inyenzi" (cockroaches) is in line with the writings of other experts not criticised by Mugesera Léon including General Romeo Dallaire, commandant of the international peacekeeping force in Rwanda and Mugesera Léon recognized him as one of the experts who were in Rwanda, Dallaire stated that "Hutus leaders, editors and broadcasters famously described Tutsi people as Inyenzi or cockroaches"[59].

[162] The Court observes that, basing on the explanations provided in the previous paragraphs, the appeal ground of Mugesera Léon who submits that the High Court convicted him on basis of the speech held at Kabaya by relying on the untrue testimonies is not founded.

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[58] Supreme Court of Canada, file No 30025, MUGESERA vs. Canada (Minister of Citizenship and Immigration), para. 68.
[59] Romeo DALLAIRE: Shake the hand of the devil, 2005, p.142.

2.2. Regarding the witnesses accusing him for the speech he held in the meeting at Nyamyumba.

[163] Mugesera Léon, assisted by Counsel Rudakemwa Jean Félix , supports that, apart from the fact that he did not participate in the meeting of which he accused and that had been held at Nyamyumba on 06/07/1992, he thoroughly analysed and noted that the witnesses Rwasubutare Callixte and Sinayobye André plotted to falsely accuse him because he noticed that the written testimonies submitted by both persons are similar in their content and writing, and the signature on the testimonies alleged to both is the one of Rwasubutare Callixte as it is similar to the one on his letter of 2010/2008 he saw in the prison, but before the High Court both sustained that they were not together when the submitted their testimonies.

[164] Mugesera Léon also criticises those who accuse him of having participated in the meeting allegedly held at Nyamyumba by supporting that they accuse him of being together with the Secretary General of MRND, Habimana Bonaventure, and Ngirumpatse Matthieu who was allegedly the Chairperson of MRND, however on this mentioned date, both persons were not in these managing positions alleged to them. Moreover, if he was together with both persons, he could not make a speech as there were his hierarchical leaders in the party of MRND at national level.

[165] The Public Prosecution avers that in the meeting held at Nyamyumba on 06/07/1992, Mugesera Léon made a speech inciting the Hutu to murder the Tutsi because they are enemies who intend to kill them, they are "*inzoka*" (snakes), they caused disabilities to the Hutu ancestors, therefore they should chase them, catch them, expel them by the shortcut to get where they

came from in Abyssinia and exterminate them because those who attack them are their descendants born in foreign countries. It further sustains that Mugesera Léon is accused of these acts by Sinayobye André and Rwasubutare Callixte who had been Interahamwe and they maintain that after the meeting, themselves together with others killed the Tutsi residing in that region.

[166] The Public Prosecution also expounded that there was no conspiracy between both witnesses because they stated what they heard themselves in the meeting in which they were present and during the investigation they recalled the content of their statement incriminating Mugesera Léon, therefore, the High Court considered their statements as consistent.

DETERMINATION OF THE COURT

[167] The article 62 of the Law No 15/2004 of 12/06/2004 relating to the evidence and its production provides that the testimony is the statement made before the Court by the person who witnessed the fact or hearsay himself/herself concerning the subject-matter, and the article 71 of the same Law provides that all the witnesses who contribute to the fair adjudication of the case deliver their statement about it.

[168] The High Court in weighing the testimony of Sinayobye André and Rwasubutare Callixte, based on the fact that both witnesses, even if each one relates the facts in his own words, recount the fact that in the meeting held at Nyamyumba, Mugesera Léon incited the Hutu to fight and kill the Tutsi, he reminded them their enmity against their parents and the fact that they detailed as the persons really present, the consequences arising from that speech. The Court also noted that the fact that

both witnesses submitted the common written testimony does not invalidate their testimony because they recalled it during the investigation and the interrogation before the High Court and Mugesera Léon does not indicate the false testimony they gave against him.

[169] The Court really observes that Rwasubutare Callixte and Sinayobye André detailed their testimony before the Public Prosecution and the High Court and Mugesera Léon was granted the opportunity to cross-examine them before the same Court, they related the facts as they witnessed them and they themselves admitted that they played a role in persecuting and killing the Tutsi after having heard the speech of Mugesera Léon.

[170] The Court observes that as the participants in the meeting, each one makes a specific statement relating to the speech of Mugesera Léon, for example RWASUBUTARE Callixte mentioned that Mugesera Léon told that the one who wants to surpass another awaits him/her and he told them that to pass by the shortcut is to exterminate (pages 111-112), and SINAYOBYE André, in his testimony, maintained that he asked them if they do not know to distinguish the herb (bad) from the cob (good), and he told them to understand the ongoing war and its origin, he reminded them the Rwandan history from 1959 and the attacks waged by the Tutsi in 1963, 1973 and 1990. Sinayobye André detailed the conditions in which for the *interahamwe* (including himself), the uniforms and the busses to bring them in the meeting were requested, Habimana Bonaventure gave them 2 busses, when they were going in the meeting held at Budaha, the lists of interahamwe were drafted, then after they were brought to the MRND palace at the Prefecture where they were given uniforms and the tools for chasing the Tutsi (pages 116-121). It observes

that the explanations given by both persons indicate that they related what they witnessed themselves, therefore, their testimony should be declared valid as decided by the High Court.

[171] The Court also observes that Rwasubutare Callixte and Sinayobye André similarly relate the principal aspects of the meeting held at Nyamyumba, both recount that it was held at Trinité Kivumu school, among the leaders who participated in the meeting there were Mugesera Léon, Habimana Bonaventure and Ngirumpatse Mathieu, Habiyambere Cosima, Banzi Wellars, Colonel Gahimano and Karemera Egide, that Mugesera Léon detailed the history of the Tutsi enmity, and the necessity to return them in their region of origin Abyssinia, the youth participating in the meeting were requested to chase the Tutsi and they immediately attacked those who resided in the vicinity. It observes that the fact that they relate the facts almost similar as the participants in the same meeting, on the same date, when particular acts happened cannot be considered as defect as Mugesera Léon tends to put that it is conspiracy, rather it must substantiate their testimony because it is founded given that the fact that they similarly relate the facts is not due to the conspiracy, but it is due to the fact that they similarly witnessed the facts.

[172] The Court observes that the pleading ground of Mugesera Léon by supporting that the witnesses gave false testimony against him because on 06/07/1992 Habimana Bonaventure was not the Secretary General of MRND and Ngirumpatse Mathieu was not the Chairperson of MRND and he could not make a speech in a meeting in which his hierarchical leaders at national level participated, that ground is unfounded, given that Mugesera Léon himself admitted that Habimana Bonaventure and Ngirumpatse Mathieu were members of the managing organs of

MRND and the witnesses maintained that they knew them because everyone among the guests introduced himself to the participants in the meeting and presented his position, the fact that the witnesses do not similarly mention the leader and his position in the party does not constitute a defect that can invalidate his testimony on basis of the long time elapsed, from the time of the occurrence of the fact to the date of giving the testimony. It also observes that Mugesera Léon, who was a leader in MRND in Gisenyi Prefecture and he himself admits that in the same period he crossed everywhere in the Country to hold the meetings convened by MRND party sensitizing about "the four satanic horns", cannot rebut the testimony incriminating him that he had been at Nyamyumba where he held a speech inciting the Hutu to kill the Tutsi.

[173] The Court observes that Rwasubutare Callixte and Sinayobye André, as some of the members of interahamwe militia affiliated to MRND party, by the testimony they gave about Mugesera Léon, themselves explained their role in the crimes committed on 06/07/1992, where they admitted that they looted and killed some of the Tutsi who were residing in Nyamyumba and its vicinity, it does not notice any interest for them to falsely accuse Mugesera Léon on the crimes in which they participated and for which they had been sentenced.

3. Whether the High Court erred in deciding that Mugesera Léon committed a crime of being accomplice of genocide perpetrators because of inciting to commit genocide.

[174] Mugesera Léon supports that if the High Court had analysed and contextualized the speech held at Kabaya, it could notice that the one who held it did not commit a crime, but that

Court erred in convicting him of the crime of inciting to commit genocide by disregarding that such speech was made by the time when Rwanda was attacked by Uganda as admitted by the President Yoweri Museveni of Uganda on 10/10/1990 when he stated that the Rwandan armed forces would not resist against his armed forces equal to 400,000 excellent in fighting , as stressed by a Dutch witness who gave the testimony in Canada and who asserted that the Ugandan armed forces attacked Rwanda, that Remigius Kintu in his book, he wrote that the President Paul KAGAME had serial number 00007 by that time, there is a telegram from Belgium Embassy in Ottawa on 16/07/1987 which stated that there were the American and Canadian experts equal to 300 who were training Tutsi armed forces of RPF for attacking Rwanda.

[175] He also puts that another evidence indicating that Rwanda was attacked by Uganda is that the soldiers from Uganda had infiltrated the civilian population as stated by the Senator Tito Rutaremara when Rwanda was attacked, as emphasized by Philippe Reyntjens in 1994, where he explained the conditions in which the war occurred, meaning that Rwanda should defend itself as indicated by some terms used in that speech relating to "not being invaded" or " I never accept that we would accept to be shot" or " the persons called Inyenzi came to attack us, but they had been repelled outside the border", but the term "Inyenzi" does not mean Inkotanyi.

[176] He sustains that the High Court disregarded that the speech was made by the time many persons in Byumba were displaced from their property by the war, also there were the persons who misappropriated their relief so that the Red Cross stopped to provide it, as written by Philippe Reyntjens in the book

above mentioned, but MUGESERA Léon was against the war, rather he requested to stop it by consensus because he requested to the President MUSEVENI to stop it and renounce to attack Rwanda, he requested to the United States of America and Canada to place the armed forces on the border of Rwanda and Uganda to halt the war, but it was not so done.

[177] He further expounds that the High Court also disregarded that such speech was held by the time preceding the election of parties which were actively campaigning, if it had thoroughly analysed and contextualized it by 1992, instead of contextualizing it by 1994 and 2020, it could notice that the one who made it did not commit a crime because he did not have the intent of inciting to commit genocide, rather he had the intent of instilling the democratic spirit through the election, given that the term "election" had been used 17 times and it is the only term that the citizens had captured in their mind as he concluded the speech by such term as indicated on the page 17 of the judgment copy.

[178] He also maintains that the High Court erred by butchering the speech held at Kabaya, because there are some parts where it skipped some principal terms, for example there is the part where it is written "ellipsis" (…) where it put other terms not mentioned, it considered the terms into the speech with the intent to convict him of the crime he did not commit, it disregarded the Law nº 15/2004 of 12/06/2004 relating evidence and its production which provides that the evidence should be altered, rather if it considered the whole speech and contextualized it, it could note that the one who gave it stated the election as above explained.

[179] He further explains that the High Court disregarded the applicable laws because if it did not disregard them, it could notice that the one who made the speech at Kabaya did not

commit the crime of inciting to commit genocide, the lists mentioned in that speech are not the lists of the persons to be killed, rather there were the lists of the persons to be submitted to the judicial organs for being tried for the crimes they had committed, for example, where he stated that "he shall be liable to death penalty any person who shall recruit young persons from the population and give them to the foreign armed forces who are attacking the Republic of Rwanda", because those who are liable for those acts should be sentenced by the judicial organs, given that those acts were prohibited by the Constitution of 1991 and punished by the penal code of 1977.

[180] He also sustains that the High Court could not convict him on basis of the speech held at Kabaya, because the one who made it used the conditional tense, meaning that the denotation could happen or not, for example where he stated "if, if they do it, if they have done, if a period elapsed, he will be sentenced to, if they once strike you on the cheek, strike them twice on the other cheek so as for them to collapse on the ground without being able to recover", because when they do not strike you, you also you do not strike anyone, there is the part where he used the future tense, for example where he stated "he will be sentenced to" and there are also cited sequences, for example, where he cited "You heard yourselves what was stated by the Prime Minister: "They are going to run to marshland", "You heard", "you have spent days hearing", and the part where he made a petition as democratic act, for example where he stated "you could write to him", "You could write to him and inform him".

[181] He adds that the High Court could not rule that he incited to commit genocide, given that the speech he held at Kabaya was not followed by the murder of the Tutsi as asserted by Counsel

Mbonampeka Stanislas who was the Minister of Justice in 1992 and stressed by Eric Gillet and Mrs Alison Des Forges in his case tried in Canada and Professor Filip Reytjens assured that Nsanzuwera, who was then the Public Prosecutor in Kigali, told him that by virtue of laws, he could not have room to initiate proceeding for prosecuting Mugesera Léon.

[182] Counsel Rudakemwa Jean Félix, assisting Mugesera Léon, avers that this Court should rectify the errors committed by the High Court above mentioned and rule that Mugesera Léon is innocent.

[183] The representative of the Public Prosecution sustains that primarily in case Mugesera Léon does not admit that it is not him who made the speech of Kabaya for which he has been tried, he has no right to interpret it nor to support that it had been altered, rather he should admit that it has been held by him, then after, explain how the High Court butchered it and misinterpreted it so that it reached to a conclusion that is unjust for him, but he must not pretend that the speech has been butchered and misinterpreted while he does not remember the speech he gave. Moreover, he did not sustain before this Court that if the High Court had maintained the extracts, it omitted they could make the original version of the speech he made, given that it is not the speech which had been accused, rather it is Mugesera Léon who had been accused for the speech he held at Kabaya.

[184] He avers that subsidiarity, in case this Court opts for interpreting the speech made at Kabaya, it observes that the High Court did not err in convicting Mugesera Léon for the crime of inciting to commit genocide on basis of the speech made in the meeting held at Kabaya on 22/11/1992 recorded on the tape and CD, because, according the copy of the appealed judgment, that

Court analysed the speech and noticed that it was made by him, it points out that the terms he used constitute the crimes including the incitement to commit genocide, it indicates the legal provisions on which it relied by convicting him and during the pre-trial conference of 30/01/1997, Mugesera Léon admitted in Canada that the taped speech transcribed by the expert is completely similar with the speech he held at Kabaya, and because of such speech, Canada expelled him from its territory so that he was transferred in Rwanda, and before this Court, he admitted himself that he was at Kabaya and he held there a speech that he allegedly does not remember, however he did not produce any evidence contradicting the motivation of the High Court in convicting him, and he did not indicate the legal provisions that it violated.

[185] He expounds that Mugesera Léon could not support that the High Court disregarded to contextualize the speech held at Kabaya because he pretends that he does not remember it, apart from that issue, that Court did not disregard it, given that in the paragraphs 42 to 46 and in the paragraphs 115 and 165 of the appealed judgment, that Court contextualized the speech that Mugesera Léon gave at Kabaya by the wartime prevailing in Rwanda from 1990, it observed that Mugesera Léon committed the crimes on basis of the message contained in that speech according to which the Hutu should exterminate Inyenzi and their accomplices, return them in Ethiopia through Nyabarongo, and that speech triggered the genocide against the Tutsi because after making it in 1992, the Tutsi were immediately killed.

[186] He puts that another evidence indicating that the Court contextualized the speech of Kabaya is that it convicted Mugesera Léon on basis of the report of the International

Commission for Investigation of March 1993 which points out the general context prevailing in Rwanda from 1990 to 22/11/1992 when Mugesera Léon delivered such speech and indicates that by that time the anti-Tutsi acts were perpetrated.

[187] He also sustains that the fact that Rwanda was in wartime when Mugesera Léon delivered the speech does not preclude him from the liability for the crime of inciting to commit genocide, because the article one of the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948 provides that the genocide can be committed in time of peace or in time of war, but Mugesera Léon did not demonstrate that the words he used at Kabaya on 22/11/1992 that "they committed the mistakes of letting the Tutsi leave the country and flee" were addressed to the Ugandans and that their necks should be cut off.

[188] He adds that the High Court did not err in analysing each part of the speech held by Mugesera Léon at Kabaya, given that in the hearing of 10/02/2020, he supported that the speech he delivered at Kabaya was composed of the following principal four (4) parts: Avoid MDR kick, not to be invaded, their attitudes to avoid the traitors and the behaviour during the election, and all those parts do not concern the election because they convey different elements including the terms related to the genocide, for example the snakes (inzoka), to purchase the machetes to cut off the Tutsi's necks and to pass them through Nyabarongo for returning in the home country Ethiopia, and there is a part where he exhorted those who have the money to bring it for use, rather if that Court has taken into account the frequency of terms, it could decide that Mugesera Léon incited to commit genocide as it did on the term "Inyenzi" used 27 times and the term "amatora"

(election) that Mugesera Léon pretexts that it has been used several times equal to 15.

[189] The Court questioned the representative of the Public Prosecution if the High Court erred or not in deciding that Mugesera Léon had been accomplice of genocide perpetrators, he replied that Mugesera Léon should be convicted of the crime of inciting others to commit genocide instead of the crime of being accomplice of genocide perpetrators as those are two different crimes, and this Court has the jurisdiction to change the qualification of the crime at any stage of the hearing as upheld in the case Nº RPAA 0117/07/CS rendered by the Supreme Court on 17/09/2010.

[190] He expounds that the High Court should not convict Mugesera Léon of the crime of being the accomplice of the genocide perpetrators, rather it should convict him of inciting others to commit genocide given that it is a specific crime, different from the first one, given that it is provided under the article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948 incorporated in the Rwandan penal code, meaning the Organic Law of 30/08/1996 which punished the crime of genocide, the Organic Law which governed the Gacaca Courts of 2000, 2004 and 2008 repealed and the Organic Law instituting the penal code of 2012 applicable by the time Mugesera Léon was tried in the High Court.

DETERMINATION OF THE COURT

[191] The Article 18, paragraph one of the Law N° 47/2013 of 16/06/2013 relating to transfer of cases to the Republic of Rwanda provides that "*Both the prosecution and the accused*

have the right to appeal against any decision taken by the High Court upon one or all of the following grounds : 1º an error on a question of law invalidating the decision ; 2º an error of fact which has occasioned a miscarriage of justice".

[192] That article insinuates that the appellant should indicate to the Court of Appeal the errors of facts and the errors of law that occasioned the miscarriage of justice as well as the supporting legal provisions as upheld in the case n° ICTR–96–4-A of AKAYESU Jean – Paul adjudicated by the International Criminal Tribunal for Rwanda on 01/06/2001[60].

[193] The Article 3 c) of the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948 incorporated in Rwandan law by the Decree Law o8/75 of 12/02/1975 provides for the direct and public incitement to commit genocide.

[194] The Article 132, paragraph 3 of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code applicable by the time Mugesera Léon case was adjudicated at the first instance provides that "incitement, either by speech, image or writing, to commit such a crime, even when not followed by the commission is an act punished as the crime of genocide". The Article 114 of such Organic Law provides that "*The crime of*

[60] "The role of the Appeals Chamber is limited to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justicee", The Prosecutor v. Jean-Paul AKAYESU, n° ICTR– 96–4– A, para. 17, Judgment of 1 June 2001. Article 24 of the Statute of the International Criminal Tribunal for Rwanda provides that "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) An error on a question of law invalidating the decision; or (b) An error of fact which has occasioned a miscarriage of justice."

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whether in time of peace or in time of war : 1° killing members of the group, among others (…).”

[195] Concerning the incitement to commit genocide, the International Criminal Tribunal for Rwanda upheld that “*The principal consideration is thus the meaning of the words used in the specific context : it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide*[61]”, especially the Tribunal upheld that the elements to be considered include:

> a) The culture, including the nuances of the Kinyarwanda language to examine how a speech was understood by its intended audience in order to determine its true message[62];
>
> b)Examine if the one who held it was an official or a leader in order to determine if he was aware or could predict the consequences of the speech he delivered to his audience[63];

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[61] Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze (Appellants) v. THE PROSECUTOR (Respondent) Case No. ICTR-99-52-A, Judgment of 28 November 2007, para.701.

[62] Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) v. the Prosecutor (Respondent) Case No. ICTR-99-52-A, Judgment of 28 November 2007, para.700.

[63] The Prosecutor v. Simon Bikindi Case No. ICTR-01-72-T, para. 136 and 137.

c) The purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide[64];

d) The fact that the speech occasioned the commission of genocide should be considered as evidence of the fact that the purpose of the one who held it was the incitement to commit genocide; even if those words may appear ambiguous they should be considered as intending to incite persons to commit genocide[65].

[196] Regarding this judgment, the casefile indicates that in paragraphs [38] to [49] and in paragraphs [110], [114], [117] and [118] of the appealed judgment, the High Court expounded that Mugesera Léon committed the crime of direct and public incitement to commit genocide provided under the legal provisions above mentioned because the speech he held at Kabaya on 22/11/1992 contained the words inciting the MRND militants who heard it to kill all or some Tutsi, for example, there is a part where Mugesera Léon stated that *inyenzi* (cockroaches) residing in the country sent their children on the battlefield to help *inkotanyi,* and he wondered himself if those parents should not be exterminated, and he wondered himself why they could not arrest those who bring those children and exterminate them. He also requested to put those persons on the list to be submitted to the judicial organs, in case they fail to judge them, the citizens should exterminate those bandits.

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[64] Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) v. The Prosecutor (Respondent) Case No. ICTR-99-52-A, Judgment of 28 November 2007, para.706.

[65] Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appellants) v. The Prosecutor (Respondent) Case No. ICTR-99-52-A, Judgment of 28 November 2007, para.703 and 709.

[197] The High Court also expounded that there is a part of the speech where Mugesera Léon requested the heads of cells to act together to crush the accomplice who penetrates the cell for not letting him to leave it, he requested the MRND militants to act together to provide the money in order to cut off their necks, because if they fail to cut off someone's neck, the latter would cut off their necks and he told to a partisan of PL[66] who derogated him that his home country is Ethiopia, that the mistake they committed in 59 even if he was still young is that they let them run away, that they would pass through Nyabarongo to quickly get there.

[198] In the paragraphs [43] and [114] of the appealed judgment, the High Court explained that even if in the meeting held at Kabaya, Mugesera Léon did not directly state that they should exterminate the Tutsi, but if it considers the words he then used, for instance to exterminate *inyenzi* (cockroaches) and the accomplices of those who attacked the country, and the context in which those word were then understood, it is evident that Mugesera Léon directly and publicly incited to kill all or some Tutsi, because the words "inyenzi" (cockroaches) or "ibyitso" (accomplices) he used intended to mean the Tutsi as explained by Mathias Ruzindana used by the International Criminal Tribunal for Rwanda in the case of Akayesu Jean Paul[67].

[199] Concerning the intent to commit the crime of incitement to commit genocide, in the paragraph [118] of the appealed

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[66] PL= Parti Libéral.

[67] Case n° ICTR -96-4 -T, The Prosecutor vs AKAYESU Jean - Paul, rendered by ICTR on 02/09/1998, para. 147-150.

judgment, the High Court expounded that the special intent of Mugesera Léon to commit the crime of incitement to commit genocide is manifested by the words he used above mentioned, for example where he stated that he does not understand the reason why they did not exterminate the parents who sent their children to join Inkotanyi and those who brought them, and the fact that he reminded to a partisan of PL (it is evident that he was a Tutsi) that his home country is Ethiopia, that the mistake they committed in 59 is that they let them leave the country, but they would pass them by Nyabarongo to quickly get there and the fact that his audience would hear him and implement his speech because Mugesera Léon made his speech in Gisenyi Prefecture, where he was born, he was the deputy chairperson of MRND party, he was a University lecturer and an Advisor in the Ministry.

[200] The Court observes that, the fact that Mugesera Léon made a speech in the meeting held at Kabaya on 22/11/1992 and he told to MRND militants who were hearing him that he did not understand the reason why they did not exterminate *inyenzi* residing in the country, meaning the parents who sent their children to join Inkotanyi and those who brought them, the fact that he requested to prepare their list to be submitted to the judicial organs for judging them, that in case they failed to judge them, the citizens should fulfil the obligation of rendering themselves justice by exterminating them, the fact that he requested the heads of cells to crush an accomplice who penetrated the cell for not letting him to leave it, the fact that he requested those who have money to bring it in order to cut off their necks, the fact that he told to a partisan of PL that his home country is Ethiopia, that the mistake they committed in 59 is that they let them leave the country, that they would pass them by

Nyabarongo to quickly get there and the fact that Mugesera Léon as deputy chairperson of MRND party, a University lecturer and an Advisor in the Ministry, he held such speech well knowing that the Tutsi he called *inyenzi* were being killed in Kigali and elsewhere in the country and the fact that he well knew that his audience considered such speech as inciting them to kill the Tutsi because they considered him as an intellectual with political experience as above explained, indicate that Mugesera Léon committed the crime of public and direct incitement to commit genocide, given that he incited the citizens to exterminate all or some Tutsi on basis of their ethnic group as provided under the article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948 ratified by Rwanda on 12/02/1975, rather than being the accomplice of the genocide perpetrators as decided by the High Court.

[201] The Court observes that another evidence which indicates that Mugesera Léon committed the crime of direct and public incitement to commit genocide is that the testimonies of Sinayobye André and Rwasubutare Callixte above mentioned indicate that in the meeting held at Nyamyumba on 06/07/1992, Mugesera Léon incited the Hutu to fight and kill the Tutsi, for example, where he told them that they should fight and exterminate the Tutsi because they oppressed their parents intending to appropriate themselves their country, and the speech was followed by disastrous consequences including killing, beating and looting the Tutsi as explained by the High Court in the paragraph [89] of the appealed judgment.

[202] The Court observes that the statement of Mugesera Léon that if the High Court did not butcher the speech he delivered at Kabaya on 22/11/1992, rather if it considered it as a whole in its

general context, it could notice that he requested that the election should be held, because it is the word which was used several times equal to 17 times, this statement is not grounded, because in the paragraph [18] of the appealed judgment, the High Court expounded that the Public Prosecution explained the whole speech on which it relied by accusing Mugesera Léon of the crime of incitement to commit genocide, the fact that the Public Prosecution insisted on some sentences that denote that he committed such crime, it did not err because, in terms of laws, it is not prohibited to consider some sentences of the speech conveying the message to be delivered by the one who held it and Mugesera Léon does not demonstrate the defect against those explanations.

[203] Furthermore, the Court observes that, even if in his speech, Mugesera Léon stated the words related to the election, not to be invaded and avoiding the kicks of MDR and PSD, opposition parties to MRND, this does not exclude the words above mentioned inciting the MRND militants to exterminate the Tutsi as above explained, because in his speech, Mugesera Léon continued to call the Tutsi inside the Country and the leaders of the opposition parties to MRND, *inyenzi* and accomplices of Inkotanyi who attacked the country, even if Mugesera Léon did not explicitly state that they should kill the Tutsi.

[204] The Court also observes that the statement of Mugesera Léon that the word retained by the citizens in their mind was "election", as it is on it he concluded, is not founded because, as explained by the High Court in the paragraph [81] of the appealed judgment, the audience does not necessarily retain the concluding word, rather it can retain the surprising one, the fearing one, the interesting one, the hurting one and any other and Mugesera Léon

does not indicate the defect against these explanations. Moreover, the Court observes that the word "election" is not the one used several times by Mugesera Léon, rather it is the word "inyenzi" used 30 times.

[205] The Court observes that the statement of Mugesera Léon that the lists mentioned in his speech were not those of the persons to be killed is not grounded because, in that speech, he requested for the preparation of the lists of *inyenzi* or the parents who sent their children to join Inkotanyi and those who brought them in order to be tried by the judicial organs, in case they fail to judge them, the citizens would exterminate them and Mugesera Léon admitted to the journalist of « Quotidien Le Soleil[68] » that those who brought those children to join Inkotanyi were the recalcitrant Tutsi, meaning that they were the Tutsi whose names should be put on the lists for being killed.

[206]] The Court observes that the pleading of Mugesera Léon that the High Court disregarded that the speech delivered at Kabaya on 22/11/1992 was made when Rwanda was attacked by Uganda so that the soldiers had infiltrated the civilian population and many persons were displaced following the war is not founded, because in the paragraph [82] of the appealed judgment, the High Court expounded that Mugesera Léon did not give such speech as the representative of Rwanda, but he delivered it in the context of MRND party, as he did not hold any other managing position which conferred to him the power to deliver such speech as the representative of the state, meaning that by virtue of the laws, such speech cannot be considered as self-defence because

[68] Stated in the paragraph 70 of the case n° 30025 adjudicated by the Supreme Court of Canada on 28/06/2005, Mugesera Léon vs Minister of Citizenship and Immigration (MCI).

there was no act against Mugesera Léon that could justify the self-defence, as provided under the article 105[69] of Organic Law Nº 01/2012/OL of 02/05/2012 instituting the penal code applicable by the time when the case of Mugesera Léon was adjudicated by the High Court, but Mugesera Léon did not demonstrate any defect against those explanations provided by the High Court.

[207] The Court finds that the statement of Mugesera Léon that the High Court disregarded that the one who held the speech at Kabaya requested for the enforcement of the laws in order to sentence to death penalty those who sent their children in Inkotanyi and those who brought them, the one who delivered the national territory and the one who demoralized the national soldiers during the wartime, as provided under the penal code, is not founded, given that he could not pretend to request for the law enforcement while that speech incited the population to exterminate the Tutsi and their accomplices as above explained.

[208] The Court also observes that the statement of Mugesera Léon that the High Court disregarded that the speech delivered at Kabaya does not incite to kill the Tutsi because all requirements were not met, as the one who delivered it used the conditional and future tenses, is not grounded, given that, through his speech, Mugesera Léon indicated to the MRND militants, who were hearing him, that all conditions are met for exterminating those they qualified as Inyenzi and their accomplices, he incited them

[69] The Article 105 of the Organic Law above mentioned provides that "A person shall be considered to act in self-defense when he/she commits an act to: 1° repel, during night, a person who breaks into an occupied place, enters it by force or trickery; 2° defends him/herself against perpetrators of theft or other criminals".

to do so, for example, there is a part where he wondered himself why they should not prepare the lists of the parents inside the country who sent their children to join Inkotanyi for exterminating them, or where he requested their collaboration by giving the money for cutting off their necks, if they fail to cut off their necks, they would come to cut off their, or where he requested the heads of cells that they should crush the accomplices of Inyenzi who penetrated the cells they were heading for preventing them to leave them as above explained.

[209] The Court also observes that the statement of Mugesera Léon that the High Court should not decide that he incited to commit genocide because the speech he held at Kabaya was not followed by the killing of the Tutsi is unfounded, given that the public and direct incitement to commit genocide is a crime, even if the incited persons should not implement it, as provided under the article 3 c) of the Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948 above mentioned, the Article 132, 3º of the Organic Law above mentioned, meaning that the Public Prosecution does not need to produce an evidence indicating that the speech of Mugesera Léon was followed by the killing of the Tutsi or violence acts.

[210] The assertions provided in the previous paragraph are similar to the decisions of the case n° 2005 S.C.R. 40 tried by the Supreme Court of Canada on 28/06/2005, in its paragraph 85, where it expounded that Mugesera Léon is accused of incitement to commit genocide, the Minister does not need to establish a direct causal link between the speech held by Mugesera Léon and any acts of murder or violence, and he does not need to demonstrate that his audience killed or tried to kill the members

of the group he targeted[70]. This has been also upheld in the case n° ICTR-99-52-T adjudicated by the International Criminal Tribunal for Rwanda on 03/12/2003, in the paragraph 1029, which upheld that "With regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred, that the media intended to have this effect is evidenced in part by the fact that it did have this effect[71]".

[211] The Court observes that another evidence indicating that the statement of Mugesera Léon that the speech he held at Kabaya was not followed by the murder against the Tutsi is not founded, because the witnesses interrogated by the High Court asserted that after the speech held by Mugesera Léon, the Tutsi were immediately killed, their properties were looted and their houses burnt, as indicated in the paragraphs [71] and [167] of the appealed judgment.

4. Whether the High Court erred in deciding that Mugesera Léon committed the crime of persecution as constituting the crime against humanity

[212] [212] Mugesera Léon sustains that the High Court committed an error of law and an error of fact because it convicted him of the crime of persecution as constituting the crime against humanity, while he never targeted individuals nor

[70] Mugesera v. Canada (Minister of Citizenship and Immigration), Case number 30025, 28/05/2005

[71] The Prosecutor v. Ferninand Nahimana, Jean-Bosco Barayagwiza, Hassan NGEZE case no.ICTR-99-51-T, para.1029, 03/12/2003.

the opposition political parties to MRND, rather he targeted those who attacked Rwanda from Uganda.

[213] He also puts that the same Court convicted him of that crime disregarding that the speech held at Kabaya was made by the troubling time of political parties competition, when a political party considered a Ministry as its own preserve because it expelled the partisans of other parties so that they dismissed the staffers of opposition parties (reciprocity), the example is the part where the one who held the speech stated that "they have to prevent against kicks of MDR, PL, FPR, PSD and PDC to which they exposed themselves in this time", but he never stated that Uwilingiyimana should be removed from the Ministry of Education and sent to her home.

[214] He also avers that the High Court disregarded the laws because, if it did not disregard them, it could notice that the one who held the speech did not commit a crime, the example is where he stated that "he shall be sentenced to death penalty any person who shall demoralize the Rwandan soldiers on the battlefield", as stated by Nsengiyaremye who was the Prime Minister, or "he shall be sentenced to death penalty any person who shall gave up a part of the national territory", as done by Twagiramungu, who then gave up Byumba Prefecture, Nsengiyaremye and Twagiramungu should be punished by the judicial organs because their acts were prohibited by the Constitution of 1991 and the penal code of 1977, and they are also prohibited in present time, because any person who should demoralizes the Rwandan armed forces or who should give up to FDRL one of the Rwandan provinces or who should attack Rwanda and the one who should aid him should be punished according to the laws as upheld in the case nº RP

0009/14/HC/MUS pronounced by the High Court, the Chamber of Musanze on 12/03/2015 in which the FDLR partisans were sentenced for having attacked Rwanda.

[215] He adds that the one who held the speech at Kabaya did not commit any crime because where he stated that "those who were seeking power went in negotiations in Belgium like MDR, PL and PSD, they promised to deliver Byumba Prefecture, to demoralize our soldiers" those words related to the "Brussels conspiracy", and he was not mistaken because the negotiations really took place, as explained by Philippe Reyntjens, in his book published in 1994, in which he explained the conditions of the attacks against Rwanda and the conditions in which the political parties like MDR, PL and PSD had no mandate to participate in the negotiations, rather the mandate was under the responsibility of the Government of Rwanda, as highlighted by Pierre Payant, in his book published in 2005, but Mugesera Léon did not submit this book as exculpatory evidence in this case because it has been seized by the Director of the Prison as it allegedly defames the incumbent Rwandan regime.

[216] The representative of the Public Prosecution sustains that the High Court did not err in convicting Mugesera Léon of the crime of persecution as constituting the crime against humanity because, as above explained, the same Court analysed and contextualized the speech held at Kabaya and it noticed that by the words used, like qualifying the Minister of Education as arrogant, the politicians opponent to MRND were targeted and killed all over the country, but, in this case Mugesera Léon did not produce any evidence contradicting the evidence on which the High Court relied in convicting him of such crime, including the testimonies of the prosecution witnesses and the final report

of the International Commission for Investigation on Human Rights Violations in Rwanda from 1 October 1990 published in March 1993 and the representatives of different human right associations including CLADHO (Comité de Liaison des Associations de Défence des Droits de l'Homme).

DETEMINATION OF THE COURT

[217] The Article 18, paragraph one of the Law N° 47/2013 of 16/06/2013 relating to transfer of cases to the Republic of Rwanda above mentioned provides that "Both the prosecution and the accused have the right to appeal against any decision taken by the High Court upon one or all of the following grounds : 1º an error on a question of law invalidating the decision ; 2º an error of fact which has occasioned a miscarriage of justice", for his appeal to have merit.

[218] Regarding this case, the crime against humanity is one of the crimes recognized by the customary international law as acts violating the fundamental human rights as upheld by the International Criminal Tribunal for Rwanda in AKAYESU Jean Paul case[72] and they should be punished by all States even if they are not provided under domestic laws as the States and the International Criminal Tribunals have incorporated them in their criminal law, for example, the article7.2. (g) of Rome statute of International Criminal Court in force on 01/07/2002 provides that "Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"[73]. The crime against

[72] Case No ICTR-96-4T, The Prosecutor v. AKAYESU Jean Paul, p.6.
[73] Article 7.2 (g) of Rome statute of International Criminal Court,

humanity is also provided under the article 6, c) of the Charter of the Nürnberg Tribunal [74] and the article 3 of the Statute of the International Criminal Tribunal for Rwanda as one of the acts committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds[75] as explained by the High Court in the paragraph [158] of the appealed judgment.

[219] The article 120 of the Organic Law Nº 01/2012/OL of 02/05/2012 instituting the penal code applicable by the time of the adjudication of the appealed judgment provides that " The crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population because of its national, political , ethnic or religious affiliation: 1° murder; 2° extermination; (…); 8^0 persecution against a person on political, racial, national, ethnic, cultural, religious grounds or any other form of discrimination(…)[76].

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[74] Article 6, c) of Charter of the Nürnberg Tribunal: "Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

[75]The Article 3 of the International Criminal Tribunal for Rwanda: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:(a) Murder;(b) Extermination;(c) Enslavement;(d) Deportation;(e) Imprisonment ;(f) Torture;(g) Rape;(h) Persecutions on political, racial and religious grounds;(i) Other inhumane acts.

[76] That article is also in accordance with the article 94 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general, which provides that "The crime against humanity is any of the following acts committed as

[220] Regarding this judgment, the High Court expounded in the paragraph [160] of the appealed judgment, that the speech of Mugesera Léon held in the meeting at Kabaya constitutes the crime of incitement to commit genocide and the crime of persecution as the crime against humanity given that it belittles the Tutsi for their ethnic group, it incites to seriously use violence against them by infringing upon their fundamental rights, because the incitement to use violence against the Tutsi has been implemented, as they were murdered, their properties were looted, their houses burnt as asserted by the witnesses interrogated by that Court and other evidence in the casefile including the newspapers and other documents of experts indicated, which report about the consequences arising from the speech held by Mugesera Léon at Kabaya.

[221] The High Court also expounded in the paragraph [161] of the appealed judgment that it notices by the speech held by Mugesera Léon in the meeting at Kabaya he targeted the politicians of other parties like MDR, PSD, PL and FPR that were in opposition to MRND, by qualifying them as accomplices of *inyenzi* (cockroaches) or the country aggressors, he incited to exterminate and murder them, he used the words belittling them because there is someone he called brigand, another an arrogant,

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part of a widespread or systematic attack directed against any civilian population: 1º murder; 2º extermination; 3º enslavement; 4º deportation or forcible transfer of population; 5º imprisonment or other severe deprivation of physical liberty against a person in violation of law; 6º torture; 7º rape, sexual slavery, enforced prostitution, enforced sterilization, or any other form of sexual violence of comparable gravity; 8º persecution against a person on political, ethnic, religious grounds or any other form of discrimination; 9º enforced disappearance of persons; 10º the crime of apartheid; 11º other inhumane acts of a similar character intentionally causing great suffering or serious injury to mental or physical health.

another was qualified as someone "I beg Satan", and he used the words that deprive them of the full political rights, for example, stating that they should never conduct political activities in Gisenyi, rather they should conduct them at their home country.

[222] In the paragraph [163] of the appealed judgment, the High Court noticed that the acts of Mugesera Léon of targeting the Tutsi civilian population and the politicians in opposition to MRND were part of the widespread of systematic attacks because he held that speech by the time when all over the country the Tutsi were murdered, imprisoned and persecuted from October 1990 as upheld in the judgment rendered by the Supreme Court of Canada on 28/06/2005[77].

[223] Concerning the intent to commit the crime of persecution as the crime against humanity, in the paragraph [165] of the appealed judgment, the High Court explained that should be considered the speech held by Mugesera Léon in the meeting at Kabaya when he targeted the Tutsi or the politicians opponent to MRND during the wartime in the country and by the time the persons were killed all over the country, others imprisoned or exposed to other forms of violence like burning their houses,

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[77] Mugesera v. Canada (Minister of Citizenship and Immigration), 28/05/2005, para. 160 and 163: "According to Mr. Duquette, a pattern of massacres, sometimes participated in and overtly encouraged by MRND officials and the military, began in 1990 and was still under way when Mr. Mugesera gave his speech. The Tutsi and moderate Hutu, two groups that were ethnically and politically identifiable, were a civilian population as this term is understood in customary international law. Mr. Duquette's findings of fact leave no doubt that the ongoing systematic attack was directed against them. For these reasons, we agree that at the time of Mr. Mugesera's speech, a systematic attack directed against a civilian population was taking place in Rwanda.

looting their properties, being beaten and the victims were qualified as accomplices of the country aggressors as above explained, it is obvious that by the time Mugesera Léon gave the speech he had the intent to persecute them on basis of the grounds based on their ethnic and political group.

[224] The Court finds that, as noted by the High Court, by the fact that in the meeting held at Kabaya, Mugesera Léon targeted the civilian Tutsi for their ethnic group when he incited the MRND militants to persecute and kill them because they were accomplices of Inyenzi who attacked the country as above explained, and such targeting has been conducted as part of systematic and widespread attacks because he gave such speech after the murder of almost two thousand (2,000) from 01/10/1990 to 22/11/1992, the date on which he gave the speech and when the murder was ongoing all over the country as it was publicly supported by the Government of Rwanda so that there were the MRND leaders and military officers who took part in it[78] and that speech occasioned the murder of the civilian Tutsi, their properties were looted, their houses burnt as testified by the witnesses interrogated by the same Court, it is evident that

[78] Mugesera v. Canada (Minister of Citizenship and Immigration), 28/05/2005, para. 159 and 160: "Mr. Duquette found that, between October 1, 1990 and November 22, 1992, almost 2,000 Tutsi were massacred in Rwanda. According to Mr. Duquette, a pattern of massacres, sometimes participated in and overtly encouraged by MRND officials and the military, began in 1990 and was still under way when Mr. Mugesera gave his speech. As discussed above, a pattern of victimizing behaviour, particularly one which is sanctioned or carried out by the government or the military, will often be sufficient to establish that the attack took place pursuant to a policy or plan and was therefore systematic. There was an unmistakable policy of attacks, persecution and violence against Tutsi and moderate Hutu in Rwanda at the time of Mr. Mugesera's speech. Mr. Mugesera's act of persecution therefore took place in the context of a systematic attack".

Mugesera Léon committed the crime against humanity by those acts of persecution and the murder of the civilian Tutsi perpetrated as part of systematic and widespread attacks targeting the Tutsi on basis of their ethnic group as explained by the High Court.

[225] The Court also observes that, as noticed by the High Court, by the fact that in the meeting held at Kabaya, Mugesera Léon targeted the leaders of the parties in opposition to MRND like MDR, PSD, PL and PDC when he qualified them as accomplices of Inyenzi who attacked the country and he belittled them when he qualified the Prime Minister Nsengiyaremye as the one "I beg Satan", and he qualified Twagiramungu, Chairperson of MDR as a brigand, he qualified the Minister of Education as arrogant and he incited to kill the Prime Minister Nsengiyaremye and Twagiramungu because he wondered himself why they did not kill them, allegedly because the Prime Minister demoralized the armed forces on the battlefield and Twagiramungu gave up Byumba Prefecture and he used the words depriving them of their full political rights because he stated that they should not conduct their political activities in Gisenyi Prefecture, nor pull up there their scraps claiming to be flags, rather they should conduct them at their homes or go live with Inyenzi, and the acts of persecution against the Hutu opponent to MRND were conducted all over the country by the time Mugesera Léon gave the speech, it is evident that Mugesera Léon committed the crime against humanity, instead of the crime of persecution as the crime against humanity as upheld by the High Court, given that the leaders of the parties opponent to MRND were persecuted in the context of systematic and widespread attacks targeted against them for their political affiliation as expounded by the High Court.

[226] Moreover, the Court finds that another evidence indicating that Mugesera Léon committed the crime against humanity is that the witnesses Sinayobye André and Rwasubutare Callixte asserted that in the meeting held at Nyamyumba on 06/07/1992, Mugesera Léon targeted the Tutsi by the wartime in the country so that some of them were killed, others imprisoned, others 'houses were burnt, others 'properties were looted as explained by the High Court in the paragraph [165] of the appealed judgment.

[227] The Court finds that, as upheld by the High Court in the paragraph [164] of the appealed judgment, the speech inciting to hatred and the MRND militants to use violence against the persons due to the discrimination based on the ethnic or political group constitutes the crime against humanity as upheld in the cases adjudicated by the International Criminal Tribunal for Rwanda including the case n° ICTR-99-52-A The Prosecutor v. Nahimana Ferdinand et al. in which the Tribunal upheld in the paragraphs 983 and 988 that "It is evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution. In the present case, the hate speeches made after 6 April 1994 were accompanied by calls for genocide against the Tutsi group and all these speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence (killings, torture and ill-treatment, rapes ...) and of destruction of property. In particular, the speeches broadcast by RTLM - all of them by subordinates of Appellant Nahimana, considered as a whole and in their context, were, in the view of the Appeals Chamber, of a gravity equivalent to other crimes

against humanity[79]". This also has been upheld by the Supreme Court of Canada on 28/06/2005 by expounding that "Mr. Duquette found as a matter of fact that Mr. Mugesera's speech had incited hatred of Tutsi and of his political opponents. This incitement included the encouragement of acts of extreme violence, such as extermination (…) A speech such as Mr. Mugesera's, which actively encouraged ethnic hatred, murder and extermination and which created in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents, bears the hallmarks of a gross or blatant act of discrimination equivalent in severity to the other underlying acts listed in s. 7(3.76) . The criminal act requirement for persecution is therefore met[80]".

[228] The Court observes that the statement of Mugesera Léon that if the High Court had contextualized the speech made at Kabaya, it could not convict him because it could notice that such speech was given during the troubling period of the political parties' competition is not founded given that, even if such speech had been delivered in that period, this does not exclude that he incited MRND militants, who were hearing him, to kill, persecute and use violence against the civilian Tutsi for their ethnic group and the leaders of the opposition parties for their political affiliation, as above explained.

[229] The Court also observes that the statement of Mugesera Léon that, if the High Court did not disregard the laws, it could

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[79] Ferdinand Nahimana, Jean Bosco Barayagwiza, Hassan Ngeze (Appellants) v. The Prosecutor (Respondent) Case No. ICTR-99-52-A, Judgment of 28 November 2007, para. 983 and 988.

[80] Mugesera v. Canada (Minister of Citizenship and Immigration), 28/05/2005, para. 148.

notice that the one who held the speech made at Kabaya did not commit a crime, because he was requesting for the law enforcement, and the Prime Minister, who demoralized the armed forces during the wartime, and Twagiramungu who gave up Byumba Prefecture, should be liable to death penalty as provided under the law, is not founded, because the fact that Mugesera Léon was requesting for the law enforcement does exonerate him from the criminal liability by the time he was inciting for the killing of Nsengiyaremye and Twagiramungu, as he was wondering why they were not killed.

5. Whether the High Court erred in convicting Mugesera Léon of the crime of incitement to hatred based to ethnic group.

[230] Mugesera Léon submits that the High Court committed error of fact and error of law because it convicted him of the crime of incitement to hatred based to ethnic group while he did not commit it. He requests this Court to be discerning and acquit him because he did not commit a crime. He also sustains that he has been aggrieved by the fact his name has been tarnished by various people above mentioned who considered him as an animal and genocide perpetrator while the real Mugesera Léon is a very kind man who loves the Tutsi because, by the time of his marriage, he was pictured with Bishop Bigirumwami, who was a Tutsi, together with other two (2) Bishops, also in case this Court deems it necessary, he would submit to it that photo, but it should be done in secrecy. He adds that even the Prison guards know that he is a kind man because their Director met him in Mpanga Prison and asked him if he cannot be helpful for Rwanda instead of spending days by only preparing his cases, and he drafted a document useful to the Rwandans and he gave it to him and also

he has a book which he would give to his Counsel Rudakemwa Jean Félix for submitting it to him.

[231] His Counsel Rudakemwa Jean – Félix avers that the High Court unjustly convicted Mugesera Léon of three (3) charges including the incitement to hatred based to ethnic group because he did never manifest the hatred against the Tutsi. He requests this Court to reverse that decision tainted with injustice and acquit him.

[232] The representative of the Public Prosecution sustains that the decisions of the appealed judgement should not be reversed because Mugesera Léon did not produce the evidence contradicting the evidence on which the High Court relied in convicting him of the crime of incitement of hatred based to ethnic group.

[233] He explains that Mugesera Léon should be convicted of the crime of incitement to hatred based to ethnic group given that it differs from the crime of incitement to commit genocide because this crime is provided under the law as a specific crime, and it is committed even if the persons incited to commit genocide did not commit it, because it requires the specific intent to exterminate all or a part of persons on basis of ethnic, racial, religious grounds, but the crime of incitement to hatred was provided as specific crime under the Decree Law n^{o} 21/77 of 18/08/1977 instituting the penal code applicable by the commission of the crime, even if it is sometimes committed on basis of ethnic group, origin or religious group. He adds that another evidence indicating the difference between the two crimes is that the legal scholars explain that the crime of incitement to commit genocide exists when there is someone who

incites others to act while the crime of incitement to hatred exists when someone makes the statement that only incites to hatred.

DETERMINATION OF THE COURT

[234] In the paragraphs [176] and [178] of the appealed judgment, the High Court expounded that on basis of the article 393 of the Decree Law N^{o} 21/77 of 18/08/1977 instituting the Penal Code applicable by the time of the crime commission, Mugesera Léon should be convicted of the crime of incitement to hatred in the population because of the words used in his speech made in the meeting held at Kabaya and Nyamyumba indicating the hatred he had against the Tutsi when he qualified them as *inyenzi* (cockroaches), accomplices of the country invaders, among others, as testified by the witnesses interrogated by that Court, therefore, those words indicate that he had the intent to hate the Tutsi and incite others to hate them, thus, MUGESERA Léon committed the crime of incitement to hatred in the population based to ethnic group as provided under the article 393 of the Decree Law.

[235] The report of the Senate of Rwanda published in 2019 on the status of denial and revisionism of the genocide against the Tutsi explains that Gregory Stanton, who thoroughly explained the preparation and execution of the genocide, indicated that the genocide against the Tutsi was prepared in ten (10) stages[81]: 1)

[81] Stanton, G. H. (2013). *10 Stages of Genocide*. Retrieved April 22, 2016, from Genocide watch net:http://www.genocidewatch.org/genocide/tenstagesofgenocide.html, in *Raporo yakozwe na Sena y'u Rwanda yo mu mwaka wa 2019 ku miterere y'ihakana n'ipfobya bya Jenoside yakorewe Abatutsi bibera mu mahanga n'ingamba zo kubirwanya*, pp 29-33.

Classification, 2) Symbolization, 3) Discrimination, 4) Dehumanization, 5) Organization, 6)Polarization, 7) Preparation, 8) Persecution, 9) Extermination, 10) Denial and revisionism.

[236] In explaining the stages above mentioned, the report indicates that in Rwanda, those who planned the genocide started by classification, each group was given a specific name, meaning the Hutu and Tutsi, and this was emphasized by the message of hatred which greatly divided the two groups, until the Tutsi targeted group was considered as enemy so that they were progressively dehumanized through the media and the hatred ideology, and the identification documents they were given made them to be identified and they were given several dehumanizing names like *inyenzi* (cockroaches), inzoka (snakes), etc. and the quota policy deprived them of their fundamental rights in the country because they could not access to education or public services in a great number. Moreover, every genocide has an official plan by the Government so that it uses the militia for hiding his role, in Rwanda, Interahamwe, Impuzamugambi and Hutu power were used and they were trained to eliminate the enemy and given different instruments to be used (machetes, cudgels,…), then after it came a slogan and ideology stating that "the one who is not with us, fights us", they were respected and disseminated to those who had to implement that intent, in Rwanda, it was explained that the enemy is the Tutsi living inside or outside the country, then after it followed the murder and the persecution of the Tutsi, the denial and revisionism of the genocide against the Tutsi.

[237] The Court finds that, concerning this judgment, the acts of inciting hatred in the population based to the ethnic group

perpetrated by Mugesera Léon in consideration of the speeches he held at Kabaya and Nyamyumba as above explained is one of the stages leading to genocide used by Mugesera Léon with the intent to commit the crime of inciting others to perpetrate genocide as explained in the Senate report above mentioned, meaning that the High Court should not consider it as a specific crime of incitement of hatred provided under the article 393 of the Decree Law above mentioned, because by the fact that Mugesera Léon incited the hatred in the population when he qualified the Tutsi as inyenzi (cockroaches) and accomplices of the country invaders he intended to incite them to hate them and exterminate the Tutsi.

6. Whether the High Court erred in sentencing Mugesera Léon to the life imprisonment.

[238] Mugesera Léon and his Counsel Rudakemwa Jean – Félix sustain that the High Court could not sentence him to the life imprisonment on basis of the fact that the speech held at Kabaya was altered ; rather it should acquit him because he did not commit a crime he is accused of.

[239] The representative of the Public Prosecution avers that Mugesera Léon should be condemned to the life imprisonment decided by the High Court because he committed the crimes of which he was convicted by that Court as above explained.

DETEMINATION OF THE COURT

[240] The Article 132, paragraph 3 of the organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code applicable by the time of hearing the case of Mugesera Léon at the first instance provides that other acts punished as the crime of

genocide are “incitement, either by speech, image or writing, to commit such a crime, even when not followed by the commission”. The Article 115 of the same Organic Law provides that the crime of genocide is punished by the life imprisonment with special provisions.

[241] The Article 120, paragraph 8 of the Organic Law above mentioned provides that “The crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population because of its national, political , ethnic or religious affiliation: persecution against a person on political, racial, national, ethnic, cultural, religious grounds or any other form of discrimination (…) The Article 121 of the same Organic Law provides that “Any person who commits a crime against humanity provided for under items 8°of Article 120 of this Organic Law shall be liable to a term of imprisonment of ten (10) years to twenty five (25) years”.

[242] The Article 83, paragraph 2, a, of the Organic Law above mentioned provides that “the ideal concurrence of offences occurs when a single act may constitute several offences”. The Article 84 of the same Organic Law provides that “If an offender would receive several penalties of imprisonment or fine as a result of one or several acts, the judge shall apply the most severe penalty and increase its duration or the amount depending on the circumstances of the offences, but not exceeding half (1/2) in addition to the maximum of the most severe penalty”.

[243] In the paragraphs [189] and [192] of the appealed judgment, the High Court expounded that the crimes that Mugesera Léon committed include being the accomplice of the genocide perpetrators for the public and direct incitement to commit genocide, the persecution as the crime against humanity

and the incitement to hatred based to ethnic group with the ideal concurrence of committing genocide and harming the so-called accomplices of the country invaders, therefore he should be liable to the penalty of life imprisonment provided for the crime of being the accomplice of the genocide perpetrators as above explained.

[244] The Court finds that the acts of inciting the hatred in the population based to the ethnic group committed by Mugesera Léon should not be considered as specific crime, rather they should be considered as one of the stages leading to the genocide used by Mugesera Léon with the intent to commit the crime of inciting others to commit genocide as above explained, meaning that Mugesera Léon should be convicted of the crime of the public and direct incitement to commit genocide and the crime against humanity (persecution), therefore, by the fact that those crimes have been committed in the ideal concurrence of committing genocide and harming the so-called Inyenzi and the accomplices of the country invaders, he should be liable to the penalty of life imprisonment provided for the crime of direct and public incitement to commit genocide because it is the most severe penalty as provided under the article 84 of the Organic Law above mentioned, but Mugesera Léon should not be liable to the penalty of the life imprisonment with special provisions provided under the Article 132, paragraph 3 of the Organic Law above mentioned because he has been transferred by Canada as provided under the Article 5 bis of the Organic Law nº 08/2013 of 16/06/2013 modifying and complementing the Organic Law nº 31/2007 of 25/04/2007 relating to the abolition of the death

penalty as modified and complemented to date[82], as decided by the High Court.

[245] Basing on the explanations above provided, the Court finds that the High Court did not err in sentencing Mugesera Léon to the life imprisonment, therefore, his ground of appeal is unfounded.

II. DECISION OF THE COURT

[246] Decides that the appeal of Mugesera Léon lacks merit ;

[247] Decides that the judgment n° RP 0001/12/CCI rendered by the High Court, The Special Chamber hearing international and transnational crimes, on 15/04/2016, is only reversed on the crimes of which Mugesera Léon is convicted ;

[248] Decides that Mugesera Léon is convicted of the crime of public and direct incitement to commit genocide and the crime against humanity ;

[249] Sentences Mugesera Léon to the life imprisonment ;

[250] Orders that the court fees of this judgment be charged to the Public Treasury.

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[82] The Article 5 bis provides that "An accused who is convicted in a case transferred to Rwanda from the International Criminal Tribunal for Rwanda or from another State shall not be subject to life imprisonment with special provisions."

ANNEX TO THE JUDGMENT RP/GEN00003/2019

The speech delivered by Mugesera Léon in the meeting of MRND party which was held on 22 November 1992 at Kabaya

Long life to our movement . . .

Long life to President HABYARIMANA . . .

Long life to ourselves, the militants of the movement at this meeting.

Militants of our Movement, as we are all met here, I think you will understand the meaning of the word I will say to you. I will talk to you on only four points. Recently, I told you that we rejected contempt. We are still rejecting it. I will not go back over that.

When I consider the huge crowd of us all met here, it is clear that I should omit speaking to you about the first point for discussion, as I was going to tell you to beware of kicks by the dying M.D.R.! That is the first point.

The second point on which I would like us to exchange ideas is that we should not allow ourselves to be invaded, whether here where we are or inside the country; that is the second point.

. The third point I would like to discuss with you is also an important point, namely the way we should act so as to protect ourselves against traitors and those

who would like to harm us. I would like to end on the way in which we must act.

The first point I would like to submit to you, therefore, is this important point I would like to draw to your attention. As M.D.R., P.L., F.P.R. and the famous party known as P.S.D. and even the P.D.C. are very busy nowadays, you should know what they are doing, and they are busy trying to injure the President of the Republic, namely, the President of our movement, but they will not succeed. They are working against us, the militants: you should know the reason why all this is happening: in fact, when someone is going to die, it is because he is already ill!

The thief Twagiramungu appeared on the radio as party president, and he had asked to do so, so he could speak against the C.D.R. However, the latter struck him down. After he was struck down, in all taxis everywhere in Kigali, militants of the M.D.R., P.S.D. and accomplices of the Inyenzi were profoundly humiliated, so they were almost dead! Even Twagiramungu himself completely disappeared. He did not even show up at the office where he was working! I assure you that this man's party is covered with shame: everyone was afraid and they nearly died!

So, since this party and those who share its views are accomplices of the Inyenzi, one of them named Murego on arrival in Kibungo stood up to say "We are descended from the Hutu and are in fact the Hutus".

The reply to him was "Can you lose your brothers by death! Tell us, who do you get these statements about the Hutu from?" They were so angry they nearly died!

That was when the Prime Minister named, they say, I don't know whether I should say Nsengashitani (I beg Satan), headed for Cyangugu to prevent the Hutu defending themselves against the Tutsi who were laying mines against them. You heard this on the radio. Then we laughed at him, you heard him yourselves, and he lost his head, he and all the militants in his party, and those of the other parties who shared his views. This is when these people had just suffered such a reverse . . .

You yourselves heard that the president of our party, His Excellency Major-General Habyarimana Juvénal, spoke when he arrived in Ruhengeri. The "Invincible" put himself solemnly forward, while the others disappeared underground! In their excitement, these people were nearly dead from excitement, as they learned that everyone, including even those who were claiming to be from other parties, were leaving them to come back to our party, as a result of our leader's speech.

Their kicks would threaten the most sensible person. Nevertheless, in view of our numbers, I realize there are so many of us that they could not find where to give the kicks: they are wasting their time!

That is the first point. The M.D.R. and the parties who share its views are collapsing. Avoid their kicks. As I noted, you will not even have a scratch!

The second point I have decided to discuss with you is that you should not let yourselves be invaded. At all costs, you will leave here taking these words with you, that you should not let yourselves be invaded.

Tell me, if you as a man, a mother or father, who are here, if someone comes one day to move into your yard and defecate there, will you really allow him to come again? It is out of the question.

You should know that the first important thing . . . you have seen our brothers from Gitarama here. Their flags – I distributed them when I was working at our party's headquarters. People flew them everywhere in Gitarama. But when you come from Kigali, and you continue on into Kibilira, there are no more M.R.N.D. flags to be seen: they have been taken down!

In any case, you understand yourselves, the priests have taught us good things: our movement is also a movement for peace. However, we have to know that, for our peace, there is no way to have it but to defend ourselves.

Some have quoted the following saying: "Those who seek peace always make ready for war". Thus, in our prefecture of Gisenyi, this is the fourth or fifth time I am speaking about it, there are those who have acted first. It says in the Gospel that if someone strikes you on one cheek, you should turn the other cheek. I tell you that the Gospel has changed in our movement: if someone strikes you on one cheek, you hit them twice on one cheek and they collapse on the ground and will never be able to recover!

So here, never again will what they call their flag, what they call their cap, even what they call their militant, come to our soil to speak: I mean throughout Gisenyi, from one end to the other!

A proverb says "An animal eats others, but when they want to eat it, it becomes bitter"! They should know that one man is as good as another, our yard (party) will not let itself be invaded either. There is no question of allowing ourselves to be invaded, let me tell you.

There is also something else I would like to talk to you about, concerning "not being invaded", and which you must reject, as these are dreadful things. Our elder Munyandamutsa has just told you what the situation is in the following words: "Our inspectors, currently 59 throughout the country, have just been driven out. In our prefecture of Gisenyi there are eight.

Tell me, dear parents gathered here, have you ever seen, I do not know if she is still a mother, have you ever seen this woman who heads the Ministry of Education, come herself to find out if your children have left the house to go and study or go back to school? Have you not heard that she said that from now on no one will go back to school? – And now she is attacking teachers! I wanted to draw to your attention that she called them to Kigali to tell them that she never wanted to hear anyone say again that an education inspector had joined a political party!

They answered: "First leave your party, because you yourself are a Minister and you are in a political party, and then we will follow your example". She is still there! You have also heard on the radio that nowadays she is even insulting our President! Have you ever heard a mother insulting people in public? So what I would like to tell you here, and this is the truth, there is no doubt, to say it would be this or that, there might be among them people who have behaved flippantly. Have you heard that they are persecuted for membership in the M.R.N.D.? They are persecuted for membership in the M.R.N.D. Frankly, will you allow them to invade us to take the M.R.N.D. away from us and to take our men?

I am asking you to take two very important actions. The first is to write to this shameless woman who is issuing insults publicly and on the airwaves of our radio to all Rwandans. I want you to write her to tell her that these teachers, who are ours, are irreproachable in their conduct and standards, and that they are looking after our children with care; these teachers must continue to educate our children and she must mend her ways. That is the first action I am asking you to take.

Then, you would all sign together: paper will not be wanting. If you wait a few days and get no reply, only about seven days, as you will send the letter to someone who will take it to its destination, so he will know she has received it, if seven days go by without a reply, and she takes the liberty of arranging for someone else to replace the existing inspectors, you

can be sure, if she thinks there is anyone who will come to replace them, for anyone who comes . . . the place where the Minister is from is the place known as Nyaruhengeri, at the border with Burundi, in Butare, you will ask this man to get moving, with his travelling provisions on his head, and be inspector at Nyaruhengeri.

Let everyone whom she has appointed be there, let them go to Nyaruhengeri to look after the education of her children. As for ours, they will continue to be educated by our own people. This is another important point on which we must take decisions: we cannot let ourselves be invaded: this is forbidden!

Something else which may be called "not allowing ourselves to be invaded" in the country, you know people they call Inyenzi (cockroaches), no longer call them Inkotanyi (tough fighters), as they are actually Inyenzi. These people called Inyenzi are now on their way to attack us.

Major-General Habyarimana Juvénal, helped by Colonel Serubuga, whom you have seen here, and who was his assistant in the army at the time we were attacked, have got up and gone to work. They have driven back the Inyenzi at the border, where they had arrived. Here again, I will make you laugh! In the meantime, these people had arrived who were seeking power. After getting it, they headed for Brussels. On arrival in Brussels, note that this was the M.D.R., P.L. and P.S.D., they agreed to deliver the Byumba Prefecture at any cost. That was the first thing. They

planned together to discourage our soldiers at any cost.

You have heard what the Prime Minister said in person. He said they were going down to the marshland when the war was at its height! It was at that point that people who had low morale abandoned their positions and the Inyenzi occupied them. The Inyenzi descended on Byumba and they ransacked the shops of our merchants in Byumba, Ruhengeri and Gisenyi. The Government will have to compensate them as it had created this situation. It was not one of our merchants, as they were not even asking for credit! Why credit! So those are the people who pushed us into allowing ourselves to be invaded. The punishment for such people is nothing but: "Any person who demoralizes the country's armed forces on the front will be liable to the death penalty". That is prescribed by law. Why would such a person not be killed?

Nsengiyaremye must be taken to court and sentenced. The law is there and it is in writing. He must be sentenced to death, as it states. Do not be frightened by the fact that he is Prime Minister. You have recently heard it said on the radio that even French Ministers can sometimes be taken to court! Any person who gives up any part of the national territory, even the smallest piece, in wartime will be liable to death. Twagiramungu said it on the radio and the C.D.R. dealt with him on the radio. The militants in his party then lost their heads – can you believe that? I would draw to your attention the fact that this man

who gave up Byumba on the radio while all of us Rwandans, and all foreign countries, were listening to him, this man will suffer death. It is in writing: ask the judges, they will show you where it is, I am not lying to you! Any person who gives up even the smallest piece of Rwanda will be liable to the death penalty; so what is this individual waiting for?

You know what it is; dear friends, "not letting ourselves be invaded", or you know it. You know there are Inyenzi in the country who has taken the opportunity of sending their children to the front, to go and help the Inkotanyi. That is something you intend to speak about yourselves. You know that yesterday I came back from Nshili in Gikongoro at the Burundi border, travelling through Butare. Everywhere people told me of the number of young people who had gone. They said to me "Where they are going, and who is taking them . . . why are they are not arrested as well as their families?" So I will tell you now, it is written in the law, in the Penal Code: "Every person who recruits soldiers by seeking them in the population, seeking young people everywhere whom they will give to the foreign armed forces attacking the Republic, shall be liable to death". It is in writing.

Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? Are we really waiting till they come to exterminate us?

I should like to tell you that we are now asking that these people be placed on a list and be taken to court to be tried in our presence. If they refuse, it is written in the Constitution that "justice is rendered in the people's name". If justice therefore is no longer serving the people, as written in our Constitution which we voted for ourselves, this means that at that point we who also make up the population whom it is supposed to serve, we must do something ourselves to exterminate those brigands.

I tell you in all truth, as it says in the Gospel, "When you allow a serpent biting you to remain attached to you with your agreement, you are the ones who will die".

I have to tell you that a day and a night ago – I do not know if it is exactly in Kigali, a small group of men armed with pistols entered a cabaret and demanded that cards be shown. They separated the M.D.R. people. You will imagine, those from the P.L. they separated, and even the others who pass for Christians were placed on one side. When an M.R.N.D. member showed his card, he was immediately shot; I am not lying to you, they even tell you on the radio; they shot this man and disappeared into the Kigali marshes to escape, after saying they were Inkotanyi. So tell me, these young people who acquire our identity cards, then they come back armed with guns on behalf of the Inyenzi or their accomplices to shoot us!

I do not think we are going to allow then to shoot us! Let no more local representatives of the M.D.R. live

in this commune or in this prefecture, because they are accomplices! The representatives of those parties who collaborate with the Inyenzi, those who represent them . . . I am telling you, and I am not lying, it is . . . they only want to exterminate us. They only want to exterminate us: they have no other aim. We must tell them the truth. I am not hiding anything at all from them. That is in fact the aim they are pursuing.

I would tell you, therefore, that the representatives of those parties collaborating with the Inyenzi, namely the M.D.R., P.L., P.S.D., P.D.C. and other splinter groups you run into here and there, who are connected and who are only wandering about, all these parties and their representatives must go to live in Kayenzi with Nsengiyaremye: in that way we will know where the people at war are located.

My brothers, militants of our movement, what I am telling you is no joke, I am actually telling you the complete truth, so that if one day someone attacks you with a gun, you will not come to tell us that we who represent the party did not warn you of it! So now, I am telling you so you will know. If anyone sends a child to the Inyenzi, let him go back with his family and his wife while there is still time, as the time has come when we will also be defending ourselves, so that . . . we will never agree to die because the law refuses to act!

I am telling you that on the day the demonstrations were held, Thursday, they beat our men, who had to take refuge in the church at the bottom of the Round - About. These so-called Christians from the P.D.C.

pursued them and went into the church to beat them. Others fled into the Centre Culturel Français. I should like to tell you that they began killing them. That is actually what happened! They attacked the homes and killed people. Now, anyone who they hear is a member of the M.R.N.D. is beaten and killed by them; that is how things are. Let these people who represent their parties in our prefecture go and live with the Inyenzi, we will not allow people living among us to shoot us when they are at our sides!

There is another important point I would like to talk to you about so that we do not go on allowing ourselves to be invaded: you will hear mention of the Arusha discussions. I will not speak about this at length as the representative of the Secretary General will speak about it in greater detail. However, what I will tell you is that the delegates you will hear are in Arusha do not represent Rwanda. They do not represent all of Rwanda; I tell you that as a fact. The delegates from Rwanda, who are said to be from Rwanda, are led by an Inyenzi, who is there to discuss with Inyenzi, as it says in a song you hear from time to time, where it states "He is God born of God". In the same way, they are Inyenzi born of Inyenzi, who speak for Inyenzi. As to what they are going to say in Arusha, it is exactly what these Inyenzi accomplices living here went to Brussels to say.

They are going to work in Arusha so everything would be attributed to Rwanda, while there was nothing not from Brussels that happened there! Even what came from Rwanda did not entirely come from our

government: it was a Brussels affair which they put on their heads to take with them to Arusha! So it was one Inyenzi dealing with another! As for what they call "discussions", we are not against discussions. I have to tell you that they do not come from Rwanda: they are Inyenzi who conduct discussions with Inyenzi, and you must know that once and for all! In any case, we will never accept the things which will come from there!

Another point I have talked to you about is that we must defend ourselves. I spoke about this briefly. However, I am telling you that we must wake up! Someone whispered in my ear a moment ago that it was not only the parents who must wake up as well as the teachers about the famous problem for inspectors. Even people who do not have children in school should also support them, as they will have one tomorrow or they had one yesterday. Let us all wake up and sign!

The second point I wish to speak to you about is the following: we have nine Ministers in the present government. Just as they rose up to drive out our inspectors, relying on their Ministry, as they rose up to drive out teachers from secondary schools . . . a few days ago, you have heard that the famous woman was going around the schools. She had no other reason for going there but to drive out the inspectors and teachers who were there and who were not in her party. You have heard what happened in MINITRAPE: it was not just a diversion; they even went after our workers! You have heard what

happened at the radio, and the Byumba program that was cancelled. You have heard how all this happened.

I have to tell you that we must ask our Ministers that they too, there are people working for their parties and who are in our Ministries . . . For example, you have heard mention of the Militant-Minister Ngirabatware, who is not present here because the country has given him an important mission. I visited his Ministry on Thursday. There was a little handful of people there, I am not exaggerating because I am in the M.R.N.D., some people from the M.R.N.D., those who were there were exclusively Inyenzi belonging to the P.L. and the M.D.R.! Those are the ones who are in the Planning Ministry! You will understand that if this Minister said: "If you touch our inspectors, I will also liquidate yours", what would happen? Our Ministers have also to shake the bag so the brigands who are with them have to disappear and go into their Ministries.

One important thing which I am asking all those who are working and are in the M.R.N.D.: "Unite!" People in charge of finances, like the others working in that area, let them bring money so we can use it. The same applies to persons working on their own account. The M.N.R.D. have given them money to help them and support them so they can live as men. As they intend to cut our necks, let them bring money so we can defend ourselves by cutting their necks!

Remember that the basis of our Movement is the cell, that the basis of our Movement is the sector and the Commune. He told you that a tree which has branches

and leaves but no roots dies. Our roots are fundamentally there. Unite again, of course you are no longer paid, members of our cells, come together. If anyone penetrates a cell, watch him and crush him: if he is an accomplice do not let him get away! Yes, he must no longer get away!

Recently, I told someone who came to brag to me that he belonged to the P.L. – I told him "The mistake we made in 1959, when I was still a child, is to let you leave". I asked him if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! I told him "So don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly".

What I am telling you is, we have to rise up, we must really rise up. I will end with an important thing. Yesterday I was in Nshili, you learned that the Burundians slandered us, I went to find out the truth. Before I went there, people told me that I would not come back. That I would die there. I replied "If I die, I will not be the first victim to be sacrificed".

In Nshili they fired the mayor who was there before, apparently on the pretext that he was old! – that he began working in 1960! I saw him yesterday, and he was still a young man! – but because he was in the M.N.R.D., he left! They wanted to put in a thief; that didn't work either. When they put in an honest man, they refused him! Now, this commune known as Nshili is administered by a consultant who also has no idea

what to do! At this place called Nshili, we have armed forces of the country who are guarding the border. There are people known as the J.D.R...

For the good reason that our national soldiers are disciplined and do not shoot anyone, especially they would not shoot a Rwandan, unless he was an Inyenzi, these soldiers did not know that everyone in the M.D.R. had become Inyenzi! They did not know it! They surrounded them and arrested our gendarmes, so that a citizen who was not in our party personally told me "What we want is for them to hold elections so we can elect a mayor. Otherwise, before it holds, let us provisionally put back the person who was there before because from the state things are in, he will not be able to put people on the right path again".

Dear relations, dear brethren, I would like to say something important to you: elections must be held, we must all vote. As you are now all together here, has anyone scratched anyone else? They talk of security. They say we cannot vote. Are we not going to mass on Sunday? Did you not come here to the meeting? In the M.R.N.D., did you not elect the incumbents at all levels? Even those who say this, did they not do the same thing? Did they not vote? On the pretext they suggest, there is no reason preventing us from voting on security grounds, because those who are going about the country and the troubles which have occurred, it is those who provoke them. That is the word I would say to you: they are all misleading us: even here where we are, we can vote.

Second, they are relying on the war displaced persons in Byumba. I should tell you that no one went to ask those people if they did not want to vote. They told me personally that they previously had lazy counsellors, that even some of their mayors were lazy. Since the Ministry which gives them what they live on is supervised by an Inkotanyi, or rather by the Inyenzi Lando, he chose people known as Inyenzi and their accomplices who are in this country, and gave them the job of taking food supplies to those people. Instead of taking it to them there, they sold it so they could buy ammunition which they gave to the Inyenzi who have been shooting us! I should tell you that they said "They shoot us from behind and you shoot us from in front by sending us this rabble to bring us food supplies".

I had no answer to give them, and they went on "What we want, they said, is that from ourselves, we can elect incumbents, advisors, cell leaders, a mayor; we can know he is with us here in the camp, he protects us, he gets us food supplies". You will understand that what I was told by these men and women who fled in such circumstances as you hear about from time to time, on all sides, was that they also wanted elections: the whole country wants elections so that they will be led by good people as was always the case. Believe me, what we should all do, that is what we should do, we should call for elections.

So in order to conclude, I would remind you of all the important things I have just spoken to you about: the

most essential is that we should not allow ourselves to be invaded, lest the very persons who are collapsing take away some of you. Do not be afraid, know that anyone whose neck you do not cut is the one who will cut your neck. Let me tell you, these people should begin leaving while there is still time and go and live with their people, or even go to the Inyenzi, instead of living among us and keeping their guns, so that when we are asleep they can shoot us. Let them pack their bags, let them get going, so that no one will return here to talk and no one will bring scraps claiming to be flags!

Another important point is that we must all rise, we must rise as one man if anyone touches one of ours, he must find nowhere to go. Our inspectors are going nowhere. Those whom they have placed will set out for Nyaruhengeri, to Minister Agathe's home, to look after the education of her children! Let her keep them!

I will end with one important thing: elections. Thank you for listening to me and I also thank you for your courage, in your arms and in your hearts. I know you are men, you are young women, fathers and mothers of families, who will not allow yourselves to be invaded, who will reject contempt.

May your lives be long!

Long life to President HABYARIMANA . . .

Long life and prosperity to you . . .