**Date: 20030908**

**Dockets: A-316-01**
**A-317-01**

**Citation: 2003 FCA 325**

**CORAM:** **DÉCARY J.A.**
**LÉTOURNEAU J.A.**
**PELLETIER J.A.**

**A-316-01**

**BETWEEN:**

**LÉON MUGESERA,**
**GEMMA UWAMARIYA,**
**IRENÉE RUTEMAN,**
**YVES RUSI,**
**CARMEN NONO,**
**MIREILLE URUMURI and**
**MARIE-GRÂCE HOHO**

**Appellants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

---

**A-317-01**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**and**

**LÉON MUGESERA,**
**GEMMA UWAMARIYA,**
**IRENÉE RUTEMA,**
**YVES RUSI,**
**CARMEN NONO,**
**MIREILLE URUMURI and**
**MARIE-GRÂCE HOHO**

**Respondents**

Hearing held at Québec, Quebec on April 28 and 29, 2003.

Judgment rendered at Ottawa, Ontario on September 8, 2003.

| | |
|---|---|
| REASONS FOR JUDGMENT: | DÉCARY J.A. |
| CONCURRED IN BY: | PELLETIER J.A. |
| CONCURRING REASONS: | LÉTOURNEAU J.A. |

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**REASONS FOR JUDGMENT**

**DÉCARY J.A.**

[1] In recent years this Court has had to rule many times on immigration cases in which crimes against humanity were alleged against refugee status claimants or permanent residents. So far as I recall, in each of these cases the fact that the act committed was a crime was not really in dispute **n** they were generally acts of terrorism **n** and the argument turned not on the existence of a crime but on the latter's nature or on the participation of the person concerned in its perpetration.

[2] In the case at bar, the alleged act is a speech. Making a speech is not a crime in itself. However, the Minister of Citizenship and Immigration ("the Minister") considers that there was a crime against humanity here and incitement to murder, hatred or genocide. The Court must decide whether

this speech can be regarded as a crime, as the Minister maintained. The speech in question is a speech made by Léon Mugesera in Rwanda on November 22, 1992 at a partisan political meeting.

[3] In view of the length of the reasons, it will be helpful if I describe at the outset the plan I will follow:


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## I.Facts

[4] On November 22, 1992, at Kabaya, Rwanda, Léon Mugesera made a speech the content of which led to the issuing of the equivalent of an arrest warrant against him on November 25, 1992. He managed to flee Rwanda on December 12, 1992 and find temporary refuge in Spain, from where on March 31, 1993 he made an application for permanent residence in Canada for himself, his wife and his five minor children. The application was approved and landing in Canada granted on their arrival at Mirabel, on August 12, 1993.

[5] A permanent resident in Canada may be deported if it is established, among other things, that he committed criminal acts or offences before or after obtaining his permanent residence or if it is shown that his landing was obtained by misrepresentation of a material fact.

[6] A report submitted to the Minister on January 23, 1995 pursuant to s. 27 of the *Immigration Act* ("the Act") contained the following information:

> [TRANSLATION]
>
> Léon Mugesera is a member of the MRND political party, the Mouvement révolutionnaire national pour le développement, and since November 1992 prefectoral vice-president from that party.
>
> On or about November 22, 1992, at Kabaya, in the sub-prefecture of Gisenyi, at a meeting organized by the MRND party, Léon Mugesera made a speech inciting violence, in which he asked militants of the party to kill Tutsis and political opponents, most of whom were Tutsis.
>
> On the following day, several killings took place in the neighbourhood of Gisenyi, Kayave, Kibilira and other places.
>
> The US Department of State published a list of persons considered to have taken part in the massacre of Tutsis in Rwanda. Léon Mugesera's name was on this list in his capacity as a member of the MRND **n** member of a death squad.
>
> In its final report published on November 29, 1994 the Commission of Experts on Rwanda said the following concerning the speech made by Léon Mugesera (p. 10, para. 63):
>
> > . . . the speech will likely prove to be of significant probative value to establish the presence of criminal intent to commit genocide . . .
>
> [a.b. vol. 20, pp. 7434-7435]

[7] This information led the Minister to make the following allegations of law which, in his opinion, justified the deportation of Mr. Mugesera.

(A) The speech made on November 22, 1992 constituted an incitement to [TRANSLATION] "commit murder". This is an offence under ss. 91(4) and 311 of the Rwanda Penal Code and ss. 22, 235 and 464(*a*) of the Canada *Criminal Code* ("the *Criminal Code*"). Consequently, Mr. Mugesera became an inadmissible person within the meaning of s. 27(1)(*a*.1)(ii) of the Act [a.b. vol. 20, p. 7435].

(B) By inciting [TRANSLATION] "MRND members and Hutus to kill Tutsis" and inciting them [TRANSLATION] "to hatred against the Tutsis", the said speech constituted an incitement to genocide and an incitement to hatred within the meaning of s. 166 of the Rwanda Penal Code, decree-law 08/75 of February 12, 1975, by which Rwanda adhered to the international Convention for the Prevention and Punishment of the Crime of Genocide and of s. 393 of the Rwanda Penal Code, as well as ss. 318 and 319 of the *Criminal Code*; consequently, Mr. Mugesera became an inadmissible person within the meaning of s. 27(1)(*a*.3)(ii) of the Act [a.b. vol. 20, p. 7435].

(C) The said speech constituted a crime against humanity within the meaning of ss. 7(3.76), 21, 22, 235, 318 and 464 of the *Criminal Code* in that Mr. Mugesera

advised [TRANSLATION] “MRND members and Hutus to kill Tutsis”, he had [TRANSLATION] “taken part in Tutsi massacres” and he had [TRANSLATION] “promoted or encouraged genocide of the members of an identifiable group, namely members of the Tutsi tribe”; consequently, Mr. Mugesera became an inadmissible person within the meaning of ss. 19(1)(*j*) and 27(1)(*g*) of the Act [a.b. vol. 20, p. 7439].

(D) By answering [TRANSLATION] “no” in his permanent residence application form to question 27-F, which asked whether he had been involved in the commission of a crime against humanity, and question 27-B, which asked whether he had ever been convicted of a crime or was currently charged with a crime or offence, Mr. Mugesera made a misrepresentation of a material fact, contrary to s. 27(1)(*e*) of the Act [a.b. vol. 20, p. 7436]. At the hearing before the adjudicator, the Minister discontinued the allegation relating to question 27-B.

[8] The deportation of Mr. Mugesera's wife was justified only by allegation D [a.b. vol. 20, p. 7441]. Under s. 33 of the Act, allegation D could also be applied against Mr. Mugesera's children.

[9] On July 11, 1996 an adjudicator concluded, after 29 days of hearing, that all the allegations were valid and ordered that the seven members of the family be deported.

[10] On November 6, 1998 the Appeal Division of the Immigration and Refugee Board ("the Appeal Division"), after 24 days of hearing, dismissed the appeal. The principal reasons were written by Pierre Duquette and the concurring, and more censorious, reasons by Yves Bourbonnais and Paule Champoux Ohrt.

[11] On May 10, 2001, after 14 days of hearing, Nadon J. in his capacity as a member of the Federal Court Trial Division found that there was no basis for allegations C (crimes against humanity) and D (misrepresentation) and that allegations A (incitement to murder) and B (incitement to genocide and hatred) were valid. He accordingly dismissed the application for judicial review on allegations A and B and allowed it in respect of allegations C and D. He referred the case back to the Appeal Division for it to again rule on the latter points (*Mugesera v. Canada (Minister of Employment and Immigration)*, [2001] 4 F.C. 421 (T.D.).)

[12] It was common ground that this disposition was improper, in that so far as Mr. Mugesera himself was concerned allowing only one of the allegations sufficed to justify the Minister's decision and result in dismissal of the application for judicial review. As to Mr. Mugesera's wife and his children, their application for judicial review should have been allowed since only allegation D, which Nadon J. did not accept, applied to them. This confusion led to the filing of two notices of appeal, one by Mr. Mugesera and his family and the other by the Minister. The two cases were joined and the reasons that follow will dispose of them both.

[13] Additionally, Nadon J. certified the following three questions pursuant to s. 83(1) of the Act:

> [TRANSLATION]
>
> Question 1:
> Did the Trial Division judge err in law in concluding that question 27(f) required a legal determination?
>
> Question 2:
> Does incitement to murder, violence and genocide, in a context in which massacres are committed in a widespread or systematic way, but absent any evidence of a direct or indirect link between the incitement and the murders committed in a widespread or systematic way, constitute in itself a crime against humanity?
>
> Question 3:
> Is the characterization of an act or omission as constituting an offence described in paragraphs 27(1)(*a*.1) and 27(1)(*a*.3) of the *Immigration Act* a question of fact or a question of law and, accordingly, what is the standard of judicial review applicable to this question?

## II. Applicable legislation

[14] I set out the following extracts from ss. 19 and 27 of the *Immigration Act* and ss. 7, 21, 22, 235, 318, 319 and 464 of the Canada *Criminal Code* in effect at the relevant time:

| ***Immigration Act*** | ***Loi sur l'immigration*** |
|---|---|
| PART III | PARTIE III |
| EXCLUSION AND REMOVAL | EXCLUSION ET RENVOI |
| *Inadmissible Classes* | *Catégories non admissibles* |
| **19.** (1) No person shall be granted admission who is a member of | **19.** (1) Les personnes suivantes appartiennent à une catégorie non |

any of the following classes:

. . . . .

(*j*) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission . . .

. . . . .

*Removal after Admission*

**27.** (1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who

(*a*) is a member of an inadmissible class described in paragraph 19(1)*c*.2), (*d*), (*e*), (*f*), (*g*), (*k*) or (*l*);

(*a*.1) outside Canada,

(i) has been convicted of an offence that, if committed in Canada, constitutes an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or

(ii) has committed, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that would

admissible :

. . . . .

*j*) celles dont on peut penser, pour des motifs raisonnables, qu'elles ont commis, à l'étranger, un fait constituant un crime de guerre ou un crime contre l'humanité au sens du paragraphe 7(3.76) du *Code criminel* et qui aurait constitué, au Canada, une infraction au droit canadien en son état à l'époque de la perpétration . . .

. . . . .

*Renvoi après admission*

**27.** (1) L'agent d'immigration ou l'agent de la paix doit faire part au sous-ministre, dans un rapport écrit et circonstancié, de renseignements concernant un résident permanent et indiquant que celui-ci, selon le cas :

*a*) appartient à l'une des catégories non admissibles visées aux alinéas 19(1)*c*.2), *d*), *e*), *f*), *g*), *k*) ou *l*);

*a*.1) est une personne qui a, à l'étranger :

(i) soit été déclarée coupable d'une infraction qui, si elle était commise au Canada, constituerait une infraction qui pourrait être punissable aux termes d'une loi fédérale, par mise en accusation, d'un emprisonnement maximal égal ou supérieur à dix ans, sauf si la personne peut justifier auprès du gouverneur en conseil de sa réadaptation et du fait

constitute an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

except a person who has satisfied the Governor in Council that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be . . .

. . . . .

(*a*.3) before being granted landing,

. . . . .

(ii) committed outside Canada, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence referred to in paragraph (*a*.2),

except a person who has satisfied the Minister that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission

qu'au moins cinq ans se sont écoulés depuis l'expiration de toute peine lui ayant été infligée pour l'infraction,

(ii) soit commis, de l'avis, fondé sur la prépondérance des probabilités, de l'agent d'immigration ou de l'agent de la paix, un fait – acte ou omission – qui constitue une infraction dans le pays où il a été commis et qui, s'il était commis au Canada, constituerait une infraction qui pourrait être punissable, aux termes d'une loi fédérale, par mise en accusation, d'un emprisonnement maximal égal ou supérieur à dix ans, sauf si la personne peut justifier auprès du gouverneur en conseil de sa réadaptation et du fait qu'au moins cinq ans se sont écoulés depuis la commission du fait . . .

. . . . .

*a*.3) avant que le droit d'établissement ne lui ait été accordé, a, à l'étranger :

. . . . .

(ii) soit commis, de l'avis, fondé sur la prépondérance des probabilités, de l'agent d'immigration ou de l'agent de la paix, un fait – acte ou omission – qui constitue une infraction dans le pays ou il a été commis et qui, s'il était commis au Canada, constituerait une infraction visée à l'alinéa *a*.2), sauf s'il peut

of the act or omission, as the case may be . . .

. . . . .

(*e*) was granted landing by reason of possession of a false or improperly obtained passport, visa or other document pertaining to his admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or by any other person . . .

. . . . .

(*g*) is a member of the inadmissible class described in paragraph 19(1)(*j*) who was granted landing subsequent to the coming into force of that paragraph . . .

. . . . .

justifier auprès du ministre de sa réadaptation et du fait qu'au moins cinq ans se sont écoulés depuis la commission du fait . . .

. . . . .

*e*) a obtenu le droit d'établisse-ment soit sur la foi d'un passeport, visa – ou autre document relatif à son admission – faux ou obtenu irrégulièrement, soit par des moyens frauduleux ou irréguliers ou encore par suite d'une fausse indication sur un fait important, même si ces moyens ou déclarations sont le fait d'un tiers . . .

. . . . .

*g*) appartient à la catégorie non admissible visée à l'alinéa 19(1)*j*) et a obtenu le droit d'établissement après l'entrée en vigueur de cet alinéa . . .

***Criminal Code***

PART I

*General*

. . . . .

**7.** (3.76) For the purposes of this section,

. . . .

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or

***Code criminel***

PARTIE I

*Dispositions générales*

. . . . .

**7.** (3.76) Les définitions qui suivent s'appliquent au présent article.

« crime contre l'humanité » Assassinat, extermination, réduction en esclavage, déportation, persécution ou autre fait – acte ou omission – inhumain d'une part, commis contre une population civile ou un groupe identifiable de personnes – qu'il ait ou non constitué une transgression du droit en vigueur à l'époque et au lieu de la perpétration – et d'autre part, soit constituant, à l'époque et

conventional international law or is criminal according to the general principles of law recognized by the community of nations . . .

dans ce lieu, une transgression du droit international coutumier ou conventionnel, soit ayant un caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations.

(3.77) In the definitions "crime against humanity" and "war crime" in subsection (3.76), "act or omission" includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.

. . . . .

(3.77) Sont assimilés à un fait, aux définitions de « crime contre l'humanité » et « crime de guerre », au paragraphe 3.76, la tentative, le complot, la complicité après le fait, le conseil, l'aide ou l'encouragement à l'égard du fait.

. . . . .

**21.** (1) Every one is a party to an offence who

(*a*) actually commits it;

(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

(*c*) abets any person in committing it.

**21.** (1) Participent à une infraction :

*a*) quiconque la commet réellement;

*b*) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;

*c*) quiconque encourage quelqu'un à la commettre.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

(2) Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpétration de l'infraction, participe à cette infraction.

**22.** (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence

**22.** (1) Lorsqu'une personne conseille à une autre personne de participer à une infraction et que cette dernière y participe subséquemment, la personne qui a conseillé participe à cette infraction, même si l'infraction a été

was committed in a way different from that which was counselled.

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

. . . . .

**235.** (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

. . . . .

*Hate Propaganda*

**318.** (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section, “genocide” means any of the following acts committed with intent to destroy in

commise d'une manière différente de celle qui avait été conseillée.

(2) Quiconque conseille à une autre personne de participer à une infraction participe à chaque infraction que l'autre commet en conséquence du conseil et qui, d'après ce que savait ou aurait dû savoir celui qui a conseillé, était susceptible d'être commise en conséquence du conseil.

(3) Pour l'application de la présente loi, «conseiller» s'entend d'amener et d'inciter, et «conseil» s'entend de l'encouragement visant à amener ou à inciter.

. . . . .

**235.** (1) Quiconque commet un meurtre au premier degré ou un meurtre au deuxième degré est coupable d'un acte criminel et doit être condamné à l'emprisonnement à perpétuité.

(2) Pour l'application de la partie XXIII, la sentence d'emprisonnement à perpétuité prescrite par le présent article est une peine minimale.

. . . . .

*Propagande haineuse*

**318.** (1) Quiconque préconise ou fomente le génocide est coupable d’un acte criminel et passible d’un emprisonnement maximal de cinq ans.

(2) Au présent article, « génocide » s’entend de l’un ou l’autre des actes suivants commis avec l’intention de détruire

whole or in part any identifiable group, namely,

(*a*) killing members of the group; or

(*b*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

totalement ou partiellement un groupe identifiable, à savoir :

*a*) le fait de tuer des membres du groupe;

*b*) le fait de soumettre délibérément le groupe à des conditions de vie propres à entraîner sa destruction physique.

**319.** (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

**319.** (1) Quiconque, par la communication de déclarations en un endroit public, incite à la haine contre un groupe identifiable, lorsqu'une telle incitation est susceptible d'entraîner une violation de la paix, est coupable :

*a*) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans;

*b*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

(2) Quiconque, par la communication de déclarations autrement que dans une conversation privée, fomente volontairement la haine contre un groupe identifiable est coupable :

*a*) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans;

*b*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

. . . . .

. . . . .

**464.** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

(*a*) every one who counsels another person to commit an indictable offence is, if the

**464.** Sauf disposition expressément contraire de la loi, les dispositions suivantes s'appliquent à l'égard des personnes qui conseillent à d'autres personnes de commettre des infractions :

*a*) quiconque conseille à une autre personne de commettre un acte criminel est, si l'infraction n'est pas

| | |
|---|---|
| offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; | commise, coupable d'un acte criminel et passible de la même peine que celui qui tente de commettre cette infraction; |
| (*b*) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction. | *b*) quiconque conseille à une autre personne de commettre une infraction punissable sur déclaration de culpabilité par procédure sommaire est, si l'infraction n'est pas commise, coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire. |

## III. Text of speech made by Mr. Mugesera on November 22, 1992

[15] For a full understanding of the issue, it seems necessary to set out in full the text of the speech made by Mr. Mugesera on November 22, 1992. The speech was made in the Kyniarwanda language. It was neither broadcast nor televised. A transcription was made from a cassette recording to which we listened. Various translations of greater or lesser quality have been made. The speech was improvised.

[16] The translation finally accepted in the Appeal Division by Guy Bertrand, counsel for Mr. Mugesera, was that made by Thomas Kamanzi. I reproduce it as such, without any improvement in the style or grammar, as several of the words used are central to the issue. I have only added numbering of the paragraphs for ease of reference, and I have indicated by double square brackets ([[ ]]) the text amended by Mr. Kamanzi himself in his cross-examination.

[17] It appears especially necessary to set out the entire text as Mr. Kamanzi's translation differs on essential points from that made, for example, in the [TRANSLATION] “Report by the International

Commission of Inquiry on Human Rights Violations in Rwanda since October 1, 1990" (ICI report) published in March 1993 following an inquiry held from January 7 to 21, 1993 [a.b. vol. 20, p. 7747]. It appeared from the evidence in the record that it was the ICI's report which gave rise to the allegations against Mr. Mugesera.

> [TRANSLATION]
>
> SPEECH MADE BY LÉON MUGESERA AT A MEETING OF THE M.N.R.D. HELD IN KABAYA ON NOVEMBER 22, 1992
>
> Long life to our movement . . .
>
> Long life to President Habyarimana . . .
>
> Long life to ourselves, the militants of the movement at this meeting.
>
> [1] 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.
>
> [2] 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.
>
> [3] 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!
>
> [4] 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 Inyenzis 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!

[5] So, since this party and those who share its views are accomplices of the Inyenzis, one of them named Murego on arrival in Kibungo stood up to say [TRANSLATION] “We are descended from Bahutus and are in fact Bahutus”. The reply to him was [TRANSLATION] “Can you lose your brothers by death! Tell us, who do you get these statements about Bahutus from?” They were so angry they nearly died!

[6] That was when the Prime Minister named, they say, I don't know whether I should say Nsengashitani (I beg Satan) or (Nseng) Iyaremye (I beg the Creator), headed for Cyangugu to prevent the Bahutus defending themselves against the Batutsis 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.

[7] 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!

[8] 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!

[9] 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: [TRANSLATION] “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!

[10] (A proverb) says: [TRANSLATION] “Hyenas eat others, but when you go to eat them they are 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: [TRANSLATION] “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?

[11] 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 (the inspectors), for anyone who comes . . . the place where the Minister is from is the place known as Nyaruhengeri, at the border with Burundi, (exactly) at Butari, you will ask this man to get moving, with his travelling provisions on his head, and be inspector at Nyaruhengeri.

[12] 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!

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

[14] 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 (both) got up and gone to work. They have driven back the “Inyenzis” 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 prefectorate 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 (the soldiers) were going down to the marshes (to farm) when the war was at its height! It was at that point that people who had low morale abandoned their positions and the “Inyenzis” occupied them. The Inyenzis descended on Byumba and they (the government soldiers) 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 (who created it), 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: [TRANSLATION] “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?

[15] You know what it is, dear friends, “not letting ourselves be invaded”, or you know it. You know there are “Inyenzis” in the country who have taken the opportunity of sending their children to the front, to go and help the “Inkotanyis”. 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 [TRANSLATION] “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 book of the Penal Code: [TRANSLATION] “Every person who recruits soldiers by seeking them in the population, seeking young persons everywhere whom they will give to the

foreign armed forces attacking the Republic, shall be liable to death". It is in writing.

[16] 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?

[17] 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 (the judges) refuse, it is written in the Constitution that "ubutabera bubera abaturage". In English, this means that [TRANSLATION] "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 this rabble. 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 one who will suffer".

[18] 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 "Inkotanyis". So tell me, these young people who acquire our identity cards, then they come back armed with guns on behalf of the "Inyenzis" 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 "Inyenzis", 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 "Inyenzis", 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 Kayanzi with Nsengiyaremye: in that way we will know where the people we are at war with are.

[19] 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 "Inyenzis", 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!

[20] 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 Rond-Point. 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 “Inyenzis”, we will not allow people living among us to shoot us when they are at our sides!

[21] 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 (Movement's) 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 “Inyenzis”, as it says in a song you hear from time to time, where it states [TRANSLATION] “He is God born of God”. In the same way, they are [TRANSLATION] “Inyenzis born of Inyenzis, who speak for Inyenzis”. 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 “Inyenzis” who conduct discussions with “Inyenzis”, and you must know that once and for all! In any case, we will never accept these things which come from there!

[22] 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!

[23] 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., (a handful of) some people from the M.R.N.D., those who were there were exclusively "Inyenzis" 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: [TRANSLATION] "If you touch our inspectors, I will also liquidate yours", what would happen? Our Ministers would also shake the bag so the vermin who were with them would disappear and go into their Ministries.

[24] 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 (the President) 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!

[25] Recently, I told someone who came to brag to me that he belonged to the P.L. – I told him [TRANSLATION] "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 [TRANSLATION] "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".

[26] 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 Barundis 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 [TRANSLATION] "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 (the public) 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 "Inyenzis"! They did not know it! They surrounded them and arrested our police, so that a citizen who was not in our party personally told me [TRANSLATION] "What I want is for them to hold elections so we can elect a mayor. Otherwise, before he comes, 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".

[27] Dear relations, dear brothers, 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.

[28] Second, they are relying on the war refugees 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 "Inyenzis" 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 "Inyenzis" who have been shooting us! I should tell you that they said [TRANSLATION] "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 [TRANSLATION] "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 "Inyenzis", 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!

[29] 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 . . .

Translation into French by
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B U T A R E – R W A N D A

[a.b. vol. 22, p. 8051]

## IV. Preliminary observations

### (1) Genocide

[18] "Genocide" is mentioned frequently in this case. However, the word is not always used in the precise sense that it has in Canada and international criminal law. The period in question here – late November 1992 – is well outside that associated with the "great genocide" committed in Rwanda between April 7 and mid-July, 1994 (testimony by Des Forges, a.b. vol. 8, p. 2035), for which an international tribunal, the International Criminal Tribunal for Rwanda, was created by the United Nations Security Council on November 8, 1994 to deal with the perpetrators.

[19] Additionally, the ICI report, published in March 1993, gave the following caveat at p. 50:

[TRANSLATION]

> The testimony proved that a large number of people were killed just because they were Tutsis. That leaves the question of whether describing the "Tutsi" tribe as a target for destruction constituted a real intention to destroy that group, or part of it, "as such" within the meaning of the Convention.

> Some jurists feel that the number of persons killed is an important indicator if we are to speak of genocide. The figures we mentioned, undoubtedly large for Rwanda, might from the juristic standpoint be less than the level legally required.
>
> [a.b. vol. 22, p. 7797]

[20] Mr. Duquette of the Appeal Division also made the distinction that must be made between the 1994 genocide and Mr. Mugesera's speech:

> [TRANSLATION]
>
> There is no doubt that the 1994 genocide in Rwanda was a crime against humanity but it occurred a year and a half after Mr. Mugesera's speech. I do not mean that there was no connection and no continuity between the events, but the horror of the 1994 events cannot justify the inhumanity of the speech of November 22, 1992.
>
> [p. 113 of decision, a.b. vol. 2, p. 300]

[21] Accordingly, one must be sure to put the allegations made concerning Mr. Mugesera in their true context. The speech Mr. Mugesera was criticized for making should not be analysed in light of what we now know of the genocide that followed it eighteen months later. The Minister did not formally allege that Mr. Mugesera was an accomplice in the 1994 genocide, although his statements in this regard were so ambiguous as to lead to the following comments by Mr. Duquette towards the end of the hearings before the Appeal Division: [TRANSLATION] “the respondent maintained that the speech was an incitement to genocide and that the genocide in fact occurred later, and so the speech was to some extent followed” (a.b. vol 36, p. 13952).

[22] Finally, we should bear in mind that the purpose of the inquiry before the adjudicator and the appeal *de novo* to the Appeal Division was not to determine Mr. Mugesera's criminal responsibility. Rather, it was to determine whether the Minister had reasonable grounds for believing that Mr. Mugesera had committed a crime against humanity or whether the Minister could conclude on a balance of probabilities that Mr. Mugesera had incited murder, hatred or genocide. Whatever the outcome of this appeal, Mr. Mugesera, who is not an "accused" in this Court, will neither be acquitted nor convicted of a crime. The proceeding here is administrative in nature, it is not criminal, although as I will indicate the seriousness of the allegations requires exceptional care and caution in applying the rules of administrative law.

### (2) Standard of review

[23] In a decision made by a trial judge on an application for judicial review, this Court may intervene for the same reasons as if the judge had had an ordinary action before him or her (*Dr. Q. v. British Columbia College of Physicians and Surgeons*, 2003 SCC 19, at para. 43). These reasons are stated in *Housen v. Nikolaisen*, 2002 SCC 33, (2002) 286 N.R. 1, 211 D.L.R. (4th) 577, and include palpable and overriding error.

[24] There is no need to dwell at length on the standard of review that was applicable at the trial level. Explanation and analysis of the speech are questions of fact. Deciding whether the speech is a crime, once the speech is understood and analysed, is a question of law.

[25] On questions of law, there is nothing in the *Immigration Act* to indicate that Parliament intended to leave the Appeal Division the slightest margin for error when it considers the commission of crimes. On questions of fact, the applicable standard is that defined in s. 18.1(4)(*d*) of the *Federal Court Act*: the Court can only intervene if it considers that the Appeal Division "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it". This standard corresponds to that referred to in other courts as patent unreasonableness.

**(3) Burden of proof**

[26] The Minister has the burden of proof. This burden will vary with the allegations.

[27] On allegation A (incitement to murder) and allegation B (incitement to genocide of the Tutsi tribe and incitement to hatred against Tutsis), s. 27(1)(*a*.1)(ii) and (*a*.3)(ii) of the *Immigration Act* requires that the immigration officer's notice be "based on a balance of probabilities".

[28] On allegation C (crimes against humanity), s. 19(1)(*j*) of the *Immigration Act* applies to persons "who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of sub-section 7(3.76) of the *Criminal Code*".

[29] According to this Court's judgment in *Ramirez v. Canada (Minister of Employment and Immigration*), [1992] 2 F.C. 306 (C.A.), at 312, the phrase "reasonable grounds" has the same meaning as the phrase "serious reasons" in Article 1F (a) of the *United Nations Convention Relating to the Status of Refugees*. Accordingly, the standard of proof is lower than the balance of probabilities (*Ramirez*, at 312; *Zrig v. Minister of Citizenship and Immigration*, 2003 FCA 178, para. 174), but this standard only applies to questions of fact (*Gonzalez v. Minister of Employment and Immigration*, [1994] 3 F.C. 646 (C.A.), at 659; *Moreno v. Canada (Minister of Employment and Immigration*, [1994] 1 F.C. 298 (C.A.)). The question of whether making the speech at issue can be regarded as a crime against humanity raises questions of fact and questions of law. Explanation of the speech and the intention the speaker had in making it are questions of fact, and accordingly subject to the standard of evidence defined above. Once these findings of fact have been made, their classification as an international crime against humanity is a question of law. The legal criteria laid down in the *Criminal Code* and international law must be met for the speech to be treated as a crime against humanity. Those criteria are not met if the evidence only shows that there were reasonable grounds to

believe that the speech "could be classified as a crime against humanity" (*Gonzalez*, at 659); the evidence must show that it was in fact a crime against humanity in law.

[30] On allegation D (misrepresentation in the information form), s. 27(1)(*e*) of the *Immigration Act* imposes no particular standard, but the issue has been argued throughout on the basis of the balance of probabilities standard.

### (4) Rules of evidence

[31] It is well settled, in accordance with the wording of s. 69.4(3)(*c*) of the Act, that the Appeal Division may receive "such additional evidence as it may consider credible or trustworthy". The effect of this provision is to free the Appeal Division from the constraints resulting from the application of technical rules on presentation of evidence, including those having to do with the best evidence and hearsay evidence (see *Canada (Minister of Employment and Immigration) v. Taysir Dan-Ash* (1988), 5 Imm. L.R. (2d) 78 (F.C.A.). I conclude from that case that for all practical purposes s. 69.4(3)(*c*) lays down for the Appeal Division the same rules of evidence as s. 68(3) lays down for the Refugee Division. The latter thus provides that the Refugee Division "is not bound by legal or technical rules of evidence". At the same time, though s. 69.4(3)(*c*) deals with the submission of additional evidence to the Appeal Division, needless to say the Division must, based on the evidence already accepted by the adjudicator and which the parties have agreed to file before it, form its own opinion on

the relevance and credibility of the latter and reject it or give it less weight, or none at all, depending on the circumstances. It also goes without saying that the more indirect or unverifiable the evidence is, the more vigilant the Appeal Division must be when accepting and weighing that evidence.

### (5) Question 27-F in the permanent residence application form

[32] Question 27-F of the permanent residence application form reads as follows:

> In periods of either peace or war, have you ever been involved in the commission of a war crime or crime against humanity, such as: wilful killing, torture, attacks upon, enslavement, starvation or other inhumane acts committed against civilians or prisoners of war; or deportation of civilians?

[33] It must be read together with question 27-B,

> Have you been convicted of, or are you currently charged with, a crime or offence in any country?

and the context of the form as a whole.

[34] The wording of question 27-F is taken with very few changes from that contained in s. 7(3.76) of the *Criminal Code* at that time. Accordingly, the Minister himself chose to place the issue in a specific legal context. The question would not really have been different if it had been:

> [TRANSLATION]
>
> Have you ever participated in the commission of a war crime or a crime against humanity within the meaning of s. 7(3.76) of the Canada *Criminal Code*?

[35] This close modelling on s. 7(3.76) of the *Criminal Code* probably explains the absence of any reference to genocide or incitement to genocide in question 27-F. Curiously, as well, the crime of genocide is not expressly defined by the *Criminal Code* of that time, but s. 319 of the Code made incitement to genocide a specific offence. Since 2000 Canadian criminal law has expressly recognized the crime of genocide in s. 4 of the *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24), but this crime is distinct from a war crime and a crime against humanity.

[36] Additionally, question 27-F does not adopt – except perhaps by use of the word "participated" – the important clarification made in s. 7(3.77) of the *Criminal Code* regarding "aiding or abetting". Having said that, it should be noted that the purpose of question 27-F is not to check an applicant's legal knowledge. The question is intended to induce him or her to disclose, in much the same way as an insurance risk, any act that could be a cause for investigation and rejection of an applicant for his involvement in a war crime or a crime against humanity. In view of the objective sought, the question is not worded in the best possible way, as can be seen from the first certified question and the arguments which took place before the motions judge.

### (6) Information relied on by Minister

[37] At para. 6 of my reasons I set out the information on which the Minister relied in seeking the deportation of Mr. Mugesera and his family. I must return to that.

[38] The first piece of information concerned membership in the [TRANSLATION] "MRND political party, the Mouvement révolutionnaire national pour le développement". There was an error in the description of this party, the name of which on April 28, 1991 had become "Mouvement républicain national pour la démocratie et le développement" (my emphasis – a.b. vol. 2, p. 203; vol. 16, p. 5732). This information by itself is neutral. It is not as such a crime to belong to a political party.

[39] The second piece of information concerned the speech of November 22, 1992, [TRANSLATION] "a speech inciting violence, in which he asked militants of the party to kill Tutsis and political opponents, most of whom were Tutsis". I note that in its report the ICI used the words [TRANSLATION] "a speech inciting violence, in which he asked the Interhamwe to kill Tutsis and political opponents" (a.b. vol. 21, p. 7828).

[40] The third piece of information was that [TRANSLATION] "On the following day, several killings took place in the neighbourhood of Gisenyi, Kayave, Kibilira and other places". In the ICI report it states [TRANSLATION] "the following day the surrounding communes of Giciye, Kayove,

Kibilira and others were again aflame" (a.b. vol. 21, p. 7828). It has since been established that this information was incorrect.

[41] The fourth piece of information was that [TRANSLATION] "The US Department of State published a list of persons considered to have taken part in the massacre of Tutsis in Rwanda. Mr. Mugesera's name was on this list in his capacity as a member of the MRND – member of a death squad". This list was published on September 17, 1994 (a.b. vol. 21, p. 7659), and so after the genocide. Mr. Mugesera's name appears in the following form: [TRANSLATION] "Mugesera, Leon. MRND – Member Death Squad" (a.b. vol. 21, p. 7661). The press release accompanying this list indicated that the U.S. Government relied on the NGOs "for the bulk of its information" (a.b. vol. 21, p. 7659). The Court invited counsel after the hearing to indicate where this list was mentioned in the record. According to the Minister, the only place was in the testimony of Ms. Des Forges (a.b. vol. 9, p. 2667), where she said that she only learned of the existence of the list "last week", that is, in mid-September 1995, and knew nothing about its preparation. This list proves nothing.

[42] The fifth piece of information refers to the [TRANSLATION] "final report published on November 29, 1994", in which [TRANSLATION] "the Commission of Experts on Rwanda said the following concerning the speech made by Léon Mugesera" (p. 10, para. 63):

> . . . the speech will likely prove to be of significant probative value to establish the presence of criminal intent to commit genocide . . .
>
> [a.b. vol. 21, p. 7740]

This Commission of Experts was set up by Resolution 935 (1994) of the United Nations Security Council on July 1, 1994.This Commission of Experts was "to examine and analyse information submitted pursuant to the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or the efforts of other persons or bodies, including the information made available by the Special Rapporteur for Rwanda, with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide". The full text of the paragraph referred to by the Minister reads as follows:

> 63. In 1992, Leon Mugesera, an official in President Habyarimana's Movement [sic] révolutionnaire national pour le développement delivered a speech at a party conference at Gisenyi. In his speech, he explicitly called on Hutus to kill Tutsis and to dump their bodies in the rivers of Rwanda. The Commission of Experts has in its possession an audio cassette of this speech, which will likely prove to be of significant probative value to establish the presence of criminal intent to commit genocide when the perpetrators are brought to justice.

[43] I note that in its context the phrase cited by the Minister does not say that Mr. Mugesera was himself one of the "perpetrators" of the genocide. It simply says, as I understand it, that the speech could be very valuable in establishing the presence of a criminal intent when the perpetrators of the genocide were brought to justice.

[44] Additionally, I note that this paragraph wrongly states that "in his speech, he explicitly called on Hutus to kill Tutsis and to dump their bodies in the rivers of Rwanda". One thing is clear: Mr. Mugesera did not make an "explicit" call for the "killing" of Tutsis. If that were the case, the nature of this matter would have been decided long ago. Additionally, according to the translation which alone concerns this Court, Mr. Mugesera never advised throwing the bodies of Tutsis into the rivers. To further illustrate the looseness of this paragraph, it is clear that the only river mentioned by Mr. Mugesera was the Nyabarongo River.

[45] The evidence on this report by the Commission of Experts is almost non-existent. We know it exists, but little more than that. Ms. Des Forges (a.b. vol. 22, p. 8123), Mr. Philpot (a.b. vol. 12, p. 3933), Mr. Mailloux (a.b. vol. 15, pp. 5066 and 5067) and Mr. Gillet (a.b. vol. 31, p. 11706) only mentioned in their testimony that they learned of it. Mr. Bertrand indicated that the United Nations refused to give him the audio cassette on which the Commission of Experts' report allegedly was based (a.b. vol. 14, p. 4787). Mr. Chiniamungu said that in his opinion the paragraph of the Commission of Experts' report dealing with the speech [TRANSLATION] "does not reflect the thinking, does not reflect the wording . . . in Kinyarwanda" (a.b. vol. 14, p. 4787).

[46] The Minister, who has the burden of proof, did not show how the Commission of Experts' report arrived at its very brief conclusion regarding Mr. Mugesera's speech. It probably relied on the

ICI's report, but there is no indication whether the Commission of Experts did its own research itself. This report by the Commission of Experts proves nothing.

[47] In short, four of the five pieces of information which led the Minister to make his decision are either incorrect, irrelevant or not conclusive. That only leaves the speech, and the interpretation given to it by the Minister in his allegations is evidently dictated by the ICI's report. As I will shortly conclude that the ICI's report is not credible as regards Mr. Mugesera's speech, the Minister will have difficulty justifying his decision, whether on the basis of “reasonable grounds” (allegation C) or a “balance of probabilities” (allegations A, B and D).

### (7) Allegations of law

[48] The allegations against which Mr. Mugesera must defend himself are those set out in para. 7 of my reasons, and no others.

[49] Additionally, the argument in this Court does not turn on the merits of the allegations in Rwandan law. I assume, for the purposes of the case at bar and where the *Immigration Act* requires a crime committed abroad, that if I come to the conclusion there was a crime in Canadian criminal law there will also have been a crime in Rwandan criminal law.

[50] However, I note that according to the Rwandan proceedings entered in evidence the crimes alleged against Mr. Mugesera are incitement to hatred and genocide (ss. 166 and 393 of the Rwandan Penal Code) and planning genocide within the meaning of the *International Convention for the Prevention of the Crime of Genocide* (a.b. vol. 20, pp. 7565 and 7569. These crimes are covered by allegation B. They are not covered by allegation A (incitement to murder).

### **(8) Crime against humanity**

[51] Persons "who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*" are not to be granted admission (Act, s. 19(1)(*j*)).

[52] For an act to be regarded as a crime against humanity, four essential factors must be present:

(i) the act, inhumane by definition and by nature, must occasion serious suffering or seriously impair physical integrity or mental or physical health;

(ii) the act must be part of a widespread or systematic attack;

(iii) the act must be against members of a civilian population;

(iv) the act must be committed for one or more discriminatory reasons, in particular for national, political, ethnic, racial or religious reasons.

(*Le Procureur v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, September 2, 1998, N. ICTR-96-4-T; *R. v. Finta*, [1994] 1 S.C.R. 701; *Sivakumar v. Canada (M.E.I.)*, [1994] 1 F.C. 433 (C.A.); *Figueroa v. Canada (M.C.I.)* (2001), 212 F.T.R. 318 (C.A.)).

### (9) Mr. Mugesera's credibility

[53] Like the three levels of jurisdiction which have dealt with this case, reading the testimony of Mr. Mugesera and his wife before the adjudicator and before the Appeal Division leads me to question their respective credibility, but only regarding the events that occurred between Mr. Mugesera's departure from the family home on November 25, 1992 and his arrival in Spain in January 1993. In the testimony of both these persons there were such inconsistencies, hesitations and mysteries that the truth of their account may be doubted.

[54] Having said that, the Minister's allegations and the argument in this Court have been directed essentially at the speech on November 22, 1992, and in this regard the documentary and oral evidence supports the version of events given by Mr. Mugesera. What Mr. Mugesera did after that is not really relevant, any more than the interpretation he himself gives to his speech. It is true that a conclusion that a witness lacks credibility in part of his or her testimony may discredit all of it, but reading the record

convinced me of Mr. Mugesera's good faith and sincerity when he described the events leading up to the speech in question and when he set out his vision and understanding of Rwandan history (see *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429, *per* Martineau J., para. 20); *Takhar v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 240 (T.D.), *per* Evans J.).

[55] Mr. Mugesera's actions as an individual, teacher, government employee and, later, politician are consistent and coherent and supported by the evidence in the record. He has his ideas about the political evolution of his country, the causes and the persons responsible for what in the eyes of the international community would become genocide, the nature of the war raging in Rwanda (a war of aggression and invasion, rather than a civil war) and the identity of the people who in his opinion were invading his country and had to be expelled. These are ideas which he was entitled to have and to express, subject of course to the way in which he was proposing to put them into effect. Essentially, it is this latter point which is the real issue, a much more limited point than suggested by the breadth of the evidence on either side.

## V. Minister's appeal (allegations C and D) (case A-317-01)

[56] The Minister's appeal can readily be disposed of forthwith.

[57] Allegation C is that the speech is a crime against humanity. Whether the speech was a crime under Canadian criminal law or not – and I will conclude below that this was not the case – it is clear that it does not *prima facie* meet the requirements that a crime against humanity must be part of a widespread or systematic attack against the members of a civilian population for (in this case) ethnic reasons.

[58] On November 22, 1992 there is no evidence that the speech was part of a widespread or systematic attack. There is nothing in the record to indicate that the massacres which had taken place up to then were coordinated and for a common purpose. In any case, there is no evidence in the record that Mr. Mugesera's speech was part of any strategy whatever. If extracts from the speech were later used without Mr. Mugesera's knowledge in preparing the genocide, the users should be blamed, not Mr. Mugesera. Further, as I will show, the Minister has not established that Mr. Mugesera was prompted by ethnic considerations.

[59] As the speech was not a crime against humanity and as the speech is the only act which the Minister can still lay to Mr. Mugesera's discredit, once the other information has been excluded, Mr. Mugesera made no misrepresentation when he gave a negative answer to question F-27.

[60] In these circumstances, the only conclusion which it is possible to draw from the evidence in the record is that the Minister did not discharge the burden upon him. The Minister could not, on the basis

of this evidence, have reasonable grounds to believe that Mr. Mugesera had committed a crime against humanity. The Minister could not conclude, on the balance of probabilities standard, that Mr. Mugesera had obtained landing by misrepresentation of a material fact.

[61] Consequently, I would dismiss the Minister's appeal, I would affirm the part of the judgment of Nadon J. dealing with allegations C and D, I would set set aside the part of the Appeal Division's decision dealing with the said allegations and I would refer the matter back to the Appeal Division to be again disposed of in respect of allegations C and D on the basis that the Minister did not discharge the burden of proof upon him. I will explain in para. 244 the reasons leading me to adopt this approach. It follows that Mr. Mugesera's wife and children are, for all practical purposes, no longer concerned with the rest of the proceedings since only allegation D applied to them.

## VI. Mr. Mugesera's appeal (allegations A and B) (case A-316-01)

[62] The Court must still determine, on a balance of probabilities, whether allegations A (incitement to murder) and B (incitement to genocide and hatred) are justified in respect of Mr. Mugesera.

### A. Overview of Rwanda's history

[63] The modern history of Rwanda, if I may so put it, begins with the abolition of the monarchy in January 1961 and the departure, to Uganda for the most part, of the king and his supporters, most of whom were Tutsis, and the creation of the first Republic governed by the Hutu party, the Parmehutu, headed by President Kayibanda. The persons who fled to Uganda, Tutsis for the most part, then tried to invade Rwanda on several occasions. They were called [TRANSLATION] “refugees” or “Inyenzis”, which means “cockroaches” because they hide during the day. Each unsuccessful attempt at invasion was followed by reprisals inside Rwanda itself, and this led waves of refugees to flee the country. The number of refugees is estimated at some 600,000 persons, essentially Tutsis.

[64] On July 5, 1973 a coup d'état made General Habyarimana president of the second Republic. Power was then exercised through a single political party, the Mouvement révolutionnaire national pour le développement (“the MRND”), which succeeded the Parmehutu party. Efforts were made to get the refugees to come back. A plan for return was eventually negotiated in January 1991 with the Ugandan authorities and the United Nations High Commission for Refugees. Under this plan, the refugees were given three options: voluntary repatriation to Rwanda, naturalization in the host country and settlement in accordance with bi-lateral and regional agreements. At that time, Rwanda was regarded by the World Bank as a model of economic development and social peace in Africa.

[65] On July 5, 1990 President Habyarimana announced a [TRANSLATION] “political aggiornamento” and his wish to create multi-party government with a new Constitution. A

[TRANSLATION] “national joint commission” was created to consider the reform of political institutions. The commission began its work on October 23, 1990. On December 28, 1990 it published a preliminary draft, and in late March 1991, a draft political charter. New parties were created: the Mouvement démocratique républicain (MDR), the Parti social démocrate (PSD), the Parti libéral (PL) and the Parti démocrate chrétien (PDC). On April 28, 1991 the President announced a change in the name of MRND, which became the Parti républicain national pour le développement et la démocratie, and ordered that in future members of the MRND central committee would be elected. The new Constitution was promulgated on June 10, 1991. The political parties law came into effect on June 18, 1991. The first opposition parties, the MDR, the PSD and the PL, were officially recognized in July 1991.

[66] On December 30, 1991 the Minister of Justice, Mr. Nsanzimana, was appointed Prime Minister. His cabinet consisted of members of the MRND, except for one Minister who was a member of the PDC. Protests occurred throughout the country. On March 13, 1992 a protocol of agreement was signed between the parties asked to participate in a caretaker government (the MRND, the MDR, the PSD, the PL and the PDC). On April 16, 1992 the President announced the appointment of Mr. Nsengiyaremye (a member of the MDR) as Prime Minister. His cabinet included nine MRND Ministers and ten Ministers from the opposition parties. Only one member of the cabinet was a Tutsi: Mr. Ndasingwa, from the PL.

[67] In the meantime, in 1988, the Front patriotique rwandais ("the FPR") was formed in Uganda, consisting of refugee Rwandans and members of the Ugandan army. The FPR was endorsed by the President of Uganda and its purpose was a takeover in Rwanda by the refugees, and in the view of many, by the President of Uganda himself. The FPR invaded northern Rwanda on October 1, 1990. The invasion was repelled on October 30, 1990. Conventional warfare was then replaced by a guerilla war, with small groups of invaders carrying out attacks in Rwandan territory and spreading terror and panic. Alleged FPR accomplices were the subject of massive arrests in October 1990 and of several massacres perpetrated by the Rwandan army. Most of these accomplices were Tutsis. Negotiations began in Brussels on May 29, 1992 between the FPR on the one hand and part of the Rwanda caretaker government (the MDR, the PL and the PSD) to restore peace in Rwanda. The MRND did not take part in these negotiations. A cease-fire was signed in Arusha on July 12, 1992 between the Rwandan government, represented by the MDR, the PL and the PSD, and the FPR. The same parties signed a protocol on a constitutional state on August 18, 1992, and another on October 30, 1992 on the distribution of power. These are the Arusha agreements which, on November 15, 1992, the President denounced as a scrap of paper.

[68] The first Arusha agreement was concluded on August 18, 1992. It concerned [TRANSLATION] "the rule of law" (a.b. vol. 27, p. 10016). The Government of Rwanda, represented by the Minister of Foreign Affairs and Co-operation, Mr. Ngulinzira, a member of the MDR, and the

FPR agreed in particular, in article 16, [TRANSLATION] "to create an International Commission of Inquiry into human rights violations committed during the war" (*ibid.*, p. 10021).

[69] The second Arusha agreement was concluded on October 30, 1992, between the same parties, represented by the same individuals. It dealt with [TRANSLATION] "the distribution of power in a more broadly-based caretaker government" (*ibid.*, p. 10023). Among other things, this agreement provided for participation by the FPR in the caretaker government. According to article 14, [TRANSLATION] "Political parties participating in the coalition government created on April 16, 1992 and the Front Patriotique Rwandais will be responsible for establishing a more broadly-based caretaker government". (*ibid.*, p. 10028).

[70] These agreements, especially the second, were severely criticized by the President and by the members of the MRND, including Mr. Mugesera, who first did not agree that an agreement signed without the support of the party in power should bind the government, and second, that the FPR, with which Rwanda was at war, should be part of the caretaker government. Even Mr. Reyntjens, an expert witness for the Minister, acknowledged that the rejection of these agreements by the party in power was legitimate: [TRANSLATION] "Moreover, I must tell you, he [the President] had been constitutionally stripped. I somewhat understand his frustration" (a.b. vol. 11, p. 3433).

[71] It was in this context of external war and internal political conflict that Mr. Mugesera made his speech on November 22, 1992.

### B. Report by International Commission of Inquiry (ICI), March 1993

[72] Although counsel for the Minister several times maintained at the inquiry and in this Court that the focus of the allegations was the speech of November 22, 1992, not the ICI report filed in March 1993, I do not think the matter is actually so simple, and that the Court can disregard the importance which this report had in the preparation of the Minister's allegations, the evidence presented on either side, the way in which the evidence was considered and the conclusions arrived at by the tribunals which have dealt with the question before the Court.

[73] When we look at the circumstances which led the Minister to file his allegations against Mr. Mugesera, it is clear that the Minister was guided largely by the conclusions, even the actual wording of the conclusions, of the ICI report (see *supra*, paras. 45, 46 and 47).

[74] It is also clear when we look at the list of expert witnesses the Minister called to testify that the Minister intended to meet the burden of proof upon him chiefly through the testimony of persons closely connected with the ICI report, specifically the two co-chairpersons of the ICI, Ms. Des Forges and Mr. Gillet.

[75] It is also clear, when we look at the evidence in the record, that it is the reference to certain passages from Mr. Mugesera's speech and the choice of translation of these passages in the ICI report which made the speech a high-profile subject of controversy. It is clear that the references made to the speech in documents such as the [TRANSLATION] “declaration by Rwandan and international non-governmental organizations working for the development of human rights in Rwanda”, issued on January 29, 1993 (a.b. vol. 21, pp. 7666-7667), the article published by the Centre National de Recherche Scientifique de Paris on March 8, 1993 (a.b. vol. 21, p. 7674), the article published by the newspaper *Le Soleil* of Québec on October 1, 1993 and June 15, 1994 (a.b. vol. 21, pp. 7681 and 7675), the article published by the Québec newspaper *Le Journal* on September 30, 1993 (a.b. vol. 21, p. 7676), the report by Amnesty International on May 23, 1994 (a.b. vol. 21, pp. 7919-7920), the publication by Médecins sans frontières, “Population en danger, 1995” (a.b. vol. 22, p. 7998, p. 34 of the document), the text by Filip Reyntjens (also an expert witness for the Minister), *L'Afrique des Grands Lacs en crise : Rwanda-Burundi, 1988-1994*, Paris, Karthala, 1994 (a.b. vol. 23, p. 8444, p. 119 of text) and the report by Mr. Ndiaye (also an expert witness for the Minister), Special Rapporteur of the United Nations, filed on August 11, 1993 (a.b. vol. 27, pp. 9937, 9940), expressly or by implication – for example, by choice of the same translation and same passages as those used by the ICI – rely on the ICI report.

[76] I note in this regard that the expert witness for the Minister and Special Rapporteur of the United Nations, Mr. Ndiaye, admitted in his examination before the Appeal Division that he had assumed, without further investigation, that the conclusions drawn by the ICI regarding Mr. Mugesera were correct. For example, Mr. Ndiaye admitted that he had not tried to check the accuracy of these conclusions in any way, though he had had an opportunity to do so at his meetings with the President and with a journalist who served as an ICI source. He further stated that he assumed that the ICI report was correct in general, including its contents regarding Mr. Mugesera, after he saw that the Rwandan government had in general admitted the substance of the ICI allegations. However, he went on to say that he had not himself personally checked anything concerning Mr. Mugesera, [TRANSLATION] "neither before, during or after" his own inquiry, and that the Rwandan government statement did not mention the allegations made by the ICI against Mr. Mugesera (a.b. vol. 36, pp. 13924, 13946, 14007, 14058, 14063, 14064, 14065, 14066, 14067, 14076, 14146, 14147, 14155, 14162). What is more, Mr. Ndiaye admitted he wrote his report without reading the full text of the speech and believed Mr. Mugesera had recommended the Tutsis be thrown in the river solely on the basis of the passages from Mr. Mugesera's speech selected by the ICI (a.b. vol. 36, pp. 14076 to 14079).

[77] Finally, it is clear that the ICI report played a decisive role in the decisions made at the lower levels. The Appeal Division acknowledged, at p. 39 of its decision (a.b. vol. 2, p. 226) that

> [TRANSLATION]
>
> The ICI report is of great importance in this case because its two co-chairpersons testified and because the adjudicator attached great weight to its conclusions.

At pp. 40 and 41 (a.b. vol. 2, pp. 227 and 228), it added that:

> [TRANSLATION]
>
> In view of the weight attached to the ICI conclusions by the adjudicator, the appellants [the Mugeseras] questioned its methodology and the integrity of its members. They placed great emphasis on this, especially as the ICI report received a lot of attention in the press and other NGOs [acronym for non-governmental organizations]. The respondent [the Minister] replied with exhaustive evidence concerning methodology. Among his witnesses, two were members of the ICI, and counsel for the appellant charged that they were trying to justify themselves. We therefore had to analyse the course of this inquiry with the greatest care to determine whether it was objective and whether its conclusions were valid. It was then necessary to determine whether its conclusions were valid and whether they could be used in the instant case.

and after a lengthy analysis it concluded, at p. 100 of its decision (a.b. vol. 2, p. 287), that:

> [TRANSLATION]
>
> The ICI report was very useful to us and I have indicated each time I have relied on this report in arriving at certain conclusions. I might use the words of Mr. Ndiaye, who considered “the substance of the allegations contained in the International Commission of Inquiry report to be generally proven”. That does not mean the ICI was completely free from error.

[78] In these circumstances, I feel I am justified in concluding that both the initial decision by the Minister to seek deportation of Mr. Mugesera and the decisions by the adjudicator, the Appeal Division and the Federal Court Trial Division were decisively influenced by the ICI report.

[79] What is the situation with respect to this report?

[80] The ICI report (a.b. vol. 21, p. 7747) was made public on March 8, 1993 (a.b. Des Forges, vol. 8, p. 2061). The ICI co-chairpersons, Alison Des Forges and Éric Gillet, were called by the Minister as expert witnesses. The ICI report, the expert reports of Ms. Des Forges and Mr. Gillet and the latter's testimony before the adjudicator and the Appeal Division respectively, were admitted in evidence by the adjudicator despite repeated objections by Mr. Mugesera's counsel. As Ms. Des Forges did not testify before the Appeal Division, I am in as good a position as the Division to assess her testimony.

[81] The testimony of Ms. Des Forges and Mr. Gillet was especially instructive.

### (1) Testimony of Ms. Des Forges

[82] Ms. Des Forges' instructions as an expert witness were the following:

> I was asked specifically to write a comment upon the history of Rwanda. To explain the background to the genocide and to attempt to situate Mr. Mugesera's speech, in what I knew about the history of the period.
>
> [a.b. vol. 10, p. 2867, September 21, 1995]

[83] The ICI was created at the request of certain Rwandan human rights associations to investigate infringements of such rights in Rwanda since October 1, 1990, that is, since the invasion of Rwandan territory by the forces of the Front Patriotique Rwandais (FPR). Four international associations agreed to sponsor the ICI and to appoint ten investigators, six of whom had never set foot in Rwandan territory

(a.b. vol. 21, p. 7751). The ICI did not receive any mandate from the United Nations (a.b. vol. 10, p. 2889). It remained in Rwanda from January 7 to 21, 1993 and collected written and oral testimony from some three or four hundred people. It noted the identity of witnesses, but for reasons of safety and efficiency it was agreed that only the identity of those who testified publicly would be disclosed (a.b. vol. 21, p. 7757). In exceptional cases it recorded some of the testimony. The report was written by a team of three people, including Ms. Des Forges (a.b. vol. 8, p. 2182, September 14, 1995).

[84] During her testimony Ms. Des Forges admitted several several times that the Commission's mandate was not to investigate Mr. Mugesera's activities, and she and the members of the Commission did not even know of his existence before going to Rwanda (a.b. vol. 8, p. 2206; vol. 8, p. 2297; vol. 9, pp. 2349, 2357, 2367, 2390; vol. 9, p. 2562). She stated that “We did not interrogate scores of people concerning Mr. Mugesera's speech, because it was a small part of our report”, “I would say between, around five” (a.b. vol. 8, p. 2324), and added that “It was not a report on Mr. Mugesera that we were producing, but an examination of the human rights records at that time and place . . . Our inquiry was not focused on Mr. Mugesera. We were not judges” (a.b. vol. 9, p. 2359).

[85] Ms. Des Forges admitted that:

> . . . the Commission produced this report very quickly, under very great pressure, with a great sense of urgency.
>
> [a.b. vol. 8, p. 2061, September 13, 1995]

and that the Commission made no effort to contact Mr. Mugesera "given that we were pressed for time" (a.b. vol. 8, p. 2177). She admitted that "Sometimes, we do not have everything available that we would like to in terms of making a judgment" (a.b. vol. 8, p. 2013).

[86] Ms. Des Forges described herself as a historian and a "human rights activist" (a.b. vol. 8, p. 2010). She acknowledged that as such her work "is dedicated to the presumption that these violations are wrong and must be eliminated. So there's no way I can claim objectivity in the sense of being objective or neutral towards violations that are committed. But in terms of any given governmental authority or political group or political faction, we attempt to maintain the strictest neutrality" (a.b. vol. 8, p. 2015). She further admitted that one of the objectives was "attempting to use the press in turn to put pressure either upon the violating government or the other foreign governments that could, in turn, influence that violating government" (a.b. vol. 8, pp. 2011, 2012). She added that "For me, the ultimate responsibility for human rights workers and for governments is to see that justice is done, to see that people who are accused of crimes are brought to justice for those crimes because if we do not break with the impunity which has been the pattern in the past, the killing will continue" (a.b. vol. 8, pp. 2018, 2019). After the report was published, she said, "We undertook a vigorous campaign of lobbying to make sure that various governmental authorities were aware of the contents of the report both in Europe and in North America" (a.b. vol. 8, p. 2062).

[87] As regards the "accusations" she was making, she admitted that "Some of them will inevitably [be] shown to be false. But, the important thing [is] that the trials go forward and that people be brought to justice" (a.b. vol. 8, p. 2090). To Mr. Bertrand, who asked why the ICI report had not really examined Mr. Mugesera's role in the Comités du Salut and in the death squad, though it concluded he was a member of them, Ms. Des Forges replied: "Because I assumed that any reader would be proceeding from the same general rules which we have established already. Namely that all information is subject to verification. And, that nothing is ever 100% absolute" (a.b. vol. 10, p. 2748).

[88] In the course of her testimony she associated Mr. Mugesera with the genocide of April 1994 several times:

> This version of the past . . . is a fundamental strain in the speech given by Mr. Mugesera, in the comment about sending the Tutsi back to Ethiopia and it is of great importance in the thinking of many people at the time of the genocide, the idea that these people do not have a right to be part of this country.
>
> [a.b. vol. 8, p. 2025]

> As we all know, during the great genocide, it's the river that was clogged with bodies that eventually ended up in Lake Victoria and despoiled that lake.
>
> [a.b. vol. 8, p. 2035]

> That the history of the genocide could be traced back to the early year of the Hathierry Mana Government (phon.). And, when I asked him exactly what he meant by that, he said that you can see that from the Mugesera speech.
>
> [a.b. vol. 10, p. 2859]

> I was told that part of the speech was rebroadcast on the radio in Rwanda in April, 1994.
>
> [extract from her expert report, cited a.b. vol. 10, p. 3091]

[Emphasis added.]

[89] She admitted that in the report and in interviews given since it was published she had "expressed a judgment on the content of Mr. Mugesera's speech. And on the role of that speech in the violence against Tutsi" (a.b. vol. 8, p. 2014).

[90] She admitted she is not a translator and has no degree in translation (a.b. vol. 10, p. 2889).

[91] She could not agree that "any honest person can give any other interpretation" of the speech (a.b. vol. 8, p. 2238), but finally acknowledged that the speech might be regarded by some as "legitimate self-defence" (a.b. vol. 10, p. 2880; see also p. 2878).

[92] She admitted that she and the other members of the ICI only met with five witnesses regarding the speech, and none of them was present when the speech was made (a.b. vol. 8, pp. 2323 *et seq*.; vol. 10, pp. 2787, 2794, 2799, 2810, 2829, 2848). These witnesses only heard passages from the speech on the radio and "my recollection is that they all referred to the same passage. The passage about Nyaburungo River (phon.) and, the passage about excluding
members of other political parties from Gisenyi" and also "the passages that you refer to about people being brought to justice were widely interpreted as meaning people being killed not brought to justice" (a.b. vol. 8, pp. 2326, 2327). She admitted that the speech was not broadcast or televised at the time it was made (a.b. vol. 10, p. 2786).

[93] She admitted that from the evidence she was able to obtain the only impact of the speech in the days that followed was acts of vandalism and theft (a.b. vol. 10, p. 2862).

[94] The translation used by the ICI was made from a transcript which it was given by a member of the diplomatic community whom she refused to identify (a.b. vol. 9, p. 2649). Ms. Des Forges saw no "significant difference" between the translation used by the ICI and that eventually used for the proceeding in Canada and "in any case, the meaning of the words is clear" (a.b. vol. 8, pp. 2133, 2134). She had not listened to the tape at the time the report was prepared (a.b. vol. 8, p. 2271). She was not concerned with verifying who the person that translated the speech was (a.b. vol. 8, p. 2278).

[95] She admitted that the ICI only reproduced from the speech passages which agreed with the conclusions arrived at by the Commission:

> [TRANSLATION]
>
> Q. To be sure you were right, did you not take out of context the passages which suited you?
>
> A. Indeed.
>
> [a.b. vol. 8, p. 2243]
>
> A speech of 100 pages about motherhood and apple pie does not fit into a human rights report, neither does a long speech on elections. One paragraph in a speech on motherhood and apple pie that calls for killing people does belong in a human rights report.
>
> [a.b. vol. 8, p. 2277]
>
> . . . our focus was a limited one. We were dealing with human rights abuses not with platitudes about the electoral process . . . But, political discourse, we know is cheap in the mind of all kinds of politicians, from whatever side. And, hardly deserves extensive attention in any kind of report, it is easy to come up with these things, these platitudes.
>
> [a.b. vol. 10, pp. 2865, 2866]
> [Emphasis added.]

[96] To Mr. Bertrand, who asked her why in its report the Commission chose to cite at the outset the passage from the speech which, according to the translation used by the Commission, said [TRANSLATION] "We cannot have peace if we do not dig up the war hatchet", she replied, "Because that was what was pertinent in the context of our report" (a.b. vol. 10, p. 3033).

[97] She went on to say, explaining the choice of passages published by the Commission: "I was not a publicist for Mr. Mugesera. I was not . . . did not feel myself in any sense obliged to reveal the entire extent of his speech. He had available to him the same possibilities as I for putting his speech before the public. And if he felt that this was a significant distortion of his message, he had every opportunity to publish the entire speech himself" (a.b. vol. 10, pp. 3035, 3036).

[98] Regarding the choice of passages, she added: "It was certainly not by chance. We chose passages which, to us, represented serious violations of human rights in that they called for an incitation to violence. We did [not] find it necessary to reproduce that [which] did not call for violations of human rights because our purpose was to demonstrate that there were human rights violations, not to demonstrate that [there] were not" (a.b. vol. 10, pp. 3036). And, later: "And from the point of view of our mandate and the work we had to do, political speeches were not . . . it was not a major part of our work to report political speeches. It was our work to report indications of human rights violations and that's what we did" (a.b. vol. 10, p. 3067).

[99] She admitted, at the end of the cross-examination: "If you wish to argue that we chose our evidence to support our conclusions, you are entirely correct. We chose our evidence to support our conclusions. There were many facts concerning the historical period which did not appear to us relevant. We did not include them. We chose our evidence after we had weighed all of the facts and reached our conclusions. We made an orderly presentation as you do as a lawyer to support your contention" (a.b. vol. 10, p. 3075 – emphasis added).

[100] Finally, at the very end of her cross-examination, she was unable to formally deny a statement she made to a journalist on the newspaper *The Gazette* in June 1994: "Throw him out on his ear . . . what are you waiting for?" she apparently said, adding that "[His speech] is part of a well orchestrated campaign by a network of senior figures in Habyarimana's entourage 'who found the killing of the Tutsis an acceptable political strategy'" (a.b. vol. 10, p. 3123 *et seq.*; Exhibit D-16, *The Gazette*, June 10, 1994, a.b. vol. 19, pp. 6945, 6946). The journalist, Mr. Norris, confirmed that he had accurately reproduced Ms. Des Forges' comments (test. Norris, vol. 12, p. 4014 *et seq.*). At pp. 4018 and 4031, Mr. Norris also admitted that the ICI report was the only source of his information on Mr. Mugesera.

[101] I readily conclude from Ms. Des Forges' testimony that the ICI concluded without basis, in a way contrary to the evidence or on the basis of a different and deliberately truncated text of the speech by Mr. Mugesera that he was [TRANSLATION] "a significant instigator of the trouble", an "intimate of the President" (a.b. vol. 21, p. 7768), he "spoke for the President" (a.b. vol. 21, p. 7772), he had

“close ties to the President” (a.b. vol. 21, p. 7795) and was a “long-standing companion of the head of state” (a.b. vol. 21, p. 7828) and was a member of the death squads (a.b. vol. 21, p. 7830). I also deduce that the conclusions she drew in her expert report on Mr. Mugesera's role were without basis (a.b. vol. 22, pp. 8119 to 8123). As a matter of fact, after Mr. Bertrand's cross-examination my chief recollection was the fury with which Ms. Des Forges launched into a diatribe against Mr. Mugesera, and I was amazed at the lack of discipline she showed in preparing the ICI report and in her expert opinion: see in particular her replies and comments on the Comités du Salut Public (a.b. vol. 8, pp. 2038-2039; vol. 9, pp. 2468, 2472, 2521, 2562, 2570, 2573; vol. 10, pp. 2748, 2749), the death squads (a.b. vol. 8, pp. 2093, 2149; vol. 9, pp. 2520, 2545, 2549), Mr. Mugesera's role, his ties to the President and his career (a.b. vol. 8, pp. 2048, 2052, 2141, 2146, 2309, 2310, 2315; vol. 9, pp. 2344, 2349, 2356, 2363, 2367, 2404, 2437, 2458, 2464, 2465, 2537).

[102] Even making the debatable assumption that a member of a commission of inquiry, who is actually its co-chairperson and co-author of the report, can be described as an objective witness concerning the conclusions of that report, Ms. Des Forges testified much more as an activist than as a historian. Her attitude throughout her testimony disclosed a clear bias against Mr. Mugesera and an implacable determination to defend the conclusions arrived at by the ICI and to have Mr. Mugesera's head.

**(2) Mr. Gillet's testimony**

[103] Éric Gillet, who with Ms. Des Forges was co-chairperson of the ICI, appeared before the Appeal Division as an expert witness for the Minister. His testimony, unlike that of his colleague, was sober, calm and non-partisan. For example, he admitted that [TRANSLATION] “it was a report which was satisfactory on the whole, but open to criticism, it certainly was, that is obvious” (a.b. vol. 30, p. 11521). His explanation of the methodology used clearly indicated the hows and whys of the inquiry method used to arrive at general conclusions, but did not explain in what way the method used enabled them to arrive at the specific conclusions in Mr. Mugesera's case.

[104] Mr. Gillet admitted that neither he nor any other member of the Commission knew Mr. Mugesera's name before they went to Rwanda in January 1993, and that no report, not even *Africa Watch*, which had appeared up to then had mentioned Mr. Mugesera (a.b. vol. 31, p. 11811; vol. 32, pp. 12159, 12254). He also did not know of the existence of the speech on November 22, 1992 and it was only when he met a diplomat, whom he did not wish to identify, that the latter told him of the speech, mentioning that [TRANSLATION] “it was the first time that a figure in authority in the country had in a public speech incited the population, part of the population, to attack another part of the population, and throw them in the Nayabarango River” (a.b. vol. 31, p. 11819). The diplomat did not speak to him about other parts of the speech, including those calling for elections (a.b. vol. 31, pp. 11821, 11822).

[105] Mr. Gillet never heard the speech himself, had no tape of it and only had a translation given to him by the same unidentified diplomat (a.b. vol. 30, pp. 11599-11603). At the time the report was

written he did not know that Mr. Mugesera was one of the persons pressing for multi-party government in Rwanda, that he had gone on missions abroad on this matter, that he had criticized the President for his slowness in this respect, that he had been pushed out of the MRND, that he got himself elected contrary to the party's wishes, that his mother-in-law was a Tutsi, that he had allowed Tutsis to stay at his home shortly before his speech and that members of his family were killed. He did not know anything about Mr. Mugesera's earlier speeches (a.b. vol. 31, pp. 11778-11782, 12035; vol. 30, p. 11523) or the other texts he had published. (a.b. vol. 31, pp. 11789-11796). He had also not tried to find out who Mr. Mugesera was at the time the report was prepared.

[106] To his knowledge, none of the local witnesses interviewed were present at Mr. Mugesera's speech or had a copy of the speech (a.b. vol. 32, pp. 12081, 12082, 12086). He did not know that the only radio report in the days following did not mention the passages used by the ICI in its report (a.b. vol. 32, p. 12080).

[107] Mr. Gillet said he was satisfied from the testimony of three people whom he did not want to identify that he could conclude without further investigation that Mr. Mugesera was a member of the death squads (a.b. vol. 32, pp. 12219-12221, 12230).

[108] He admitted that the facts described by Mr. Mugesera in his speech were generally true (a.b. vol. 32, pp. 12175, 12176). He admitted there had been no deaths after Mr. Mugesera's speech (a.b. vol. 31, p. 12042) and he was not aware of anything for which Mr. Mugesera could be blamed in

connection with the massacres or incidents that occurred in 1991 and 1992, even after his speech (a.b. vol. 32, pp. 12086-12099, 12130, 12131).

[109] He admitted that it was he and Ms. Des Forges who chose the passages from the speech that would be published in the report: it was Ms. Des Forges [TRANSLATION] "who marked in pencil" the passages in the report dealing with Mr. Mugesera (a.b. vol. 31, p. 11842; vol. 32, p. 12056); and it was Ms. Des Forges who was responsible for finding someone in the U.S., a person whose name could not be disclosed, to check the translation of the speech given to the ICI (a.b. vol. 31, pp. 11930, 11942).

### (3) Conclusions regarding ICI report

[110] In short, the ICI conducted its investigation at full speed in two weeks in difficult conditions, in a manner and in circumstances that did not lend themselves to determining individual responsibility. In this connection it is important to distinguish the general conclusions it was able to draw regarding what was happening in Rwanda at the time – and I make no comment on the validity of those conclusions – from the specific conclusions it drew regarding Mr. Mugesera.

[111] The ICI based its conclusions about Mr. Mugesera's speech on passages which it selected carefully and which it in fact manipulated, and on a translation the source of which is unknown and which is substantially different from that accepted for use in these proceedings.

[112] To establish the bias by the ICI against Mr. Mugesera, we need only reproduce the full text of paragraph 25 of the speech (in the anonymous translation used by the ICI):

> [TRANSLATION]
>
> Recently, I made these comments to someone who was not ashamed to disclose that he had joined the PL. I told him that the fatal mistake we made in '59, when I was still a boy, was that we let them leave. I asked him if he knew of the Falachas, who had gone back to their home in Israel from Ethiopia, their country of refuge. He told me he did not know about that affair. I replied that he did not know how to listen or read. I went on to explain that his home was in Ethiopia but we were going to find them a shortcut, namely the Nyabarongo River. I would like to emphasize this point. We must react!

and the passage it reproduced from this paragraph in its report:

> [TRANSLATION]
>
> *The fatal mistake we made in 1959 . . . was that we let them [the Tutsis] leave [the country]. [Their home] was in Ethiopia, but we are going to find them a shortcut, namely the Nyabarongo River. I would like to emphasize this point. We must react!*

Reading these two texts together gives the following result:

> [TRANSLATION]
>
> ~~Recently, I made these comments to someone who was not ashamed to disclose that he had joined the PL. I told him that the fatal mistake~~ (**the** mistake[1]) we made in '59, ~~when I was still a boy~~, was that we (**had**[2]) let them [**the Tutsis**] leave. ~~I asked him if he knew of the Falachas, who had gone back to their home in Israel from Ethiopia, their country of refuge. He told me he did not know about that affair. I replied that he did not know how to listen or read. I went on to explain that his home~~ was in Ethiopia but we are ~~going~~ to find them a shortcut, namely the Nyabarongo River. I would like to emphasize this point. We must react!

---

Crossed out = deleted
Bold face = added
Bold face, underlined = altered
Shaded - version modified by Commission

---

[1] Original text "**the**"
[2] Original text "**had**"
[3] Original text "**his home**"
[4] Original text "**we were going**"

[113] By eliminating, in particular, any reference to "the case of Falachas who went home to Israel" – the Falachas, as we shall see below, were Jews who were formerly transported by air safe and sound from their country of refuge, Ethiopia, to their country of origin, Israel – this paragraph is deprived of its true meaning, if the text is cut up and interpreted in this way as meaning the transportation of corpses by water.

[114] To make the matter clearer, I reproduce again the text of paragraph 25 of the Kamanzi translation used for the purposes of the case at bar:

> [TRANSLATION]
>
> Recently, I told someone who came to brag to me that he belonged to the P.L. – I told him [TRANSLATION] "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 [TRANSLATION] "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".

The careful reader will see, *inter alia*, that the words which the anonymous ICI translation places at the end of paragraph 25, [TRANSLATION] “I would like to emphasize this point. We must react!” are to be found with a different translation at the start of paragraph 26 of the Kamanzi translation.

[115] The ICI based its conclusions regarding Mr. Mugesera on pieces of testimony the number of which can be counted on one hand and the authors of which were not identified. We know from one of the expert witnesses called by the Minister that one of the ICI members, Mr. Carbonare, [TRANSLATION] “was not an impartial member” and “was planted on the Commission by people close to the FPR” (Reyntjens test. vol. 11, p. 3572). Mr. Carbonare joined the ranks of the FPR after taking part in the ICI mission, but we know nothing about the influence it may have had during the inquiry. We also know that apart from Ms. Des Forges and Mr. Gillet, other ICI members have publicly taken positions against Mr. Mugesera since the report was published (André Paradis (a.b. vol. 21, p. 7676), Mr. Schabas (a.b. vol. 17, p. 6195; vol. 29, p. 11089 *et seq*.; vol. 29, p. 11208 *et seq.*)).

[116] The ICI conclusions on Mr. Mugesera's role and influence in the Rwandan government, the meaning of his speech and its effect in the days that followed are not reliable. Ms. Des Forges herself disavowed several conclusions in her testimony. Moreover, those conclusions were found to be patently unreasonable by Nadon J. when they were adopted by the members Bourbonnais and Champoux Ohrt in the Appeal Division decision. Nadon J. said the following in this regard:

> [41] The applicants' second submission is that panel members Yves Bourbonnais and Paule Champoux Ohrt erred in fact and in law in finding that Léon Mugesera was a close associate of President Habyarimana, that he was a

> member of Akazu and of death squads, that he had participated in massacres, and that murders had been committed following his speech.
>
> [42] The conclusions reached by panel members Bourbonnais and Champoux Ohrt on this point are, in my opinion, patently unreasonable. I adopt the reasons of the panel chairperson, Mr. Duquette, who concluded that he was unable, from the evidence on the record, to find that Léon Mugesera was a close associate of President Habyarimana, that he was a member of Akazu and of death squads, that he had participated in massacres, and that murders had been committed following his speech of November 22, 1992. See, in support of this statement, Mr. Duquette's remarks at pages 38, 99, 100, 101 and 107 of his reasons.
>
> [43] In my opinion, there is no evidence to justify the conclusions of Mr. Bourbonnais and Ms. Champoux Ohrt on this point. It suffices, in my opinion, to read closely the evidence as a whole and more particularly the testimony of Ms. Des Forges, Mr. Reyntjens and Mr. Gillet, in order to realize that the conclusions of Mr. Bourbonnais and Ms. Champoux Ohrt are unreasonable. In my opinion, there is no evidence to support their conclusions.

I concur in the opinion of Nadon J.

[117] In these circumstances it is clear that the ICI report, at least in its conclusions regarding Mr. Mugesera, is absolutely not reliable. Whatever may be the value, usefulness and credibility of this report for the international purposes of prevention and denunciation of crimes against humanity, the Appeal Division acted in a patently unreasonable way by relying on the findings of fact made by the International Commission of Inquiry regarding Mr. Mugesera and the latter's speech.

[118] In this connection I accept in substance the conclusions arrived at by the expert witnesses John Philpot, Violette Gendron and Marc Angenot called by Mr. Mugesera.

[119] Mr. Philpot said, for example, [TRANSLATION] "I have never seen anything so inquisitorial . . . a blow has been dealt to the principle of *ad hoc* commissions by this kind of report" (a.b. vol. 29, p. 11014). He added that he had never seen [TRANSLATION] "a private commission which arrived at such striking conclusions without questioning the persons involved" (a.b. vol. 29, p. 11019). He also noted the anti-governmental tendencies of the NGOs and their lack of neutrality (a.b. vol. 29, pp. 10898, 10899) and was concerned about the pro-FPR bias demonstrated by members of the ICI since publication of the report, namely Mr. Carbonare (a.b. vol. 29, p. 10899), Ms. Des Forges (a.b. vol. 29, p. 10999) and Mr. Schabas (a.b. vol. 29, pp. 11-95 à 11107, 11208 to 11210).

[120] For her part, Ms. Alarie-Gendron explained that the ICI was not reliable from the outset because of its choice of members, connections with the NGOs at whose request the ICI was created and its terms of reference and choice of interpreters (a.b. vol. 28, pp. 10712, 10713) and that the very short two hour-period spent by the ICI in territory occupied by the FPR, in the presence of soldiers, deprived the report of all credibility (a.b. vol. 28, p. 10747).

[121] Prof. Angenot, a specialist in the analysis of speeches, concluded as follows in his expert report:

> [TRANSLATION]
>
> > Ultimately, this radical and tendentious cutting up, which reduces the speech to a few isolated phrases, takes out the essence of what the speaker said, which was . . . to apply the laws and move forward to elections despite the uncertainty reigning in the country.

> This "analysis" has no methodological value, the cutting up is obviously designed to created a different text, a much more aggressive one than the speech when understood and read as a whole.
>
> [a.b. vol. 23, p. 8592]
>
> [Emphasis added.]

[122] These three pieces of testimony seem more useful than those of the two experts on methodology called by the Minister.

[123] Mr. Ndiaye, to whom I referred above, admitted that the investigative methods of the NGOs were not systematic because the purpose of the inquiries was publicity and the making of recommendations intended to initiate real judicial inquiries and make governments face up to their responsibilities (a.b. vol. 36, pp. 13859 to 13863). He added that the NGOs [TRANSLATION] "do not exist to render justice" (a.b. vol. 36, p. 13864) and that the guarantee of confidentiality given to witnesses [TRANSLATION] "is intended to guarantee the safety of the witnesses, not the truth of what they say" (a.b. vol. 36, p. 14179).

[124] Éric David explained that inquiry commissions are limited to finding facts and making recommendations, whereas courts of opinion made up of activists make value judgments which are critical in nature (a.b. vol. 34, pp. 13126 to 13143). He acknowledged that an inquiry commission could be transformed into a court of opinion (a.b. vol. 35, p. 13513; vol. 34, pp. 13126 to 13143). He said like Mr. Bertrand he was surprised that the Minister went to seek so many Belgian witnesses (a.b.

vol. 34, p. 13227) and admitted that if he had been a member himself he would have tried to contact Mr. Mugesera and his family before writing the report (a.b. vol. 34, pp. 13527, 13528).

[125] The ICI report's conclusions regarding Mr. Mugesera therefore completely lack credibility. This report should not have been taken into consideration. This error is conclusive. However, it is not the only error alleged by counsel for Mr. Mugesera. He argued that the Appeal Division, and after it the trial judge, made an error in law or a patently unreasonable error in their interpretation of Mr. Mugesera's speech. It is this second allegation of error that I will now consider.

## C. Mr. Mugesera's past before November 22, 1992

### (1) Mr. Mugesera's birth, family, education and university career

[126] Mr. Mugesera was born in Rwanda of Hutu parents in 1952. His father, who was polygamous, had also married three women from the Tutsi tribe (a.b. vol. 16, pp. 5621 to 5626).

[127] He married Gemma Uwamariya on October 7, 1978. The marriage was celebrated by a friend of Mr. Mugesera, Fr. Murava, a Tutsi. Monsignor Kagame, a Tutsi family friend, co-celebrated the marriage (a.b. vol. 16, pp. 5650-5651). Mr. Mugesera's wife was the child of a Hutu father and Tutsi mother (a.b. vol. 16, p. 5647). Five children were born of the marriage. One of the godmothers is a

Tutsi (a.b. vol. 16, p. 5660). Several Tutsi friends and relatives were invited to the confirmation of his children in summer 1992 (a.b. vol. 16, pp. 5662, 5663).

[128] Mr. Mugesera stated that during the 1959 revolution his parents gave shelter to Tutsi refugees (a.b. vol. 16, pp. 5630-5631), and during the 1990 war and during an attack in 1991, he himself sheltered Tutsis (a.b. vol. 16, pp. 5667, 5668). His children were looked after by a Tutsi family during a long stay he had to spend in hospital (a.b. vol. 16, p. 5665).

[129] Mr. Mugesera is the godfather of a Tutsi child (a.b. vol. 16, p. 5661) and during his career he has recruited Tutsi trainees and teachers (a.b. vol. 16, pp. 5692, 5697, 5698).

[130] Mr. Mugesera stated that he had always good relations with Tutsis (a.b. vol. 38, pp. 14911 to 14914).

[131] He obtained a B.A. from the University of Rwanda in June 1979. From 1979 to 1989 he was a professor at the Institut Pédagogique National (IPN) and the University of Rwanda. During that period, from 1982 to 1987, he obtained a scholarship offered by the Government of Quebec under the Canadian International Development Agency (CIDA) program and studied at Laval University in Québec, which awarded him a doctorate in philosophy. In 1988 he was a founding member and president of the Association d'Amitiés Rwando-Canadiennes (a.b. vol. 16, pp. 5672 to 5682).

[132] All the witnesses who have known him at some time in his life, in Rwanda or in Canada, before or after November 22, 1992, were unanimous in saying that never in their presence or to their knowledge had Mr. Mugesera made racist statements about Tutsis (Buies, a.b. vol. 12, p. 3678; Bernard, vol. 12, p. 3774; Langlois, vol. 12, p. 3822; Naymana, vol. 12, p. 3956; Jeanneret, vol. 13, p. 4279; Shimamungu, vol. 13, p. 4365). The witness Nsengiyumva even said he thought that Mr. Mugesera [TRANSLATION] "fraternized much more with Tutsis" (a.b. vol. 13, p. 4153). The Minister called no one to contradict this testimony.

[133] Additionally, even Mr. Gillet, expert witness for the Minister, admitted that Mr. Mugesera had nothing to do with the massacres that occurred before November 22, 1992 (a.b. vol 32, pp. 12088 *et seq.*, 12094).

### (2) Mr. Mugesera's bureaucratic and political career

[134] Mr. Mugesera did not get into active politics until January 1992. Up to then his career had been occupied with the university and the Rwandan civil service. According to custom in Rwanda, a student who had received a study grant had to spend five years of his life working for the government as a civil servant appointed by presidential decree. The position was chosen by the President without prior consultation with the incumbent (a.b. vol. 16, p. 5699). Accordingly, Mr. Mugesera was successively head of the political affairs branch in the MRND headquarters from June 1989 to November 1991 (a.b.

vol. 20, p. 7141), Secretary General in the Ministry of Information from March 18 to November 15, 1992 (a.b. vol. 20, p. 7143), and then counsellor for Political and Administrative Affairs in the Ministry of the Family and the Status of Women on November 15, 1992 (a.b. vol. 20, p. 7144).

[135] The civil service to which he belonged was quite separate from the political branch of the MRND, which was composed of the President and the National Congress. The executive body of the National Congress was the Central Committee, consisting of five commissions. The members of the Central Committee were appointed by the President directly and were not responsible to the civil service (a.b. vol. 16, pp. 5707, 5708).

[136] Mr. Mugesera never met with the President by himself (a.b. vol. 16, p. 5733). He was called to a meeting along with other persons in 1990 on two occasions, in his capacity as head of the Political Affairs Branch. Each time the discussion was about a multi-party system (a.b. vol. 16, pp. 5711, 5712, 5713, 5716). He then met him in early 1992 at a meeting of about ten people elected in elections held in Gisenyi (a.b. vol. 37, pp. 14534, 14535).

[137] During 1990 Mr. Mugesera took part in a number of missions or delegations abroad, including the delegation for research into Western experience with the structure, organization and operation of the political system (Switzerland, September 2-9, 1990), the mission to obtain information and conduct research about the North American viewpoint on the aggression against Rwanda by armed forces from

Uganda on October 1, 1990 (October 18-November 4, 1990, U.S. and Canada) and the delegation for research into the North American experience with the structure, organization and operation of the political system (November 5-25, 1990, Canada) (a.b. vol. 2, p. 222).

[138] As a result of differences with MRND members Mr. Mugesera was dismissed from his position in November 1991, then rescued in January 1992 by the new Ministry of Information, with which he had done his mission to the U.S. and Canada in fall 1990. He then, somewhat as a challenge and in the hope of bringing in new blood, defied the senior levels of the MRND and ran for election in the Gisenyi Prefecture, where he was a co-winner. He accepted the position of vice-president of the Prefecture, allowing his adversary to be president as he thought the latter was more capable of carrying out the duties since he was not a civil servant and lived in the area (a.b. vol. 16, pp. 5726, 5734, 5735, 5737, 5738). He was not paid for his duties as vice-president (a.b. vol. 37, p. 14532).

[139] Despite the statements in the ICI report, it is clear that there is nothing in the evidence in the record to suggest that Mr. Mugesera was an intimate of the President or an influential member in the government or the MRND. The testimony of the only two witnesses who were in the President's entourage, Charles Jeanneret, who as representative of the Swiss government in Rwanda was economic advisor to the presidency from 1981 to 1993 (a.b. vol. 13, p. 4197), and Violette Alarie-Gendron, who knew the President well through her cooperation work in Rwanda, left no doubt on this point. The testimony of several other people, including that of Ms. Des Forges, was to the same effect. I note here

that the testimony of Mr. Jeanneret, the person probably best able to assist the Court since he experienced the crisis on the spot in the position of a privileged observer, was entirely ignored by the Appeal Division. The Minister did

not even think it advisable to cross-examine Mr. Jeanneret (a.b. vol. 13, p. 4312).

### (3) Mr. Mugesera's past writings

[140] As well as texts of an academic nature, the record contains five documents written by Mr. Mugesera or which he helped to prepare.

#### – Report by mission to U.S. and Canada on November 9, 1990

[141] Mr. Mugesera took part in a mission to the U.S. and Canada from October 16 to November 4, 1990. There were three members of the delegation and it was headed by Mr. Nkundabagenzi, who became Minister of Information in 1992. According to the mission report (a.b. vol. 25, p. 9208), the purpose of the mission was to [TRANSLATION] “undo the network of lies woven by the enemies of our country”. Three major themes were discussed during the mission: the invasion, the refugee problem and the problem of adjusting the political system. The question of human rights was added to these points.

[142] The report dealt with the themes dear to Mr. Mugesera. The war was not a civil war, involving Rwandan refugees, but an attack from outside, in this case by Uganda. The refugee problem was being solved with the participation of the United Nations High Commission for Refugees. The political system was about to be adjusted, as a national joint commission had been set up to devise a national political charter that would set [TRANSLATION] "rules that would more substantially encourage respect for democracy and national unity" (*ibid.*, p. 9217). Rwanda was a model of respect for human rights before the October 1990 invasion and the measures taken after that invasion were justified by the state of war and the need to provide protection for citizens.

– **Undated document on the political situation in Rwanda at the time of the October 1990 war**

[143] In an undated document, probably written on November 14, 1990 and titled [TRANSLATION] "Rwandan political situation at time of attack against Rwanda by Ugandan armed forces" (a.b. vol. 1, p. 275; vol. 19, p. 7007), Mr. Mugesera, in his capacity as a professor at the National University of Rwanda, set out ideas to which he later returned. Thus, the aggression was carried out by the Ugandan Armed Forces: 70% of the attackers were pure Ugandans and 30% Ugandans of Rwandan culture, and he divided the latter into four groups: the population occupying Rwandan territory annexed to Uganda in 1912; a labour force exported from Rwanda by the colonial government; émigrés seeking a better life in Uganda; and refugees from the political-social revolution of

the 1960s, who received Ugandan nationality (a.b. vol. 19, pp. 7002-7003); where some of the aggressors were refugees, their participation in the aggression caused them to lose that status; the refugee problem was dealt with by a choice between three options they were given by the United Nations High Commission.

**– Pamphlet in February 1991: the truth about the war**

[144] In February 1991 he assisted with a political pamphlet setting out Rwanda's position on the October 1990 war (a.b. vol. 22, p. 8154). Entitled [TRANSLATION] “The whole truth about the October 1990 war in Rwanda”, this pamphlet repeated the view firmly held by Mr. Mugesera that the attackers were members of the Ugandan Army supported by the President of Uganda, Mr. Musevini; that under the Convention of the Organization for African Unity (OAU), Rwandan refugees who were members of that army ceased to be Rwandan refugees once they took up arms against Rwanda; the war was not a civil war but a war of aggression; the typical attacker was a [TRANSLATION] “maquisard who having no faith or law ignored human rights, children's rights and protection of the environment” (a.b. vol. 22, p. 8157); the purpose of the attack was to overthrow the democratic institutions resulting from the referendum held in Rwanda in 1961, when the population rejected the monarchy, to [TRANSLATION] “restore the dictatorship of extremists from the Tutsi minority based on genocide and extermination of the Hutu majority” and to [TRANSLATION] “create in the Bantu zone of the Great Lakes region (Rwanda, Burundi, Zaire, Tanzania, Uganda) an enormous Hima-Tutsi kingdom, for

a tribe which regarded itself as superior like the Aryan race, and the symbol of which was Hitler's swastika" (a.b. vol. 22, p. 8158). (This last passage is the only place I found in which Mr. Mugesera spoke of Tutsis and Hutus in terms of a minority and majority in a context of "genocide". He associated the genocide with the "extremists from the Tutsi minority", not with the Tutsi minority itself.)

[145] This pamphlet then set out the history of democracy in Rwanda since 1961 up to the establishment on September 24, 1990 of the national commission to develop multi-party government, and then explained [TRANSLATION] "the problem of Rwandan refugees" (a.b. vol. 22, p. 8163), which an independent committee of experts supervised by the United Nations High Commission for Refugees suggested in January 1991 should be solved in the following way: giving Rwandan refugees three options – voluntary repatriation, integration by naturalization into the host country and settlement under bilateral and regional agreements (a.b. vol. 22, p. 8165). As the Rwandan President Mr. Habyarimana accepted this solution on February 15, 1991 and stated that all refugees could go back to their country, the pamphlet then raised the question: [TRANSLATION] "How could a real refugee, whose problems have finally been solved, choose to die on the field of battle . . . how . . . could he insist on dying in combat?" (a.b. vol. 22, p. 8166). The pamphlet condemned this [TRANSLATION] "shameful war

– **with sinister designs:**
  - restoration of the monarchy;
  - genocide of the Hutu ethnic majority;
  - massacre of the political and administrative authorities;

- massacre of Tutsis who refused to collaborate with the aggressor;

– **by proscribed methods:**
  - enrolling minors;
  - maneuvers to divide the Rwandan people so as to provoke civil war;
  - destruction of the environment;
  - raping and kidnapping women and children and demanding ransom;
  - destruction of Rwanda's image abroad so as to rule out all assistance".

[a.b. vol. 22, p. 8166]

[146] The pamphlet ended with the setting out of short- and long-term objectives, including that of creating new purposes for Rwandan society so as to avoid the spectre of a disastrous war for future generations and preserve national unity while respecting differences (a.b. vol. 22, p. 8167).

### – Pamphlet in 1991: observance of human rights

[147] In April 1991 he assisted with another political pamphlet titled [TRANSLATION] "Observance of human rights during the aggression in Rwanda since October 1990 by forces originating in the Ugandan army" (a.b. vol. 22, p. 8145). This pamphlet seeks to clarify observance of human rights, economic and social rights and political rights in Rwanda to counteract charges orchestrated by the October 1990 aggressors. In particular, the pamphlet refers to the report published by the World Bank in 1989 which regarded Rwanda as a model of development and considered that it had achieved this [TRANSLATION] "without creating the injustices which have sometimes accompanied

development in other countries" (a.b. vol. 22, p. 8147). Dealing with political rights, the pamphlet mentioned the lack of harmony which had characterized relations between Tutsis and Hutus until 1961, and set apart this passage:

> [TRANSLATION]
>
> The two tribes will have taken a step toward national unity by really working together and not trying to deny this clear historical background. Tutsis and Hutus must make a concerted effort to change the outlook of people: together they must condemn maneuvers by those who would distort the history of their country and must acknowledge mistakes made on either side, so as to arrive at a new blueprint for society together.
>
> [a.b. vol. 22, p. 8148]

[148] The pamphlet then sought to cast some [TRANSLATION] "light on human rights violations by the aggressor" (a.b. vol. 22, p. 8149). The pamphlet identified the figures directing the aggression, indicated that the aggression was [TRANSLATION] "led chiefly by Ugandans of Rwandan culture from the Hima-Tutsi caste" (*ibid.*) and listed a number of acts of torture committed against the Rwandan civilian population. The pamphlet then noted the division existing among Tutsis between [TRANSLATION] "Tutsis who wish to live in peace, agreeing to work with their HUTU and TWA brothers, for the democratic and economic development of the country, and who with them deplore the savage aggression suffered by Rwanda" and "the descendants from diehard supporters of royalty, who were educated in the extremism of the former leading circles and only wished to perpetuate the monarchist aims of their ancestors" (a.b. vol. 22, p. 8152).

[149] The pamphlet ended with a call for [TRANSLATION] “a better future” for people in the region, who were entitled to peace, and for [TRANSLATION] “a posterity unquestionably obliged to live in perfect harmony with complementarity and solidarity so as to achieve mutual development” (a.b. vol. 22, p. 8153).

### – Document of September 3, 1992: Uganda, the aggressor

[150] On September 3, 1992, in his capacity as Secretary General of the Ministry of Information and at the request of the Prime Minister, Mr. Nsengiyaremye, Mr. Mugesera prepared a document entitled [TRANSLATION] “Uganda, aggressor against Rwanda since October 1, 1990” (a.b. vol. 19, p. 6999).

[151] This text explains why, under international law, [TRANSLATION] “Uganda has been an aggressor against Rwanda since October 1, 1990” (*ibid.*) and it states that [TRANSLATION] “there is no question that the conflict raging in northern and north-eastern Rwanda is not an internal conflict or a civil war” (*ibid.*, p. 7001). The document makes the argument that although some aggressors are Rwandan refugees, they have lost their refugee status by participating in the aggression. As he had already done, Mr. Mugesera divided Ugandans of Rwandan culture into four categories, and concluded that [TRANSLATION] “the aggressors against Rwanda are thus led by Ugandan citizens, some of

whom are Ugandan by origin, others by an accident of history, to whom must be added a small number of genuine refugees" (*ibid*., p. 7003).

[152] Mr. Mugesera went on to urge the Rwandan government, in particular, to [TRANSLATION] "cease negotiations with the FPR immediately and denounce all agreements it had with the FPR" (*ibid*., p. 7004), to hand a [TRANSLATION] "note of protest" to the Ugandan ambassador, to indict Uganda before the OAU and to initiate proceedings to bring Uganda before the United Nations Security Council (*ibid*., p. 7005). Before concluding, he went on to say: [TRANSLATION] "But for this war of aggression, the life and peaceful coexistence of various tribes in a multicultural society would have become the norm in Rwanda" (*ibid*., p. 7006).

### (4) Mr. Mugesera's previous speeches

[153] Mr. Mugesera stated that he made five or six speeches between the time he was elected to the vice-prefecture in January 1992 and November 22, 1992.

[154] In June 1992 he made a political speech in the Gisenyi Prefecture before a crowd of 6,000 to 10,000 people. We do not have the text of that speech (a.b. vol. 17, pp. 5945, 5946; a.b. vol. 2, p. 223). No evidence was entered in the record about the content of the speech or the effect it created, if any.

[155] In October 1992, Mr. Mugesera made a speech before 3,000 to 4,000 people in Bugayi, in the Gisenyi Prefecture (a.b. vol. 17, pp. 5938-5940; vol. 2, p. 224). This speech was described at the hearing as the four-horn speech. It was set out in the record (a.b. vol. 18, p. 6489). Mr. Mugesera told the Court that the subjects dealt with in the speech are those he had developed in the speeches the text of which the Court does not have.

[156] In this speech, Mr. Mugesera said he wanted to describe the [TRANSLATION] "weapons" he wished to give militants of the party so they would not give way to fear and panic, but first he urged them to reject [TRANSLATION] "the four horns of Satan", which are contempt, insolence, vanity and treachery. I adopt here the summary given by Mr. Duquette of the Appeal Division:

> [TRANSLATION]
>
> Under the heading of contempt, he attacked those who wanted to destroy people's ideas with alcohol, opposition parties who sought a national conference and who despised the army.
>
> Speaking of insolence, he criticized young persons who claimed to be teaching the principles of the 1959 revolution and insulted the President.
>
> The third horn, vanity, applied to an individual who claimed to find land for Rwandans and promoted free education.
>
> Under the heading of treachery, he severely attacked five people: a former Minister of Foreign Affairs, a former UN representative, a Minister who had obtained a matchbox factory from the President and who was not there when the President needed him, a former Parmehutu who wished to recruit sympathizers to shoot the people, a former head of the University and a former ambassador who was ungrateful to the President. All these persons were traitors.
>
> [a.b. vol. 2, pp. 279-280]

[157] This first part of the speech accordingly dealt with specific cases of persons or politicians who are of no interest for the purposes of this proceeding. However, I note Mr. Mugesera's tendency to use images that appeal to the imagination and carry overtones of violence: [TRANSLATION] “this man's frocks almost fell down, he was drenched in sweat”, “if he went
wrong, the Chinese would give him a karate chop that would bring him back to reason”, “she committed fraud, and when the Chinese realized it, they hit her with an overheated metal object, and her mouth was deformed in that way” (a.b. vol. 18, pp. 6492, 6493). I also note his frankness and boldness in vigorously attacking important members of the government by name, though they were Hutus.

[158] In the second part, Mr. Mugesera then came to the [TRANSLATION] “weapons” which “any militant of the movement should carry on him, wherever he is” (*ibid*., pp. 6495, 6596).

[159] The first weapon was elections ([TRANSLATION] “elections are democracy”), [TRANSLATION] “the song of the movement which we sing now, the important thing which is a weapon for a militant supporter of the movement, which is the feature of democracy, is nothing more or less than elections. They told me to make you get this first weapon. And you will sing it everywhere you go in your townships, you will sing it in the prefectures where you go home and say 'what the movement wants is elections'” (*ibid*., p. 6496).

[160] The second weapon is courage: [TRANSLATION] “Tell our men they must be armed with something known as courage. If anyone comes and stands in front of you, if he speaks to you, you speak back to him . . . Each person who comes to tell such a lie, you meet him with an equal denial . . . If anyone comes and slaps you, do not leave him and turn the other cheek: you also, get together and say 'we are not going to be beaten' . . . They told me to ask you to be brave, there is no one who will provoke you and you will let [go]” (*ibid*., p. 6496).

[161] The third weapon is love: [TRANSLATION] “The movement is a movement for peace. The movement is a movement for unity, and its purpose is to achieve progress. Imana [i.e. God] has created us with a heart for loving, he has not given us a heart to hate. Imana has given us a tongue so we can say good things about love, he has not given us a tongue to insult people with . . . Wherever they [militants] are, people who want to hate you, avoid them, let them go about their business, but do not hate them at all” (*ibid*., p. 6497).

[162] The speech concluded with this appeal: [TRANSLATION] “So, militant supporters of our movement, the weapons I have spoken of and which you must carry with you are those: the first weapon is elections; the second weapon is courage; the third weapon is love” (*ibid*., p. 6497).

### (5) Conclusion: Mr. Mugesera's outlook

[163] The view of events held by Mr. Mugesera is the following. Until Rwanda was invaded on October 1, 1990 by military forces from Uganda, Rwanda was a model country on the African continent in terms of economic development, social peace and observance of human rights. Hutus and Tutsis had learned to live together in harmony. The war started in October 1990 was not a civil war, but a war of aggression begun by the FPR and the Ugandan armed forces. Seventy per cent of the aggressors were pure Ugandans and 30 per cent Ugandans of Rwandan culture, the latter being divided into four groups: the population occupying Rwandan territory annexed to Uganda in 1912; a labour force exported from Rwanda by the colonial government; refugees seeking a better life in Uganda; and refugees from the politico-social revolution of the 1960s, who were given Ugandan nationality.

[164] Accordingly, Rwanda is in a state of war and therefore under the rules of international law may legitimately defend itself. Those of the aggressors who are Rwandan refugees have lost that status in international law by participating in armed aggression against their country of origin. The aggressors have engaged in acts of terror in Rwandan territory which involved Hutus and Tutsis equally and required some reaction. The targets or victims of the reaction were the aggressors and their accomplices in Rwanda, whether Hutus or Tutsis.

[165] In political matters, it is unacceptable for the Rwandan government to negotiate with the FPR and no agreement concluded with the latter could ever be valid. The only solution is to denounce

Uganda internationally and take it before the OAU and the United Nations Security Council. As well, within the country the crisis will be solved by elections and no other means, so the people can choose a government that will represent it and will withstand the aggressor and establish a presence internationally.

[166] Mr. Mugesera did not deny that many massacres had taken place since October 1990. He deplored them, but in his opinion they were not for ethnic reasons: the persons targeted were attacked because they were part of a group of aggressors or accomplices of the latter, not because most of them were Tutsis. In his opinion, such persons came primarily from the extremist Tutsi faction, wishing to revive the era of the monarchy in which it was Tutsis, not Hutus, who held positions of power. In short, it was the chances of war which caused most of the enemies struck down to be Tutsi extremists.

## D. Explanation, analysis and legal nature of speech of November 22, 1992

[167] In order to assess the speech in legal terms, one must first explain its contents, especially as it is a speech made in another language and in a very special political and cultural context. Secondly, one has to analyse the speech to determine the message the speaker intended to communicate to his audience. Thirdly, the nature of that message must be determined for purposes of the possible application of Canadian criminal law or international criminal law.

[168] Certain cautions should be given at the outset. I take two from Prof. Marc Angenot, who worded them as follows in his expert report:

> [TRANSLATION]
>
> I begin with a *preliminary observation*: the material on which I am working here as an expert is a translation. This is not an ideal situation for analysis, especially as without commenting on its quality, it contains (and this is unavoidable), in a general sense *grosso modo* identical to the others which I have been given, differences in words and passages which are of real significance in these proceedings. The problem that exists in working, not in the original language but on a translation – especially a translation of a partisan political text from a political culture different from one's own – must be clear enough to the non-specialist that there is no need for me to discuss the matter further.
>
> A further preliminary observation is that the speech to be analysed, like any reported statement made in a situation which is completely unfamiliar to us, contains difficulties of comprehension which are due not to its being translated but to the fact that it is full of references to empirical realities, persons and institutions unknown to the ordinary Canadian reader, and underlying it are inferences, intra-cultural value judgments and assumptions which, though undoubtedly familiar to the public addressed by Mr. L.M. in Rwanda in 1992, must be reconstituted in their entirety to make the matter clear to the legal system. Without such clarifications and reconstitution (which involve a margin of doubt), Mr. Mugesera's text would remain completely unclear.
>
> With this in mind, and in these circumstances, I have felt it necessary, in answering question 2 and to make the matter clear to the Court, to undertake a systematic paraphrase designed to clarify the statements made paragraph by paragraph – and this paraphrase is followed by a glossary in which I define, objectively and without comment, all the anthroponyms, toponyms, abbreviations, words left in Kinyarwanda and other terms which may be assumed to be difficult for a Canadian reader of the translation to understand.
>
> [a.b. vol. 23, pp. 8589-8590]

[169] I would add a third caution. The text of the speech is not a statute which should be scrutinized minutely with the requirements and assumptions of strict logic and consistency. This is especially true as the speech was improvised and the translation has been the subject of much discussion, so that we cannot be sure it accurately conveys the wording or meaning, or the image, the speaker had in mind. It

is true that at some point there had to be agreement on a given text, but that does not mean this text fully conveys the message communicated by the speaker and received by his audience and that it cannot be further clarified to assist in understanding its meaning.

[170] The translation accepted is very literal, and if I may say so not very political. This explains why reading the speech in French is so laborious. Thus, for example, some of the words used by Mr. Kamanzi reflect images of death and violence ([TRANSLATION] “kicks”, “being in the throes of death”, “death”, “exterminate”) which have little meaning in their immediate context or in the context of a political speech in general. We do not say “exterminate” in describing the result of a conviction; political parties do not give each other “kicks”; and so on.

[171] Perhaps the laborious and in many respects unrealistic quality of the translation can be explained by the fact that Mr. Kamanzi left Rwanda as a refugee in 1973 to settle in Burundi, he has a great many fields of interest but they do not include politics – he reads no political newspapers and, for example, did not know that the Falashas had been expatriated to Israel by air – and he only sporadically followed what was happening in Rwanda, as he had neither telephone nor television (a.b. vol. 6, p. 1244; vol. 8, p. 1890).

[172] I would add a final caution. Although Mr. Kamanzi's credibility as a translator was not questioned and he said he was unaware of what his son Jean is doing in Canada (a.b. vol. 5, p. 1191),

the fact remains that the latter is president of the [TRANSLATION] “Association of Canadians of Rwandan origin”, and in that capacity attacked Mr. Mugesera in February 1993. At that time he sent a copy of Mr. Mugesera's speech in Kinyarwanda – we do not know what version of the speech this copy was – to an official of the Canadian Department of Employment and Immigration. He depicted Mr. Mugesera as [TRANSLATION] “one of the great leaders of President-General Habyarimana's party, the MRND” and summed up the speech as follows:

> [TRANSLATION]
>
> This speech is in Kinyarwanda but you can have it translated if necessary. It incites the people of Kabaya to kill all Tutsi Rwandans and throw them in the Nyabarongo River so they can go back to their country of origin, Ethiopia!
>
> [a.b. vol. 21, p. 7681]

It is somewhat ironic that the Minister eventually accepted the suggestion by Mr. Kamanzi's son that the speech be translated and asked Mr. Kamanzi senior to do the job.

[173] Before proceeding any further, I have to say that of the two expert witnesses heard by the Appeal Division on the specific question of analysing the speech, Prof. Angenot (Mr. Mugesera's witness) and Pastor Overdulve (the Minister's witness), Prof. Angenot unquestionably stands out. He was the only one whose specialty was the analysis of speeches. He is the director of the Centre interuniversitaire d'analyses des discours et de sociocritique at McGill University. He said that analysis of speeches was a relatively new discipline (thirty or forty years, a.b. vol. 28, p. 10368) which already has a bibliography of some one thousand titles, and which he defined as follows:

[TRANSLATION]

> Analysis of the speech simply assumes this question which distinguishes it fundamentally from linguistics. The object is not to examine vocabulary or study sentences, but to look at the social background to the statements and take words, the two most frequent words, the most obvious words, and in some cases examine the argument or narration . . .
>
> What I have tried to objectify, to clarify, is the quasi-logical forms of argument, narration, narration serving the argument . . .
>
> [*ibid*., p. 10370]
>
> The purpose of analysing the speech is not to look at the psychology of the hearers or to speculate on what went on in a person's mind. An analyst of a speech cannot say that a person is a liar. He can unquestionably say: this is the type of argument proposed; he cannot consider whether, for example, this message is genuine . . .
>
> [*ibid*., p. 10373]

[174] In rebuttal, if I may so put it, to Prof. Angenot's expert report submitted by Mr. Bertrand, counsel for the Minister filed that by Cornelis Marinus Overdulve, a Protestant pastor who has lived in Rwanda for 23 years. Mr. Overdulve testified with such sincerity and such naïveté that ultimately his testimony provided little support for the Minister's arguments, and instead supported those of Mr. Mugesera. It was apparent from the outset that he had no expertise in analysis of speeches. He frankly admitted that he was not testifying as a linguist, historian or translator, but on the basis of his [TRANSLATION] “personal commitment to Rwanda” in a [TRANSLATION] “context of human commitment” (a.b. vol. 32, p. 12291). His only degree is in theology and his argument concerned non-verbal communication (*ibid*., p. 12306).

[175] The Court learned from his cross-examination that he could not set aside his own faith in examining Mr. Mugesera's speech (*ibid*., p. 12406), that he knew very little about the development of a

multi-party system in Rwanda or the Brussels agreements (a.b. vol. 33, p. 12518), that he was not aware of the speech made by the President on November 15, 1992 or of other speeches by Mr. Mugesera (*ibid*., p. 12531), that he had never attended a political meeting (*ibid*., p. 12593), that he only knew Mr. Mugesera's name in connection with [TRANSLATION] “the passage by the river”, which has become a fashionable expression since the speech was made (*ibid*., p. 12630), that Mr. Mugesera's speech did not attract his attention when it was made and he knew nothing about the circumstances of the speech (*ibid*., pp. 12637, 12667), that another Rwandan might have a different interpretation of the speech (*ibid*., p. 12683), that a speech might be interpreted differently depending on whether it was made during peacetime or wartime (*ibid*., pp. 12700, 12853), that he did not know the speech was improvised (*ibid*., p. 12756), that if the facts the speaker mentioned were correct, they operated in his favour (*ibid*., p. 12761), that in his opinion the facts related by Mr. Mugesera were correct (*ibid*., p. 1274), and that there were about forty facts in the speech (*ibid*., p. 12783).

[176] He admitted he did not think about self-defence when analysing the speech and, in any case, in his view self-defence excluded any possibility of murder (*ibid*., pp. 12769, 12770), that [TRANSLATION] “everyone understands in his own way, in accordance with his conscience” (*ibid*., p. 12813), that he made up the expression [TRANSLATION] “blacklist” in the text of the speech instead of “list”, recalling the Nazi occupation (*ibid*., p. 12827), that he replaced the words “defend oneself” with the words “fight” in the text (*ibid*., p. 12829), that he had never heard, read or heard

mention made of a speech like Mr. Mugesera's speech (*ibid.*, pp. 12853 *et seq.)*, that he could not say the speech had an impact (*ibid*., p. 12866), that he could not rule out having made an error (*ibid.*, p. 12870) and that [TRANSLATION] “it may be I would not find it [the speech] dangerous at all” (*ibid*., p. 12860).

[177] He further admitted that in reading the speech he could not avoid taking his personal principles (*ibid*., p. 12851) or the 1994 genocide (*ibid*., p. 12874) into account.

[178] He also mentioned this Rwandan proverb: [TRANSLATION] “When the word climbs the hill, we cannot get it down again” (*ibid*., p. 12813).

[179] Understandably, counsel for the Minister did not think it advisable to re-examine Mr. Overdulve.

[180] In the circumstances, it was patently unreasonable for the Appeal Division not to accept Prof. Angenot's testimony. It is true that the latter only had the background information on Rwandan political life which, in accordance with his instructions, he gleaned from the media, mainly in North America, and the French text *L'État du monde*, but I am fully satisfied from reading his report and his testimony that in so doing he learned the essence of what he needed to understand the speech and its context. Moreover, there are few contradictions that became apparent in testimony explaining the

speech and few parts of the speech which really created any dispute. In all justice to Mr. Mugesera and the members of his family, I must re-examine the speech at issue based on the expert opinion which it was patently unreasonable for the Appeal Division not to consider.

### (1) Explanation

[181] In order to understand what Mr. Mugesera said in his speech, I can do no better here than to adopt the [TRANSLATION] "explanatory paraphrase" given of it by Prof. Angenot in his expert report (a.b. vol. 23, pp. 8592 to 8601). I have added alongside Prof. Angenot's text the paragraph numbers in Mr. Mugesera's speech to which he refers and which I set out in para. 17 of these reasons.

[TRANSLATION]

> Analysis and explanatory paraphrase of translation of speech made by Léon Mugesera at a meeting of the MRND in Kabaya, Rwanda in November 22, 1992.
>
> (Page 1)
>
> (O) Greeting formulas and slogans: the speaker greeted a crowd of militants from his party, the MRND [which is a member of the coalition in power in Kigali in the form of a "caretaker government" in 1992].
>
> [para. 1] (½) He announced the plan of his speech, which he said would be in four parts.
>
> [para. 2] 1. Do not trust the MDR [another, and the most influential, member of the coalition making up the caretaker government and] political adversary of the MRND, the party of the speaker and of the crowd he was addressing;
> 2. we must not let ourselves be invaded – a verb which in the general context of the speech carries two implications: (a) not allowing themselves to be invaded by persons infiltrating from Uganda; (b) and from the standpoint of MRND, supporters not

allowing themselves to be threatened by aggressive intimidations by supporters of the other parties;
3. he will show how they should protect themselves and react;
4. ?? – This fourth point, although mentioned, was not specified: it was omitted.

[para. 3] (3) Do not trust other parties, including the FPR [which on 3/6/92 concluded an alliance with the MDR, the PL and the PSD, but not the MRND, in Brussels]. They attack the President (the MRND party to which the speaker belonged had nominated the President as its candidate in elections which were to have taken place in 1993). [One of the aims emerging from the speech was to put pressure on the President to call general elections, which was his constitutional prerogative. This aim was the gist of the peroration of the speech. See below.]

[para. 4] (4) Denounced one Twagiramungu, who he said was a profiteer and parasite, the leader of the opposing party, the MDR, and a person who the speaker said had just lost face in a debate broadcast by radio. MDR and PSD people were described as accomplices of the “Inyenzis”, that is, FPR maquisards [who had concluded the Brussels agreement of 3/06/92 with this movement, identified with the infiltrators from Uganda].

(P. 2)

[para. 5] (2) Denounced one Murego, also an influential member of the MDR, who to win over militants to his party had just appealed to the Hutu tribe and been reprimanded for this gaffe by the leading figures in his party [since this party, previously known as “Parmehutu”, was supposed to have rejected any ethnic reference and recently concluded an alliance with the FPR, most of whom were Ugandan Tutsis].

[para. 6] (3) The speaker attacked the present Prime Minister, again from the MDR, made a pun on his name and indicated that the said Prime Minister did not allow citizens, identified as “Bahutus”, to defend themselves against infiltrations by “Batutsis” who were laying mines in the country – information indicated as having just been reported on the radio. These lines are thus to be read in connection with a reported speech.

The Prime Minister's attitude was contrasted with that of the President. In general, the argument made to the crowd was framed as follows: our adversaries commit mistake after mistake, while the President (who came from the speaker's party) alone distinguished himself. This makes them nervous.

[paras. 7 & 8] (5) Summed up his remarks: the MDR is dangerous, it is thrashing about in its death throes.

[para. 9] (6) Moving on to point 2, as indicated at the beginning: you must not let yourselves be invaded – then followed two ideas or specific instances: as Rwandans, by FPR aggressors from Uganda; as members of the MRND, by attacks and devious intimidations by your political opponents.

Symptom of such attacks which militants do not sufficiently resist: taking down of party flags in Gitarama at the prefecture which the speaker had just passed.

(Page 3)

(1) Our movement is a peace movement, the proverb [TRANSLATION] "Whoever wants peace . . ." is applied as a parody to political struggles between coalition parties: if you resist attacks, you will not let yourselves be weakened or intimidated.[4]

_____

[4] Mr. Mugesera indicated he thought the translation of the proverb incorrect: relying on references in the Rwandan French dictionary of the INRS, he translated [TRANSLATION] "whoever wants peace is always on his guard not to be taken by surprise by war". The translator had shifted the meaning of the Rwandan proverb, thinking of the Latin proverb *Si vis pacem para bellum*, and confusing the two, which is quite possible.

[para. 10] (2) Using a proverb which essentially says that a hyena attacks, but is furious when you fight back (a proverb that can be found in the collection of Rwandan proverbs: see *Proverbes du Rwanda* by Pierre Crepeau and Simon Bizimana, Butare, INRS, 1979, p. 307), the same theme of vigilance and prevention of aggression continued to be developed: the speaker took a second example of MDR insolence and the inadequate reply by MRND militants: the MDR Minister of Education had insulted the President on the radio and there was no reaction!

(4)

(1) These charges were followed by examples of "patronage" and political aggression against MNRD supporters: the said Minister illegally dismissed school inspectors because they belonged to the MRND.

[para. 11] (2) The speaker democratically suggested that his supporters react by filing petitions. He suggested [ironically] that if the Minister appointed new inspectors these should go and work in her electoral fiefs.

[para. 12] (3) Conclusion of this part: if the Minister refuses to listen to us and observe the law, we will keep our inspectors in place!

(Page 5)

[para. 13] (1) Do not give the prestigious and epic name of “determined fighters” (Inkotanyi, *Dict*. II, 274) to those who are invading the country, they are only “maquisards” (this is a recognized meaning; see reference in appendix to *Dictionnaire rwandais français de l'INRS* [Kigali], 1985, II, loc. Inyeenzi, meaning 3 – for this meaning, a lexiconized meaning, derived from the name of the kind of cockroach that disappears into a crack on the wall when the light is turned on).

The passage shows that the people who “should not be allowed to invade” were presented and known by the public as coming from outside the country ([TRANSLATION] “are on the way to attack us”). (This is confirmed by paragraph 2 on page 5, line 4: “at the border where they arrive”.) The fact that the speaker and his audience regarded these persons as aggressors from abroad is a point of great importance in understanding the speech.

[para. 14] (2) The speaker denounced Prime Minister Nsengiyaremye, whom he charged with demoralizing and demobilizing the armed forces, while the country was being attacked from outside: he said his attitude came within the Rwandan Penal Code, which provided for capital punishment. He should be convicted and executed!

The Prime Minister's crime was all the more serious as his speech was taken literally by several groups of soldiers, who left the front and pillaged, sacked, three towns in the province, including Gisenyi [chief town in the speaker's native prefecture]. In the context of the speech, these events were known to the Kabaya public, who came under the Gisenyi prefecture. The MDR leader should also be convicted of impairing the integrity of the territory, the speaker went on, as he had said he was prepared to give up a “prefecture” (that is, a province or department) to the FPR invaders.

(Page 6)

(1) End of preceding argument: PM deserved death penalty. [TRANSLATION] “ any person who . . . shall be liable” is a quotation [approximate but essentially correct] from the Penal Code in effect dealing with impairing the integrity of the territory.

[paras. 15, 16 & 17] (2) Young people are going to join the FPR army going through Burundi: these are things which are generally being talked about and which the speaker knew as he had received a report from three towns in the region bordering Burundi.

(Page 6)

(2) The speaker was amazed that persons joining the invaders and those transporting or convoying them, persons who helped them, were not arrested despite the code, which the speaker paraphrased again.

(3-4) The speaker repeated the accusations he had heard in the border towns. People there wanted the parents of children who joined the FPR to be arrested and [TRANSLATION] "exterminated". However, the context before and after paragraph 4 indicated that, for the speaker at least, the law should be applied and a public judgment obtained against them. If the law refused to do its duty, however, he commented, we would be entitled to act in self-defence.

(Page 7)

[para. 18] (1) Another example on the theme of aggressions by our coalition opponents and the inadequacy of "our" reactions in the MNRD: the FPR maquisards killed an MRND militant in a café with the complicity of MDR people. The MDR is in league with the maquisards who want to "exterminate" us. That is their aim.

[para. 19] (2) We are not going to allow ourselves to be massacred: we must defend ourselves.

[para. 20] (3) Another example of aggression by other parties: members of the PDC this time beat MRND militants even when they were in a church.

(Page 8)

(1) Let these FPR supporters and their allies go and join the enemy ranks rather than remaining among us. This was also the theme of paragraph 1 on page 10 and paragraph 2 *in fine* on page 11.

[para. 21] On the discussions in Arusha, Tanzania: some delegates did not really represent Rwanda. These were members of the MDR, which signed an alliance with the FPR in Brussels, and it is not surprising that they agreed with them.

[paras. 21 (3) The speaker went back to the problem of the laying off of the

and 22] school inspectors: let us sign a petition to protest these abuses and let us work together!

(Page 9)

[para. 24] (1) We must not hesitate to use public money for party propaganda, as our opponents are doing it as well. They are driving people who are not in the MDR out of their jobs, so let MRND Ministers do the same thing and take our people into their Ministries!

If our Ministers only made this threat known, the others would stop to think and would no longer perpetrate these abuses.

(2) Unite! Let people who have money and who have been supported by the MRND contribute to the war effort. We must watch people who infiltrate into the region, and if you discover any in cells (administrative term: subdivision of *sector*, which is a subdivision of *township*) they must not get out!

The context suggests interpretation as follows: militants must question a person suspected of belonging to the armed subversion, and if they find he is an “infiltrator”, take him to the authorities, but if he reacts by shooting, they must get rid of him.

(Page 10)

[para. 25] (1) The speaker recounted an anecdote, of a meeting which made him angry: he met an alleged PL member (the context indicated that he unmasked him as an “infiltrator” and supporter of the invaders from Uganda), and in this verbal duel he finally told him this, so he could know he had been unmasked: in 1959 [following the UN referendum which, at the end of the Belgium occupation, set up a republic, abolished the Mwamis' monarchy and said “no” to the then king, Kigeli V, a referendum which resulted in an exodus of diehard monarchists (Hutus as well as Tutsis) and part of the Tutsi “aristocracy”; however, it should be noted in this context that Queen Rosalie and certain princes of the former royal family had remained in the country], we [=Rwandans] allowed you [=persons who chose exile] to leave the country [= “get out”]. It should be noted this was a clear reference to the distant past, as indicated by the syntagma: [TRANSLATION] “I was still a child”. The speaker contrasted the case of persons who left the country with those who stayed in independent Rwanda. The passage is allusive. The speaker said he was attacked by the alleged PL member, who threatened to chase him out. The speaker claimed that he promised he could chase him from the country as well, and [TRANSLATION] “send him down the river”. “It was a mistake”, he said, to let you the leave the country then: but we can now send you back home, to Ethiopia, by way of the Nyabarongo River,

which empties into Lake Victoria, bordered by Uganda, the country from which the attackers are coming.

This passage does not literally or expressly contain any identification of Tutsis or of any particular tribe, any threat of extermination or generalization beyond the altercation with an individual opponent. Undoubtedly the reference to [TRANSLATION] "sending you home by way of the river" might be understood in a very threatening sense, but that meaning is neither clear nor probable for three converging reasons taken from the text itself:

1. the express comparison excludes this possibility in the context: it goes without saying that the Falashas from Abyssinia, to whose fate the Tutsis are compared, were not killed, as is well known, but on the contrary left for Israel safe and sound by an airlift organized by that country;
2. as well, in Africa immigration goes by the river; [in the context, it should be noted that the Nyabarongo is one of the rivers in Rwanda, made up of the Mwóongo and the Mbirúrume, it takes the name of Akagera at the border with Burundi, near Lake Rugwero (INRS *Dict*., II, 431). The Akagera empties into Lake Victoria, the riparian states of which are Uganda, Kenya and Tanzania, and the Nile issues from it; Uganda is the country, according to *L'État du monde* cited above, from which elements of the Ugandan army attacked Rwanda in 1990];
3. finally, the speaker many times earlier in the speech recommended inviting the infiltrators and their collaborators *to go and join the enemy camp* (Kamanzi, p. 7, para. 2; p. 8, para. 1; p. 11, para. 2 *in fine* and p. 12), as he suggested that political opponents go to the opposing fief (Kamanzi, page 7, para. 1; for illegally appointed inspectors, p. 4, para. 2): this passage can thus be regarded as continuing that theme.

The passage – from the functional standpoint in the argumentative construction of the whole – is part of a series of examples of aggression suffered by Rwandans and/or members of the MRND and/or the speaker: armed aggression from Uganda, insults to the President, abuse of power by Ministers from opposing political parties, MRND militant beaten, MRND refugees beaten inside a church, and so on. This argumentative function (leading to the conclusion that: we are not victims, let us not allow it, let us defend ourselves) is quite clear. These recurring examples are part of the entire structure of the speech.

(Page 10)

[para. 26] (2) Burundians are supposed to have said that Rwanda attacked Burundi: the speaker suspected them of wanting to open a second

front in the south of the country; he said he had checked on this in a border township despite risks to his safety from the “infiltrators”. Some persons (that is, members of the MDR “youth”) had driven out the MRND mayor by force from the town in question (this was given as additional proof of violence and abuse by the MDR party and the failure of the authorities to take action).

The soldiers [who are there to guard the border] are disciplined enough not to intervene in this rumpus. They should understand that the MDR is allied with the FPR (an accusation already made at various points in the speech) and is collaborating with the “Inyenzis”. The JDRs took their insolence so far as to lock up police officers, who (their numbers being fewer, it is implied) suffered this humiliation (an event reported in the local press). The speaker mentioned with approval the comments of a citizen who was calling for elections/or reinstatement of the former mayor.

(Page 10)

[para. 27] (3) The speaker expanded this claim and called for general elections (to clarify: elections which were within the mandate of the caretaker government, but no date had been set and the President had to be pressured into calling them].

He considered that the insecurity regularly mentioned – but which was hard to understand in view of the present meeting, he told the crowd – was only a pretext for delaying elections. Public life continued to go on despite the insecurity. The parties claiming that elections should be postponed had still held recent internal elections, which showed their groundless argument about lack of security, that was preventing any normal civic life, was at variance with their actions.

(Page 11)

[para. 28] (2) The parties who do not want elections are now using as a pretext the fact that there are refugees or displaced persons in the north (according to the international press in late 1992, there were 350,000) at Byumba (which is a prefecture in the north of the country): but perhaps these refugees also want elections! In any case, the speaker said, that is what they told me. All the statements that follow are presented as reported statements. According to the said refugees, the Ministry of Labour (which had responsibility for refugees) was in the hands of a PL member, allied with the FPR, and so as such described by the speaker as “Inyenzis”. The displaced persons questioned by the speaker were incensed by the fact that it was this Minister and his allies who were responsible

for feeding the refugees. It was hardly surprising that they sold the food instead of distributing it! The refugees also were demanding elections! [TRANSLATION] “The whole country wants elections”, the speaker said.

We must therefore call for elections. We must protect ourselves against aggression, both external and internal. The formula that follows is an aphorism and amounts to saying that if you do not defend yourself, it is you who will suffer. The speaker returned to the idea discussed already (page 7, paragraph 2) that in order to clarify the situation on the spot “Inyenzi” supporters should go back to their front and not remain among us, carrying weapons among unarmed people. This statement (that FPR supporters should not remain among us) also in my opinion corresponds to and gives meaning to paragraph 1 on page 10. Let the FPR supporters and allies go away, let them no longer fly their flags since they took ours down (see on this point page 3, paragraph 1).

[para. 29] (12, paragraph 2) The speaker asked everyone to join with him in self-defence. Our school inspectors (driven out by the Minister of Education, finally named at this point in the speech, Uwilingiyimana Agathe) will not budge from their posts and the replacements appointed by the Minister will simply have to go and teach her own children (read: [TRANSLATION] “if that amuses them”, that is, in a sarcastic way)!

The speaker ended by again calling for elections. The speech ended where the speaker began: they should reject [TRANSLATION] “contempt” (in the context contempt consisted of allowing themselves to be intimidated by the other parties, and especially the named opponent, although it was necessary to share the coalition government with it, the MDR, and incidentally citizens should not allow themselves to be corrupted by parties trying to buy their opinions).

[182] It seems to me that this paraphrase reflects the gist of what Mr. Mugesera said. However, it does not sufficiently indicate the violence of some of the images used by Mr. Mugesera, violence which I attribute to the speaker's own style. In reviewing the four-horn speech in para. 157, we have seen that Mr. Mugesera did not mince words. He tended to dramatize situations, to give exaggerated importance to anecdotes and to choose extreme language that appeals to the imagination. It also has to be said that

the background was not a completely peaceful one: the enemy was at the door, acts of brutality had been committed, in short violence was in the air.

[183] Prof. Angenot's paraphrase thus made gentler reading than the speech and I would have preferred that the brutality of certain passages be made clearer. Having said that, the explanation of the speech was coherent, plausible and well grounded in reality. The famous "river passage" (para. 25 of the speech), in particular, was the subject of a lengthy comment which seems to me to give a valid interpretation to the paragraph. It is clear in retrospect that the reference in November 1992 to the Nyabarongo River was not a particularly happy choice of words, as the river was associated with massacres that occurred in 1959 and would become in popular imagery one of the symbols of the 1994 genocide. However, the fact remains that this short anecdote (para. 25 only contains a few lines), which stood on its own in the speech, is about a story which had a happy ending, the return of the Falachas to Israel after centuries of exile. It seems to the Court rather strange that Mr. Mugesera took the trouble to recount an old story which ended on a positive, hopeful note if his intention was to invite his audience, in a subliminal way as it were, to give a tragic ending to the story. Instead it would seem, more simply, that Mr. Mugesera wanted to put political enemies on notice that if they did not leave the country by themselves Rwandans would certainly finds the means of sending them home.

### (2) Analysis

[184] Prof. Angenot described the rules applicable to analysing a speech as follows.

[185] The analyst places himself in the position of a reasonable listener who, hearing the speech, assumes that the speaker exhibits a certain coherence (a.b. vol. 28, p. 10373). If the speech is a political one and is also improvised, the analysis will deal mainly with the degree of recurrence and repetition. In an electoral campaign, even the clearest repeated statements tend not to register: the speaker [TRANSLATION] "knows he must make a single point in a speech and hit the nail as much as possible, as his audience listening to an oral speech needs to retain only the major points, [for it] is unable to halt the progress of the speech and concentrate on fine points". (*ibid*., p. 10375). What the analyst will try to extrapolate at the outset [TRANSLATION] "is the overriding aim around which the speech is constructed", and this is particularly true of an oral speech where [TRANSLATION] "incidental discussion and digression, if they have any meaning, only have it through a framework of reasoning which is generally made extremely clear" (*ibid*., p. 10376). A political speech generally leads to a conclusion or a group of conclusions of a practical nature (*ibid*., p. 10377).

[186] At the outset an analyst of speeches avoids cutting up a text or taking out specific phrases. His basic idea is that speeches [TRANSLATION] "are not juxtaposed objects, but a single composite object, and that it is this whole which has to be analysed, not a kind of juxtaposition of parts" (*ibid*., p. 10377). Prof. Angenot then cited this sentence, attributed to Fouché, Napoleon's Minister of Police: [TRANSLATION] "Give me three lines from anyone and I will hang him".

[187] In a political speech, especially if it is oral, the speaker does not use language which is [TRANSLATION] “covert and very, very difficult to extrapolate, known only to the 'happy few' . . . If you want to have – if you want to get a message across, it cannot be done in a completely hermetic way” (*ibid*., p. 10379).

[188] Prof. Angenot is also an expert in genocidal speeches. He has published two books on the history of anti-Semitic propaganda in French (a.b. vol. 28, p. 10534). He came to the conclusion that in this type of speech [TRANSLATION] “the object of hatred is not only identified, but is generally identified by a very rich vocabulary with the key word 'Jew' and a series of slang derivatives” (*ibid*., p. 10535).

[189] In the case at bar, the key word would be “Tutsi”, which is only used once in the speech. The word “Hutu” or its plural “Bahutu” appears twice, and what struck Prof. Angenot [TRANSLATION] “was that the only time the word 'Hutu' appeared in an ethnic context it was used by the speaker as a reproach to one of his opponents” (a.b. vol. 28, p. 10462). Additionally, I note that the Prime Minister and Minister of Justice whom Mr. Mugesera suggested be taken to court were both Hutus (a.b. vol. 13, pp. 4271, 4275).

[190] Prof. Angenot's testimony confirms in all respects that given before the adjudicator by Mr. Shimamumgu. The latter testified as a translator – he offered a translation of the speech which

ultimately was not accepted – and as a specialist in analysis of speeches. This part of his testimony was overlooked by the adjudicator, the Appeal Division and the trial judge once his translation was not accepted, but it seems extremely important to this Court and it was patently unreasonable to ignore it.

[191] Mr. Shimamungu is a specialist in [TRANSLATION] "language technique science" (a.b. vol. 13, p. 4368), which led him *inter alia* to examine the various strategies of oral communication and to develop an interest in the production and reception of political messages (*ibid*., p. 4370). He described himself as [TRANSLATION] "a specialist in political communication in Rwanda" and has published a Diplôme d'études approfondies thesis in information science in which he tried to find [TRANSLATION] "stereotypes in political communication in Rwanda" (*ibid*., p. 4371). He knows of no other expert in the world who is specialized in the field of political communication in Rwanda.

[192] I will not repeat his analysis here, as it corresponded in general to that of Prof. Angenot. I will simply quote a few passages from his testimony:

> [TRANSLATION]
>
> . . . one must know both the context in which it (the political message) was delivered and the audience to which it was addressed, the person who gave it, and of course when I say one must know the person, obviously one must know his connections, his political or sociological connections, to mention only a few. So all this must be found out, and after that the speech can analysed as it was given.
>
> [a.b. vol. 13, p. 4369]
>
> (In Kinyarwanda) . . . the speaker's tone is of capital importance in understanding the meaning of the speech.

[*ibid*., p. 4375]

. . . you have to put yourself in his position, in his actual position at the time, and look back at what happened earlier, and then see the mentality of the people to whom he was speaking . . .

. . . what can be said in wartime will not be said in peace . . .

[*ibid*., p. 4425]

. . . to find this [the purpose of the speech] . . . is quite simple, that is, the person going to speak, in fact, announces what he will read [say?] then there are repetitions, repetitions so that a person listening can retain what he said, then there is the conclusion . . .

[*ibid*., p. 4428]

. . . what is important is the words repeated because they remain – they remain in the mind of the person listening, and then the conclusion, because that is what you say last. Obviously, if you have to remember, you will always remember what a person said, what someone said last, of course. There will be things forgotten, a loss of information, but what the speaker will retain will be what you said last, and the repetitions which must have remained in his memory.

[*ibid*., pp. 4428, 4429]

Q. Then, if he had intended to use the term "throw in the river" here, I am asking you whether, by comparison with what he said elsewhere, would he have hesitated to say it? Did he restrain himself elsewhere? Would that lead you to say here, restraint here or non-restraint elsewhere, if he had wanted to say that the Tutsis should be thrown in the river, would he have said it in a direct or indirect way?

A. It means that here, throughout the speech, there was no restraint, I think that reading all of the speech, it was an improvised speech in my opinion, there was no restraint whatever. So it was a direct speech, a speech I would describe as transparent.

[a.b. vol. 14, p. 4561]

[193] Applying these rules to analysis of the speech of November 22, 1992, Prof. Angenot came to the following conclusion:

[TRANSLATION]

*IN GENERAL AND OVERALL*, the concurrent aims of this speech are to call for elections (the words "elections", "elect", "elected", occur 16 times in the last three pages of the translation, and this obvious lexicometric fact indicates that this is the primary aim of the speech) – to denounce the opposing parties, the

> MDR, PL and PSD by name, as intimidating and attacking “our people” and being allied with the FPR invaders – to denounce the passive policy and inaction of the government, which is incapable of ensuring that its laws and Constitution are respected and which is not considering taking to court persons who are bearing arms against it – demanding that the militant audience from the speaker's party, the MRND, petition against abuses, demand elections, demand prosecutions, act together and not allow themselves to be massacred without reacting.
>
> The word “Hutu” appears in the text on p. 2 ¶ 2 – but it is attributed to an opponent who by a ridiculous and revealing oversight claimed membership in a tribe when his party, formerly the “Parmehutu”, had renounced any reference to such membership.
>
> When *violence* is mentioned in the text, the speaker indicated that it was attributable to opponents whom he named, the FPR invaders from Uganda, and the militants in certain opposing parties forming part of the caretaker government.
>
> For the people to whom he was speaking, the order of the day was “defend yourselves”, but the means expressly mentioned were vigilance, petitions, enforcing the laws and elections.
>
> The speaker lumped together in this speech “Inyenzis”, “Inkotanyis”, FPR and “infiltrators” from Uganda: he regarded them as aggressors against his country; he included in this enemy category the political parties who concluded an alliance with the FPR [on 3/06/92 in Brussels].
>
> I repeat that the speaker's primary aim was to call for elections. The incidental aim was to ask his supporters to petition against abuses and demand that the courts try individuals named for breaches of the law, the wording of which is paraphrased in the speech. The thesis of self-defence is – wherever it appears – presented as a last resort if legislation and institutions are powerless.
>
> The entities attacked are for the most part not characterized in racial or ethnic terms: they are the other parties who are members of the government, and are accused of corruption, partisan appointments, illegality, demoralizing the national armed forces and conspiring with armed invaders.
>
> The sociological context is that of a meeting in a pre-electoral campaign in a situation described as volatile, characterized by armed invasion from abroad in the north and by armed infiltration in the rest of the country.
>
> [a.b. vol. 23, pp. 8601-8602]

[194] It goes without saying that Prof. Angenot's conclusion is not in any way binding on the Court, which ultimately must form its own opinion after analysing the speech using the method suggested by the

professor. It should adopt the method suggested by him not because, ultimately, it is the only one suggested, but because, adapting it to the type of speech at issue in the case at bar, it complements the rule laid down by the courts that the meaning of a speech, and hence the intention of the speaker, is in general to be assessed in terms of the speech as a whole, in terms of the context in which it was made and in terms of a reasonable listener (see *Prud'homme v. Prud'homme*, 2002 SCC 85, para. 66). I say “in general” as needless to say speakers can skilfully profit from the context of a speech or the nature of an audience to get across a message completely different from what an objective analysis of the speech would produce. However, it must still be established that the speaker manipulated the words with the intention of misleading the audience or of leading them unawares to commit reprehensible acts. I will return to this point.

[195] In the case at bar, I adopt Prof. Angenot's conclusion because it is the one I have arrived at myself.

[196] However, I would add three comments.

[197] First, the words [TRANSLATION] “the important thing”, “the important point” and “very important” recur eleven times in the speech, and never in the passages for which Mr. Mugesera is generally blamed.

[198] Second, the speech essentially makes assumptions which will have to be considered if the democratic process does not succeed: according to Prof. Angenot, there are about 18 cases where the conditional is used (a.b. vol. 33, p. 12893).

[199] Third, Ms. Des Forges herself indicated that two people, one in Geneva and the other in Washington, in 1999, whom she did not identify, expressed before her the opinion that the speech was one of "legitimate self-defence" (a.b. vol. 10, p. 2880).

### (3) Nature of speech

[200] Canadian society – because I must deal with this in terms of whether a crime would have been committed in Canada – is remarkably tolerant where freedom of expression in political life is concerned. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, Dickson C.J. said at 763-764:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee [in the *Canadian Charter of Rights and Freedoms*], and the nature of this connection is largely derived from the Canadian commitment to democracy.

and recently in *Prud'homme* (*supra*, para. 194) l'Heureux-Dubé and LeBel JJ. noted at para. 41 that:

> . . . this Court has often stressed that political discourse is central to the constitutional guarantee of freedom of expression . . .

[201] In *Libman v. Québec (Attorney General)*, [1997] 3 S.C.R. 569, the Court wrote the following at para. 60:

> The degree of constitutional protection may also vary depending on the nature of the expression at issue (*Edmonton Journal, supra*, at pp. 1355-56; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 246-47; *Keegstra, supra*, at p. 760; *RJR-MacDonald, supra*, at pp. 279-81 and 330). Since political expression is at the very heart of freedom of expression, it should normally benefit from a high degree of constitutional protection, that is, the Court should generally apply a high standard of justification to legislation that infringes the freedom of political expression.

[202] In *R. v. Kopyto* (1987), 62 O.R. (2d) 449 (Ont. C.A.), Cory J.A., as he then was, quashed a conviction of a lawyer for contempt of court in the following terms:

> In my view, statements of a sincerely held belief on a matter of public interest, even if intemperately worded, so long as they are not obscene or criminally libellous, should, as a general rule, come within the protection afforded by s. 2(b) of the Charter. It would, I think, be unfortunate if freedom of expression on matters of public interest so vital to a free and democratic society was to be unduly restricted. The constitutional guarantee should be given a broad and liberal interpretation.
>
> [p. 15]

[203] In *Hébert v. Procureur général de la province de Québec*, [1966] Q.B. 197, Tremblay C.J. held for the majority that Jacques Hébert's book, *J'accuse les assassins de Coffin*, did not constitute contempt of court. At p. 219 he said:

> [TRANSLATION]
>
> I must consider the Quebec argument and ask myself whether the comments made by the appellant about the judge are such as to destroy confidence in the courts and prevent them from carrying out their duties.
>
> The appellant objected to the death penalty and wanted his fellow citizens to share his view. In his book, *J'accuse les assassins de Coffin*, instead of appealing to their reasons he appealed to their passions. Dealing with a particular case, that of the unfortunate Coffin, he castigated theories and hurled insults and invectives. He adopted a violent and hyperbolic style. However, this style is its own remedy. The reader will soften the meaning of the words and reduce them to a less highly charged and more reasonable level. The reign of Napoleon III is not judged by *Les Châtiments*, the poorer classes in Paris at the

> turn of the century by *Mort à crédit* nor the administration of French justice in the last century by the caricatures of Daumier.

[204] In *R. v. Boucher*, [1951] S.C.R. 265, a Jehovah's witness had published a pamphlet severely criticizing the Government of Québec. He was charged with seditious libel and convicted. The Supreme Court of Canada overturned the conviction. Kerwin J., who was part of the majority, wrote the following:

> The main element which it was necessary for the jury to find was an intention on the part of the accused to incite the people to violence or to create a public disturbance or disorder: *Reg v. Burns supra*; *Reg. v. Sullivan* [(1868) 11 Cox C.C. 44.]; *Rex v. Aldred* [(1909) 22 Cox C.C. 1.]; *The King v. Caunt* not reported but referred to in a note in 64 L.Q.R. 203. The use of strong words is not by itself sufficient nor is the likelihood that readers of the pamphlet in St. Joseph de Beauce would be annoyed or even angered, but the question is, was the language used calculated to promote public disorder or physical force or violence. In coming to a conclusion on this point, a jury is entitled to consider the state of society or, as it is put by Chief Justice Wilde in his charge to the jury in *The Queen v. Fussell* [(1848) 6 St. Tr. (N.S.) 723 at 762.]--
>
> > You cannot, as it seems to me, form a correct judgment of how far the evidence tends to establish the crime imputed to the defendant, without bringing into that box with you a knowledge of the present state of society, because the conduct of every individual in regard to the effect which that conduct is calculated to produce, must depend upon the state of the society in which he lives. This may be innocent in one state of society, because it may not tend to disturb the peace or to interfere with the right of the community, which at another time, and in a different state of society, in consequence of its different tendency, may be open to just censure.
>
> [p. 281]

[205] Just recently, in *Hervieux-Payette v. Société Saint-Jean Baptiste de Montréal*, [2002] J.Q. No. 1607, leave to appeal denied by the Supreme Court of Canada, [2002] S.C.R. No. 530, a majority of the Quebec Court of Appeal dismissed an action for damages brought by two Quebec

M.N.A.s following publication in the newspapers by the Société Saint-Jean-Baptiste de Montréal of a long text saying of these M.N.A.s [TRANSLATION] “THESE ARE TRAITORS”.

[206] Thibault J.A. refused to regard this text as an unreasonable opinion:

> [TRANSLATION]
>
> ¶ 26 Is this an unreasonable opinion? In my view, no. The message in the appellants' document corresponds to a viewpoint that can be defended and the tone used does not go beyond what a reasonable individual would tolerate from another person in our democratic society. In order to see this, we need only refer to the studies entered in the record showing that such messages, given in a quite similar tone, have been part of the range of Canadian political criticism for over a century and a half . . .
>
> ¶ 27 There is no denying that some politicians and political commentators use unrestrained language. Whatever the members of this Court may think of the words used in the above text, the courts are not arbiters of courtesy, good manners and good taste. Consequently, it is not desirable for judges to apply the standard of their own taste to muzzle commentators, since that would mark the end of criticism in our society.
>
> ¶ 28 Moreover, Canadian and English commentators have concurred in this conclusion:
>
> > The opinion need not be fair in any objective sense. There is no requirement that the criticism be impartial and well-balanced. A story teller may add to the recital a little touch of a piquant pen. There is no cause to complain merely because the commentator is obstinate, biased, prejudiced or wrong, or the comments are rude, severe, extravagant, exaggerated or even fantastic, or they are expressed in colourful language, or the tone is unnecessarily discourteous. A court generally will not consider whether the commentary is well founded or reasonable. Mere extravagance of the language employed will not destroy the privilege unless it is so great or perverse as to warrant a finding of malice.
>
> . . . . .
>
> > The comment does not have to be reasonable or temperate in order to be fair, in spite of some early suggestions to the contrary. There is no reason why the opinion expressed cannot be couched in a language vividly reflecting a writer’s emotions no matter how caustic, severe, acerbic, vitriolic or

> even extravagant and farfetched these comments may be [See note 5 below].
> [Citations deliberately omitted]
>
> Note 5 : Raymond E. BROWN, The Law of Defamation in Canada, loose-leaf, Scarborough, Carswell, 2000, pp. 15-30; 1998, 15-46.

¶ 29 In conclusion, on the question of whether opinion is reasonable, I concur in the reasons . . . stated by . . . Mayrand J.A. in an application for an interlocutory injunction . . .

¶ 31 According to Mayrand J.:

> You may not believe a single word of the respondent's diatribe, which may be wrong, but that does not really matter. She is entitled to think that the appellants betrayed Quebec's interests; if she sincerely thinks this, she is entitled to say it. She would not really be free to express herself if she was only entitled to do so provided she did not make a mistake.
>
> That she spoke in strong language, no one would deny: some would say her language was shocking. However, in a public discussion where differing political ideas meet, the vocabulary used is commonly both vigorous and colourful. The courts are not here to impose standards of tact or good taste. By her aggressive tone and bold vocabulary, the respondent may have approached the limits of what is tolerable, but she did not overstep them! (See note 8 below]
>
> (Note 8: *Dubois v. Société St-Jean-Baptiste de Montréal*, [1983] C.A. 247, at 258)

[207] She also refused to see it as [TRANSLATION] “a call to vengeance and violence”:

> [TRANSLATION]

¶ 32 Did the appellants' text contain a call to vengeance and violence?

¶ 33 With the greatest respect for the trial judge, I cannot see how the wording of the publication of December 4, 1981 constitutes an incitement to vengeance or violence. I see it rather as a call for political mobilization . . .

¶ 34 On this point, I adopt the following comments by Deschênes C.J. . . .

¶ 35 According to Deschênes C.J.:

> The applicants see the sentence immediately preceding their names on the notice as a call for violence. However, it should be noted that this call, if there was one, did not create any uprising. It should also be noted that the text is open to another equally valid interpretation: “do not forget them tomorrow when there are elections”.
>
> ¶ 44 Further, the reasonableness of a document must be assessed in the abstract, according to the test of the reasonable man, not citing the opinion of commentators. The Court must determine what an informed and diligent person, possessed of ordinary intelligence and judgment, would have understood. If that were not so, the party opposing a party who quotes journalists could in their turn rely on other commentators as learned as the first one, who were of the contrary view. In short, a judge cannot base his opinion on the ultimate question he has to decide on the opinion of people who have no jurisdiction to make a judicial ruling on the point.

[208] I cite these cases to show that if Mr. Mugesera was tried in Canada in a criminal court on a charge of incitement to murder, hatred or genocide he would probably not be convicted because of the bellicose and brutal tone and language he sometimes used in his speech. He [TRANSLATION] “did not tread lightly”, to use the excellent expression of Thibault J.A. in *Hervieux-Payette*, but verbal violence would not make him guilty.

[209] What would make him guilty is violence in the message that indicated the speaker intended to lead the audience he was addressing to commit reprehensible acts. The incitement might be direct or indirect, express or implied, open or covert, but in the last analysis it is the speaker's intent that must be determined. In this sense, the rules for analysis of speeches laid down, for example, in *Prud'homme* (*supra*, para. 194) and *Hervieux-Payette* (*supra*, para. 205) in defamation or in *Hébert* for contempt for court, should not obscure the fact that where incitement to murder, hatred or genocide is concerned,

the focus is on the speaker rather than on the audience. If it is shown that a speaker used a single word or phrase in a speech fully aware that the word or phrase would lead his immediate audience to commit reprehensible acts, he can be found guilty whatever meaning may be given to the speech by objective analysis. The harshest words may be innocent and the gentlest words may be culpable.

[210] In the case at bar, for the reasons I have given above, the message communicated by Mr. Mugesera is not, objectively speaking – that is, after analysing the speech and its context as a whole – a message inciting to murder, hatred or genocide. Nor is it such a message subjectively speaking, as there is nothing in the evidence to suggest that Mr. Mugesera intended under cover of a bellicose speech, that would be justified in the circumstances, to impel toward racism and murder an audience which he knew would be inclined to take that route. There is simply no evidence, on a balance of probabilities, that Mr. Mugesera had any guilty intent.

### E. Sequel to speech

[211] Mr. Mugesera's speech on November 22, 1992 appears to have had a negligible impact in Rwanda in the days and weeks that followed.

[212] As I noted earlier, the ICI members heard nothing about it on their arrival in Rwanda in mid-January 1993 and there is no evidence in the record that the speech had been mentioned up to

then, let alone denounced by any international body for the defence of human rights, although there were many of these closely observing the situation in Rwanda.

[213] The only evidence filed by the Minister concerning the immediate impact of the speech – apart from the ICI report, of course, which should not be taken into account – is a letter from one Jean Rumiya, three newspaper articles, the arrest warrant issued for Mr. Mugesera and Mr. Reyntjens' conclusions in *L'Afrique des Grands Lacs en crise*.

**(1) Mr. Rumiya's open letter**

[214] Mr. Rumiya apparently wrote an [TRANSLATION] "open letter" dealing with Mr. Mugesera's speech. This letter was dated December 2, 1992 (a.b. vol. 22, p. 8236). We do not know to whom it was written and whether it was published anywhere. Mr. Rumiya wrote that he had just [TRANSLATION] "read with astonishment the transcript of the meeting you had in Kabaya". *Inter alia*, he mentioned that Mr. Mugesera compared [TRANSLATION] "Batutsis to Falashas who should go back to Ethiopia by way of the Nyabarongo and preferably in pieces" (my emphasis). It is clear from this passage alone that the [TRANSLATION] "transcript" on which Mr. Rumiya said he relied did not correspond to the tape of the speech which is in our possession. It is also clear from the text of the letter that Mr. Rumiya was not present at the Kabaya meeting.

[215] This letter was filed by Ms. Des Forges in her expert report (a.b. vol. 22, pp. 8120, 8121). The letter, or more precisely a copy of the letter, was given to her in Kigali during the ICI investigation by someone whose identity she did not wish to disclose (a.b. vol. 9, p. 2620). She did not see a copy in a newspaper (*ibid*., p. 2621). She knew that Mr. Rumiya had parted company with the MRND (a.b. vol. 8, p. 2167). She did not see fit to mention this in the ICI report in March 1993 (a.b. vol. 8, p. 2166; vol. 9, p. 2619).

[216] For his part, Mr. Reyntjens said he received a copy of this letter by fax on December 5, 1992 and the sender was one of his friends in Butare, Michel Campion, son of a hotel proprietor (a.b. vol. 11, p. 3234).

[217] According to Mr. Shimamungu, Mr. Rumiya was wrong when he said that according to its text in Kinyarwanda the speech was a call to murder and violence, and in saying that it mentioned ethnic and political cleansing (a.b. vol. 11, p. 4715).

[218] Mr. Mugesera never received this letter (a.b. vol. 17, pp. 5925, 5926). He said that Mr. Rumiya had left the MRND – which the latter admitted in his letter – and [TRANSLATION] "had become my fierce opponent" (*ibid*., p. 5927). Mr. Rumiya had [TRANSLATION] "gone to another political party", which Mr. Mugesera suspected was the FPR (*ibid*., pp. 5932, 5928). According to Mr. Mugesera, [TRANSLATION] "MRND people in Butare complained about the fact that Rumiya

was siphoning off money intended for the party and had built a hotel in Butare with it (*ibid*., p. 5932) and he would not be surprised if the letter was not genuine" (*ibid*., pp. 5929, 5933).

[219] In the circumstances, this "open letter" has no evidentiary value.

### (2) Newspaper articles

[220] The Minister also relied on three articles that were published in Rwandan newspapers shortly after November 22, 1992.

[221] First, I note that at the time there were a large number of newspapers in Rwanda espousing a large number of political causes. These newspapers were weeklies or monthlies (a.b. vol. 14, p. 4836; vol. 33, p. 1254; vol. 17, p. 6284). According to Mr. Jeanneret, there were at that time [TRANSLATION] "sixteen political parties" and "sixty, sixty-five publications, newspapers, magazines and so on" (a.b. vol. 13, p. 4251). Accordingly, it would not seem that proof of publication of an article in three newspapers is very significant as such.

[222] The articles were published in the newspapers *Isibo*, *Ijambo* and *Imbaga* (a.b. vol. 23, pp. 8538, 8539 and 8543).

[223] The newspaper *Isibo* is an opposition newspaper (a.b. vol. 22, pp. 8016, 8021). This newspaper supports the MDR party, the president of which, Mr. Twagiramungu, had been denounced by Mr. Mugesera in his speech and had become Prime Minister of the FPR government. His editor was a [TRANSLATION] "very strong" supporter of the MDR, and after the FPR took power became director of the FPR's information branch (a.b. vol. 16, p. 5470; vol. 17, p. 6132; vol. 22, pp. 8004 and 8021; vol. 38, p. 14892 *et seq.*). This newspaper is one of those which in *L'Afrique des Grands Lacs en crise* Mr. Reyntjens said, at p. 172, was [TRANSLATION] "a partisan press, unethical and practising defamation and denunciation" (a.b. vol. 23, p. 8471).

[224] The newspaper *Ijambo* is also one of those described by Mr. Reyntjens as the partisan press. Its editor personally locked horns with Mr. Mugesera, a teacher at the time, during a student strike (a.b. vol. 23, pp. 8540, 8541).

[225] The newspaper *Imbaga* is also an opposition newspaper (a.b. vol. 22, p. 8016). The writer of the incriminating article became Minister of Information in the FPR government (*ibid*., pp. 8000, 8003, 8004).

[226] The fact that only these Rwandan newspapers dealt with Mr. Mugesera's speech, that the national radio mentioned it in a brief and dismissive way (see *infra*, para. 230) and that neither

the foreign press nor the human rights agencies in Rwanda at the time mentioned it supports the theory that the speech was not what some have described it as being and did not have any particular impact in the conflict then raging in Rwanda. This inference is further supported by the fact that none of the witnesses could say that he or she had heard the speech mentioned on the radio or in the newspapers (Mr. Bernard, vol. 12, pp. 3785, 3798; Ms. Alarie-Gendron, vol. 12, pp. 4116, 4117; Mr. Jeanneret, vol. 13, pp. 4251, 4252, 4257, 4259; Mr. Shimamungu, vol. 14, pp. 4807, 4808, 4836; Mr. Ndiaye, vol. 36, p. 14207).

### (3) Arrest warrant

[227] On November 25, 1992 the Minister of Justice, Mr. Mbonampeka, asked the Attorney General Mr. Nkubito to proceed to arrest Mr. Mugesera, who had allegedly [TRANSLATION] “made an inflammatory speech that could set citizens against each other and even cause disturbances in the Republic's territory”. According to the Minister, Mr. Mugesera
[TRANSLATION] “said among other things that certain Rwandans should go home, that is to their country of origin according to the history of African migration, and that if they did not do so he was urging the public to throw them in the Nyabarongo River. He further urged the same members of the public to immediate vengeance against what he called 'ibyitsos'” (a.b. vol. 20, p. 7562).

[228] On November 26, 1992 the Attorney General, in the course of his investigation, asked the director of the Rwandan Office of Information ("ORINFOR") to [TRANSLATION] "provide a transcript and tape of the speech" (a.b. vol. 20, p. 7563).

[229] On November 27, 1992 the ORINFOR director sent the Attorney General [TRANSLATION] "the cassette of the speech" and "the transcript from the tape broadcast on Radio Rwanda at the same meeting" (a.b. vol. 20, p. 7564).

[230] The [TRANSLATION] "transcript of the soundtrack", that is, the report on the [TRANSLATION] "Kibaya meeting" presented over Radio Rwanda contained the following concerning Mr. Mugesera's speech:

> [TRANSLATION]
>
> The vice-president of the party in the prefecture, Mr. Léon Mugesera, continued to speak to those who were there and summarized his speech in four points. The first was that he asked MRND members not to allow themselves to be invaded, saying that the famous Gospel quotation that asked Christians to turn the other cheek should change: anyone who was struck on one cheek should at once defend himself and give two blows to the person striking him. One man is as good as another, he said, and his yard should not allow itself to be invaded. Also on this point, he asked the Ministry of Primary and Secondary Education to look carefully at the problem of primary school inspectors, who had been driven out in a way that was not clear. If that was not done, he said, the parents themselves would take the decision if these inspectors were replaced by others in unclear circumstances. He said "justice is there to serve the people". Another point he went on to discuss was concerning the treachery of political parties who had responded to the call by others to collaborate with those who have decided to attack our country. A member of any political party, even if he was not a party leader or an important figure, who discouraged the army and plotted against the country, he said, should be sentenced to death.
>
> [a.b. vol. 20, pp. 7571, 7572]

[231] On November 28, 1992 a bench warrant was issued against Mr. Mugesera, charging him with [TRANSLATION] "damaging the security of the State" (a.b. vol. 20, p. 7566).

[232] On December 6, 1992 an [TRANSLATION] "official search telegram" was sent by the Attorney General, which specified that Mr. Mugesera was being sought for [TRANSLATION] "breaches of ss. 166 and 393 of the Penal Code" (a.b. vol. 20, p. 7565). These sections concern incitement to hatred and genocide.

[233] Over two years later, on January 13, 1995, that is after the 1994 genocide and under an FPR government, the public prosecutor, Mr. Nsanzumera, issued a new warrant against Mr. Mugesera [TRANSLATION] "to be heard on charges":

> [TRANSLATION]
>
> Being in a popular meeting in the GISENYI Prefecture, KABAYA sub-prefecture, on November 22, 1992, did plan genocide by inciting supporters of the MRND party and the entire Hutu population to kill Tutsis and throw them in the NYABARONGO River. His call was fully answered on April 7, 1994, the day the genocide began.
>
> [a.b. vol. 20, p. 7569]

[234] I admit that I was more impressed by the lack of impact which the speech had in the daily life of Rwandans, if we go by the media coverage, the lack of reaction by human rights monitoring agencies and the testimony of some persons who were living in Rwanda at the time than by this official manhunt orchestrated by political adversaries who were members of the coalition government. It is hardly

surprising that Mr. Mugesera was being sought when we know that he had asked to have the Prime Minister and Minister of Justice taken to court and had severely criticized a number of members of the government, including the Minister of Education.

We can hardly be surprised at the Attorney General's activism toward Mr. Mugesera when we know that a few years later he was Minister of Justice in the FPR government (a.b. vol. 32, p. 12060; vol. 21, p. 7731; vol. 38, p. 14847; vol. 17, p. 6185).

[235] In these circumstances, it is more readily understandable that as the days and years have gone by Mr. Mugesera has first been seen as attacking the security of the State (on November 28, 1992), then inciting to hatred and genocide (December 6, 1992), then as having planned the genocide (January 13, 1995). Such a manipulation of the charges against Mr. Mugesera is suspicious and suggests that the speech of November 22, 1992 was only a pretext used by his political opponents to discredit him.

[236] In these circumstances, I readily conclude that the injunction to prosecute and bench warrant in November 1992 had nothing to do with the fact that the speech may have been a call to murder, hatred or genocide.

### (4) ***L'Afrique des Grands Lacs en crise***

[237] An important expert witness for the Minister was Filip Reyntjens. Like the expert witnesses Des Forges and Gillet, Mr. Reyntjens has already made his position clear against Mr. Mugesera, this time in a book. This is what he said about Mr. Mugesera in *L'Afrique des Grands Lacs en crise*:

> [TRANSLATION]
>
> A week later, the MRND vice-president for the Gisenyi Prefecture, Léon Mugesera, made an inflammatory speech before MRND militants in the Kabaya sub-prefecture. Using extremely tribally motivated language identical to that used by the CDR (48), Mugesera incited a massacre of opponents ([TRANSLATION] "Their penalty is death and nothing less") and Tutsis ([TRANSLATION] "Your country is Ethiopia, and we are going to send you there very soon via the Nyabarongo express route. That is it. I repeat that we are soon going to get to work"). This is in fact what his audience did: in December 1992 and January 1993 the Gisenyi prefecture was the scene of violent pogroms, to which we will return. The Minister of Justice, S. Mbonampeka, regarded it as the last straw. As it was impossible to have Mr. Mugesera arrested, he resigned, but his resignation was initially refused by the head of State. It should be noted that this action was unprecedented: prior to Mbnampeka, no Minister had resigned since 1962. Mbonampeka's departure left the Department of Justice without a Minister in charge until July 1993, that is for nearly seven months, at a time when a prolonged vacancy at the head of this department was obviously very harmful. In a letter to Mugesera on December 2, Prof. Jean Rumiya, a former member of the MRND central committee, also condemned him for this [TRANSLATION] "real call to murder". He noted that Mugesera appeared [TRANSLATION] "to have set in motion an ethnic and political cleansing operation": "I like other Rwandans thought that the period of ritual murders for political purposes was past".
>
> [a.b. vol. 23, pp. 8444, 8445]

[238] In cross-examination, Mr. Reyntjens explained how he came to write [TRANSLATION] this "dozen or so lines" on Mr. Mugesera:

> [TRANSLATION]
>
> This book was written quickly at a time when I had collected all the documentation I needed; I wrote this book by myself. This paragraph, it must be ten or so lines in my book, this paragraph, for the purpose of writing it, I certainly did not discuss it with anyone, I did not need to.

> The information I used was on my table. There was one thing, the text of the speech, which Mr. Mugesera made in Kabaya, there was the document by Mr. Rumia, there was the report by the politico-administrative commission, there was the report by the International Commission of Inquiry and there was the fact, the actual fact, that the Minister of Justice had resigned and not been replaced for over six months. These were the actual facts with which I worked.
>
> [a.b. vol. 11, p. 3330]

[239] It has to be said that for all practical purposes that Mr. Reyntjens' sources came down to the open letter from Mr. Rumiya and the ICI report, two pieces of evidence which I have already said were not trustworthy. This very short passage proves nothing.

### F. Conclusion as to Mr. Mugesera's appeal

[240] The Kabaya speech was made on November 22, 1992 by a political figure before a partisan meeting in a context of armed aggression. The speech was improvised and not based on any notes, and the various speakers were not consulted before beginning to speak (a.b. vol. 16, pp. 55795 to 55799). The speaker spoke fluently, used clear and colourful language, sometimes even brutal language. This speaker was a fervent support of democracy, patriotic pride and resistance to invading foreign forces. The themes of his speeches were elections, courage and love. His family life, his personal and professional relationships, his past, did not indicate any tendency toward racism. Even though it is true some of his statements were misplaced or unfortunate, there is nothing in the evidence to indicate that Mr. Mugesera, under the cover of anecdotes or other imagery, deliberately incited to murder, hatred or genocide.

[241] The principal witnesses for the Minister – Ms. Des Forges, Messrs. Gillet, Reyntjens, Overdulve and Hnadye – only provided a biased or misinformed view of the events concerning Mr. Mugesera. The Minister's case was so weak, once the evidence and testimony which it was patently unreasonable to consider was set aside, that the final conclusion was unavoidable: the Minister did not discharge the burden of proof in respect of allegations A and B.

[242] I do not see how in these circumstances the Appeal Division could have come to the conclusion that, on a balance of probabilities, the Minister had established that in Canada the speech would have constituted a crime of incitement to murder, hatred or genocide within the meaning of ss. 22, 235, 318, 319 and 464(*a*) of the Canada *Criminal Code*. The Appeal Division's decision is wrong in law as regards the nature of the speech and patently unreasonable so far as the explanation and analysis of the speech are concerned.

[243] With respect, the error made by the trial judge was not to see that the Appeal Division had without reasons ignored important testimony and accepted testimony or evidence which was devoid of all credibility. I would add that the judge appears to have chosen not to intervene essentially on grounds of deference. In fact, I gather from para. 52 of his reasons that he would have come to the same conclusion as myself if he had himself ruled on the meaning to be given to Mr. Mugesera's speech.

[244] In these circumstances, there would be no point in referring the case back to the Appeal Division for re-hearing. Paraphrasing the comments of MacGuigan J.A. in *Ramirez* (*supra*, para. 29, p. 323) and of Linden J.A. in *Sivakumar* (*supra*, para. 52, p. 449), I would say that this is not a case in which a properly directed court could conclude on the evidence in the record and on a balance of probabilities that in Canada the speech would have constituted an incitement to murder, hatred or genocide. I note that in *Moreno, supra*, para. 29, Robertson J.A. allowed the appeal and referred the case back to the tribunal before it "for consideration on the basis" that the appellants did not commit a crime against humanity (see also: *Punniamoorthy v. Minister of Employment and Immigration*, A-860-91, January 28, 1994; *Wihksne v. Canada (Attorney General)*, 2002 FCA 356).

[245] Consequently, I would allow Mr. Mugesera's appeal regarding allegations A and B and would refer the matter back to the Appeal Division to be disposed of on the basis that the Minister did not discharge his burden of proof in respect of those allegations.

## VII. Costs

[246] At the hearing Mr. Bertrand asked, though he did not do so in his written pleadings, that his clients be awarded costs in this Court as well as in the Trial Division. I am prepared to allow this request and, as I am authorized to do by Rule 400(4) of the Federal Court Rules, to award a lump sum instead

of assessed costs. Consequently, I would ask Mr. Bertrand to make written submissions to the Court regarding the costs to which he feels he is entitled, within 30 days of the date of publication of these reasons. Counsel for the Minister may file written submissions within 15 days of receipt of those by Mr. Bertrand, and he may reply within seven days of receiving the Minister's written submissions. The Court will then vary the judgment so as to include whatever order on costs it considers appropriate in the circumstances.

## VIII. Replies to certified questions

[247] In view of the conclusions at which I have arrived, namely that the Minister did not discharge his burden regarding the commission of a crime against humanity or incitement to murder, hatred or genocide, it is not necessary to respond to questions 1 and 2.

[248] Question 3 is answered by paragraphs 23 *et seq.* of my reasons.

## IX. Motion to submit new evidence

[249] While the case was under advisement counsel for the Mugeseras filed a [TRANSLATION] "motion to submit new evidence". This motion sought to establish that allegations of corruption had been

made against one of the three members of the Appeal Division which heard this case, Yves Bourbonnais, in connection with an investigation conducted by the RCMP. The ultimate purpose of the motion was to obtain from the Court a declaration of nullity *ab initio* on the Appeal Division's decision and a final disposition of the proceedings initiated against Mr. Mugesera and members of his family.

[250] At this stage, this motion is premature and without real foundation. Mr. Bertrand perhaps had to submit his motion while the case was under advisement so he could not later be blamed for not acting promptly, as soon as he knew there was a possibility that Mr. Bourbonnais' impartiality would be called into question. However, this Court could not rule simply on allegations which in any case, so far as we know at this time, are not related to Mr. Mugesera's case. I would dismiss the motion without costs as being premature.

## X. Disposition

[251] I would dismiss the Minister's appeal in case A-317-01 and I would allow that by Mr. Mugesera and the members of his family in case A-316-01.

[252] I would affirm the part of the Trial Division's judgment setting aside the decision by the Appeal Division on allegations C and D, I would reverse the part of the Trial Division's judgment affirming the

Appeal Division's decision on allegations A and B, I would accordingly set aside the Appeal Division's decision in its entirety and I would refer the matter back to the Division to be again disposed of on the basis that the Minister did not discharge the burden of proof upon him on each and every one of the allegations.

[253] I would award Mr. Mugesera and the members of his family costs in this Court based on a single appeal and in the Trial Division, and I would award a lump sum in lieu of assessed costs. This lump sum will be determined subsequently, after which the judgment rendered in the case at bar will be varied to add the amount of the lump sum then determined by the Court.

"Robert Décary"

J.A.

"I agree.
J.D.Denis Pelletier, J.A."

Certified true translation

Suzanne M. Gauthier, C. Tr., LL.L.

**LÉTOURNEAU J.A. (concurring)**

[254] It is without hesitation whatsoever that I endorse the exhaustive, meticulous and rigorous analysis that my colleague, Décary J.A., made of the issues raised on this appeal as well as his assessment of the voluminous evidence on the record. I fully agree with the conclusions that he draws from that evidence.

[255] I cannot but express my bewilderment not only at the ease with which Mr. Mugesera's speech was altered for partisan purposes by the International Commission of Inquiry, but especially at the ease and confidence with which the alterations of the text were subsequently accepted, with the consequences that we know.

[256] As my colleague pointed out, conclusions sometimes erroneous, sometimes hasty and speculative, sometimes doubtful, with a weak foundation, often reasserted and reiterated by others without discrimination and any other attempt at authentication, have generated a belief in a non-existent reality. These words of Hughes Mearnes in "*The Psychoed*", cited in "*Bartlett's Familiar Quotations*", 16th ed., Little, Brown and Company, 1992, page 630, aptly summarize the result of this phenomenon:

> As I was going up the stairs, I met a man who wasn't there.

[257] For the reasons given by my colleague Décary J.A., I would dispose of the appeals as he proposes.

"Gilles Létourneau"

J.A.