

# BALANCING THE RIGHTS OF MIGRANTS AND INTERNATIONAL CRIMINAL LAW: THE CASE OF ALLEGED RWANDAN WAR CRIMINALS UNDER CANADA'S IMMIGRATION LAWS

Philippe Larochelle and Sébastien Chartrand\*

---

*For Canadian laws to hold immigrants accountable for international crimes is a laudable policy. However, even though these laws provide for prosecution or extradition of suspected criminal, the Canadian approach emphasizes immigration remedies. In this regard, the Rwandan genocide has provided the Canadian authorities with a delicate task and unique challenges. This article explores the merits of the Canadian approach and its consequences through a discussion of three main issues: its reliance on immigration over extradition proceedings, thereby circumventing important safeguards; its lack of consistency in the application of international criminal law provisions between criminal and immigration matters; and its reliance on the impermissible concept of “guilt by association” in determining complicity for international crimes.*

---

*Il est louable, du point de vue des politiques, que le droit canadien puisse tenir les immigrants responsables pour les crimes commis dans d'autres pays. Cependant, même si ces lois prévoient l'exercice de poursuites à l'encontre de personnes dont on suspecte qu'elles ont commis un crime, ou leur extradition, l'approche canadienne met l'accent sur les recours dans le domaine de l'immigration. À cet égard, le génocide au Rwanda a généré, pour les autorités canadiennes, une tâche délicate et des défis uniques en leur genre. Cet article examine les mérites de l'approche canadienne et ses conséquences en discutant de trois questions principales : d'abord le fait que cette approche se fonde sur des procédures propres à l'immigration plutôt qu'à l'extradition, évitant ainsi d'importantes protections; ensuite son manque d'uniformité dans l'application des dispositions du droit pénal international aux questions pénales et aux questions d'immigration; finalement le fait qu'elle se fonde sur le concept inadmissible de « culpabilité par association » pour déterminer la complicité à l'égard de crimes internationaux.*

---

\* Roy Larochelle Avocats inc. The authors have represented Jacques Mungwarere in his criminal trial before the Ontario Superior Court of Justice, as well as Telesphore Dereva, Alfred Gahizi and Emmanuel Musabyimana in their admissibility hearings before the Immigration Division of the Immigration and Refugee Board of Canada. The authors would like to extend their gratitude to Marie Brassard-Lecours, jurist, for her research and collaboration in the preparation of this contribution.

Better that ten guilty persons escape than that one innocent suffer.  
– Sir William Blackstone (1765)

### *1. Introduction: The Canadian Approach to the Domestic Implementation of International Criminal Law*

From a study of Rwandan cases, this article posits that the Canadian approach to its obligations under international criminal law has reversed Blackstone's ratio in immigration proceedings. To demonstrate this, an analysis of the immigration process as it relates to war crimes, crimes against humanity and genocide will be made through a review of recent cases before Canadian courts involving Rwandan immigrants.

Finding the legal means to ensure that Canada will not serve as a safe haven for perpetrators of international crimes has been a long-standing preoccupation. On February 7, 1985, the Canadian Government established the Deschênes Commission to examine the alleged presence of World War II-era war criminals in Canada. In December 1986, Justice Deschênes submitted his report,<sup>1</sup> identifying a number of potential cases warranting intervention.<sup>2</sup> It further recommended the following measures to address these cases, *in order of preference*: extradition; criminal prosecution in Canada; and denaturalization and deportation.<sup>3</sup>

Canada has always prided itself as taking a leading role in international efforts to fight impunity. It was the fourteenth state to sign the *Rome Statute of the International Criminal Court (ICC)*<sup>4</sup> on December 18, 1998.<sup>5</sup> It created a War Crimes Program in 1998,<sup>6</sup> and adopted the *Crimes Against Humanity and War Crimes Act (CAHWCA)*<sup>7</sup> in 2000, with a primary objective to 'retain and enhance Canada's capacity to prosecute and punish persons accused of the "core" international crimes, namely

---

<sup>1</sup> Jules Deschênes, *Commission of Inquiry on War Criminals Report* (Ottawa: Minister of Supply and Services, 1986) [Deschênes Report].

<sup>2</sup> *Ibid* at 13-14, 272-74, and 827-28.

<sup>3</sup> *Ibid* at 86.

<sup>4</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6 [*Rome Statute*].

<sup>5</sup> Laura Barnett, *La Cour pénale internationale: Histoire, rôle et Situation actuelle* (Ottawa: Bibliothèque du Parlement, 4 novembre 2008).

<sup>6</sup> The War Crimes Program is an integrated initiative between the Department of Justice, the Royal Canadian Mounted Police (RCMP), Citizenship and Immigration Canada (CIC) and Canada Border Services Agency (CBSA), all working together in achieving the same objectives in a coordinated fashion; see Government of Canada, *Canada's Program on Crimes Against Humanity and War Crimes 2008-2011*, 12th Report, BSF5039 Rev 12 [12th Report].

<sup>7</sup> SC 2000, c 24 [*CAHWCA*].

genocide, crimes against humanity and war crimes,<sup>8</sup> particularly necessary after the failings of the prosecutions undertaken under the *Criminal Code* provisions adopted after the Deschênes Report.<sup>9</sup>

The *CAHWCA* provides the framework for prosecution before Canadian criminal courts of persons suspected of having participated in crimes abroad and effectively eliminates territorial and temporal obstacles in that regard. Thus far two such trials have been held, those of Jacques Mungwarere<sup>10</sup> and Désiré Munyaneza,<sup>11</sup> both Rwandan refugees who were brought to the attention of the Canadian authorities as genocide suspects.

Following these developments, the *Immigration and Refugee Protection Act (IRPA)*<sup>12</sup> was modified in 2001 to reflect international criminal law principles contained in the *CAHWCA* and the *Rome Statute*. The purpose of these provisions is to deny entry, exclude, declare inadmissible and ultimately remove persons or whole categories of persons, to ensure that criminals do not take advantage of Canada's immigration system, particularly in shielding themselves from prosecution.

In this regard, the Rwandan genocide has presented the Canadian authorities with sustained judicial activity since 1994, given the steady stream of Rwandans, both Hutus and Tutsis, arriving on Canada's shores. Through the domestic implementation of international criminal law provisions, various courses of action are available for Canadian authorities to address the suspected complicity of individuals in the Rwandan genocide. Provided these individuals have passed undetected through preventive screenings, if suspicions of involvement in the genocide subsequently arise, at one end of the spectrum, Canada can opt to exercise its universal jurisdiction and formally accuse and try them before Canadian criminal courts through the *CAHWCA*. Or, upon a formal request from Rwanda and provided the required arrangements to that effect under the *Extradition Act*<sup>13</sup> are made, Canada may initiate extradition proceedings before Canadian criminal courts on behalf of Rwandan authorities, in order to confirm the charges and obtain the transfer of the accused to be tried under Rwanda's jurisdiction. It can otherwise institute immigration

---

<sup>8</sup> Fannie Lafontaine, *Prosecuting Genocide, Crimes against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012) at 1.

<sup>9</sup> *Criminal Code*, RSC 1985, c C-46; see Lafontaine, *ibid* at 27-31.

<sup>10</sup> *R c Mungwarere*, 2013 ONCS 4594, [2013] OJ No 6123 (QL) [*Mungwarere*].

<sup>11</sup> *Munyaneza c R*, 2014 QCCA 906, (2014), 309 CRR (2d) 71 [*Munyaneza*].

<sup>12</sup> SC 2001, c 27 [*IRPA*].

<sup>13</sup> SC 1999, c 18.

proceedings before the relevant Division of the Immigration and Refugee Board of Canada (IRB), with a view to removing them from Canadian territory, by obtaining rulings on their admissibility, notably under section 35 of the *IRPA*, or their exclusion from refugee protection under article 1F of the United Nations *Convention Relating to the Status of Refugees*<sup>14</sup> and related provisions of the *IRPA*.

These procedures were implemented to keep Canada in line with laudable international efforts to challenge impunity. Expelling an immigrant is, however, a potentially very prejudicial measure, which should not be taken lightly. The Canadian approach to this balancing act, we argue, is distorted in favor of the Canadian authorities to facilitate the removal of individuals suspected of international crimes that should otherwise be protected. The immigration procedures, which reflect a policy emphasizing stricter control over new immigrants, are in the end exposing possible innocent persons to undue and unnecessary hardship. This article explores the merits of the Canadian approach and its consequences through a discussion of three main issues: first, its reliance on immigration over extradition proceedings, thereby circumventing important safeguards; second, its lack of consistency in the application of international criminal law provisions between criminal and immigration matters, enabling Canadian authorities to pursue a given case before different fora on the same set of facts using only the distinction on the relevant burden of proof; and finally, its reliance on the impermissible concept of “guilt by association” in determining complicity for international crimes.

A review of Rwandan genocide cases indicates that the end may not justify the means when it comes to Canada’s approach to alleged criminals on its soil. Even though Canadian law provides for the exercise of universal jurisdiction over international crimes and for extradition procedures, most cases are processed not by criminal courts, but by immigration administrative tribunals, which apply lowered burden of proof and evidentiary standards. Therefore, contrary to the recommendations of the Deschênes Report and to the *CAHWCA*’s objectives, the Canadian approach has reversed the preferred order of legal measures, relying heavily on “cost-efficient” immigration procedures to address alleged breaches to international criminal law.<sup>15</sup>

---

<sup>14</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS, vol 189 at 137 [*Refugee Convention*].

<sup>15</sup> Government of Canada, 12th Report, *supra* note 6 at 4:

*The War Crime Program emphasizes immigrations remedies, namely denying visas and denying entry to Canada to persons who are inadmissible to Canada under the IRPA. Immigration remedies have been found to be effective and cost-efficient. The*

It is submitted that one of the major issues with the Canadian approach to international criminal law is that it is completely at odds with the principles that triggered its implementation in Canada. The reluctance to resort to criminal courts when they would in many situations be the most fair and pragmatic solution calls for a closer scrutiny of Canada's preference for removal and deportation over prosecution. This is a choice that cannot be left unchecked in the hands of the executive.

## *2. Expulsion as Disguised Extradition without the More Onerous Procedural Safeguards*

Despite the impetus derived from international criminal law to avoid impunity through prosecution or extradition, despite the recommendations of the Deschênes Report and the clear objectives behind the *CAHWCA*, "Canada chose practical expediency over justice."<sup>16</sup>

Indeed, it appears that an emphasis has been placed on keeping suspected criminals from being on Canadian soil, rather than ensuring that they be prosecuted or extradited according to more stringent procedural safeguards. Whilst the decision to handle a given case as a criminal or immigration matter is a discretionary one belonging to the executive, it is certainly not an unintentional or inconsequential one. Indeed, it will have a substantive impact on the rights guaranteed. Through a review of Rwandan genocide cases, this section will compare these procedures and their interrelations in order to assess the merits of the Canadian approach. What are the comparative advantages of criminal over immigration proceedings and why is this preferred order not applied, at least for most Rwandan genocide cases?

As recalled by the Supreme Court of Canada in *Ezokola v Canada (Minister of Citizenship and Immigration)*, there are fundamental distinctions between criminal and immigration proceedings. In the context of an admissibility or exclusion hearing before immigration tribunals on the grounds of alleged violations of human or international rights, the

---

most expensive and resource-intensive remedies are the criminal investigation and prosecution of war criminals – these methods are therefore pursued infrequently. *Nonetheless, the ability to conduct criminal investigations and to prosecute is an important element of the War Crime Program. In some cases, a criminal justice response is the most appropriate action* and sends a strong message to Canadians and the international community that the Government of Canada does not tolerate impunity for war criminals or for persons who have committed crimes against humanity, or genocide [emphasis added].

<sup>16</sup> Nicholas P Weiss, "Somebody Else's Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals" (2012) 45 Case W Res J Intl L 579 at 580.

purpose is not to determine whether an individual is liable under international criminal law<sup>17</sup> or even if there are sufficient grounds to extradite him to be prosecuted, but only whether the individual should be prevented from staying on Canadian soil. As the Court observed in *Ezokola*, “The differences between a criminal trial and a Board hearing are further reflected in – and accommodated by – the unique evidentiary burden applicable ... ‘serious reasons for considering’ standard.”<sup>18</sup>

#### *A) Why Expulsion over Extradition?*

From the Canadian authorities’ perspective, “[i]mmigration remedies have been found to be effective and cost-efficient. The most expensive and resource-intensive remedies are the criminal investigation and prosecution of war criminals – these methods are therefore pursued infrequently.”<sup>19</sup> Indeed, criminal proceedings are far more onerous as the means required are proportionate to a determination of guilt beyond reasonable doubt and its associated safeguards. While the requirements for extradition are much lower, there is a clear interest in circumventing the safeguards applied by criminal courts by pursuing these cases before an immigration jurisdiction. In determining inadmissibility and obtaining a removal order, many of the judicial guarantees enshrined in criminal and extradition proceedings are set aside. In this regard, an overview of the applicable procedure before an extradition court is enlightening as to some of the shortcomings of the immigration process.

First, the judicial determination of the extradition process takes place before a criminal judge of a superior court of the province where the suspected individual resides, and is conducted as a preliminary inquiry under the *Criminal Code*, governed by relevant criminal evidentiary standards, with the required adaptations.<sup>20</sup> The test applied is equivalent to a hearing for the confirmation of charges before a Pre-Trial Chamber at the ICC, determining “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”<sup>21</sup> Conversely, immigration proceedings bear no resemblance to criminal proceedings, as it would risk creating safe havens for perpetrators of international crimes.<sup>22</sup> They are not bound by any traditional rules of

---

<sup>17</sup> *Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100 at paras 114-16 [*Mugesera*]; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at paras 37-40, 101-102, [2013] 2 SCR 678 [*Ezokola*].

<sup>18</sup> *Ezokola*, *ibid* at para 40.

<sup>19</sup> Government of Canada, 12th Report, *supra* note 6 at 4 [emphasis added].

<sup>20</sup> *Extradition Act*, *supra* note 13, ss 2, 24, 29, 32-37.

<sup>21</sup> *Rome Statute*, *supra* note 4, art 61.

<sup>22</sup> *Ezokola*, *supra* note 17 at paras 35-40.

evidence<sup>23</sup> and proceed “as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.”<sup>24</sup>

Second, the Canadian *Charter of Rights and Freedoms* generally applies to extradition hearings,<sup>25</sup> as in criminal proceedings, while it has been held that a finding of inadmissibility under the *IRPA* does not, in and of itself, engage an individual’s fundamental legal rights under Section 7 of the Canadian *Charter*.<sup>26</sup> This has substantial procedural effects, as for example, pursuant to Section 11(c) of the Canadian *Charter*, the accused is not a compellable witness in criminal proceedings. Conversely, this does not extend to immigration proceedings,<sup>27</sup> as not only is the concerned person compellable, he is at times the only witness called by the Minister’s representative, with the clear objective to make his case via his examination.

Finally, the *Extradition Act* provides for a right of appeal of the extradition judge’s decision before the court of appeal of the province,<sup>28</sup> while no appeal may be made to the Immigration Appeal Division for individuals found inadmissible on grounds of violations of human or international rights,<sup>29</sup> who can only apply for judicial review before the Federal Court,<sup>30</sup> with very limited chances of success.<sup>31</sup>

Moreover, as recognized by the Court in *Segasayo v Canada (Minister of Citizenship and Immigration)*,<sup>32</sup> discussed below, a finding of inadmissibility on these grounds will worsen the already precarious situation of an immigrant, who will find himself considerably restricted in

<sup>23</sup> *IRPA*, *supra* note 12, ss 170(g) and 170(h).

<sup>24</sup> *Ibid*, s 162(2).

<sup>25</sup> *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; see *United States of America v Ferras*; *United States of America v Latty*, 2006 SCC 33, [2006] 2 SCR 77.

<sup>26</sup> *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 FCR 487; *Segasayo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 173, (2010), 361 FTR 259 [*Segasayo*].

<sup>27</sup> *Almrei (Re)*, 2009 FC 3, (2009), 337 FTR 160; see also *Canada (Minister of Citizenship and Immigration) v Dueck*, [1998] 2 FC 614.

<sup>28</sup> *Extradition Act*, *supra* note 13, s 49.

<sup>29</sup> *IRPA*, *supra* note 12, s 64(1).

<sup>30</sup> *Ibid*, s 72.

<sup>31</sup> According to the statistics compiled by the Federal Court, in 2013, only 15% of *Immigration Applications for Leave and for Judicial Review* were granted leave to present their judicial review; see Federal Court of Canada, *Activity Summary - January 1 to December 31 (2013)*, online: <[http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc\\_cf\\_en/Statistics/Statistics\\_dec13](http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics/Statistics_dec13)> (last visited 17 August 2014).

<sup>32</sup> *Segasayo*, *supra* note 26 at paras 28-30.

his recourse to the last procedural safeguard before a removal order is executed, that of a procedure called “pre-removal risk assessment,” which allows for individuals subject to a removal order to apply to the Minister for protection and have him assess their personal situation and circumstances in the country of return with the objective of having that removal order suspended. Indeed, pursuant to sections 112(3)(a) and (c) of the *IRPA*, refugee protection may not result from an application for protection if the person is determined to be inadmissible on grounds of violating human or international rights, or when refugee protection was rejected on the basis of article 1F of the *Refugee Convention*. Therefore, even if a stay of removal is afforded, “by virtue of section 114(2), if the Minister forms the opinion that the circumstances surrounding a stay of a removal order have changed, he may re-examine the case and cancel the stay,”<sup>33</sup> leaving the individual with no status on Canadian soil and at the mercy of Canadian authorities.

Furthermore, as to the protection of the principle of *non-refoulement*, by which Canada will not remove a person to a country where he would be at risk of persecution or at risk of torture or cruel and unusual treatment or punishment, pursuant to section 115(2)(b) of the *IRPA*, it “does not apply to a person who is inadmissible on the grounds of violating human or international rights if the Minister is of the view the person should not be allowed to remain in Canada ‘on the basis of the nature and severity of the acts committed or of danger to the security of Canada.’”<sup>34</sup> Therefore, the safeguards associated with the Canadian *Charter*, as applied in extradition proceedings, are restricted for those found inadmissible, although, as seen earlier, it has been held that such finding in itself does not engage an individual’s fundamental legal rights under the *Charter*.

These are just some examples of the comparative benefits of extradition proceedings, which are still much less onerous than a criminal trial and related guarantees associated with a determination of guilt or innocence, and could therefore address the Canadian authorities’ concerns with efficiency in compliance with their international obligations.

### *B) Disguised Extradition? The Cases of Telesphore Dereva and Alfred Gahizi*

Extradition is defined as the surrender by one state to another, on request, of persons accused or convicted of having committed a crime in the state seeking the surrender. This is ordinarily done pursuant to a treaty or other arrangements between two states acting in their sovereign capacity, and

---

<sup>33</sup> *Ibid* at para 30.

<sup>34</sup> *Ibid*.



indubitably engages their honor and good faith.<sup>35</sup> Therefore, the decision to treat a given case as an immigration matter is all the more debatable when immigration proceedings stem from an international arrest warrant issued by foreign authorities whose judicial process and ultimate motives may be questionable.

Such was the case for two Rwandan immigrants, Telesphore Dereva<sup>36</sup> and Alfred Gahizi,<sup>37</sup> who faced inadmissibility proceedings before Canadian immigration courts under section 35 of the *IRPA*, on the basis of allegations of complicity in the Rwandan genocide. These allegations rested solely upon Rwandan operative judicial documents that leveled charges against them and requested their arrest and transfer to Rwanda to face trial. The Canadian authorities relied on these documents to initiate immigration proceedings to obtain their removal.

As Rwandan authorities were seeking the extradition of these individuals, it is interesting to explore the reasons that could have led their Canadian counterparts to pursue these cases as an immigration matter rather than extradition proper. Canada's *Extradition Act* covers the situation where the requesting state is not an extradition partner, as is the case for Rwanda. Indeed, section 10 of the *Extradition Act* allows for the Minister of Foreign Affairs, with the approval of the Minister of Justice, to enter into a specific agreement with a foreign country with whom Canada has no extradition treaty or which is not listed in the Schedule, for the purpose of giving effect to a request for extradition in a particular case, as long as the agreement is consistent with the Act.

Although it has been held that when there is a legitimate domestic immigration issue at stake, Canadian authorities cannot be compelled to favor extradition over immigration proceedings,<sup>38</sup> the principle remains that “[i]t is an abuse of process to exercise a statutory power for a reason that is unrelated to the purpose for which that power was granted.”<sup>39</sup> More specifically in the context of immigration, it was held that “it is an

---

<sup>35</sup> *Canada v Schmidt*, [1987] 1 SCR 500.

<sup>36</sup> *Canada (Public Safety and Emergency Preparedness) v Dereva*, 18 October 2013, ID File No: 0018-B2-00297, Immigration and Refugee Board of Canada – Immigration Division [*Dereva*].

<sup>37</sup> *Canada (Public Safety and Emergency Preparedness) v Gahizi*, 30 May 2014, ID File No: 0018-B3-00306, Immigration and Refugee Board of Canada – Immigration Division [*Gahizi*].

<sup>38</sup> *Canada (Public Safety and Emergency Preparedness) v Gao*, 2007 CanLII 60410 (CA IRB); see also *Moore v Minister of Manpower and Immigration*, [1968] SCR 839; *Kindler v Minister of Employment and Immigration* (1985), 47 CR (3d) 225 (FCTD); *Halm v Canada (Minister of Employment and Immigration)*, [1996] 1 FC 547 (TD).

<sup>39</sup> *United States of America v Tollman*, [2006] OJ No 5588 (Ont Sup Ct) at para 24.

improper use of the *IRPA* power to remove a foreign national to another country for the purpose of enabling that foreign state to prosecute him or her for offences allegedly committed there.”<sup>40</sup> A stay of proceedings was accordingly granted in that case where it was considered that resorting to immigration procedures was a way to circumvent the extradition scheme and its associated safeguards.<sup>41</sup>

Conversely, it has also been held that immigration procedures do not take precedence over an extradition request, even when a refugee status has previously been afforded to an individual.<sup>42</sup> Nevertheless, the Canadian authorities’ decision not to avail themselves of the distinct possibility to enter into an ad hoc agreement with their Rwandan counterparts for the purpose of these cases and proceed according to the provisions of the *Extradition Act* is telling.

### C) *Paling in Comparison*

Faced with similar requests from Rwanda, the UK authorities seemingly felt compelled to accede. Although, like Canada, the UK does not have an extradition treaty with Rwanda, and Rwanda is not a listed partner in the UK’s *Extradition Act*,<sup>43</sup> the UK Act also provides for the Secretary of State to enter into a specific agreement,<sup>44</sup> procedure which was followed in the case of *Brown (formerly Bajinya) v HMP Belmarsh*.<sup>45</sup> Ultimately, in 2009, the High Court reviewed evidence regarding the judicial process in Rwanda, looking into, among others, International Criminal Tribunal for Rwanda (ICTR) decisions, cases in Europe, expert opinions, NGO reports, and reached

a firm conclusion as to the gravity of the problems that would face these appellants as regards witnesses if they were returned for trial in Rwanda. Those very problems do not promise well for the judiciary’s impartiality and independence. The general evidence as to the nature of the Rwandan polity offers no better promise. When one adds all the particular evidence we have described touching the justice system, we are driven to conclude that if these appellants were returned there would be a real risk that they would suffer a flagrant denial of justice.<sup>46</sup>

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at para 26.

<sup>42</sup> *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281.

<sup>43</sup> 2003 (UK), c 41 [*UK Extradition Act*].

<sup>44</sup> *Ibid.*, s 194.

<sup>45</sup> [2007] EWHC 498 at para 2.

<sup>46</sup> *Brown (aka Vincent Bajinya) & Ors v Government of Rwanda & Ors* [2009]

The order of extradition fell and the four men were discharged. A new request was made by Rwanda in 2013 adding two individuals to the initial four. The proceedings, which started in March 2014, are still ongoing at the time of writing.<sup>47</sup> It seems more recent decisions from the ICTR, national jurisdictions and the European Court of Human Rights (ECtHR) led the UK authorities to believe that the situation in Rwanda has sufficiently improved to allow for a fair trial in accordance with international standards.

While in 2011, the first ICTR decision allowing for the transfer of an accused to Rwanda,<sup>48</sup> as well as the ECtHR ruling confirming a Swedish court's decision to extradite a genocide suspect to Rwanda,<sup>49</sup> have set precedents and demonstrate some newly found trust in the reliability of the Rwandan judiciary system, this renewed confidence is certainly not unanimously shared.<sup>50</sup> The current state of law in several European countries such as Germany,<sup>51</sup> Finland<sup>52</sup> and Switzerland,<sup>53</sup> where extradition to Rwanda was denied, certainly encourages the debate, while France continues to deny extradition requests from Rwanda,<sup>54</sup> rather choosing to exercise its universal jurisdiction.<sup>55</sup>

---

<sup>47</sup> Jon Manel, "Rwanda 'refused UK police request' over genocide suspects", *BBC News UK*, 12 December 2013, online: <<http://www.bbc.com/news/uk-25004725>> (last visited on 22 August 2014); Estelle Shirbon, "Rwandan genocide suspects face UK extradition battle", *Reuters*, 5 June 2013, online: <<http://uk.reuters.com/article/2013/06/05/us-britain-rwanda-genocide-idUSBRE95417C20130605>> (last visited on 22 August 2014).

<sup>48</sup> Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, *Uwinkindi* (ICTR-01-75-R11bis), Appeals Chamber, 16 December 2011.

<sup>49</sup> *Ahorugeze v Sweden*. ECtHR (2011), No. 37075/09.

<sup>50</sup> Human Rights Watch, *Rwanda: Justice after Genocide – 20 Years On* (2014), online: <[http://www.hrw.org/sites/default/files/related\\_material/2014\\_March\\_Rwanda\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/2014_March_Rwanda_0.pdf)> (last visited on 17 August 2014) at 8-10.

<sup>51</sup> *Oberlandesgericht* (Court of Appeals) Frankfurt am Main, judgment of 3 November 2008.

<sup>52</sup> *Prosecutor v Francois Bazaramba, Porvoo District Court* (now District Court of Itä-Uusimaa), Finland, R 09/404, 11 June 2010.

<sup>53</sup> Office fédérale de la justice (OFJ), «La Suisse refuse d'extrader un Rwandais», Communiqués OFJ, 30 June 2009, online: <<https://www.bj.admin.ch/content/bj/fr/home/dokumentation/medieninformationen/2009/2009-06-30.html>> (visited on 22 August 2014).

<sup>54</sup> See e.g. *Cour d'appel de Rouen, affaire Robert Mariyamungu, alias Nwitenawe*, N°2013/00029, 7 février 2013.

<sup>55</sup> *Cour d'assises de Paris*, 2<sup>e</sup> section, statuant en premier ressort, affaire Pascal Senyamuhara Safari (alias Pascal Simbikangwa), Arrêt Criminel, N°10/0033, 12 March 2014.

As for Canada, it never engaged in any extradition procedures with Rwanda. Contrary to popular misconception regarding the case of Léon Mugesera, he was in fact *removed* from Canada in early 2012, following immigration proceedings in which the Supreme Court validated the removal order taken against him<sup>56</sup> and the Federal Court ultimately dismissed his application for a stay of the said order.<sup>57</sup>

One can only speculate about the exact reasons for such a decision, but arguably, if Canadian authorities shared this renewed confidence toward their Rwandan counterparts and the guarantees offered by their judicial system, one would expect extradition arrangements between the two countries to be made, as is the case for other European countries. This reluctance could be explained by the fact that the Rwandan Patriotic Front (RPF), the regime that has been in power in Rwanda since July 1994, was once characterized by Canadian authorities as an organization with limited and brutal purposes.<sup>58</sup> Indeed, there is compelling evidence about the persistence of limited rights for Rwandans, violence against genocide survivors, arbitrary detention and imprisonment, irregular elections, arbitrary arrests of members of the political opposition, and limits on freedom of speech and association.<sup>59</sup> Moreover, it should be recalled that

---

<sup>56</sup> *Mugesera*, *supra* note 17.

<sup>57</sup> *Mugesera v Canada (Citizenship and Immigration)*, 2012 FC 32 (2012), 409 FTR 25 [*Mugesera FC*].

<sup>58</sup> *Rwiyamirira v Canada (Minister of Citizenship and Immigration)*, [2004] RPDD No 286 (QL) [*Rwiyamirira*] at paras 27-29, judicial review denied, *Rwiyamirira v Canada (Citizenship and Immigration)*, [2006] FC 1171.

<sup>59</sup> *Nsengiyumva v Canada (Citizenship and Immigration)*, 2014 FC 122 at para 30, [2014] SCJ No 229 (QL); see e.g. Commonwealth Human Rights Initiative, *Rwanda's Application for Membership of the Commonwealth, Report and Recommendations of the Commonwealth Human Rights Initiative* (2009), online: <[http://humanrightsinitiative.org/publications/hradvocacy/rwanda's\\_application\\_for\\_membership\\_of\\_the\\_commonwealth.pdf](http://humanrightsinitiative.org/publications/hradvocacy/rwanda's_application_for_membership_of_the_commonwealth.pdf)> (last visited 22 August 2014); Human Rights Watch, *Rwanda Tribunal should pursue Justice for RPF Crimes* (2008), online: <<http://www.hrw.org/news/2008/12/12/rwanda-tribunal-should-pursue-justice-rpf-crimes>> (last visited 22 August 2014); Filip Reyntjens, "Constructing the Truth, Dealing with Dissent, Domesticating the World, Dealing with Dissent in Post-Genocide Rwanda" (2011) 110 (438) *Afr Aff* 1; US Department of State, *Country Reports on Human Rights for 2013*, Rwanda; US Department of State, Marie Harf, Deputy Spokesperson, *Ongoing Detentions and Arrest in Rwanda*, 4 June 2014, online: <<http://m.state.gov/md227087.htm>> (last visited 22 August 2014); Susan Thomson, "Whispering Truth to Power: The Everyday Resistance of Rwandan Peasants to Post-Genocide Reconciliation" (2011) 110 (440) *Afr Aff* 439; Human Rights Watch, *Repression Across Borders, Attacks and Threats Against Rwandan Opponents and Critics Abroad* (2014), online: <<http://www.hrw.org/news/2014/01/28/rwanda-repression-across-borders>> (last visited 22 August 2014); United Nations Human Rights Office of the High Commissioner, *Report of the Mapping Exercise documenting the most serious violations of Human Rights and international humanitarian*

until July 2009, there was a stay on removal orders to Rwanda enacted by Canadian authorities under section 230 of the *Immigration and Refugee Protection Regulations (IRPR)*<sup>60</sup> considering the generalized risk of violence in the country.<sup>61</sup>

Recent incidents such as the assassination of Patrick Karegeya on January 1, 2014 in South Africa,<sup>62</sup> the abduction from Uganda between August and October 2013 of Joel Mutabazi, Jackson Karamera and Innocent Kalisa and their trial for terrorism in Rwanda<sup>63</sup> (charges described by the US State Department, as international human rights organizations, as “politically motivated, aimed at stifling internal dissent”),<sup>64</sup> and the hijacking in August 2014 of the Rwandan League for the Promotion and Defence of Human Rights,<sup>65</sup> continue to cast doubt on the actual state of judicial guarantees in the country.

Therefore, it can be argued that what Canadian authorities are seemingly unwilling or unable to do directly through the relevant

---

*law committed within the territory of the Democratic Republic of Congo, 1993-2003* (2010), online: <[http://www.ohchr.org/Documents/Countries/CD/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf)> (last visited 22 August 2014); Luc Reydam, “Let’s Be Friends: The United States, Post-Genocide Rwanda, and Victor’s Justice in Arusha,” Institute of Development Policy and Management (IOB) of the University of Antwerp Discussion Paper, 1 January 2013, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2197823](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197823)> (last visited 22 August 2014) ; Human Rights Council, *Rwanda : Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association* (2014), A/HRC/26/29/Add 2.

<sup>60</sup> SOR/2002-227.

<sup>61</sup> Government of Canada, *Notice - Measures for People Affected by the Lifting of the Temporary Suspension of Removals to Burundi, Liberia and Rwanda*, 23 July 2009.

<sup>62</sup> AFP, « L’Afrique du Sud lance un «avertissement très sévère» au Rwanda », 12 March 2014, online: <<http://www.lapresse.ca/international/afrique/201403/12/01-4746995-lafrique-du-sud-lance-un-avertissement-tres-severe-au-rwanda.php>> (last visited 24 August 2014).

<sup>63</sup> BBC News Africa, « Paul Kagame ex-guard Joel Mutabazi rejects Rwanda trial », 28 January 2014, online : <<http://www.bbc.com/news/world-africa-25930720>> (last visited 24 August 2014); RFI, « Rwanda: reprise du procès de Joël Mutabazi et de ses 15 co-accusés », 13 May 2014, online: <<http://www.rfi.fr/afrique/20140513-rwanda-reprise-proces-joel-mutabazi-15-co-accuses/>> (last visited 24 August 2014). The East African, “Kigali terrorism trial suspects deny evidence”, 21 June 2014, online: <<http://www.theeastafrican.co.ke/news/Kigali-terrorism-trial-suspects-deny-evidence/-/2558/2357162/-/10x80tgz/-/index.html>> (last visited 24 August 2014).

<sup>64</sup> US Department of State, *Country Reports on Terrorism 2013 Africa Overview*, online: <<http://www.state.gov/j/ct/rls/crt/2013/224820.htm>> (last visited 24 August 2014)

<sup>65</sup> Human Rights Watch, “Rwanda Takeover of Rights Group: Stop Interference with Independent Organizations”, 14 August 2014, online: <<http://www.hrw.org/news/2013/08/14/rwanda-takeover-rights-group>> (last visited 24 August 2014).

extradition process, has nonetheless been tried indirectly through immigration courts, with the same result sought: handing over alleged criminals to Rwandan judicial authorities for prosecution. This is particularly problematic since, as pointed out by the Minister itself in *United States v Burns* in support of his request for extradition in that case, the process by which “Canada satisfies itself that certain minimum standards of criminal justice exist in the foreign state before it makes an extradition treaty in the first place”<sup>66</sup> is circumvented.

The Supreme Court of Canada concluded in *Burns* that extradition towards a jurisdiction applying death penalty, without diplomatic assurances,<sup>67</sup> and in *Suresh v Canada (Minister of Citizenship and Immigration)* that deportation to torture, even where national security interests are at stake, safe from “exceptional circumstances ... such as natural disasters, the outbreak of war, epidemics and the like,”<sup>68</sup> would contravene section 7 of the Canadian *Charter*. Both decisions emphasized that section 7 is concerned not only with the act of extradition/deportation itself, but also with the potential consequences of that act.<sup>69</sup> Therefore, the Supreme Court of Canada leaves the door open to other situations that would justify a refusal to deport, extradite or otherwise expel under section 7:

Situations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s 7.<sup>70</sup>

The situation of Rwanda is unique in several aspects. There has been persistent controversy regarding the RPF, whose record in matters of human rights has been appalling since 1994, and although there are signs of improvement, it still leaves a lot to be desired, despite persistent international condemnation.<sup>71</sup>

In all fairness to potential deportees, if “serious reasons for considering” were to make them liable for deportation, “substantial ground to believe” that they will not receive a fair trial in Rwanda, as applied in

---

<sup>66</sup> *United States v Burns*, 2001 SCC 7 at para 73, [2001] 1 SCR 283 [*Burns*].

<sup>67</sup> *Ibid* at para 124.

<sup>68</sup> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 75-78, [2002] 1 SCR 3 [*Suresh*]. In *Suresh*, which was a deportation case, the Court at para 54 indicated that it saw no reasons to depart from the principles of *Burns*, even if they were developed in the context of extradition.

<sup>69</sup> *Burns*, *supra* note 66 at para 60; *Suresh*, *ibid* at paras 53, 54, 56.

<sup>70</sup> *Burns*, *ibid* at para 60; see also *Suresh*, *ibid*.

<sup>71</sup> See *Mugesera FC*, *supra* note 57.

the case of deportation to torture,<sup>72</sup> should dictate that an alternative be sought.

The balancing test required under section 7 of the *Charter* between the protected legal rights of individuals and the legitimate interests of the State, aimed at assuring that the rights to life, liberty and security may only be infringed in accordance with principles of fundamental justice, should take into consideration the fact that the trial of any Rwandan for genocide allegations can take place in Canada since the adoption of the *CAHWCA*. In *Burns*, the Supreme Court, quoting *Soering v United Kingdom*,<sup>73</sup> the landmark case from the ECtHR, mentioned that the possibility of holding the trial of Soering in Germany, even if the crimes had been committed in the US, was a relevant circumstance in proceeding to the balancing test.<sup>74</sup> The legitimate purpose of extradition is to ensure that suspects face accusations, preferably in the country where alleged crimes were committed, but subject to the principle that the fugitive must be able to receive a fair trial in the requesting state, in accordance with the fundamental principles of justice as not to shock the conscience of Canadian.<sup>75</sup> Therefore, it is suggested that if this standard is not met, the decision to deport such persons, as is the case for extradition, rather than prosecute them under Canadian universal jurisdiction, would amount to a violation of section 7 of the *Charter* and be reviewable. The fact that there now exists a manner to achieve prosecution without subjecting the fugitive to suffering of an exceptional intensity or duration should weigh in the determination of the level of acceptable risks before someone is deported. In other words, the balancing test of section 7 of the *Charter* cannot ignore the fact that there is no imperative necessity to subject immigrants to unsafe returns and trials. If there are any doubts remaining as to how they will be treated by the country they fled for persecution in the first place, the *CAHWCA* now offers the possibility to prosecute international criminal suspects in Canada.

### *3. Damaging Lack of Consistency in the Measures Adopted to Deal with Alleged Rwandan Génocidaires: The Case of Jacques Mungwarere*

Even on the rare occasions where Canada does exercise its universal jurisdiction and tries Rwandan genocide cases before its criminal courts, the prospect of immigration proceedings still lingers. In this regard, the case of Jacques Mungwarere illustrates the need for coherence in the

---

<sup>72</sup> *Suresh*, *supra* note 68 at para 78.

<sup>73</sup> *Soering v United Kingdom*, ECtHR (1989) Series A, No. 14038/88.

<sup>74</sup> *Burns*, *supra* note 66 at para 137.

<sup>75</sup> *Ibid* at paras 68, 69, 72.

Canadian approach to alleged breaches of international criminal law between criminal and immigration jurisdictions.

Following investigations by the RCMP war crime unit from 2003, Mungwarere, a Rwandan refugee in Canada since April 2002, was arrested on November 6, 2009, and tried before the Ontario Superior Court of Justice in Ottawa under the *CAHWC* for his alleged involvement in the Rwandan genocide. On July 5, 2013, Mungwarere was acquitted of all the charges against him<sup>76</sup> and released after 1,337 days of detention. The prosecution did not appeal his acquittal.

Mungwarere's acquittal did not, however, mark the end of his dealings with the Canadian authorities. On June 25, 2013, the Canadian Border Service Agency (CBSA) initiated proceedings before the Refugee Protection Division of the IRB under section 109 of the *IRPA*, requesting to vacate the decision allowing Mungwarere's claim for refugee protection, as it was obtained by way of misrepresenting and withholding material facts, as acknowledged by Mungwarere when he testified at his criminal trial. The CBSA also used the evidence generated during the criminal investigations and trial to argue that Mungwarere should originally have been excluded from refugee protection.

The way immigration proceedings are devised in Canada enables the authorities to rely simply on the fact that Mungwarere has been accused in Canada to argue that he should be excluded from refugee protection under article 1F of the *Refugee Convention* as someone for whom there are serious reasons for considering that he has committed a crime against humanity.

Therefore, the Canadian authorities relied on evidence obtained in the course of the criminal proceedings against Mungwarere in order to reevaluate his refugee status and ultimately aim at removing him from Canada. As the agencies involved in these different stages of Mungwarere's proceedings are all part of the Canadian War Crimes Program,<sup>77</sup> the objective of which is to fight impunity, but by different means, it therefore appears that what the authorities failed to achieve directly by one agency is tried indirectly by another – and again, on the basis of some of the *same allegations* that were part of the failed prosecution case against him.

---

<sup>76</sup> *Mungwarere*, *supra* note 10 at paras 1260-61.

<sup>77</sup> Government of Canada, 12th Report, *supra* note 6.



### A) *The Need for Consistency as Regards Inadmissibility*

What is particularly problematic is firstly that the evidence adduced in Mungwarere immigration proceedings, most notably his contradictory testimony, could not have been obtained save from criminal prosecution and correlative exercise of his fundamental rights to a full answer and defense. Secondly, Mungwarere is now facing the same allegations, but in the setting of immigration proceedings, where the standard of proof is lowered from “beyond a reasonable doubt” to “serious reasons for considering.”<sup>78</sup>

Even if the remedy sought is purportedly different, as the identity of the parties involved and the case presented are ultimately the same, both falling under the umbrella of the War Crimes Program, there is a problem of coherence, which creates an appearance of judicial obstinacy, and therefore injustice. Even if the factual determination in criminal and immigration procedures is subject to varying standards, it remains nevertheless the same factual determination, that of the involvement of the suspect in given crimes.

A comparison with other grounds of inadmissibility under the *IRPA* further reveals the incoherence between Canadian international criminal law provisions. Section 101 of the *IRPA* provides that a refugee claim is ineligible by reason of “serious criminality” when the claimant *has been convicted* for an offence under an Act of the Parliament punishable by a maximum term of imprisonment of at least 10 years. Section 36(1) of the *IRPA* also provides for inadmissibility, leading to loss of status and removal from Canada, of a permanent resident or a foreign national based on the same grounds.

When Canadian authorities elect to exercise their universal jurisdiction under the *CAHWCA*, the offence is equivalent to any other one under an Act of Parliament<sup>79</sup> and should therefore be considered as such in all other regard. It is submitted that since Mungwarere has been prosecuted under Canadian law, the need for predictably and coherence requires the offence in question to be considered as a national offence in all other aspects. It should not therefore be allowed to be redefined *ex post facto* as an international crime or a serious non-political crime committed outside the country of refuge, pursuant to article 1F of the *Refugee Convention* and under section 98 of the *IRPA*, for the purposes of immigration proceedings.

---

<sup>78</sup> A standard described in the Canadian courts as being lower than the civil burden of balance of probability; see *Mugesera*, *supra* note 17 at para 114; *Ezokola*, *supra* note 17 at paras 101-102.

<sup>79</sup> Lafontaine, *supra* note 8 at 93-94.

Indeed, as other national offences require a conviction to trigger immigration proceedings, it would constitute unfair and unequal treatment for international crimes, once treated as a national offence, to retain a status that would enable them to be reused for immigration purposes despite an acquittal. This effectively circumvents the legislator's clear intent, as can be seen from the specific requirement for a conviction in these other provisions, to avoid situations where evidence from a criminal trial in Canada would be repurposed for immigration proceedings despite acquittal, since they bare a lower threshold.

Moreover, it should be recalled that the purpose of article 1F(a) of the *Refugee Convention* is not to determine guilt or innocence, but to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status.<sup>80</sup> The objective behind this principle is to prevent alleged international criminals from securing asylum<sup>81</sup> and thereby *avoiding* criminal proceedings. Once criminal proceedings are in fact pursued, the lack of impunity is assured and the purpose of inadmissibility fulfilled. Therefore, this distinct purpose becomes moot and should not be relied upon as this provision, in the context where universal jurisdiction is exercised, was not conceived to serve as a fallback position.

Come what may, as the jurisprudence currently stands, the flaws in the coordination of immigration and criminal laws concerning the application of international criminal law are exploited by the different Canadian agencies involved in furtherance of their common purpose.

### *B) Harmonizing the Contribution Threshold*

The fact that the intervention of the Supreme Court in *Ezokola* was necessary to adjust the contribution threshold required to establish complicity for immigration purposes to international criminal laws standards,<sup>82</sup> illustrates the reluctance of the authorities to afford the same judicial rights as citizens to immigrants suspected of international criminal conduct. While *Ezokola* in effect did put an end to what amounted to a presumption of guilt, where individuals were deemed guilty of crimes simply by virtue of their belonging to some groups or governments, the Canadian legal scheme is still fraught with difficulties when it comes to the interaction between immigration and criminal procedures, and the application of the varying burdens of proof in these procedures.

---

<sup>80</sup> *Ezokola*, *supra* note 17 at para 38.

<sup>81</sup> *Ibid* at para 35.

<sup>82</sup> *Ibid* at paras 9, 52.

A particular problem arises from the usage of the lower threshold standard in immigration proceedings *following* an acquittal by a criminal court under the more stringent standard of proof beyond a reasonable doubt. This situation occurred in *Mungwarere*, but could also arise in different circumstances, such as, for example, the case of someone acquitted before the ICTR who would attempt to immigrate to Canada.

A closer look at Mungwarere's criminal trial reveals the possibility of incoherent findings regarding his alleged contribution to the Rwandan genocide at the outset of criminal and immigration proceedings. In light of the evidence presented at Mungwarere's criminal trial, the judge concluded that it was insufficient to establish beyond a reasonable doubt his contribution to the crimes alleged and their essential elements, in these terms:

*Même si je fais fi des inquiétudes que j'ai soulevées concernant le témoignage d'Asinathe Nyiragwiza et de Maria Myiramaboyi, l'ensemble de la preuve qui m'apparaît crédible ne me permettrait pas de conclure, hors de tout doute raisonnable, qu'après le départ vers les attaques avec le groupe d'attaquants, l'accusé a posé des actes qui ont largement facilité la perpétration des meurtres de Tutsis ou posé des actes qui ont contribué de façon appréciable à la mort de Tutsis. Je suis d'avis que dans les deux cas, la preuve doit identifier les actes spécifiques sur lesquels s'appuie la poursuite. Ici, ce que l'accusé a fait après le départ du petit centre, n'est que pure spéculation. Tout au plus, cette preuve établit une probabilité de culpabilité.*

Pour ces motifs, la Couronne n'a pas prouvé, hors de tout doute raisonnable, tous les éléments essentiels des crimes reprochés à l'accusé. Je déclare M. Mungwarere non coupable.<sup>83</sup>

The contribution threshold applied by the trial judge is almost identical to that defined by the Supreme Court in *Ezokola*, which requires evidence of a substantial, voluntary and conscious contribution to the alleged crime.<sup>84</sup> This interpretation is compatible with the explicit objective, as stated in *Ezokola*,<sup>85</sup> for immigration standards to reflect those of international criminal law.

According to the judge in the Ontario Superior Court, all the credible evidence presented in this case did not reveal a single specific act of Mungwarere which would amount to a substantial contribution to the Rwandan genocide. Taken against this background, and bearing in mind that the contribution threshold is a question of law, and therefore not

<sup>83</sup> *Mungwarere*, *supra* note 10 at paras 1260-61 [emphasis added].

<sup>84</sup> *Ezokola*, *supra* note 17 at paras 8, 29, 84.

<sup>85</sup> *Ibid* at paras 9, 52.

subject to the lower “serious reasons for considering” standard,<sup>86</sup> this means that there are no acts of Mungwarere upon which his involvement in the Rwandan genocide could rest. According to the judge, the conduct of Mungwarere upon which his criminal liability could rest is pure speculation.

The “probability of guilt” concept introduced by the Judge is misleading, as, apart from being stated in a hypothetical context on the basis of evidence found unreliable, it is foreign to criminal and immigration proceedings alike. Indeed, a probability can be infinitesimal or very strong, but it is in itself of no assistance to determine if the required contribution threshold is met based on the credible evidence at hand. In such circumstances, the opportunity of subjecting Mungwarere to immigration proceedings is highly questionable, since it appears that unidentifiable acts, based on pure speculation, even if considered in light of the lower immigration evidentiary standard, simply cannot amount, in law, to the required contribution threshold and therefore constitute criminal conduct that is punishable under international criminal law. In this regard, it is submitted that immigration law can and must be interpreted so as to avoid the *Mungwarere* conundrum, especially in light of the principle in *Ezokola* that the applicable law be harmonized and interpreted in a compatible fashion, regardless of the difference in the applicable burden of proof.

More importantly, beyond the mere legalities of it all, the sufferings of Mungwarere and his family are very real. After having been separated from his family for a prolonged period of time, because of an indictment resting largely on false accusations,<sup>87</sup> the immigration proceedings are now adding to his hardship.

The area at the intersection of international criminal law and immigration law is indeed a rough place to be at. A group of 14 formerly ICTR accused currently find themselves at that juncture, facing the systematic refusal of countries to harbor them despite their acquittal and repeated implorations by the UN Security Council to that effect.<sup>88</sup> Clearly, reforms are needed to fine-tune the interaction between criminal and immigration proceedings, locally and internationally.

---

<sup>86</sup> *Mugesera*, *supra* note 17 at para 116; it must therefore be established that the facts constituted a crime.

<sup>87</sup> *Mungwarere*, *supra* note 10 at para 1222.

<sup>88</sup> Raymond Ouigou Savadogo, « Non-coupables : La réinstallation des acquittés des juridictions pénales internationales » (LLM thesis, Laval University, 2014) [unpublished].

#### 4. Reminiscence of “Guilt by Association”: The Cases of Maximin Segasayo and Henri Jean-Claude Seyoboka

As was just hinted, *Ezokola* stresses that, even though the evidentiary standard within the Canadian immigration law realm is one of “serious reasons for considering” that an individual has committed international crimes, this “*unique evidentiary standard does not, however, justify a relaxed application of fundamental criminal law principles in order to make room for complicity by association.*”<sup>89</sup>

In accordance with the broadest modes of commission recognized today in international criminal law, complicity thus requires, beyond the mere association or passive consent, a link between the individual and the crime or criminal purpose of the group.<sup>90</sup> Complicity must be determined based on the fundamental principle of individual criminal responsibility, according to which a person can only be held liable for his or her own reprehensible acts.<sup>91</sup>

To meet this burden under the applicable standard of proof, a significant, voluntary and conscious contribution to the crimes or criminal purpose of an organization must be proven.<sup>92</sup> These conditions are essential to the notion of complicity based on the contribution, to prevent it from being unduly extended to include guilt by association,<sup>93</sup> as has been the case in the past.

While these recent findings in *Ezokola* were reached in the context of determining the standard for exclusion of refugee status under article 1F(a) of the *Refugee Convention*, it has been held that their generality extend to inadmissibility proceedings.<sup>94</sup>

We will eventually see how these new principles are applied in these different contexts, but let us consider one inadmissibility ground that seems difficult to reconcile with the laudable conclusions of the Supreme Court in *Ezokola* and which has played, and is perhaps called to play, a significant role in the exclusion of Rwandan nationals.

Section 35(1)(b) of the *IRPA* reads

---

<sup>89</sup> *Ezokola*, *supra* note 17 at para 102 [emphasis added].

<sup>90</sup> *Ibid* at paras 52-53, 68, 77.

<sup>91</sup> *Ibid* at para 82.

<sup>92</sup> *Ibid* at paras 8, 29, 84.

<sup>93</sup> *Ibid* at para 85.

<sup>94</sup> *See Dereva*, *supra* note 36 at para 91; *Gahizi*, *supra* note 37 at para 106.

a permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for ... *being a prescribed senior official* in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity ...<sup>95</sup>

In the context of this provision, it has consistently been held that mere association with an organization designated by the Minister as “criminal” was sufficient and that any actual complicity of the individual in the crimes committed by the said organization was not relevant in determining inadmissibility.<sup>96</sup> In this regard, although the concerned person “did not personally by word or deed engage in such atrocities, the question is whether he has the status of a prescribed senior official. If he does, any personal lack of blameworthiness is simply not relevant.”<sup>97</sup>

On the basis of this provision, Maximin Segasayo, the Rwandan ambassador to Canada from 1991 to 1995, and a protected refugee since 1996, was found inadmissible to Canada for violating human or international rights as being a prescribed senior official of a designated government, although absent from Rwanda during the 1994 genocide. In his judicial review proceedings of this decision, Segasayo argued that since section 35(1)(b) of the *IRPA* and related provisions created an irrebuttable presumption, it violated the rules of natural justice, given that he had no opportunity to present his case that, despite occupying the position of ambassador, he was not in any way complicit in crimes against humanity. He also argued that section 35(1)(b) of the *IRPA* as applied was unconstitutional with regard to section 7 of the Canadian *Charter*.<sup>98</sup> His submissions were dismissed, as it was held that a determination of inadmissibility did not engage his constitutional rights to life, liberty and security since other avenues remained for Segasayo to avoid returning to Rwanda, although arguably restricted. Therefore his arguments based on violation of his fundamental rights were deemed premature.<sup>99</sup>

As section 35(1)(b) of the *IRPA* and related provisions arguably provide for systematic application of the impermissible concept of guilt by association, it remains to be seen if and how they can be interpreted in a

---

<sup>95</sup> *IRPA*, *supra* note 12 [emphasis added].

<sup>96</sup> *Canada (Minister of Citizenship and Immigration) v Adam*, [2001] 2 FC 337 at paras 7, 8, 11; *Younis v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1157 at para 28, [2010] FCJ No 1441.

<sup>97</sup> *Lutfi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391 at para 8, (2005), 52 Imm LR (3d) 99.

<sup>98</sup> *Segasayo*, *supra* note 26 at paras 9-11.

<sup>99</sup> *Ibid* at paras 7-8, 28-32.

compatible fashion with the principles set out in *Ezokola*. Where Segasayo faces hardship because of his political association with the Interim Government, Henri Jean-Claude Seyoboka does so because he was a member of the Forces Armées Rwandaises (FAR).

After nearly 10 years of litigation and following the latest decision of the Federal Court of Canada on September 27, 2012, the only valid ground of exclusion remaining was his involvement in the FAR. The court found that his continued role within an organization with limited and brutal purposes, while being aware of crimes committed, was sufficient to exclude him even though there was no evidence of his participation in any crime, as he failed to rebut the presumption of complicity based on the purported nature of the FAR.<sup>100</sup>

However, in a recent decision of the Immigration Division,<sup>101</sup> it has been held that, based inter alia on recent ICTR judgments in the military cases,<sup>102</sup> the FAR did not constitute an organization with limited and brutal purposes. Moreover, it was determined that in application of the *Ezokola* principles, involvement in the FAR during the 1994 genocide, absent of evidence of a substantial, voluntary and conscious contribution to the crimes committed by the organization, was insufficient to constitute reasonable grounds to believe of complicity in Rwandan genocide. This decision is currently under appeal.

It remains to be seen how the important steps made by *Ezokola* in harmonizing immigration law principles to international criminal law standards will fare in light of these irreconcilable differences; and most importantly, whether Canadian authorities will adjust their mindset of guilt by association to the new, more stringent test enunciated by the Supreme Court.

### 5. Conclusion

From the approach of Canadian authorities on the matter, it appears to be politically tempting to emphasize efficiency over a precautionary approach

---

<sup>100</sup> *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1143, (2012), 419 FTR 94.

<sup>101</sup> *Canada (Minister of Public Safety and Emergency Preparedness) v Musabyimana*, 24 April 2014, ID File No.: 0018-B3-00305, Immigration and Refugee Board of Canada – Immigration Division.

<sup>102</sup> Judgment, *Bagosora* (ICTR-98-41-T), Trial Chamber, 18 December 2008, at para 7; Judgment, *Bagosora* (ICTR-98-41-A), Appeals Chamber, 14 décembre 2011; Judgment, *Ndindiliyimana* (ICTR-00-56-T), Trial Chamber, 17 May 2011; Judgment, *Ndindiliyimana* (ICTR-00-56-A), Appeals Chamber, 11 février 2014.

as to both the substance of cases against alleged international criminals and their fate once satisfied that the suspicions against them are deemed serious enough. However, a review of Rwandan cases indicates that such efficiency is accompanied by unacceptable risks regarding the wellbeing and fundamental rights of targeted suspects. Individuals are subjected to costly and protracted proceedings that should be much more rigorously filtered before finding their way to Courts. Ensuring that Canada does not become a “safe haven” for dangerous fugitives is an entirely legitimate objective, but equally so is preserving Canada’s credibility in addressing alleged breaches to international criminal law.

An important issue arising from a review of Rwandan genocide cases pertains to the level of deference that should be accorded to executive decisions concerning the course of conduct to follow when dealing with alleged criminals from Rwanda. To what extent should the Canadian approach fall under the executive prerogative powers over foreign affairs and escape judicial review? The willingness to entertain normal relations with Rwanda and to rely on material generated from that country would, no doubt, be considered by the Canadian authorities as falling under that “residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”<sup>103</sup> However, the confirmed duties of Canadian courts to review, when asked, the exercises of prerogative power for constitutionality, as stated for example in *Canada (Prime Minister) v Khadr*,<sup>104</sup> *Burns*,<sup>105</sup> and *Suresh*,<sup>106</sup> would provide an interesting background against which to assess the validity of the Canadian approach under Section 7 of the Canadian *Charter* that enshrine the rights to life, liberty and security.

The concept of international criminal justice is a whole that cannot and should not be dissociated with the very purpose it serves: to enforce the rule of law on an international level by bringing suspects to justice and determining criminal liability in accordance with the fundamental rights of the accused. If swift immigration procedure may appear cost-efficient or effective, in the long run there is also a cost associated with sending even the worse suspects without due process and to countries where they might not receive fair trials. With respect to Rwanda, doing so does not contribute

---

<sup>103</sup> *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 34, [2010] 1 SCR 44 [*Khadr*], citing *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] SCR 269, at 272, per Duff CJC, quoting Arthur Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: MacMillan, 1915) at 420.

<sup>104</sup> *Khadr*, *ibid* at paras 37-38.

<sup>105</sup> *Burns*, *supra* note 66 at para 283.

<sup>106</sup> *Suresh*, *supra* note 68 at para 38.



to the fight against impunity. By contrast, sending suspects to Rwanda gives the RPF an aura of legitimacy that is counter-productive and slows the pace of necessary changes in the country, in particular concerning these wide scale crimes which the RPF has gotten away with for the last 20 years.