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**Rights, responsibilities and reform: a study of French justice (1990-2016)**

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Submitted for the Degree of

Doctor of Philosophy

Faculty of Management and Law

University of Bradford

2017

## **Abstract and subject key words**

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### **Rights, responsibilities and reform: a study of French justice (1990-2016)**

#### **Subject key words**

French criminal procedure; French criminal justice; *Juge d'instruction*; Prison reform; Media in France; French privacy legislation; Rwandan genocide; International Criminal Tribunal for Rwanda; Universal jurisdiction

#### **Abstract**

The principal questions addressed in this portfolio of eleven publications concern the reforms to French justice at the end of the twentieth and beginning of the twenty-first centuries. The portfolio is accompanied by a supporting statement explaining the genesis and chronology of the portfolio, its originality and the nature of the submission's distinct contribution to knowledge.

The thesis questions whether the reforms protect the rights of the defence adequately. It considers how the French state views its responsibility to key figures in criminal justice, be they suspected and convicted criminals, the victims of offences or the professionals who are prosecuting the offences. It reflects upon the role of the examining magistrate, the delicate relationship between justice, politics and the media, breaches of confidentiality and the catastrophic conditions in which suspects and prisoners are detained in French prisons. It then extends its scope to a case study of the prosecution of violent crimes before the International Criminal Tribunal for Rwanda, and discovers significant flaws in procedures even at international levels. In concluding, it asks whether, given the challenges facing the French criminal justice system, French courts are adequately equipped to assure justice when suspects charged with the most serious international crimes appear before them under the principle of universal jurisdiction.

The research, carried out over a number of years, relies predominantly on an analysis of French-language sources and represents a unique contribution to the understanding and knowledge of French justice for an English-speaking public at the turn of the twenty-first century.

## **Copyright statement**

The copyright in this thesis is owned by the author. Any quotation from the thesis or use of any of the information contained in it must acknowledge this thesis as the source of the quotation or information.

## Acknowledgments and dedication

I would like to extend thanks to the many people who so graciously supported me in the journey which this thesis represents, to colleagues past and present, to friends and family.

At the start of my career as an academic, the need to publish took priority over obtaining a postgraduate research qualification, and completing this PhD by published works has offered me the opportunity to achieve a long-held goal.

More particularly, I would like to express my gratitude to the following:

Firstly, I would like to thank my mentor Dr Kathryn Dutton. Her calmness and level-headedness as we explored the route to successfully conquering the PhD by published works have been invaluable, and her confidence in my work, particularly at the moments when I wavered, was priceless. I dedicate my Methodology section to you!

Secondly, my thanks go to Dr Jess Guth, who persuaded me that I really did need (and want!) to embark upon this project, allowing me to grasp my aspirations with both hands.

Thirdly, certain of the works included in the portfolio are the product, directly or indirectly of conversations with other scholars. Pascale Feuillée-Kendall and Joëlle Godard have been sources of inspiration and motivation at many key moments, and Roger Briottet a wise mentor and great encouragement, especially as we organised the conference '*Faut-il avoir peur des juges?*'

Fourthly, funding from the Franco-British Lawyers' Society and the Arts and Humanities Research Board contributed to the development of my research into the role of the French *juge* and has been most gratefully received, as was the support from referees which enabled the successful awarding of the funding.

Finally, I owe an enormous debt to my family, who have never been anything other than supportive. They have provided the environment which enabled this project to flourish, from conception to completion. You are true champions!

## Statement of authorship

I confirm that I am solely responsible for the authorship of all of the published articles which support this submission to the University of Bradford for the Degree of Doctor of Philosophy by Published Work, with the exception of the publication: H. L. Trouille and P. Feuillée-Kendall, 'French Prisons: *une humiliation pour la République*' 2004 12 (2) *Modern and Contemporary France*, 159-175.

This journal article was co-authored with Pascale Feuillée-Kendall. The contribution made by the respective authors is detailed in the Statement of independent work (Appendix 6).

Signed.....

Date.....

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- ix. H. L. Trouille, 'Conclusion: From the twentieth century into the twenty-first: should we still fear the *juge* in the new legal framework?' in P. Feuillée-Kendall and H. Trouille (eds), *Justice on Trial: the French juge in question* (Peter Lang 2004).

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- xi. H. L. Trouille, 'France, Universal Jurisdiction and Rwandan *génocidaires*: The Simbikangwa Trial' (2016) 14 (1) *Journal of International Criminal Justice* 195-217.

## Table 1

### Table of publications included in the portfolio of work

#### Part One

##### Reforms to French criminal procedure in the 1990s: enhancing the rights of the defence

- i. H. L. Trouille, 'A Look at French Criminal Procedure' (1994) *The Criminal Law Review*, 735-743.
- ii. H. L. Trouille, '*Le juge d'instruction*: a figure under threat or supremely untouchable?' (1994) *NS2 (1) Modern and Contemporary France* 11-19.

#### Part Two

##### Criminal justice, confidentiality and the role of the media

- iii. H. L. Trouille, 'Media, Politics and Justice: spotlight on Thierry Jean-Pierre' (1999) *23 (1) Contemporary French Civilization* 81-94.
- iv. H. L. Trouille, 'Secrecy, Privacy and Human Rights in the Fifth Republic' in M. E. Allison and O. N. Heathcote (eds), *Forty Years of the Fifth French Republic: Actions, dialogues and discourses* (Peter Lang 1999) 223-236.
- v. H. L. Trouille, 'Private Life and Public Image: French Privacy Legislation' (2000) *49 International and Comparative Law Quarterly* 199-208.
- vi. H. L. Trouille, 'Modes of Detection in the Crime Reality Show' in E. O'Beirne and A. Mullen (eds), *Crime Scenes: Detective Narratives in European Culture since 1945* (Rodopi 2000) 15-24.

#### Part Three

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- viii. H. L. Trouille and P. Feuillée-Kendall, 'French Prisons: *une humiliation pour la République*' (2004) *12 (2) Modern and Contemporary France*, 159-175.

- ix. H. L. Trouille, 'Conclusion: From the twentieth century into the twenty-first: should we still fear the *juge* in the new legal framework?' in P. Feuillee-Kendall and H. Trouille (eds), *Justice on Trial: the French juge in question* (Peter Lang 2004).

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- xi. H. L. Trouille, 'France, Universal Jurisdiction and Rwandan *génocidaires*: The Simbikangwa Trial' (2016) 14 (1) *Journal of International Criminal Justice* 195-217.

## **Table 2**

### **Table of cases**

#### **England and Wales**

*Government of the Republic of Rwanda - Requesting state v Vincent Brown (aka Vincent Bajinya), Charles Munyazeza, Emmanuel Nteziryayo, Celestin Ugirashebuja and Celestin Mutabaruka-Requested persons* (Westminster Magistrates' Court) 21 December 2015.

#### **France**

Cour d'assises Paris, Judgment no13/0033, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 14 March 2014.

Cour d'assises Seine Saint Denis (statuant en appel), Judgment no 51/2016, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 3 December 2016.

#### **International Criminal Tribunal for Rwanda**

*The Prosecutor v Ndindiliyimana et al (Judgment and Sentence)* ICTR-00-56-T, International Criminal Tribunal for Rwanda (ICTR) 17 May 2011.

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##### **Legislation of England and Wales**

Police and Criminal Evidence Act 1984

##### **1950 European Convention on Human Rights**

Art 6 (1)

##### **French codes**

*(Ancien) code pénal 1810*

Art 271

*(Nouveau) code pénal 1994*

Art 211-1

Art 222-33

*Code de procédure pénale 1959*

##### **French lois**

*Loi no 92-683 du 22 juillet 1992 portant réforme des dispositions générales du code pénal.*

*Loi no 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes, Journal officiel, no 138, 16 juin 2000 (Loi Guigou).*

*Loi no 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice, Journal officiel, no 211, 10 septembre 2002 (Loi Perben I).*

## **Rights, responsibilities and reform: a study of French justice (1990-2016)**

### **1. Introduction**

Professor Sally Brown, Emerita professor at what is now Leeds Beckett University, where she was Pro-Vice-Chancellor for Assessment, Learning and Teaching, speaks of a 'golden thread' which should weave its way through a carefully-worked PhD by published work.<sup>1</sup> In a traditional PhD conceived prospectively, identifying the golden thread is not problematic. It forms the spine of the research plan, out of which everything else springs. In a PhD by published work, the golden thread tends to be less conspicuous: research projects and publications grow organically, one flowing out of another, but they are nonetheless related by a common theme waiting to be articulated.

The golden thread of this submission is the theme of rights, responsibilities and reform in French justice at the end of the twentieth and opening of the twenty-first centuries, and this has become the title of this thesis. The submission consists of eleven papers published between 1994 and 2016, eight of which were peer-reviewed by anonymous reviewers and published in academic journals. Five of these journals were legal studies journals<sup>2</sup> and three were

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<sup>1</sup> S. Smith, *PhD by published work: a practical guide for success* (Palgrave Research Skills, Palgrave 2015) 4.

<sup>2</sup> H. L. Trouille, 'A look at French criminal procedure' (1994) *The Criminal Law Review* 735; H. L. Trouille, 'Holiday camp or boot camp? Where does France stand in the prison reform debate?' (2000) 13 *The Justice Professional* 391; H. L. Trouille, 'Private life and public image: French privacy legislation' (2000) 49 *International and Comparative Law Quarterly* 199; H. L. Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*' (2013) 13 *International Criminal Law Review* 747; H. L. Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial' (2016) 14 *Journal of International Criminal Justice* 195.



French studies journals<sup>3</sup>. The remaining three papers are chapters in books, one of which is a French studies work, a collection of conference proceedings refereed by editors Maggie Allison and Owen Heathcote,<sup>4</sup> one a volume of selected conference proceedings on crime narratives refereed by Emer O'Beirne and Anne Mullen,<sup>5</sup> and one a legal studies volume edited by the author and her research partner for that project, Pascale Feuillée-Kendall.<sup>6</sup>

The subject matter of the publications falls naturally into four parts, which reflect the evolution of the author's research and her particular areas of interest at the times the contributions were written. Part One lays the foundation for the submission, with a critique of French criminal procedure in the 1990s and of the controversial role of the *juge d'instruction* (examining magistrate). The *juge d'instruction's* role was frequently analysed by the press at the time, as successive governments attempted to balance the restricted rights of the defence against issues of security and the rights of the victim. Indeed, the *juges d'instruction* themselves were hostile to any limitation of their powers or threat to their existence. Part Two focusses on the interface between justice and the media and expands on references made in Part One to the use of the media by *juges d'instruction* to comment on and thus advance their investigations, or

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<sup>3</sup> H. L. Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' (1994) 2 *Modern and Contemporary France* 11; H. L. Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre' (1999) 13 *Contemporary French Civilization* 81; H.L. Trouille and P. Feuillée-Kendall, 'French prisons: *une humiliation pour la République?*' (2004) 12 *Modern and Contemporary France* 159.

<sup>4</sup> H. L. Trouille, 'Secrecy, privacy and human rights in the Fifth Republic' in M. E. Allison and O. N. Heathcote (eds), *Forty years of the Fifth French Republic: actions, dialogues and discourses* (Peter Lang 1999).

<sup>5</sup> H. L. Trouille, 'Modes of detection in the crime reality show' in E. O'Beirne and A. Mullen (eds), *Crime Scenes: Detective Narratives in European Culture since 1945* (Rodopi 2000).

<sup>6</sup> H. L. Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the '*juge*' in the new legal framework?' in P. Feuillée-Kendall and H. L. Trouille (eds), *Justice on trial: the French '*juge*' in question* (Peter Lang 2004).

ensure that an investigation into a political scandal takes place.<sup>7</sup> This practice was carried out by *juges d'instruction* - according to Honoré de Balzac writing in 1838, the most powerful men in France<sup>8</sup> – despite the confidentiality of the investigation process (*le secret de l'instruction*) and the presumption of innocence of the suspect.<sup>9</sup> Part Two then extends this study to consider the implications – in both civil and criminal law – of breaching the rights to privacy of the individual in general. Part Three centres on prison reform and the appalling state of French prisons in the early twenty-first century, a theme raised in Part One, where the impact of the unchecked use of pre-trial detention by *juges d'instruction* was highlighted. This frequent use of pre-trial detention led to a significant number of suspects held on remand in French prisons, resulting in serious overcrowding and ensuing physical and mental health trauma for detainees who are, of course, innocent until proven guilty.<sup>10</sup> Part Three looks at the responses to the overcrowding: a massive prison-building campaign launched by the Right,<sup>11</sup> but also reforms aimed at keeping suspects out of

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<sup>7</sup> *Juge* Thierry Jean-Pierre's investigation of the Affaire Urba and illicit financing of the *parti socialiste's* election campaign was evoked in Part 1. He openly used the media to draw attention to the illegal practices of those in positions of power and to ensure that investigations into their malpractices should not be closed prematurely: see L. Greilsamer and D. Schneiderman, *Les juges parlent* (Fayard 1992) cited in Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 16-17; and Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre'.

<sup>8</sup> H. de Balzac, *Splendeur et misères de courtisanes: édition augmentée* (Arvensa 2014) 324.

<sup>9</sup> For example, several years before the final verdict was reached, *juge d'instruction* Jean-Michel Lambert published a book *Le Petit Juge* (Albin Michel 1987) in which he recounted the effects that the Affaire Grégory had had on his life (Trouille, 'A look at French criminal procedure' 740).

<sup>10</sup> 42.8% of the French prison population were on remand in 1988, Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 13.

<sup>11</sup> Dominique Perben was *ministre de la justice* (justice minister) under the leadership of Jacques Chirac and Jean-Pierre Raffarin (all members of the newly-formed centre right party, *l'Union pour un mouvement populaire*) from 2002 to 2005. His *programme pénitentiaire* (prison programme) was put in place by the *Loi no 2002-1138 du 9 septembre 2002 orientation et programmation pour la justice, Journal officiel*, no 211, 10 septembre 2002 (*Loi Perben I*).

prison favoured by the Left,<sup>12</sup> diverging responses favoured by different governments according to their political leanings.<sup>13</sup> In Part Four, there is a comparative element to the portfolio, when the author looks outside France at the work of an international tribunal in the prosecution of the most serious crimes, finding and examining flaws in criminal procedures even at this level.<sup>14</sup> Part Four considers whether French criminal justice, under the principle of universal jurisdiction and thanks to recent reforms to the *Code pénal* (Criminal code) and the *Code de procédure pénale* (Code of criminal procedure), can offer a viable alternative to international tribunals or the national courts of the state where the atrocities were committed when holding perpetrators of the most serious international crimes to account.<sup>15</sup>

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<sup>12</sup> *Loi no 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*, *Journal officiel*, no 138, 16 juin 2000 (*Loi Guigou*). The *Loi Guigou* reinforced the rights of the defence and was elaborated by Elisabeth Guigou. Currently *Parti socialiste* (PS; Socialist Party) MP for Seine Saint-Denis, Guigou was *ministre de la justice* from 1997 to 2002, under Jacques Chirac and PS leader Lionel Jospin.

<sup>13</sup> See Section 2.1: Background, chronology and evolution of the individual publications and Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the 'juge' in the new legal framework?' 262.

<sup>14</sup> Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*'.

<sup>15</sup> Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial'.

## 2. Context

### 2.1 Background, chronology and evolution of the individual publications

The author initially took the decision not to register for a PhD by the traditional route at the start of her academic career due to encouragement from her institution to focus on publishing research outputs and to form part of a realistic Research Assessment Exercise (RAE) submission.<sup>16</sup> In addition, adapting to a new academic post and raising a young family meant that combining academic research, publication of findings and obtaining a postgraduate qualification would have been immensely challenging. Furthermore, it was not considered of such importance to hold a PhD when the author began her academic career as it is now. Many research-active colleagues did not possess a doctorate.

The stimulus for the portfolio of work was an MA in Twentieth Century French Studies completed at the University of Nottingham between 1989-91. A nascent interest in the law had previously given way to a passion for modern languages, the author choosing to study French and German at the University of Manchester, and thereafter to pursue an academic career, which began as a lecturer in French at the University of Wolverhampton in the late 1980s. The MA included a taught session on aspects of the French legal system, and a decision was formed to write a dissertation on the evolution of the role of the *juge d'instruction* in French society since its creation in the Napoleonic era. Although there were a certain number of well-known works on French law, such as Sherriff Albert Sheehan's comparative work on Scottish and French criminal

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<sup>16</sup> The author's work was submitted in RAEs in 1992, 1996 and 2001, but not in 2008, at which time she was employed in private legal practice.

procedure,<sup>17</sup> Kahn-Freund and Rudden's *Source book on French law*<sup>18</sup> and *Amos and Walton's introduction to French law*,<sup>19</sup> these were often dated or general in nature, and in 1989, there was very little up-to-date English-language material available which focussed on contemporary issues in French criminal procedure. Richard Vogler's excellent *Guide to the French criminal justice system*<sup>20</sup> was a very informative, practical handbook for Britons unfortunate enough to find themselves in trouble with the law in France, but its aim was not to focus on socio-legal analysis of or reflection on French criminal procedure. Other works were historical treatments of the subject,<sup>21</sup> comparative Anglo-French approaches<sup>22</sup> or examinations of English procedures for a French language public, like Professor John Spencer's writings.<sup>23</sup> Jackie Hodgson also adopted a comparative approach in the early nineties,<sup>24</sup> only later carrying out an empirical study of the work of the French prosecutor. This was published in English in 2001,<sup>25</sup> the year in which Professor John Bell's unique work on

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<sup>17</sup> A.V. Sheehan, *Criminal procedure in Scotland and France* (HMSO 1975).

<sup>18</sup> O. Kahn-Freund and B. Rudden, *Source book on French law* (OUP 1979).

<sup>19</sup> F.H. Lawson and others, *Amos and Walton's introduction to French law* (2nd edn, OUP 1967).

<sup>20</sup> R. Vogler, *A guide to the French criminal justice system* (Prisoners Abroad 1989).

<sup>21</sup> R. Lévy, 'Police and the judiciary in France since the nineteenth century' (1993) 33 *British Journal of Criminology* 167; R. David, *English law and French law* (Stevens and sons 1980).

<sup>22</sup> M. Delmas-Marty and J. Spencer, *European criminal procedures* (2002), the English version of J. Spencer, 'Le système anglais' in M. Delmas-Marty (ed), *Procédures pénales d'Europe* (Thémis 1995).

<sup>23</sup> For example, J. Spencer, 'French and English criminal procedure: a brief comparison' in B. Markesinis (ed), *The gradual convergence: foreign ideas, foreign influences and English law on the eve of the 21st century* (Clarendon 1994).

<sup>24</sup> J. Hodgson and G. Rich, 'L'avocat et la garde à vue : expérience anglaise et réflexions sur la situation actuelle en France' (1995) 2 *Revue de science criminelle et de droit pénal comparé* 319.

<sup>25</sup> J. Hodgson, 'The police, the prosecutor and the *juge d'instruction*: judicial supervision in France, theory and practice' (2001) 41 *British Journal of Criminology* 342.

French Legal Cultures was published, in which he analyses the French legal system from a cultural perspective.<sup>26</sup>

The vast majority of sources referred to for the MA dissertation research were French, whether these were books, journal articles or contemporary journalistic sources. Quality journalism, such as that found regularly in *Le Monde*, proved an invaluable source for factual developments in the law, which were reported in detail, and commentary on these. The early research led to further research focussed on contemporary developments in French criminal justice. This culminated in the publication of two articles dealing specifically with the impact on French society of reforms to French criminal procedure and the role of the *juge d'instruction* in the late twentieth century.<sup>27</sup> These were of interest to the Franco-British Lawyers' Society (FBLs) and led to contacts with Sherriff Sheehan, Sir Tom Legg<sup>28</sup> and Joëlle Godard of the FBLs, and to the organisation in 2000 of a conference on the *juge d'instruction* and publication of a co-edited volume of proceedings funded in part by the FBLs.<sup>29</sup> A third short piece (not included in the portfolio), published in *Modern and Contemporary France*, summarised the most significant provisions in the 1994 reforms to the *Code pénal*.<sup>30</sup> The *Nouveau code pénal*, under construction since 1974, modernised and replaced the original 1810 Napoleonic *Code pénal*. It updated the terminology of the original Code, removed some anachronistic offences and

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<sup>26</sup> J. Bell, *French legal cultures* (Law in Context, Cambridge University Press 2001).

<sup>27</sup> Trouille, 'A look at French criminal procedure'; Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?'

<sup>28</sup> Permanent Secretary of the Lord Chancellor's Department and Clerk of the Crown in Chancery (1989–98), responsible for conducting the MPs' expenses audit in 2009.

<sup>29</sup> P. Feuillée-Kendall and H. L. Trouille (eds), *Justice on Trial: the French juge in question* (Peter Lang 2004).

<sup>30</sup> H. L. Trouille, 'Reforms to the *Code pénal* March 1st 1994' (1994) NS 2 *Modern and Contemporary France* 503.

their penalties,<sup>31</sup> consolidated the numerous offences added over time to the original *Code*, and included new offences such as sexual harassment in the workplace,<sup>32</sup> which would have been far from the minds of the original drafters of the *Code* and nineteenth century French society. These provisions included the introduction of a definition of genocide into French criminal law. This definition of genocide had been drafted following a series of trials of high profile Nazi war criminals, who had been charged with crimes against humanity, in part at least due to the fact that there was no definition of genocide in French law at the time.<sup>33</sup> This piece became of particular relevance whilst researching the last publication submitted,<sup>34</sup> which focusses on the trial of Pascal Simbikangwa, the first person to be tried in France under the doctrine of universal jurisdiction for crimes committed during the Rwandan genocide.<sup>35</sup> Simbikangwa was prosecuted under the 1994 *Code pénal*'s definition of genocide.<sup>36</sup>

Thanks to the interdisciplinary nature of the research, the findings interested both French studies and legal studies scholars, were published in journals in the two fields, and were cited in the research of academics working in a variety of

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<sup>31</sup> For example, *vagabonds* could still be imprisoned (article 271, *Ancien code pénal*), whereas corporations (*personnes morales*) were not criminally liable for offences they committed.

<sup>32</sup> Article 222-33, *Nouveau code pénal*.

<sup>33</sup> Klaus Barbie, the butcher of Lyon, in 1987, Paul Touvier, head of the Lyon *milice* (militia) and the first Frenchman to be convicted of crimes against humanity in 1994, and Maurice Papon, senior police official in Bordeaux, responsible for sending many Jews to their deaths in concentration camps, tried in 1998, but charged in 1992. See Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial' 211.

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

<sup>35</sup> *Cour d'assises Paris, Judgment No. 13/0033, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 14 March 2014* and *Cour d'assises Seine Saint Denis (statuant en appel) Judgment No. 51/2016, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 3 December 2016*.

<sup>36</sup> Article 211-1, *Code pénal*, created by loi no 92-683, which came into effect on 1 March 1994.

areas.<sup>37</sup> The author was approached by Professor Eric Cahm<sup>38</sup> as legal terminology adviser for his work on the Dreyfus Affair, and by criminal lawyer Michael McColgan, for advice on French criminal procedure.<sup>39</sup>

In the course of the research, it became apparent that certain *juges d'instruction* practising in the late twentieth century, despite the compulsory *secret de l'instruction*, were actively seeking to use the media in their attempts to extend the reach of justice to political leaders, perceived as a historically privileged class, above the law. A full-length article was devoted to examining the career and practices of a young *juge d'instruction*, Thierry Jean-Pierre, who used the media to further his investigations into affairs of political corruption, at the same time, potentially advancing his career.<sup>40</sup> In fact, the rather enigmatic Thierry Jean-Pierre later left his career as a *juge d'instruction* with left-wing leanings to become a Euro MP in 1994, for Philippe de Villier's far right party, *l'Autre Europe*.

The blurred boundaries of secrecy and privacy legislation prompted an interest in and a curiosity to comprehend the reasons for the frequent invasions of privacy of, for example, the Princess of Wales and the Duchess of York by French media, compared to the absolute secrecy surrounding President

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<sup>37</sup> See Appendix 3: Impact of publications forming portfolio of work: Selected citations and expressions of esteem.

<sup>38</sup> Professor of French at the Universities of Portsmouth and Tours and Editor of *Modern and Contemporary France*.

<sup>39</sup> See acknowledgments, E. Cahm, *The Dreyfus Affair in French society and politics* (Routledge 1996) x; M. McColgan and A. Attanasio, 'France: paving the way for arbitrary justice' (*Fédération internationale des droits de l'homme*, March 1999) 48. See Section 4.1 Part One: Reforms to French criminal procedure in the 1990s – enhancing the rights of the defence.

<sup>40</sup> Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre'. See footnote 7.



François Mitterrand's mistress and illegitimate daughter,<sup>41</sup> a secrecy preserved until two years before his death in 1996. Subsequent research led to two papers which examined the responses available in both civil and criminal law in France for violations of an individual's privacy and the practice of the *juge d'instruction* him or herself to breach this secrecy in the interests of advancing the inquiry.<sup>42</sup> These publications proved of interest to legal practitioners such as current Supreme Court judge Lord Jonathan Mance and legal academics such as Professor Eva Steiner in their exploration of infringements of human rights, as well as to academics working in the spheres of political communication, who were focussing their research on political sex scandals in the news.<sup>43</sup> Articles on secrecy and privacy were also increasingly of interest in the domain of French studies, as the discipline of French media studies grew rapidly, and some modern languages departments moved away from traditional literary-based degrees to more contemporary programmes whose emphasis was on media and cinema. A conference paper on 'Secrecy, privacy and human rights in the Fifth Republic' presented in 1998 at the annual conference of the Association for the Study of Modern and Contemporary France led to a publication of the same name. In the course of the conference, the author was approached by Dr Sheila Perry, then of Northumbria University and

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<sup>41</sup> Mitterrand had a daughter, Mazarine, with Anne Pingeot in 1974. Their relationship was only revealed in 1994, when *Paris Match* published photographs of Mitterrand with Mazarine. H. Schofield, 'Mitterrand seduces France again with letters to his lover' <<http://www.bbc.co.uk/news/world-europe-37621875>> accessed 6 January 2017.

<sup>42</sup> Trouille, 'Secrecy, privacy and human rights in the Fifth Republic'; Trouille, 'Private life and public image: French privacy legislation'.

<sup>43</sup> Lord Jonathan Mance, 'Human rights, privacy and the public interest - who draws the line and where?' (2009) 30 *Liverpool Law Review* 263 and E Steiner, 'The new president, his wife and the media: pushing away the limits of privacy law's protection in France' (2009) 13 *Electronic Journal of Comparative Law*. See Appendix 3 Impact of publications forming portfolio of work: selected citations and expressions of esteem.

subsequently of the University of Nottingham, to offer a presentation on French privacy laws to her French media studies students. The interdisciplinary character of the research also enabled a conference paper on the use of French crime reality shows in the detection of crime to be published as a chapter of an edited volume on detective narratives in European literature produced by Emer O'Beirne and Anne Mullen.<sup>44</sup>

The golden thread of this submission is the theme of rights, responsibilities and reform in French justice at the end of the twentieth and opening of the twenty-first centuries, and research projects have largely taken their inspiration from significant current events in French justice, contemporaneous to the time of writing. In 2000, prison doctor Véronique Vasseur's book *Médecin-chef à la prison de la Santé*<sup>45</sup> took French society by storm with her diary-like exposition of the conditions in which prisoners in the Paris prison of La Santé were detained. The excessive use by *juges d'instruction* of pre-trial detention already alluded to in Part One and the inevitable crisis of overcrowding in French prisons led to a catalogue of ills. Vasseur detailed the appalling conditions of hygiene, the drug abuse, the dilapidated and inadequate buildings, the physical and sexual abuse, the humiliations at the hands of staff and fellow prisoners which were a part of inmates' daily lives. The nation was deeply shocked. A series of parliamentary reports resulted, one of which was entitled *Prisons: une humiliation pour la République*,<sup>46</sup> and promises of reform were made. Part

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<sup>44</sup> Trouille, 'Modes of detection in the crime reality show'.

<sup>45</sup> V. Vasseur, *Médecin-chef à la prison de la Santé* (Le Cherche Midi 2000).

<sup>46</sup> J.-J. Hyst, *Prisons: une humiliation pour la République (Rapport no. 449 au nom de la commission d'enquête sur les conditions de détention dans les établissements pénitentiaires en France, déposé au Sénat le 28 juin 2000)*.

Three of the portfolio therefore looks at the reactions of political leaders to the failures of the penal system and of prison reform. Even in the event of a justified incarceration, which might include periods of remand, the abject state of France's prisons was clearly considered to be a violation of the prisoners' human rights not only by Vasseur, but also by legal professionals, society at large and by the political class, who felt pressure to pursue reforms. The lamentable conditions 'inside' compounded any other human rights violations that suspects might already have encountered in the preparation of their defence.

Part Three concludes with a contribution: 'From the twentieth century into the twenty-first: should we still fear the *juge* in the new legal framework?'<sup>47</sup> This publication forms the final chapter in an edited volume of proceedings from a conference organised in 2000 by the author and her research partner Pascale Feuillée-Kendall, with financial support from the FBLS and the *Délégation Culturelle* of the French Embassy. The piece examines the reforms brought in by the Socialists' *loi sur la présomption d'innocence* (law on the presumption of innocence) of 2000.<sup>48</sup> This legislation reformed pre-trial detention by creating *juges des libertés et de la détention* (judges of freedom and detention) who would ultimately make decisions regarding pre-trial detention in place of *juges d'instruction*. This move was held to enhance the rights of the defence, since previously the *juges d'instruction* had often been accused of acting as both

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<sup>47</sup> Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the *'juge'* in the new legal framework?'

<sup>48</sup> *Loi no 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*, *Journal officiel*, no 138, 16 juin 2000 (*Loi Guigou*).

investigator and judge in their own inquiries. This was due to the authority they had to incarcerate the suspect, based purely on their *intime conviction* (inner conviction), with no obligation to give reasons. Consequently, it was hoped the law would also tackle prison overcrowding by reducing the number of remand prisoners detained. Additionally, it enabled France to comply more effectively with article 6 of the European Convention on Human Rights (ECHR), the right to a fair trial within a reasonable delay.<sup>49</sup> The chapter explains how these rights were undermined almost immediately by the right-wing Chirac government's *loi d'orientation et de programmation pour la justice*.<sup>50</sup> Passed following a few seriously unpleasant crimes,<sup>51</sup> the *Loi Perben I* aimed to reinforce the rights of the victim and combat juvenile crime – by lowering the age of criminal responsibility from thirteen to ten years, by extending the period of police detention from ten to twelve hours for minors aged between ten and thirteen and by a construction programme of *Centres éducatifs fermés*, in which juvenile delinquents between the ages of thirteen and eighteen would be detained and schooled.<sup>52</sup>

These publications were interspersed with presentations at conferences on French criminal justice in the European framework, some of which were

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<sup>49</sup> European Convention on Human Rights, article 6 (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....

<sup>50</sup> Law of orientation and programming for justice, *Loi no 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice, Journal officiel*, no 211, 10 septembre 2002 (*Loi Perben I*).

<sup>51</sup> For example, the burned body of seventeen-year-old Sohane was found dumped next to the rubbish bins of a housing estate in Vitry-sur-Seine (Val-de-Marne) on 4 October 2002. She had apparently turned down the advances of a youth, who had doused her in petrol and threatened her with a cigarette lighter.

<sup>52</sup> See D. Durand, 'La loi Perben et la majorité pénale à 10 ans: quelles conséquences pour les jeunes et les éducateurs ?' (2007) 15 *Éduquer* [En ligne].

published in volumes of conference proceedings. These are not included in this portfolio.<sup>53</sup> Although they could have formed another distinct chapter on France and the European judicial area, this would have broadened the focus of the PhD, and the decision was taken to leave them aside.

The final part of the portfolio follows an interruption in the author's career as a French academic in 2004 in order to obtain formal qualifications and a solid theoretical foundation in the law. A period of intense study of the English law (Graduate Diploma in Law and Certificate in Legal Practice, 2004-06), admission to the roll as a solicitor (2009) and some years in private practice ensued. A return to academia followed completion of an LLM (2012), and associate lectureships and teaching fellowships in the Law Schools at the Universities of York and Bradford (2013-2014).

Parallel to the acquisition of academic qualifications, and through her experience as a French interpreter in the criminal justice system since 2000, the author had developed a keen interest in the experiences of refugees and asylum seekers from francophone Africa, who often had traumatic accounts of violations of their human rights in their countries of origin. It was in part this interest which led the author to register for and complete her LLM in the work of

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<sup>53</sup> See Appendices 4 and 5: Conference papers: H. L. Trouille, 'The European judicial area: Europe pulling together or torn apart?' (Global (dis)connections, University of Bloomington Normal, Illinois, USA, April 2001); H. L. Trouille, 'France in the European judicial area: an examination of French support for European legislation on cross-border crime' (Bigger and better? The European Union, enlargement and reform; Fifth Biennial Conference of the European Community Studies Association, Canada, University of Toronto, Canada, June 2002); H. L. Trouille, 'Globalisation, Europeanisation and national policies: French criminal procedure examined' (Implications of a wider Europe: politics, institutions and diversity – The European Consortium for Political Research (ecpr) Standing Group on the European Union, Second Pan-European Conference on EU Politics, Bologna Center, John Hopkins University, Bologna, Italy, June 2004); H. L. Trouille, *Criminal law and criminal procedure and the challenge of Europeanisation: the French perspective* (Bibliothèque Nationale du Québec/Bibliothèque Nationale du Canada 2004).

the International Criminal Tribunal for Rwanda (ICTR), elaborating on the theme of the prosecution of violent crime. The research led to a publication on the investigation and prosecution by the ICTR of sexual offences committed against women during the Rwandan genocide.<sup>54</sup> The case study on the ICTR focussed once more on flaws in criminal procedures. It highlighted inadequacies in evidence-gathering by investigators and in the preparation of cases by the Office of the Prosecutor (OTP) in an international tribunal, and noted that, despite the considerable financial resources and international expertise available, an international tribunal is no more immune from criticism than national jurisdictions. This piece was followed by a final publication on the first prosecution in the French system under the doctrine of universal jurisdiction of a Rwandan genocide suspect arrested on French soil.<sup>55</sup> Different potential fora for the trial were compared and the challenges faced by a French court and prosecution team when trying a defendant for a crime committed on a different continent were explored. These two articles form the final part of the submission, Part Four.<sup>56</sup>

Inevitably, the target audience influenced the expression and approach used in the different outputs, the aim being either to make legal concepts accessible to French specialists who were non-lawyers or to make aspects of French language and society accessible to lawyers who were not necessarily

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<sup>54</sup> Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*'.

<sup>55</sup> Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial'.

<sup>56</sup> Part Four Statutory Reform and universal jurisdiction: do French courts offer a viable alternative to international tribunals in the prosecution of the most serious crimes?

linguists.<sup>57</sup> For example, two articles published in French studies journals, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' and 'Media, politics and justice: spotlight on Thierry Jean-Pierre',<sup>58</sup> were written with a French-studies readership in mind. These readers were interested particularly in the impact that legal reforms would have on French society, and the publications make reference to journalistic sources such as *Le Monde* or *Le Nouvel Observateur*, to books written by French legal professionals, such as *avocat* Daniel Soulez-Larivière and *juge d'instruction* Renaud van Ruymbeké, or to prominent French academics such as Professor Mireille Delmas-Marty, in preference to citing statute. Other papers were written for a readership of legal scholars with an interest in comparative legal studies, and this is particularly noticeable in the last two publications,<sup>59</sup> written post-LLM. These differ in that the footnotes are far denser than those written for a public of non-lawyers, and they make more frequent reference to the actual text of the law. In these publications, no assumptions are made regarding the foreign language skills of the readers, and translations of French materials cited are provided in the footnote references.

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<sup>57</sup> On the didactic purpose of publication – to share knowledge gained and teach other researchers, see D. Green, 'Active citizens and effective states: definitions and interactions - a critical review', Oxford Brookes (2010) 6.

<sup>58</sup> Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?'; Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre'.

<sup>59</sup> Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*' and Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial'.

## 2.2 The design of the context statement: the PhD by published work

The PhD by published work represents an opportunity for those already actively carrying out good quality doctoral or postdoctoral standard research to gain recognition for their contribution to knowledge by highlighting the golden thread or theme which links their research outputs after they have been produced, as opposed to establishing this in advance.<sup>60</sup> However, guidance on how to complete a PhD via this route of accreditation of prior and experiential learning is quite scarce and enigmatic. A scan of the websites of a number of universities offering this qualification has revealed that the expectations and rules for the qualification are frequently couched in vague terms even by institutions themselves. They focus more on entry requirements than on outlining the composition of the final submission.<sup>61</sup> An early step in the submission process was to locate academic literature which might offer assistance in designing the context statement, in terms of both its content and structure. Via a search of the University of Bradford library catalogue and a broader internet search, a small number of publications in academic journals and conference proceedings were identified, and even a short handbook by

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<sup>60</sup> D. Durling, *Understanding the PhD by publication* (Design Research Society/CUMULUS 2013) 4.

<sup>61</sup> For example, some useful but outline information was found in regulations produced by the University of Manchester (Research Office Graduation Team, 'Guidance for the PhD by published work' 2014) <<http://documents.manchester.ac.uk/display.aspx?DocID=7472>> accessed 21 August 2016 21 August 2016), the University of Stirling (Research and Enterprise Office, 'Guidelines for PhD by publication' 2007) <<https://www.stir.ac.uk/media/schools/naturalscience/bes/documents/forms/PhDbyPublicationGuidelines.pdf>> accessed 21 August 2016), University Research Degrees Committee, 'Guidelines for the award of PhD by prior publication/portfolio' 2015) <<http://cdn.kingston.ac.uk/documents/research/documents/PhD-by-prior-publication-portfolio-guidelines-2015.pdf>> accessed 21 August 2016), and these appeared to be very similar to documents provided by a number of other university research offices. See also C. Cowton, 'Looks good on paper' *Times Higher Education* (4 August 2011) <<https://www.timeshighereducation.com/features/looks-good-on-paper/416988.article>> accessed 21 August 2016.



Susan Smith, Head of Curriculum Development and Review at Leeds Beckett, devoted solely to the PhD by published work.<sup>62</sup>

With regard to structure of the PhD by published work, the following insights were useful. David Durling<sup>63</sup> suggests adapting Chad Perry's five chapter model<sup>64</sup> for the traditional PhD to give the following structure:

Section One	Context statement (background)
Section Two	Contribution to knowledge
Section Three	Methodology
Section Four	The published works (factors which led to the publications and reflections on the publications).

In her book, Smith advocated her approach: retrospectively generating a series of research questions – the specific things studied: the ‘measurables’<sup>65</sup> – which she wished to answer, around each one of which she could group all or some of her publications, and reflecting on these questions to structure her context statement.<sup>66</sup> Callie Grant, in her PhD submission on teacher leadership in South African schools, adopted a five chapter approach to emphasise the notion of ‘connectedness’ in her work: a first chapter which clustered her articles according to research questions; a second chapter which examined the

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<sup>62</sup> Smith, *PhD by published work: a practical guide for success*.

<sup>63</sup> Durling, *Understanding the PhD by publication* 10.

<sup>64</sup> C. Perry, 'A structured approach for presenting theses' (1998) 6 *Australasian Marketing Journal* 63, 65. Section 1 introduces the core research problem and then ‘sets the scene’ and outlines the path that the examiner will travel towards the thesis’ conclusion. The research itself is described in sections 2 to 5: the research problem and hypotheses arising from the body of knowledge developed during previous research (section 2); methods used in this research to collect data about the hypotheses (section 3); results of applying those methods in this research (section 4); and conclusions about the hypotheses and research problem based on the results of section 4, including their place in the body of knowledge outlined previously in section 2 (section 5).

<sup>65</sup> M. Denscombe, *Ground rules for social research: guidelines for good practice* (2nd edition edn, Open University Press, McGraw-Hill 2010) 15.

<sup>66</sup> Smith, *PhD by published work: a practical guide for success* 97.

literature thread through the articles; a third chapter which outlined the theoretical framing; a fourth chapter which exposed the design of the PhD in terms of methodology; and a fifth chapter which resumed insights gathered as a result of the synthesis process.<sup>67</sup> In the current submission, the author opted for a combination of these models in order to provide an effective treatment of the elements required by the University of Bradford for the PhD by published work. It was felt that the structure outlined below made it possible to demonstrate the genesis and chronology of the published works (Section Two), competence in independent work, understanding of appropriate techniques and ability to make critical use of source materials at the forefront of the academic discipline (Section Three), as well as originality of the research and the publications, the nature of their distinct contribution to knowledge in the field of French justice at the end of the twentieth and beginning of the twenty-first centuries, and independent judgment through the analysis carried out (Section Four).<sup>68</sup> It concludes with a look ahead to possible research projects which may emerge from the current work (Section Five).

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<sup>67</sup> C. Grant, 'Diversifying and transforming the doctoral studies terrain: a student's experience of a thesis by publication' (2011) 18 *Alternation* 245, 251.

<sup>68</sup> 4.1 (ii) ... All candidates should outline the genesis and chronology of the published work in relation to relevant aspects of their curriculum vitae. Candidates for the degree of PhD should highlight the originality of their work and the nature of the distinct contribution to the knowledge of the subject made by the submission...

7.1 ...All candidates are required to satisfy the Examiners in their competence in independent and original work or experimentation, of their understanding of the appropriate techniques and of their ability to make critical use of published work and source materials much of which is at, or informed by, the forefront of their academic discipline, field of study or area of professional practice. In addition, candidates for the degree of Doctor of Philosophy by published work are required to satisfy the Examiners that the published work contains original work of merit and forms a distinct contribution to the knowledge of the subject. They should also show evidence of the discovery of new facts or the exercise of independent judgement...

University of Bradford, *Regulation for the degree of Doctor of Philosophy or Master of Philosophy by published work*, (2015) 3, 4.

The structure adopted was the following:

- Section One A brief introduction to the PhD submission and outline of the themes covered.
- Section Two A presentation of the author's personal background, and of the chronology and context of the individual publications, as required by the University's Regulations. This includes a discussion of the structure of the PhD by published work and introduces and explains the layout of the submission.
- Section Three An explanation of the methodology used in the publications. Methodologies tend not to be exposed as explicitly in short, individual publications as they would be in a traditional PhD. The methodology used in the writing of the context statement of the PhD by published work itself is also discussed, including the use of research questions underlying the individual elements in the portfolio of publications and the design of the research questions for the PhD itself. The purpose of this section is to demonstrate an understanding of appropriate techniques for carrying out the research and an ability to make critical use of other published work and source materials while carrying out the research, as required by the Regulations.
- Section Four Reflections on the publications in the four component parts of the portfolio of work, Part One to Part Four, demonstrating the intermeshing of the research questions, the originality of the work, the contribution to knowledge made by the individual publications, and independent judgment in the design of the research questions and manipulation of the subject matter studied.
- Section Five Conclusion: reflections on the limitations of the research to date and ideas for future research. This shorter section looks back critically on the research produced and forward to future possible projects.

This structure also provides evidence that the criteria specified in the Quality Assurance Agency's Framework for Higher Education Qualifications descriptor, level 8, for any doctoral degree, have been satisfied: the creation and

interpretation of new knowledge through original research satisfying peer review, extending the forefront of knowledge and meriting publication (Section Four<sup>69</sup>); a systematic acquisition and understanding of a substantial body of knowledge which is at the forefront of an academic discipline (the portfolio of publications themselves); the ability to conceptualise, design and implement a project for the generation of new knowledge (Sections Two and Five<sup>70</sup>); a detailed understanding of applicable techniques for research and advanced academic enquiry (Section Three<sup>71</sup>).<sup>72</sup>

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<sup>69</sup> Section Four The published works: originality and contribution to knowledge.

<sup>70</sup> Section Two Context and Section Five Conclusion: limitations and ideas for future research.

<sup>71</sup> Section Three Methodology.

<sup>72</sup> Quality Assurance Agency, *UK quality code for higher education: the frameworks for higher education qualifications of UK degree-awarding bodies - Part A* (2014), 30, <<http://www.qaa.ac.uk/en/Publications/Documents/qualifications-frameworks.pdf>.> accessed 22 August 2016:

'Doctoral degrees are awarded to students who have demonstrated:

- the creation and interpretation of new knowledge, through original research or other advanced scholarship, of a quality to satisfy peer review, extend the forefront of the discipline, and merit publication
- a systematic acquisition and understanding of a substantial body of knowledge which is at the forefront of an academic discipline or area of professional practice
- the general ability to conceptualise, design and implement a project for the generation of new knowledge, applications or understanding at the forefront of the discipline, and to adjust the project design in the light of unforeseen problems
- a detailed understanding of applicable techniques for research and advanced academic enquiry.

Typically, holders of the qualification will be able to:

- make informed judgements on complex issues in specialist fields, often in the absence of complete data, and be able to communicate their ideas and conclusions clearly and effectively to specialist and non-specialist audiences
- continue to undertake pure and/or applied research and development at an advanced level, contributing substantially to the development of new techniques, ideas or approaches.

And holders will have:

- the qualities and transferable skills necessary for employment requiring the exercise of personal responsibility and largely autonomous initiative in complex and unpredictable situations, in professional or equivalent environments.'

### 3. Methodology of research

#### 3.1 The initial publications

As stated in the previous section, it is a requirement of doctoral research to show originality of work, contribution to knowledge and application of independent critical thought. As in the case of a PhD by the traditional route, a PhD by published work must make a contribution to knowledge by ‘filling a gap in existing knowledge,’<sup>73</sup> or revealing a ‘blind spot’ which identifies ignorance.<sup>74</sup> Both of these aims were undertaken in the research leading to the pieces in the portfolio, which identified a dearth of analytical English-language debate on contemporary issues in French justice, specifically in reforms in French justice between 1990 and 2016 (see Section 2.1).

This was of particular interest in England and Wales in the 1980s to 1990s, when inspiration for reform was being sought by looking to other jurisdictions, after a string of miscarriages of justice: the convictions of The Birmingham Six and The Guildford Four, for example, were quashed in 1991 and 1989 respectively because evidence had been fabricated and suppressed by the police.<sup>75</sup> Significant reforms took place in England and Wales to strengthen the rights of the defence: the 1984 Police and Criminal Evidence Act, and the creation of the Crown Prosecution Service in 1986. The 1991 Report of the

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<sup>73</sup> Smith, *PhD by published work: a practical guide for success* 106.

<sup>74</sup> J. Wagner, 'Ignorance in educational research: how not knowing shapes new knowledge' in P. Thomson and M. Walker (eds), *The Routledge doctoral student's companion* (Routledge 2010) 27, 34-35.

<sup>75</sup> See Trouille, 'A look at French criminal procedure' 735, for reference to miscarriages of justice in England and Wales in the 1980s-90s.

Royal Commission on Criminal Justice,<sup>76</sup> set up to review the criminal justice process in England and Wales following the appeals in the above cases, considered other jurisdictions. It made reference to expert writings on their criminal procedures, specifically citing the French report *La mise en état des affaires pénales* of the *Commission justice pénale et droits de l'homme*<sup>77</sup> chaired by Professor Mireille Delmas-Marty. Following this Report, The Criminal Appeal Act 1995 established the Criminal Cases Review Commission in 1997, a statutory body set up to investigate alleged miscarriages of justice in England, Wales and Northern Ireland.

### **3.1.1 Research questions in the initial publications**

In a PhD by the traditional route, research questions are established at the outset of the project and a methodology designed in accordance with the aims of the research. In a PhD by published work, this same process takes place for each individual publication, and the research question may be stated in the abstract or the introduction of the publication or perhaps even formulated less explicitly due to word count limitations. In the portfolio of work submitted, the approach to each individual publication was largely very similar: an area of research was identified as a response to curiosity on the part of the author regarding current events reported in the French news on the theme of contemporary issues in French criminal justice, and there was a desire to gain a deeper understanding of the issues reported, of their

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<sup>76</sup> Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (HMSO 1991) 3, 4.

<sup>77</sup> Commission justice pénale et droits de l'homme, *La mise en état des affaires pénales* (La Documentation Française 1991).

causes and repercussions. According to Bryman, interest on the part of the researcher is potentially a good starting point for formulating research questions.<sup>78</sup> Research questions were devised to direct each individual publication, making these appropriate for the size of the project envisaged, and these individual research questions can be found in Appendix 2 (Originality and nature of contribution to knowledge of the portfolio of work). For Bryman, research questions should be 'clear, researchable, linked and neither too broad nor too narrow; they should connect with established theory and show potential for new knowledge.'<sup>79</sup> These are considerations which the author sought to respect in formulating the research questions for the individual publications and also in framing the final submission.

### **3.1.2 Literature reviews**

The literature reviews for each piece are not explicitly stated in the text of the individual publications either, but reviews of the available literature were nonetheless carried out as part of the research process in order to identify the sources available to Anglophone scholars, the 'gap' in knowledge which the research aimed to fill, to assess the significance of this gap and to discover why it existed. In contrast, a PhD by the traditional route frequently requires the inclusion of a discrete review of the relevant literature and sources relating to the area of research as an appendix to the thesis, or

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<sup>78</sup> A Bryman, *Social research methods* (Fifth edn, OUP 2016) 78, 79.

<sup>79</sup> Ibid 83, cited in J. Pryor, 'Constructing research questions: focus, methodology and theorisation' in P Thomson and J. Wagner (eds), *The Routledge doctoral student's companion* (Routledge 2010) 165.

even the submission of a formal literature review as a part of the application process.

Particularly in the early publications in the portfolio, constraints set by the academic journals in which they were published dictated that a submission should not normally exceed five thousand words,<sup>80</sup> thus the publications are generally relatively short. Hence there was little room for discussion of literature or of methodologies used to conduct the research, and distinct literature reviews are absent.

### **3.1.3 Choice of research topic**

The choice of research topics was influenced by the author's background in French studies, which provided her with an awareness of what other French scholars might wish to know in order to enhance their teaching or further their research. Most French studies undergraduate degrees today will include French Society and Culture modules, which will cover contemporary issues in French politics, media and popular culture, and these are key areas where academic staff are also research active. Aspects of the law are very rarely mentioned and certainly not handled in any detail on undergraduate French degree courses, and yet touch many of the topics taught or which find themselves the focus of research projects. In French studies, a solid specialism in media studies has evolved, with academics carrying out research in areas such as the use of media during political

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<sup>80</sup> See Grant on the issue of journal requirements: Grant, 'Diversifying and transforming the doctoral studies terrain: a student's experience of a thesis by publication' 252.



campaigns, or the representation of women in the media,<sup>81</sup> and it was anticipated that publications on invasions of privacy and privacy legislation would be of interest to scholars carrying out research in these areas. Scholars conducting research in French politics would inevitably be interested in the conviction of *Parti socialiste* treasurer Henri Emmanuelli for his role in the illicit financing of the 1988 election campaign, which was revealed via the investigation of *juge d'instruction* Thierry Jean-Pierre into the Urba scandal.<sup>82</sup> Furthermore, matters such as this and the uproar and political fallout following Vasseur's work on La Santé<sup>83</sup> could not fail to come to the attention of French studies scholars working in the field of contemporary French studies, such was the coverage given to them in the French press. In addition, the editorial board of the primary British academic journal for those researching contemporary issues of French society, *Modern and Contemporary France*, considered the 1994 reforms to the *Code pénal* to be of sufficient interest to French studies academics to approach the author for a summary of the principal changes to the legislation for inclusion in its Spring volume in 1994.<sup>84</sup>

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<sup>81</sup> For example, see the works of Professor Pamela Moores, Aston University, Dr Sheila Perry, formerly of the University of Nottingham and Maggie Allison, formerly of the University of Bradford.

<sup>82</sup> J. Perrignon, 'Condamnation confirmée pour l'ex-trésorier du PS' *Libération*, (17 décembre 1997) <[http://www.liberation.fr/evenement/1997/12/17/condamnation-confirmee-pour-l-ex-tresorier-du-ps-chirac-ultime-recours-pour-emmanuelli-seul-le-presi\\_222306](http://www.liberation.fr/evenement/1997/12/17/condamnation-confirmee-pour-l-ex-tresorier-du-ps-chirac-ultime-recours-pour-emmanuelli-seul-le-presi_222306)> accessed 25 August 2016. See also Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 18 and Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre' 84 and following.

<sup>83</sup> See Trouille, 'Holiday camp or boot camp? Where does France stand in the prison reform debate?' and Trouille and Feuillée-Kendall, 'French prisons: *une humiliation pour la République*'

<sup>84</sup> Trouille, 'Reforms to the *Code pénal* March 1st 1994'. See Section 2.1 Background, chronology and evolution of the individual publications for further details.

### 3.1.4 Sources

Once the main theme of the early publications had been identified, largely as a result of research carried out for the French studies MA dissertation – reforms to French criminal procedure and the role of the *juge d'instruction* – contemporary developments in the law and in social justice became the prime catalyst for future research projects. Journalistic sources<sup>85</sup> were a starting point for research for the publications in the French studies journals.<sup>86</sup> An initial informal scan of print sources revealed the principal issues of concern to the French public. This was followed by a more thorough analysis of the content reported. Print sources were used for the most part, with a preference for *Le Monde*, due to the high quality of its reporting. Its *Société* pages carry lengthy and detailed accounts of developments in the law and their impact on society, accompanied by sound critical analysis. Newspapers *Le Monde* and *Libération*, read by the French intellectuals, and weeklies *Le Point* and *Le Nouvel Observateur* tend to have a left-wing orientation and express a desire for reform, and these proved invaluable sources offering an incisive critique of the establishment, and a support for an enhancement of the rights of the defence. These sentiments, already articulated by a new generation of critical *juges*, were often overtly voiced in their reporting. For example, there was coverage of the *juges rouges* (red judges), a group of mainly young judges, members of

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<sup>85</sup> Especially *Le Monde*, but also *L'Express*, *Libération*, *Le Nouvel Observateur*, *Le Point*.

<sup>86</sup> Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?'; Trouille and Feuillée-Kendall, 'French prisons: *une humiliation pour la République?*'; Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre'; Trouille, 'Secrecy, privacy and human rights in the Fifth Republic'.

the left-wing judges' union *le syndicat de la magistrature*, who contrasted with the conservative, bourgeois judges typical to the profession at that time. They gained a reputation in the late 1970s for extending justice to high-ranking company directors who had previously appeared to be above the law.<sup>87</sup> It is widely believed that Thierry Jean-Pierre modelled his early fight against corruption on the combat of the *juges rouges*.

Although very sound, the reporting may not always have been purely objective, but according to Bryman 'far fewer writers than in the past overtly subscribe to the position that the principle of objectivity can be put into practice,'<sup>88</sup> and this applies to the research carried out by journalists as much as to that carried out by academics. Relativist epistemological considerations tell us that knowledge is 'perspectival' and that 'a single absolute truth is impossible,'<sup>89</sup> and while the author has endeavoured always to be as accurate as possible in her research, she accepts that she has particularly appreciated the tenor of the left-wing intellectual newspapers *Le Monde* and *Libération*. Bryman acknowledges also that it is difficult for research to be value free,<sup>90</sup> and points to a tendency amongst those carrying out social research 'to be sympathetic to underdog groups,'<sup>91</sup> and the author admits a genuine sympathy with regard to the rights of the defendant and the prisoner, especially where infringement of these rights may have serious consequences. This may be evident in some of her work.

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<sup>87</sup> See F. Cornet, 'Les juges rouges' (24 juin 1978) <<http://www.ina.fr/video/CAB7800706301>> accessed 15 July 2016.

<sup>88</sup> Bryman, *Social research methods* 36.

<sup>89</sup> V. Braun and V. Clarke, *Successful qualitative research* (Sage 2013) 29.

<sup>90</sup> Bryman, *Social research methods* 35.

<sup>91</sup> H. S. Becker, 'Whose side are we on?' (1967) 14 *Social Problems* 239, quoted in Bryman, *Social research methods* 35.

The journalistic sources at the genesis of the publications were supported by readings from French language journals such as *Après-demain*,<sup>92</sup> publications of the *Documentation française* (the French official publications office) such as *Cahiers français*, and by reference to the official government website *Légifrance*.<sup>93</sup> They were informed by commentary from well-respected French legal experts. Those consistently consulted by the French press for analysis and commentary were figures such as Professor Mireille Delmas-Marty, Chair of the *Commission justice pénale et droits de l'homme* and a leading French academic who had written numerous works on criminal law,<sup>94</sup> and Renaud van Ruymbeke, a renowned Parisian examining magistrate. Van Ruymbeke was regularly interviewed by the press, as an anti-corruption judge specialising in financial and corruption cases and author of a book on the *juge d'instruction*.<sup>95</sup>

The final volley of articles in Part Four, which deal with the ICTR and universal jurisdiction in French courts, is, in contrast, aimed at a Legal Studies public rather than a French Studies public, and this can be seen in the sources used. Although the judgments of French cases, the *Journal*

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<sup>92</sup> *Après-demain* is a French publication founded in November 1957 by members of the Ligue des droits de l'homme, under the direction of Françoise Seligmann: <<http://www.fondation-seligmann.org/147>> accessed 20 July 2016.

<sup>93</sup> <<https://www.legifrance.gouv.fr/>> accessed 20 July 2016.

<sup>94</sup> M. Delmas-Marty, *Droit pénal des affaires* (Thémis, Presses Universitaires de France 1973); M. Delmas-Marty, *Les chemins de la répression, lectures du code pénal* (Presses Universitaires de France 1980); M. Delmas-Marty, *Modèles et mouvements de politique criminelle* (Economica 1983); M. Delmas-Marty, *Les grands systèmes de politique criminelle* (Thémis, Presses Universitaires de France 1992).

<sup>95</sup> R. van Ruymbeke, *Le Juge d'instruction* (Que sais-je?, Presses Universitaires de France 1988).

*officiel*<sup>96</sup> and the *Gazette du palais*<sup>97</sup> had been referred to in the articles on privacy legislation, there are many more references to case law and statute in Part Four than in the earlier publications, and also to international conventions, and United Nations official documents. These publications were written after the author's formal legal training and qualification as a solicitor, and following the completion of the LLM. The first of these publications<sup>98</sup> followed a case study approach and a detailed examination of one specific case, the judgment of the ICTR case *Ndindiliyimana et al.*,<sup>99</sup> to examine the progress made in the prosecution and investigation of sexual offences committed against women during the Rwandan genocide. The final publication in the portfolio<sup>100</sup> brings the work back from the dimension of the international tribunals to the French courts again, using once more a specific case, that of Pascal Simbikangwa,<sup>101</sup> to examine whether the French courts are equipped to try in their own domestic courts under the doctrine of universal jurisdiction foreign nationals suspected of committing crimes in foreign states.

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<sup>96</sup> The *Journal officiel* is an official French government publication which publishes all statutes and decrees, as well as other administrative decisions. These must be published in the *Journal officiel* before becoming binding (*Code civil*, art premier).

<sup>97</sup> The *Gazette du palais* is a weekly periodical published by Lextenso, which specialises in reporting and commenting on decisions of the courts <<http://www.gazettedupalais.com/index.phtml>> accessed 25 August 2016.

<sup>98</sup> Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al.*'

<sup>99</sup> *Prosecutor v Ndindiliyimana et al.*, 17 May 2011, ICTR-00-56-T, *Judgment and Sentence*.

<sup>100</sup> Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial'.

<sup>101</sup> *Cour d'assises Paris, Judgment No. 13/0033, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 14 March 2014* and *Cour d'assises Seine Saint Denis (statuant en appel) Judgment No. 51/2016, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 3 December 2016*.

The break from active research and subsequent return to academia allowed the author time to step back and review research methods, and to adopt a different approach in the later publications. This led to a genuinely iterative approach to the study of French criminal justice permeating the portfolio. The author repeatedly returned to collect data, challenging it and testing her understandings through an inductive reasoning process. Lecturer and dissertation adviser John Dudovskiy describes inductive reasoning as a form of 'learning from experience' in which '[p]atterns, resemblances and regularities in experience (premises) are observed in order to reach conclusions (or to generate theory).'<sup>102</sup> Inductive research 'starts with the observations, and theories are proposed towards the end of the research process as a result of observations.'<sup>103</sup> This is very much the approach adopted by the author, as she developed and elaborated theories of the workings of French justice, conclusions which frequently had their sources in studies of specific individuals or situations. For example the profile of *juge d'instruction* Thierry Jean-Pierre,<sup>104</sup> the impact of the revelations of prison doctor Véronique Vasseur,<sup>105</sup> the role of the examining magistrate in

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<sup>102</sup> J. Dudovskiy, 'Inductive approach (inductive reasoning)' <<http://research-methodology.net/research-methodology/research-approach/inductive-approach-2/>> accessed 31 December 2016.

<sup>103</sup> W. Goddard and S. Melville, *Research methodology: an introduction* (2nd edn, Juta and Company Ltd 2004) in Dudovskiy, 'Inductive approach (inductive reasoning)'.

<sup>104</sup> See Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 16 and Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre'.

<sup>105</sup> See Trouille, 'Holiday camp or boot camp? Where does France stand in the prison reform debate?' 391 and Trouille and Feuillée-Kendall, 'French prisons: *une humiliation pour la République*?' 159.

general and the effectiveness of French criminal procedure, which are recurrent themes in the portfolio.<sup>106</sup>

### 3.2 The PhD by published work and its research questions

As stated above, in a PhD by published work, research questions and methodologies are identified for each individual publication. This process also takes place in the design of the completed PhD itself, with overarching research questions being explicitly identified retrospectively to demonstrate the connectivity or the golden thread running through the work,<sup>107</sup> in this case rights, responsibilities and reform in French justice (1990-2016).

In order to generate the research questions, the publications were subjected to an analysis to identify patterns in the publications which the research had been seeking to explain. Publications were grouped into sections, or Parts, with common themes (Parts One to Four), and the research questions which these Parts sought to answer were formulated. Not surprisingly, the Parts also reflect a chronological pattern, as interest in a particular subject led to several publications on a theme. For example, Part Three contains three publications

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<sup>106</sup> Trouille, 'A look at French criminal procedure', Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?', Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre', Trouille, 'Secrecy, privacy and human rights in the Fifth Republic', Trouille, 'Private life and public image: French privacy legislation', Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the *'juge'* in the new legal framework?' Trouille and Feuillée-Kendall, 'French prisons: *une humiliation pour la République*?' Trouille, 'Modes of detection in the crime reality show' Trouille, 'Secrecy, privacy and human rights in the Fifth Republic', Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial'.

<sup>107</sup> Smith, *PhD by published work: a practical guide for success* 96-7.

which examine the state of French prisons, all of which were published between 2000 and 2004.

Both Smith and Grant generated a series of three research questions relating to their main themes,<sup>108</sup> which they wished to answer in their PhD submissions. The questions were phrased in such a way that all or some of the publications could be clustered around each research question. In my own submission, I have followed this model, designing three research questions which are broad enough to incorporate all the relevant individual publications included in the portfolio and yet specific enough to provide evidence of a research focus. The research questions which this PhD submission seeks to address are the following:

1. Do the reforms to French justice at the end of the twentieth and the beginning of the twenty-first centuries protect the rights of the defence?
2. How does the French state view its responsibility to key figures in criminal justice: suspected and convicted criminals, the victims of offences and the professionals prosecuting the offences?
3. Given the perceived flaws in the French justice system, are French courts able to assure justice in international crimes as effectively as international fora?

The articles are clustered in a manner enabling the research questions to be treated in the most effective way. Part One of the portfolio, entitled 'Reforms to French criminal procedure in the 1990s: enhancing the rights of the defence,' is

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<sup>108</sup> Ibid 97. See also Section 2.2 of context statement: The design of the context statement: the PhD by published work.



essentially devoted to dealing with Research question 1.<sup>109</sup> Parts Two and Three, 'Criminal justice, confidentiality and the role of the media' and 'Crime and punishment and the condition of French prisons: the responsibility of the state for its prisoners' respond to research question 2.<sup>110</sup> Part Four, 'Statutory reform and universal jurisdiction: do French courts offer a viable alternative to international tribunals in the prosecution of the most serious crimes?' responds to research question 3.<sup>111</sup> Some of the publications crossed over two research questions, for example, publications (iv) and (ix)<sup>112</sup> responded to research questions 1 and 2, and publication (xi)<sup>113</sup> responded to research questions 2 and 3. The research questions will be addressed in more detail in Section Four of the submission, The published works: originality and contribution to knowledge.

### 3.3 Conclusion

In his chapter on constructing research questions in *The Routledge Doctoral Student's Companion*, Pryor describes formulating research question as 'not so

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<sup>109</sup> Trouille, 'A look at French criminal procedure' and Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?'

<sup>110</sup> Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre', Trouille, 'Secrecy, privacy and human rights in the Fifth Republic', Trouille, 'Private life and public image: French privacy legislation', Trouille, 'Modes of detection in the crime reality show', Trouille, 'Holiday camp or boot camp? Where does France stand in the prison reform debate?', Trouille and Feuillée-Kendall, 'French prisons: *une humiliation pour la République?*' and Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the *'juge'* in the new legal framework?'

<sup>111</sup> Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*' and Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial'.

<sup>112</sup> Trouille, 'Secrecy, privacy and human rights in the Fifth Republic' and Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the *'juge'* in the new legal framework?'

<sup>113</sup> Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial'.

much an event as a process,<sup>114</sup> opining that research questions are often in a state of flux in a traditional PhD. He recommends that PhD students return to them in the course of their research, reviewing and refining, maybe even abandoning them to find others that 'fit better.' In fact, this process is very similar to the approach in a PhD by published works. Because the research is carried out over several years and is produced in stand-alone pieces, only collated later into a portfolio of work, the PhD research questions will rarely have been overtly formulated at the outset of the very first publication. Similarly, it may be that, in a PhD by the traditional route, the research questions phrased at the end of the completed project have evolved in the course of the research and are no longer those designed at the very beginning.

In this portfolio, the research questions centre initially on the failures of the role of the *juge d'instruction* and their impact, reported regularly in the press (inexperience, flouting of the *secret de l'instruction*, issues of accountability), and progress into considerations of breaches of privacy law and abusive conditions of detention of suspects and convicted prisoners, as the focus of public attention shifted. The final question asked goes to the very heart of the matter: is French justice sound enough to hold its head up on the international stage?

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<sup>114</sup> Pryor, 'Constructing research questions: focus, methodology and theorisation' 170.

#### 4. The published works: originality and contribution to knowledge

Demonstrating originality and new contributions to knowledge is perhaps more straightforward in scientific subjects than in the social sciences: the results of a new experiment whose findings, once analysed, will drive practice in a new direction, for example. In the social sciences, originality and new contributions to knowledge are arguably a little more problematic to highlight. Smith, who describes originality as 'new contributions to knowledge in a particular subject area' and 'offering something not offered before,'<sup>115</sup> suggests that one means of measuring originality is via submission of papers to peer-reviewed journals. The reviewers judge whether an author's claims that the work is new and contributes to the current state of knowledge in the area are valid ones.<sup>116</sup> Originality, says Smith, can be demonstrated if an author can show progress in the development of his or her ideas, show they had had an impact on the wider community, show how his or her contribution was new to the subject or context at the time of publication, or that others cited his or her work.<sup>117</sup> An author may also indicate originality if, in reviewing the literature, he or she identifies that the focus of his or her research has been hitherto lacking in the field,<sup>118</sup> and builds on this gap in knowledge in his or her publications. These are all claims which, in this portfolio of work, the author feels she can justifiably make. Jean McNiff explains that '[m]ost research aims to show how it draws on the thinking of others in the field by engaging critically with the literatures. Once validated, the new knowledge is placed within the existing body of knowledge in the literatures.

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<sup>115</sup> Smith, *PhD by published work: a practical guide for success* 102.

<sup>116</sup> Ibid 103.

<sup>117</sup> Ibid 103.

<sup>118</sup> Ibid 105.

The claim may now be perceived as a new contribution.<sup>119</sup> This process reflects that outlined by Smith, and the steps that the author has carried out for each publication: conducting a review of the literature, making a contribution to knowledge by completing research that is not already covered by the pre-existing literature, submitting a paper detailing the research findings for peer review (in all cases but one<sup>120</sup>), and subsequently, via expressions of esteem and citations of other scholars, ascertaining that the findings have been accepted within the body of knowledge as a new contribution to the field.

The originality and contribution to knowledge of the works forming the various Parts will be considered in more detail below (Sections 4.1 to 4.4), following a discussion of the thread which binds the work.

The overarching theme of the work is rights, responsibilities and reform in French justice between 1990 and 2016. The eleven pieces forming this submission have been divided into four parts, centred around this common thread. The principal contribution the works make, taken together, is twofold. Firstly, this may be found in the socio-legal analysis of the need for reform – to protect adequately the rights of the defence, of victims and of the legal professionals. Secondly, the contribution may be seen in the analysis of the reforms themselves, both as enacted by the legislators and as seen through the eyes of French society. The analyses provided across the work constitute a significant theoretic contribution to the creation of a greater understanding of

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<sup>119</sup> J. McNiff, *You and your action research project* (4th edn, Routledge 2016) 18.

<sup>120</sup> The following chapter in Feuillée-Kendall and Trouille (eds), *Justice on Trial: the French juge in question*, was not independently reviewed: Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the '*juge*' in the new legal framework?'

how the French criminal justice system was perceived at the time, an understanding then capable of influencing reform in other jurisdictions such as England and Wales or further afield. Together, the works ask the question whether French justice at the turn of the century – due to flaws in its criminal procedure, in the protection of the presumption of innocence and in the conditions of detention – actually respected the rights of suspects and prisoners. The works examine shortcomings perceived in French public debate as evidenced in the serious press and works produced by lawyers for a public audience. They conclude by asking whether, in view of the many challenges French justice has faced in the past, France, '*le pays des droits de l'homme*,'<sup>121</sup> can have a valid role – be considered 'fit for purpose' – in its recent commitment to prosecute international crimes through its courts. The four parts in the submission focus on certain features of the French criminal process where an individual's rights may be undermined, and these will be outlined in more detail below. They examine uncomfortable aspects of French criminal procedure in the 1990s (Part One), breaches of confidentiality by examining magistrates and by the media and the ensuing threat to the presumption of innocence (Part Two), the lamentable state of French prisons, in which suspects and convicted criminals are detained (Part Three), and conclude with a look at the credibility of French justice as a player on the international stage (Part Four).

Part One analyses the rights of the defence in criminal matters in France and focusses particularly on those cases – the most serious crimes – where there is

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<sup>121</sup> France still considers itself to be '*le pays des droits de l'homme*,' and the 1789 *Déclaration des droits de l'homme et du citoyen* is still a core part of the French Constitution.

recourse to the intervention of the *juge d'instruction*.<sup>122</sup> The two publications in this Part highlight the challenges facing the suspect, such as the restricted access of the defence team to the file being constituted by the *juge d'instruction*, who could determine the defence's access to the documents according to the conditions necessary for the smooth-running of his or her enquiry.<sup>123</sup> They question the fairness of a procedure in which the *juge d'instruction's intime conviction* alone was all that was needed to justify his or her decisions;<sup>124</sup> a procedure in which, in the 1990s, the decision to detain a suspect prior to trial fell to the *juge d'instruction* alone, who was answerable to no-one. They evoke the consequences of this lack of accountability in decisions to imprison a suspect, in terms of inevitable prison overcrowding.<sup>125</sup> The publications also point to the very limited right to legal advice of the suspect upon arrest: prior to the 1993 reforms, the suspect had no right to legal advice during the twenty-four-hour police detention. These rights evolved over the years and were finally extended to include contact with a lawyer from the start of the *garde à vue* in 2004.<sup>126</sup> There were such misgivings regarding the undermining of the suspect's rights by the role of the *juge d'instruction* that, in 1990, the *Commission justice pénale et droits de l'homme* chaired by Professor

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<sup>122</sup> About 6-8% of all criminal cases. See Bell, *French legal cultures* 111.

<sup>123</sup> Trouille, 'A look at French criminal procedure' 742.

<sup>124</sup> Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 14.

<sup>125</sup> In 1990, the prison in Nice, which was built for 280, housed 900 prisoners. See *ibid* 13.

<sup>126</sup> Article 63-4, *Code de procédure pénale* (Loi no 2004-204 du 9 mars 2004): '*Dès le début de la garde à vue, la personne peut demander à s'entretenir avec un avocat. Si elle n'est pas en mesure d'en désigner un ou si l'avocat choisi ne peut être contacté, elle peut demander qu'il lui en soit commis un d'office par le bâtonnier.*' ('At the start of the custody period, the person may request to talk to an advocate. Where he is not in a position to choose one, or if the advocate chosen cannot be reached, he may request an advocate to be appointed to him officially by the president of the bar.' Official translation, *Légifrance* <<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 31 May 2017).

Mireille Delmas-Marty, had even suggested doing away with the role altogether, and distributing its functions elsewhere.<sup>127</sup> Measures proposed by the Socialist government in 1992 in a revised *Code de procédure pénale* aimed to enhance the rights of the defence,<sup>128</sup> and protect the presumption of innocence of the suspect, which was frequently compromised by breaches in the *secret de l'instruction* emanating from media and *juges d'instruction*. These reforms were only partially implemented before the Right came to power in 1993, and put a brake on the movement. Thus, features of French criminal procedure at the end of the twentieth century conspired to create a 'very negative view of justice'<sup>129</sup> in France, a system ripe for reform. Was French justice at the end of the twentieth century really 'fit for purpose'?

Part Two develops the theme of the breaches of confidentiality already alluded to in Part One and looks at the infringement of the suspect's right to be presumed innocent. Breaches of privacy and the presumption of innocence regularly took place during the investigation, despite the secrecy of the investigation process protected under article 11 of the *Code de procédure pénale*.<sup>130</sup> The 1985 *Affaire Villemin*, referred to in the first article in the portfolio of work, demonstrated the worst consequences of breaches of the *secret de*

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<sup>127</sup> Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 15.

<sup>128</sup> Trouille, 'A look at French criminal procedure' 740.

<sup>129</sup> Ibid 744.

<sup>130</sup> Art 11, *Code de procédure pénale* in force 1958-94: 'Sauf dans le cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète. Toute personne qui concourt à cette procédure est tenue au secret professionnel dans les conditions et sous les peines de l'article 378 du code pénal.' (Except where the law provides otherwise and subject to the defendant's rights, the inquiry and investigation proceedings are secret. Any person contributing to such proceedings is subjected to professional secrecy under the conditions and subject to the penalties set out by articles 226-13 and 226-14 of the Criminal Code.' Official translation, *Légifrance* <<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 31 May 2017).

*l'instruction*: the fatal shooting of the prime suspect by the father of his supposed four-year-old victim,<sup>131</sup> a deprivation of the right to life itself.

Part Two opens with an article which centres on one *juge d'instruction* in particular, Thierry Jean-Pierre. Jean-Pierre deliberately and somewhat audaciously admitted to making use of the media to advance his work: he gave interviews, appeared on television and published books. He advocated the divulging of details of cases in progress (*'sans cela, je n'avancerais pas'*<sup>132</sup>), even if this involved breaching the *secret de l'instruction*. This was ostensibly as part of a campaign to bring to justice corrupt politicians and their wealthy supporters, but perhaps as much to advance his own career, which veered from the *'petit juge'* to the politician to the media personality. Two further articles in Part Two analyse the legal basis of the breaches in confidentiality, seeking to investigate how the *secret de l'instruction* could so regularly be breached by press and *juges d'instruction*, when strict privacy laws were in place to protect the right to the presumption of innocence of the suspect. These works examine the reach of the criminal law and the criminal penalties imposed for breaches of privacy, and also remedies offered by the civil law for the victims whose rights were breached, whether suspects under investigation or public figures enjoying the privacy of their own homes. This Part concludes with a publication which examines the ultimate use of the media by a *juge d'instruction* in a criminal investigation – the role of the television programme *Témoignage numéro Un* to solve crime. This French version of *Crimewatch UK* featured a *juge d'instruction* in the

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<sup>131</sup> Trouille, 'A look at French criminal procedure' 740.

<sup>132</sup> 'Without that, I would not make progress.' Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre' 90, 93.



television studio advancing the investigation, rather than police officers carrying out their enquiries as in the British version, and trod a constantly delicate path to avoid infringing the rights to privacy of suspects, eventually ceasing production in 1996. This Part therefore demonstrates the extent to which an individual's rights to privacy, and ultimately to his or her right to be presumed innocent if a suspect under investigation, were being disregarded regularly in the 1990s. Although stringent laws were in place to protect members of the public from invasions of privacy, and this extended to suspects under investigation, *juges d'instruction* themselves did not always respect the *secret de l'instruction* and responsibility to protect the suspect's right to privacy. This abuse of the right to privacy and consequently to the presumption of innocence, could compromise an individual's chances of a fair trial particularly when compounded by a period of pre-trial detention, so frequently used by *juges d'instruction*: 'il n' y a pas de fumée sans feu'.<sup>133</sup> The penalty could be a lengthy sentence in a French prison, conditions in which are considered in Part Three.

Part Three of the portfolio of works goes to the heart of the theme of rights, responsibilities and reform in French justice. Part Three examines the rights of suspects on remand, whether guilty or not, and convicted prisoners to be detained in conditions worthy of a modern state, and the responsibility of the state to provide a standard of care which does not punish more than is appropriate (for example, with conditions which may involve threat to life) and to commit to reforming inadequate infrastructures. This Part focusses on the appalling state of French prisons at the start of the twenty-first century, a

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<sup>133</sup> 'There's no smoke without fire.' See Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 13.

situation exacerbated by the problem of overcrowding and the large number of remand prisoners detained alongside convicted criminals, referred to in Part One.

In 1988, remand prisoners accounted for 42.8% of the prison population,<sup>134</sup> and they were held on average for a period of nine months<sup>135</sup> although the law allows them to be detained for as long as four years for the most serious offences.<sup>136</sup> The most serious manifestations of the abuses of prisoners' rights were the exposure to high risk of contamination with the Aids virus<sup>137</sup> and a suicide rate in French prisons which, even today, is still higher than that of the average of Council of Europe member states.<sup>138</sup> The state of French prisons is therefore central to the respect of the human rights of the suspect and convicted criminal – an individual who may well already consider his or her rights to have been undermined in the course of the investigation process, due to the flaws in the procedures outlined in Parts One and Two.

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<sup>134</sup> van Ruymbeke, *Le Juge d'instruction* 83, in Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 13.

<sup>135</sup> Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 15.

<sup>136</sup> For example, offences with an international element, such as terrorist offences or drug trafficking, Article 145-2, *Code de procédure pénale*.

<sup>137</sup> Trouille and Feuillée-Kendall, 'French prisons: *une humiliation pour la République*?' 163.

<sup>138</sup> At 9.9 suicides per 10,000 inmates in 2014, this is an improvement on previous years (12.4 in 2013; 22 in 1999), but still higher than the average of all member states, which was 6 suicides per 10,000 inmates in 2014 and 5 in 2013. See the Council of Europe Annual Penal Statistics SPACE reports and *résumés* at <<http://wp.unil.ch/space>>, notably SPACE 1 Prison populations Survey 2015 (updated 25 April 2017) <[http://wp.unil.ch/space/files/2017/04/SPACE\\_I\\_2015\\_FinalReport\\_161215\\_REV170425.pdf](http://wp.unil.ch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf)>; Council of Europe Annual Penal Statistics, SPACE 1 Prison populations Survey 2014 (2015) <[http://wp.unil.ch/space/files/2016/05/SPACE-I-2014-Report\\_final.1.pdf](http://wp.unil.ch/space/files/2016/05/SPACE-I-2014-Report_final.1.pdf)> Council of Europe Annual Penal Statistics, SPACE 1 Prison populations Survey 2000 (2001) <[http://wp.unil.ch/space/files/2011/02/Council-of-Europe\\_SPACE-I-2000-E.pdf](http://wp.unil.ch/space/files/2011/02/Council-of-Europe_SPACE-I-2000-E.pdf)>; Council of Europe Annual Penal Statistics, SPACE 1 2015 *Faits et chiffres* (2017) <[http://wp.unil.ch/space/files/2017/03/SPACE-I-2015\\_Executive-Summary\\_FR\\_170314.pdf](http://wp.unil.ch/space/files/2017/03/SPACE-I-2015_Executive-Summary_FR_170314.pdf)>; Council of Europe Annual Penal Statistics, SPACE 1 2014 *Faits et chiffres* (2015) <[http://wp.unil.ch/space/files/2016/07/SPACE-I-2014\\_Executive-Summary\\_FR\\_160725\\_final.pdf](http://wp.unil.ch/space/files/2016/07/SPACE-I-2014_Executive-Summary_FR_160725_final.pdf)> all accessed 31 May 2017.

The final publication in this Part compares the reforms of the alternating Left and Right wing governments at the turn of the century as they shouldered the state's responsibilities towards inmates, and improved the respect of prisoners' rights by tackling prison overcrowding. Reforms by the Socialist governments in the form of the *loi sur la présomption d'innocence* of 2000 proposed to reinforce the presumption of innocence at the same time as reducing prison overcrowding by restricting pre-trial detention. A *juge des libertés et de la détention* was created, to whom the *juge d'instruction* would have to defer for all matters of pre-trial detention,<sup>139</sup> and it would appear that this has had an impact on the number of suspects detained in prison prior to trial. This figure has now dropped to 29.1%,<sup>140</sup> a feature of the reforms which has made a difference in protecting the rights of the defendant. For its part, the Right with the 2002 *loi d'orientation et de la programmation de la justice* focussed on an extensive prison-building campaign to reduce overcrowding, although despite this French prisons today are still over capacity, at 70, 230 inmates for 58, 670 places.<sup>141</sup> French justice in the 1990s, in terms of the rights of the defence, the respect of the presumption of innocence and the treatment of convicted prisoners, was in serious need of the reforms which were implemented by different justice ministers at the turn of the century. Part Four now examines whether these reforms were adequate to produce a system of justice which could also be respected on an international level.

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<sup>139</sup> Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the 'juge' in the new legal framework?' 257.

<sup>140</sup> Ministère de la Justice, '*Statistique mensuelle des personnes écrouées et détenues en France*' (2017) 19 <[http://www.justice.gouv.fr/art\\_pix/mensuelle\\_avril\\_2017.pdf](http://www.justice.gouv.fr/art_pix/mensuelle_avril_2017.pdf)> accessed 31 May 2017.

<sup>141</sup> Ibid 12.

Part Four turns to consider the status of French justice in an international context. It looks at the prosecution of some of the most serious crimes – genocide and crimes against humanity – in various fora and asks whether the French criminal process is a credible arena to try an international crime. The final piece of the portfolio focusses on the trial of Rwandan genocide criminal Pascal Simbikangwa in Paris under the doctrine of universal jurisdiction and highlights the difficulties facing French courts when prosecuting offences committed thousands of miles away by a foreign national against other foreign nationals. Can French courts ensure the respect of the rights of the defence in such a challenging context and provide a fair trial? This concluding publication is preceded by an article on the trial of four Rwandan genocide suspects at the ICTR, which sets the context for the final publication. The penultimate publication analyses the shortcomings in procedures that exist even in an international tribunal which deals solely with the most serious of crimes, and it concludes that there are flawed processes even at this level. Part Four thus engages with France's responsibility towards a foreign state in its dealings with its suspects. France has long refused to extradite genocide suspects to Rwanda, but must extradite or must judge. It cannot ignore. However, if French courts refuse to extradite suspects of international crimes to Rwanda on grounds of human rights abuses they might face there (unfairness of the trial process, and in Simbikangwa's case, inadequate conditions of detention for paraplegics), are French processes sound enough, in their respect for human rights, to be able to justify prosecuting those international criminals in France under the doctrine of universal jurisdiction? The considerable reforms of the turn of the century detailed in the earlier parts of the thesis and the creation in 2012

of the *pôle génocide et crimes contre l'humanité*<sup>142</sup> have arguably given legitimacy to the French courts to prosecute fairly international criminals arrested on French soil.

The following sections discuss the originality and contribution to knowledge of the works forming the various Parts of the portfolio.

#### **4.1 Part One**

##### **Reforms to French criminal procedure in the 1990s – enhancing the rights of the defence**

The two publications forming Part One of the submission<sup>143</sup> represented a new addition to the existing literature in the field. As explained in Section 2.1 of this context statement,<sup>144</sup> previous English-language works on French criminal procedure were very dated, had been comparative studies of French and English or Scottish law, approached from a legal studies perspective, or tended not to analyse the impact on society of features of French criminal procedure, sometimes all three of these. The research questions at the heart of the two publications in Part One questioned the adequacy of French criminal procedure to protect the rights of the defence, asked why the *juge d'instruction* was the subject of such criticism within the French justice system and whether the role was under threat. They brought an English-language criticism of French criminal

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<sup>142</sup> Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial' 213.

<sup>143</sup> Trouille, 'A look at French criminal procedure' and Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?'

<sup>144</sup> Section 2.1 Background, chronology and evolution of the individual publications.

procedure and in particular the controversial role of the *juge d'instruction* into the 1990s,<sup>145</sup> at a time when reforms to criminal procedure in England and Wales were taking place.<sup>146</sup> For example, the only source of information relating to French criminal procedure which was cited by the 1991 Royal Commission on Criminal Justice was the French language report of the *Commission justice pénale et droits de l'homme: La mise en état des affaires pénales*.<sup>147</sup> Thomson and Walker stress that 'simply reporting a set of findings is insufficient' to constitute knowledge of doctoral or post-doctoral standard. There is a need to 'elaborate what those findings mean, asking questions such as 'Why is this so' and 'How did it get to be this way?'" and to furnish 'a new voice in the conversation, a different angle and slant on something that many are concerned about.'<sup>148</sup> The author considers that the numerous citations of these two publications, detailed in Appendix 3,<sup>149</sup> indicate that she has contributed a new voice in the conversation by her status as a French studies scholar, with a genuine familiarity of contemporary French society. Using contemporary French-language sources, including a close study of the French press has enabled her to commence responding to the 'hows' and 'whys.'

Following the publication of the article 'A Look at French Criminal Procedure,'<sup>150</sup>

Albert Sheehan, a former Scottish Sherriff and specialist in French Criminal

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<sup>145</sup> See Research questions driving individual publications in Appendix 2 Originality and nature of contribution to knowledge of the portfolio of work.

<sup>146</sup> See Section 3.1 of context statement: The initial publications.

<sup>147</sup> Commission justice pénale et droits de l'homme, *La mise en état des affaires pénales, La Documentation Française, 1991* in Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice 1991* (HMSO 1991). See Section 3.1.

<sup>148</sup> P. Thomson and M. Walker, 'Last words: why doctoral study?' in P. Thomson and M. Walker (eds), *The Routledge doctoral student's companion* (Routledge 2010) 392-3.

<sup>149</sup> Appendix 3 Impact of publications forming portfolio of work: selected citations and expressions of esteem.

<sup>150</sup> Trouille, 'A look at French criminal procedure'.

procedure,<sup>151</sup> contacted the author by telephone, and he and Sir Thomas Legg, former Clerk of the Crown in Chancery and subsequent chair of the independent panel examining claims in the Parliamentary expenses scandal, encouraged her to join the Franco-British Lawyers' Society, of which they were both members. These contacts led to a conference which the author co-organised in 2000 with Pascale Feuillée-Kendall (University of Reading, now *avocate* at the Versailles bar), and which was called 'Faut-il avoir peur des juges?' to which the FBLS lent financial support. The conference was attended by participants from the United Kingdom, USA, France and Italy, including Sir Thomas, who gave a paper and contributed a chapter to the co-edited volume of conference proceedings,<sup>152</sup> also published with the financial support of the FBLS.<sup>153</sup> A contribution by the author to the volume forms part of this PhD submission (see portfolio of work, Part Three).<sup>154</sup> As a result of this conference and associated volume, the author was invited by Joëlle Godard (FBLS) to participate in a research seminar in France in 2002 funded by the FBLS and the French Embassy. The seminar was organised specifically for legal professionals and scholars and consisted of specially arranged interviews with key figures in French legal and political institutions (for example, visits to the *Sénat*, *Cour de Cassation*, *Conseil constitutionnelle*, and an interview with Simone Veil, chair of the *Conseil constitutionnelle*). From a group of a dozen academics, the author was the only modern linguist in the team.

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<sup>151</sup> A. V. Sheehan, *Criminal procedure in Scotland and France* (HMSO 1975).

<sup>152</sup> Thomas Legg, Sir 'The English judiciary: some current issues' in P. Feuillée-Kendall and H. L. Trouille (eds), *Justice on Trial: the French juge in question* (Justice on Trial: the French juge in question, Peter Lang 2004) 161-169.

<sup>153</sup> Feuillée-Kendall and Trouille (eds), *Justice on Trial: the French juge in question*.

<sup>154</sup> Trouille, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the 'juge' in the new legal framework?'

These two publications have been cited by a number of academics who are specialists in French criminal procedure in the United Kingdom: Professor Jacqueline Hodgson (University of Warwick), Professor Richard Vogler (University of Sussex) and Dr Eva Steiner (Kings College, London), and in the USA by Professor Gordon van Kessel (University of California). They have also had an international impact. 'A look at French criminal procedure,' for which, much to her surprise, the author received a small fee from The Criminal Law Review after the paper was accepted, was referred to by Sir David Carruthers, a family court judge in Wellington, New Zealand, with an interest in comparing adversarial and inquisitorial systems, who wrote to the author for details of sources. In addition, Michael McColgan, former criminal law solicitor at Howells LLP Sheffield, approached her for advice on French criminal procedure for his report for the *Fédération internationale des droits de l'homme* (FIDH),<sup>155</sup> into human rights abuses in large anti-terrorist trials in France in the 1990s. For its part, 'The *juge d'instruction*: A figure under threat or supremely untouchable?' was cited by a member of the US judiciary, Philadelphia Court of Common Pleas Judge the Honorable Gene D. Cohen. It was following its publication that the editorial team of the journal *Modern and Contemporary France* asked the author to produce the afore-mentioned summary of the most significant reforms of the 1994 *Code pénal*.<sup>156</sup>

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<sup>155</sup> McColgan and Attanasio, 'France: paving the way for arbitrary justice' (*Fédération internationale des droits de l'homme*, March 1999).

<sup>156</sup> Trouille, 'Reforms to the *Code pénal* March 1st 1994'. See Section 3.1.3 Choice of research topic.



## 4.2 Part Two

### Criminal justice, confidentiality and the role of the media

Part Two focusses on the relationship between criminal justice and the media, and the research questions central to the publications build on those addressed in Part One. The first paper<sup>157</sup> interrogates the matter of whether *juges d'instruction* abused their powers in order to do more than just tackle crime, but also to create a media profile and enhance their careers as well, and looks at one *juge* in particular, Thierry Jean-Pierre, who was frequently in the headlines in the 1990s.<sup>158</sup> These questions were being asked in the French press, and French weekly newsmagazines such as *Le Point*, *Le Nouvel Observateur* and *L'Express* regularly ran features profiling the careers of well-known *juges d'instruction* such as Renaud van Ruymbeke,<sup>159</sup> Eva Joly, Laurence Vichnievsky and Eric Halphen. These household names were completely unknown in the United Kingdom, and to the best of the author's knowledge, there is no English-language material examining their work in any detail. This also led to a more in-depth treatment of the flouting of the confidentiality of the investigation process in France in this and the next publication in Part Two,<sup>160</sup> a shortened version of which was given as a conference paper at Modern and Contemporary France's annual conference in 1998, and of invasions of privacy in general by the French press. The paper was very well-received, and it was as a result of this that the author was asked by Dr Sheila Perry to give a presentation on privacy legislation to her students at the University of

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<sup>157</sup> Trouille, 'Media, politics and justice: spotlight on Thierry Jean-Pierre'.

<sup>158</sup> See Section 2.1 Background, chronology and evolution of the individual publications.

<sup>159</sup> See Section 3.1.4 Sources.

<sup>160</sup> Trouille, 'Secrecy, privacy and human rights in the Fifth Republic'.

Northumbria. The third publication in Part Three, 'Private life and public image: French privacy legislation,' was written for a legal studies public and asks the question 'How does the French state protect the rights of public figures through privacy legislation?' It develops the theme of privacy to focus on the privacy of public figures from media reporting about their private lives and the penalties inflicted on journalists and newspapers under both civil and criminal law for infringing privacy legislation. Again, French source material was used. The work has been cited numerous times by academics in a variety of disciplines and also by Supreme Court judge Lord Jonathan Mance.<sup>161</sup>

The final piece in this Part, 'Modes of detection in the crime reality show,' asks if the crime reality show as a genre has a role in resolving crime, and whether the *juge d'instruction* in the French version, *Témoignage numéro Un*, risks breaching the confidentiality of the investigation process. The programme format is rather more problematic for French viewers than *Crimewatch UK* is for British audiences, as the French public have uncomfortable memories of *délation* - the reporting of fellow citizens to the authorities during the Occupation - but it was nonetheless a solidly successful show. Much has been written in English about *Crimewatch UK* and its German model *Aktenzeichen XY ungelöst*, but there appears to be no English-language analysis of the French equivalent *Témoignage numéro Un*. The author has been unsuccessful in tracing evidence of citations of this publication, which could suggest that this volume was not the best place for publication of the paper. The volume of papers in which it appeared

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<sup>161</sup> See Appendix 3 Impact of publications forming portfolio of work: selected citations and expressions of esteem.

contained chapters mainly reflecting on literary genres, novels rather than television series, fiction rather than fact.

### **4.3 Part Three**

#### **Crime and punishment and the condition of French prisons: the responsibility of the state for its prisoners**

The research questions at the heart of the publications in Part Three query whether the French state, through its reforms to criminal procedure in the late twentieth century and early twenty-first, respects the human rights of those who find themselves in prison, whether convicted prisoners or prisoners on remand awaiting trial, and therefore innocent until proven otherwise. The violation of an individual's rights when imprisoned in substandard and humiliating conditions, the threats to that individual's physical and mental health, and the ensuing prison overcrowding, had already been alluded to in Part One.<sup>162</sup> The publication of prison doctor Véronique Vasseur's book<sup>163</sup> brought the matter to the attention of the public and generated an explosion of information in the French press. A number of short news articles were published in the international press regarding Vasseur's book, but this did not materialise into research in the English-speaking world. The opportunity therefore existed for the author to make a new contribution to knowledge by exploring the state of French prisons before the reforms to which Vasseur's book led, and the reforms

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<sup>162</sup> Trouille, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' 13.

<sup>163</sup> Vasseur, *Médecin-chef à la prison de la Santé*. See Section 2.1 Background, chronology and evolution of the individual publications.

themselves. The publications in Part Three do not appear to have been cited as frequently as those forming the previous two parts, and citations have been from penologists and public policy specialists (in the USA and in Australia) rather than lawyers or French specialists. Again, it is probable that the journals chosen were not the most appropriate outlets to have the maximum impact in penology research. However, there still appears to be little English-language research into the state of French prisons.<sup>164</sup>

#### **4.4 Part Four**

##### **Statutory reform and universal jurisdiction: do French courts offer a viable alternative to international tribunals in the prosecution of the most serious crimes?**

The focus of the final part of the submission adopts an international perspective and questions whether international fora, and in particular the ICTR, are able to ensure fairness to the parties any more effectively than national jurisdictions in the investigation and prosecution of the most violent crimes. The first publication<sup>165</sup> focusses on a specific case, *Ndindiliyimana et al*,<sup>166</sup> which had only recently been decided at the time the research was carried out, and it had not previously been the subject of any published critical analysis. The

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<sup>164</sup> See K. Levan, *Prison violence: causes, consequences and solutions* (Routledge 2016) 'Unfortunately very little research exists that focusses on sentencing and imprisonment in France.' 35.

<sup>165</sup> Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*'.

<sup>166</sup> *The Prosecutor v Ndindiliyimana et al. (Judgment and Sentence)*, ICTR-00-56-T, 17 May 2011.

publication queried whether, despite significant international expertise, the ICTR investigative practices, evidence-gathering and performance of the Office of the Prosecutor (OTP) made possible effective prosecutions of offences of sexual violence against women, and concluded that interviewing of witnesses was often superficial and the work of the OTP seriously flawed. Nearly fifteen years after its ground-breaking first trial, that of Akayesu,<sup>167</sup> which ruled that rape could constitute a genocidal act, and produced a very broad definition of rape ('a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'<sup>168</sup>) the OTP was still very likely not to pursue or not to convict on charges of sexual violence against a defendant, amongst other reasons, because they were 'very annoying and very difficult to prove.'<sup>169</sup> This publication, reviewed by Professor Michael Bohlander of Durham University, currently international co-investigating judge in the Extraordinary Chambers in the Courts of Cambodia, has been referenced in Werle and Jessberger's *Principles of International Criminal Law*,<sup>170</sup> one of the key textbooks in the field of international criminal justice.

The final publication in the portfolio<sup>171</sup> brings the portfolio full circle, returning to the French courts to study the first – and very recent – trial, in 2014, in a French

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<sup>167</sup> *Prosecutor v Jean-Paul Akayesu*, (*Judgment and Sentence*) ICTR-96-4-T, Trial Chamber 1, 2 September 1998.

<sup>168</sup> *Prosecutor v Akayesu*, (*Judgment and Sentence*) para 598.

<sup>169</sup> Aranburu's comments on a conversation between prosecutors at the International Criminal Tribunal for Yugoslavia. See X. Aranburu, 'Sexual violence beyond reasonable doubt: using pattern evidence and analysis for international cases' (2010) 23 *Leiden Journal of International Law* 609, quoted in Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*' 781.

<sup>170</sup> G. Werle and F. Jessberger, *Principles of international criminal law* (3rd edn, OUP 2014) footnote 100, 304.

<sup>171</sup> Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial'.

court of a Rwandan genocide suspect, Pascal Simbikangwa,<sup>172</sup> who was tried under the doctrine of universal jurisdiction. It looks at the lengthy and difficult path to prosecution before the French courts of Rwandan *génocidaires*, the refusals of French courts to extradite suspects to Rwanda, and the legislation used to prosecute them. It asks whether French procedures, despite the creation of the *pôle génocide et crimes contre l'humanité*<sup>173</sup> as a highly specialised unit of three *juges d'instruction* and two prosecutors dealing specifically with the most serious of international crimes,<sup>174</sup> can offer a viable alternative to international fora, or to the domestic courts of the state in which the offences took place, in the investigation and prosecution of the most serious crimes. It returns also to the reforms of the *Code pénal* evoked in an earlier piece, which introduced the definition of the crime of genocide into French law,<sup>175</sup> the law used to prosecute Simbikangwa.

This publication, although still recent, was the only title referred to as the source of information on the laws used to try Simbikangwa in volume III of Professor Kai Ambos' authoritative three-volume *Treatise on International Criminal Law*.<sup>176</sup> Publication of this final piece and the Bradford Law School blog of a School research seminar on the same subject<sup>177</sup> led to contact from David Whitehouse,

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<sup>172</sup> *Cour d'assises Paris, Judgment No. 13/0033, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 14 March 2014* and *Cour d'assises Seine Saint Denis (statuant en appel) Judgment No. 51/2016, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 3 December 2016*.

<sup>173</sup> Genocide and crimes against humanity unit.

<sup>174</sup> Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial' 212.

<sup>175</sup> See Trouille, 'Reforms to the *Code pénal* March 1st 1994', 505; Trouille, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial' 211.

<sup>176</sup> K. Ambos, *Treatise on international criminal law*, vol III: international criminal procedure (OUP 2016) footnote 154, 229, and footnote 244, 243.

<sup>177</sup> H. L. Trouille, *Bringing Rwandan génocidaires to justice* (2016) <<http://blog.foml.brad.ac.uk/category/law/>> accessed 7 September 2016.

a Paris-based journalist with Bloomberg, and a fruitful exchange of ideas on the roles of international tribunals in such situations took place. In addition, a link to the article was tweeted immediately post publication by Thijs Bouwknecht, a Dutch academic (University of Amsterdam), trial monitor and former journalist.<sup>178</sup> This publication is also highly relevant in the current context. A second trial of two Rwandan *génocidaires* took place in Paris between May and July 2016,<sup>179</sup> and the appeal of the Simbikangwa case in November/December 2016,<sup>180</sup> and, with nearly thirty other Rwandan genocide suspects under investigation in France,<sup>181</sup> there will surely be other trials. We wait to see if Britain also will be the arena for a Rwandan genocide trial, that of Vincent Brown et al, following the decision of Westminster Magistrates' Court not to extradite five genocide suspects to Rwanda on grounds that they could not be guaranteed a fair trial there.<sup>182</sup>

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<sup>178</sup> 10 February 2016 @thijsbouwknecht.

<sup>179</sup> The trial of Barahira and Ngenzi, May-July 2016, Collectif des parties civiles pour le Rwanda, 'Mémoire de procès' (2016) <<http://www.collectifpartiescivilesrwanda.fr/condamnation-ngenzi-barahira/>> accessed 5 September 2016.

<sup>180</sup> *Cour d'assises Seine Saint Denis (statuant en appel) Judgment No. 51/2016, Pascal Senyamuhara Safari (alias Pascal Simbikangwa) 3 December 2016.*

<sup>181</sup> Collectif des parties civiles pour le Rwanda, 'Law suits by the CPR' (2016) <<http://www.collectifpartiescivilesrwanda.fr/en/tableau-des-plaintes-du-cpr/>> accessed 5 September 2016.

<sup>182</sup> *Government of the Republic of Rwanda-Requesting state v Vincent Brown (aka Vincent Bajinya), Charles Munyazeza, Emmanuel Nteziryayo, Celestin Ugirashebuja and Celestin Mutabaruka-Requested persons (Westminster Magistrates' Court) 21 December 2015*, 21 December 2015, <<https://www.judiciary.gov.uk/wp-content/uploads/2015/12/rwandan-five-judgment-211215.pdf>> accessed 5 September 2016. See also L. Waldorf, 'A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal' (2010) 33 *Fordham Int'l L.J.*, 1221-1277, 1241; and M. A. Drumbl, 'Prosecution of Genocide v The Fair Trial Principle: Comments on *Brown and Others v The Government of Rwanda and the UK Secretary of State for the Home Department*' (2010) 8 *Journal of International Criminal Justice* 289-309, 289.

## 4.5 Conclusion

John Pryor states that '[t]he significant original knowledge that is the point of the thesis comes through addressing but not necessarily answering the research questions.'<sup>183</sup> The author has attempted to not only address, but also to answer, at least in part, the research questions posed in the individual elements of the portfolio. However, in Yates' words 'one of the characteristics of knowledge in the late twentieth and twenty-first centuries is its rate of change and its interconnectedness.'<sup>184</sup> The areas researched in the portfolio are areas in constant flux as society evolves and as reforms take place, each change impacting on other areas, like ripples in a pond, and no answer can be a full one. There is also an element of subjectivity as to what the role of French justice should be and consequently how effective it is, dependent on political sympathies and the perceptions and expectations of each individual observer.

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<sup>183</sup> Pryor, 'Constructing research questions: focus, methodology and theorisation' 170.

<sup>184</sup> L. Yates, 'Quality agendas and doctoral work: the tacit, the new agendas, the changing contexts' in P. Thomson and M. Walker (eds), *The Routledge doctoral student's companion* (Routledge 2010) 305.



## **5. Conclusion: limitations and ideas for future research**

As can be seen from the methodology and the publications themselves, the studies leading to the publications have been largely desk-based. As explained above, data has been gathered through a close reading of the French press, supported by academic texts and articles, books written by legal professionals,<sup>185</sup> and statute and case law. Thanks to family and personal contacts, there have been regular trips to France which have enabled an informal observation of events and reactions to changes in legislation. In addition, the trip to France in 2002 organised by the FBLS provided an opportunity to see some of the principal institutions and to interview some key figures in the legal process in France.<sup>186</sup> The author has also visited Africa on a number of occasions, and although these visits have been of a personal nature, at least until a research trip to East Africa in October 2016, they have contributed to laying a foundation for an understanding of certain aspects of African life, for example relating to perceptions of time and distance (which are frequently given with little precision) or the difficulty of identifying geographic locations with accuracy (ie paucity of street names and house numbers). This has aided the author to comprehend some of the evidential challenges facing the ICTR and the French courts in the trial process of the Rwandan genocide suspects.

For the portfolio of work a deliberate choice was made not to gather data from legal professionals, prisoners, suspects or members of the general public via

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<sup>185</sup> See Section 3.1.4 Sources.

<sup>186</sup> Godard's FBLS research seminar, see section 4.1 Part One Reforms to French criminal procedure in the 1990s – enhancing the rights of the defence.

interviews, surveys or questionnaires, and this approach has had both its advantages and disadvantages. In some ways, to have conducted interviews amongst, for example, a group of *juges d'instruction* or prisoners would have given the impression of discovering 'the truth' with regard to the power of the *juges d'instruction*, or the plight of the prisoner, rather than using the filter of a third party such as the press or academic literature. There is a tendency amongst some researchers to presume that interview research – 'a "professional conversation" ... with the goal of getting a participant to talk about their experiences and perspectives, and to capture their language and concepts, in relation to a topic that you have determined'<sup>187</sup> – is 'the scientific method'<sup>188</sup> of carrying out research, as it identifies a control group, in the same way a scientific experiment does. However, precisely because a control group is often of necessity limited in size, the scope of the research findings must also be limited to reflections on the opinions of a small group of *juges* as opposed to those of *juges d'instruction* as a whole, or of a sector of the prison population rather than all prisoners. As Brinkman and Kvale explain:

'If the number of participants is too small, it is difficult to generalize and not possible to test hypotheses of differences among groups or to make statistical generalizations. If the number of subjects is too large, there will hardly be time to make penetrating analyses of the interviews.'<sup>189</sup>

Furthermore, arguably, scholarly research should build on existing research findings identified via literature reviews and data which has been analysed and

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<sup>187</sup> Braun and Clarke, *Successful qualitative research* 77.

<sup>188</sup> S. Brinkman and S. Kvale, *InterViews: learning the craft of qualitative research interviewing* (3rd edn, Sage 2015) 127.

<sup>189</sup> *Ibid* 140.

written about by other researchers.<sup>190</sup> The author has chosen not to use interviews, but rather to 'gather data where appropriate to the problem ... by using whatever methods are most likely to generate such data.'<sup>191</sup> She has analysed and critiqued data gathered by others and published in the press, in books and in academic journals, in order to give as comprehensive a picture of the key debates in French criminal justice at the end of the twentieth and start of the twenty-first centuries as possible.

However, as well as continuing to observe the outcomes of the forthcoming trials in France of Rwandan *génocidaires* and the work of the *pôle génocide et crimes contre l'humanité*, the author's plans for future research turn actively around a series of research trips to East Africa. Evolving from research in the last two publications in the portfolio, a new piece is planned on the role of Non-governmental organisations (NGOs) in two post-conflict East African states in providing access to justice for people who do not have the financial means to pay for professional legal advice. This, it is hoped, will sit well within a developing field of research in legal empowerment and transitional justice.<sup>192</sup> The research trips are organised with the support of two UK-based NGOs, the Lawyers' Christian Fellowship (LCF)<sup>193</sup> and the African Prisons Project (APP),<sup>194</sup> which have well-established contacts in Rwanda, Uganda and Kenya, and which provide legal advice and legal education in criminal law, family law,

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<sup>190</sup> See reference to McNiff, Section 4 The published works: originality and contribution to knowledge.

<sup>191</sup> M. Salter and J. Mason, *Writing law dissertations* (Pearson Longman 2007) 130.

<sup>192</sup> See, for example, the work of Lars Waldorf: L. Waldorf, 'Introduction: legal empowerment in transitions' (2015) 19 (3) *International Journal of Human Rights* 229-241, 231.

<sup>193</sup> Lawyers' Christian Fellowship Worldwide CLEAR <<https://lawcf.org/worldwide/clear>> accessed 31 December 2016.

<sup>194</sup> African Prisons Project <<https://africanprisons.org/our-work#access-to-justice>> accessed 31 December 2016.

child rights, land rights and succession. APP also provides education up to degree level for small mixed classes of prisoners and warders in some Ugandan and Kenyan prisons via the University of London's international programmes. This is part of an initiative to train prisoners and prison staff to become Prison Human Rights Advocates and Peer Educators and to 'provide simple, accessible information about the court process to those in need,'<sup>195</sup> for example by assisting with the preparation of appeals or bail applications. This form of legal education is particularly beneficial in a country where lawyers are in short supply, and where even people employed in the 'professions' do not earn enough to pay for legal advice. It also helps relieve the pressure of prison overcrowding by moving convicted prisoners as rapidly as possible through the system and reducing the number of inmates on remand.

Although some informal interviews with the charity workers have been scheduled, the trips are exploratory for the most part, with the aim of providing the author with a greater familiarity of the context in which the charities operate, particularly in the area of criminal legal advice and legal education. This may well lead to a comparative project on the experience of prisoners in France (with Feuillée-Kendall, using her day-to-day experience as an *avocate* in Versailles), in the UK (with Dr Kathryn Dutton, an experienced researcher in this area) and in East Africa. As mentioned in Section 4.3, it has already been established that

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<sup>195</sup> Ibid, accessed 30 January 2017.

there is little English-language research focussing on imprisonment in France.<sup>196</sup>

Wagner appositely points out that ‘we can never confirm that [a particular approach] will generate knowledge that is new to one and all for all time, everywhere.’<sup>197</sup> However, the author is optimistic that this comparative study could make a valid contribution to filling a knowledge-gap in English-language works concerning imprisonment in France, opening up increased possibilities for future dialogue and exchanges of practice between policy-makers in France and the United Kingdom, and also be of practical use to some NGOs working with prison populations in East Africa. It is on this note of anticipation that the author concludes the statement of her research to date into rights, responsibilities and reform in French justice between 1990 and 2016.

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<sup>196</sup> See footnote 164: Levan, *Prison violence: causes, consequences and solutions* ‘Unfortunately very little research exists that focusses on sentencing and imprisonment in France.’ 35.

<sup>197</sup> Wagner, ‘Ignorance in educational research: how not knowing shapes new knowledge’ 36.

## Glossary

<i>Avocat(e)</i>	Lawyer, ~ barrister
<i>Code de procédure pénale</i>	Code of criminal procedure
<i>Code pénal</i>	Criminal code
<i>délation</i>	the reporting of fellow citizens to the authorities during the Occupation
<i>Intime conviction</i>	firm conviction; inner conviction
<i>Juge des libertés et de la détention</i>	Judge of freedom and detention
<i>Juge d'instruction</i>	Examining magistrate; investigating judge
<i>Juge rouge</i>	Red judge; judge with left-wing political tendencies
<i>Loi d'orientation et de programmation pour la justice</i>	Law of orientation and planning for justice
<i>Loi sur la présomption d'innocence</i>	Law on the presumption of innocence
<i>Milice</i>	Militia
<i>Ministre de la justice</i>	Justice minister
<i>Parti socialiste</i>	Socialist Party
<i>Personne morale</i>	Body corporate, corporation
<i>Pôle génocide et crimes contre l'humanité</i>	Genocide and crimes against humanity unit
<i>Programme pénitentiaire</i>	Prison programme

<i>Secret de l'instruction</i>	Secrecy of the investigation process; confidentiality
<i>Union pour un mouvement populaire</i>	Union for a popular movement
<i>Vagabond</i>	Tramp, vagrant, wanderer

## Abbreviations

APP	African Prisons Project
CLEAR	Christian Legal Education Aid and Research
CPS	Crown Prosecution Service
ECHR	European Convention on Human Rights
FBLS	Franco-British Lawyers' Society
FIDH	<i>Fédération internationale des droits de l'homme</i> (International Federation of Human Rights)
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal for Yugoslavia
LCF	Lawyers' Christian Fellowship
NGO	Non-governmental Organisation
OTP	Office of the Prosecutor
PS	<i>Parti socialiste</i> (Socialist Party)
RAE	Research Assessment Exercise



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### **Statutes**

*(Ancien) code pénal*

*Code de procédure pénale*

*(Nouveau) code pénal*

## Appendix 1

### Chronological list of publications including category of publication

Title of publication	Category of publication	Detail
i. 'A Look at French Criminal Procedure' (1994) <i>The Criminal Law Review</i> 735-743.	Journal article	R P *
ii. ' <i>Le juge d'instruction: a figure under threat or supremely untouchable?</i> ' (1994) NS2 (1) <i>Modern and Contemporary France</i> 11-19.	Journal article	R P *
iii. 'Media, Politics and Justice: spotlight on Thierry Jean-Pierre' (1999) 23 (1) <i>Contemporary French Civilization</i> 81-94.	Journal article	R P *
iv. 'Secrecy, Privacy and Human Rights in the Fifth Republic' in M.E. Allison and O.N. Heathcote (eds), <i>Forty Years of the Fifth French Republic: Actions, dialogues and discourses</i> (Peter Lang 1999) 223-236.	Chapter in book; Conference proceedings	R P *
v. 'Private Life and Public Image: French Privacy Legislation' (2000) 49 <i>International and Comparative Law Quarterly</i> 199-208.	Journal article	R P *
vi. 'Modes of Detection in the Crime Reality Show' in Emer O'Beirne and Anne Mullen (eds), <i>Crime Scenes: Detective Narratives in European Culture since 1945</i> (Rodopi 2000) 15-24.	Chapter in book; Conference proceedings	R P *
vii. 'Holiday Camp or Boot Camp? Where does France stand in the Prison Reform Debate?' (2000) 13 <i>The Justice Professional</i> 391-403.	Journal article	R P *

viii. 'French Prisons: <i>une humiliation pour la République</i> ' (with Pascale Feuillée-Kendall), (2004) 12 (2) <i>Modern and Contemporary France</i> 159-175.	Journal article	R P **
ix. 'Conclusion: From the twentieth century into the twenty-first: should we still fear the <i>juge</i> in the new legal framework?' in P. Feuillée-Kendall and H. Trouille (eds), <i>Justice on Trial: the French juge in question</i> (Peter Lang 2004) 249-274.	Chapter in book	U P *
x. 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of <i>Ndindiliyimana et al</i> ' (2013) 11 <i>International Criminal Law Review</i> 743-788.	Journal article	R P *
xi. 'France, Universal Jurisdiction and Rwandan <i>génocidaires</i> : The Simbikangwa Trial' (2016) 14 (1) <i>Journal of International Criminal Justice</i> 195-217.	Journal article	R P *

**Key:**

- R refereed
- U unrefereed
- P available in the public domain
- \* sole author
- \*\* principal author
- \*\*\* joint author

## Appendix 2

### Originality and nature of contribution to knowledge of the portfolio of work

Publication	Research questions driving individual publications	Originality and contribution to knowledge
<p><b>Part One</b></p> <p>i. 'A look at French criminal procedure' (1994) <i>The Criminal Law Review</i> 735-743.</p>	<ul style="list-style-type: none"> <li>• Does French criminal procedure protect the rights of the defence adequately in the late twentieth and early twenty-first century?</li> <li>• How is the state addressing any deficiencies in procedures?</li> </ul>	<ul style="list-style-type: none"> <li>• Produced English-language analysis of French language sources relating to reforms in French criminal procedure of interest to legal studies scholars</li> <li>• This was not a comparative study of the two systems but a critical analysis of the 1993 reforms to the <i>Code de procédure pénale</i>.</li> <li>• Set the reforms in the French political context at the time.</li> </ul>
<p>ii. '<i>Le juge d'instruction</i>: a figure under threat or supremely untouchable?' (1994) <i>NS2</i> (1) <i>Modern and Contemporary France</i> 11-19.</p>	<ul style="list-style-type: none"> <li>• In France's search to strengthen the rights of the defence, is the role of the <i>juge d'instruction</i> under threat?</li> <li>• Why is role of the <i>juge d'instruction</i> the focus of such criticism?</li> </ul>	<ul style="list-style-type: none"> <li>• Introduced the role of the <i>juge d'instruction</i> to French studies scholars.</li> <li>• Analysed the relationship between key actors in French justice and French politics, especially in relation to the 1993 election campaign.</li> <li>• Carried out research using French sources.</li> </ul>

<p><b>Part Two</b></p> <p>iii. 'Media, politics and justice: spotlight on Thierry Jean-Pierre' (1999) 23 (1) Contemporary French Civilization 81-94.</p>	<ul style="list-style-type: none"> <li>• Why is Thierry Jean-Pierre so much in the headlines at present?</li> <li>• Are <i>juges d'instruction</i> simply trying to tackle crime or are they trying to create a high profile for themselves and enhance their careers?</li> </ul>	<ul style="list-style-type: none"> <li>• Expanding on the previous analysis of the relationship between key actors in French justice and French politics, examined interactions between media, politics and justice in France.</li> <li>• Explored the attitudes of Thierry Jean-Pierre towards the secrecy of the investigation process.</li> <li>• Identified illogicality in French legislation whereby privacy legislation was sometimes respected and sometimes flouted.</li> <li>• Reflected on treatment by French journalists of French and British celebrities; drew conclusions as to the application of the law.</li> </ul>
<p>iv. 'Secrecy, privacy and human rights in the Fifth Republic' in M. E. Allison and O.N. Heathcote (eds), <i>Forty Years of the Fifth French Republic: Actions, dialogues and discourses</i> (Peter Lang 1999) 223-236.</p>	<ul style="list-style-type: none"> <li>• How does the French state protect the rights of the defence and ensure the confidentiality of the investigation through its privacy legislation?</li> <li>• How is this legislation so frequently breached and what are the legal consequences of the breaches?</li> </ul>	<ul style="list-style-type: none"> <li>• Developing the theme of the secrecy of the investigation process, expounded to French studies scholars texts of French criminal and civil codes which protect privacy.</li> <li>• Applied these laws to contemporary issues relating to privacy of criminal investigations and to respect of privacy of well-known French public figures.</li> </ul>
<p>v. 'Private life and public image: French privacy legislation' (2000) 49 International and Comparative Law Quarterly 199-208.</p>	<ul style="list-style-type: none"> <li>• How does the French state protect the rights of public figures through its privacy legislation?</li> <li>• How is this legislation so frequently breached? What are the legal consequences?</li> </ul>	<ul style="list-style-type: none"> <li>• Building on research for the previous publication, explained to English legal studies scholars texts of French criminal and civil codes which protect privacy.</li> <li>• Applied these laws to contemporary issues relating to the respect of privacy of well-known French and British public figures.</li> </ul>

<p>vi. 'Modes of detection in the crime reality show' in Emer O'Beirne and Anne Mullen (eds) <i>Crime Scenes: Detective Narratives in European Culture since 1945</i> (Rodopi, 2000) 15-24.</p>	<ul style="list-style-type: none"> <li>• Does the crime reality show <i>Témoin numéro Un</i> shown on the state-run television channel France 2 have a role in solving crime in France?</li> <li>• Does the role of the <i>juge d'instruction</i> in this programme infringe the secrecy of the investigation process?</li> </ul>	<ul style="list-style-type: none"> <li>• Expanding the study of the relationship between the <i>juge</i> and the media, analysed the reasons for the partnership being between the television presenters and the <i>juge d'instruction</i> in <i>Témoin numéro Un</i>, whereas in the United Kingdom, it is the police who co-present in <i>Crimewatch UK</i>.</li> <li>• Clarified the problems besetting this format in France, in contrast with the highly successful <i>Crimewatch UK</i> series (mass collaboration with the police during the second world war has led to a reluctance to report others to the police today).</li> </ul>
<p><b>Part Three</b></p> <p>vii. 'Holiday camp or boot camp? Where does France stand in the prison reform debate?' (2000) 13 <i>The Justice Professional</i> 391-403.</p>	<ul style="list-style-type: none"> <li>• What is the situation in French prisons at the start of the twenty-first century?</li> <li>• Does the state, through the reforms implemented in the late twentieth century, respect the human rights of prisoners on remand and those convicted?</li> </ul>	<ul style="list-style-type: none"> <li>• Presented the tensions in the French prison system and the reforms of the late twentieth century.</li> <li>• Demonstrated these to an Anglophone readership via incidents reported in the French press and Véronique Vasseur's newly published book <i>Médecin chef à la prison de la Santé</i>.</li> </ul>
<p>viii. 'French prisons: <i>une humiliation pour la République</i>' (with Pascale Feuillée-Kendall), (2004) 12 (2) <i>Modern and Contemporary France</i>, 159-175.</p>	<ul style="list-style-type: none"> <li>• How has the publication of Véronique Vasseur's book <i>Médecin chef à la prison de la Santé</i> improved the respect of prisoners' rights the early twenty-first century?</li> <li>• What reforms have taken place since its publication?</li> </ul>	<ul style="list-style-type: none"> <li>• Building on the previous research, presented the political developments, including two parliamentary reports, and reforms enacted after the publication of Vasseur's book.</li> <li>• Examined the consequences on individuals of the non-respect of prisoners' rights.</li> </ul>

<p>ix. 'Conclusion: from the twentieth century into the twenty-first: should we still fear the <i>juge</i> in the new legal framework?' in P. Feuillee-Kendall and H. Trouille (eds) <i>Justice on Trial: the French juge in question</i>, (Peter Lang 2004) 249-274.</p>	<ul style="list-style-type: none"> <li>• Are the rights of the suspect respected more in the early twentieth-first century, following the socialist government's reforms, than they were in the 1990s?</li> <li>• What have been the challenges to enhancing these rights?</li> <li>• Should the suspect still fear <i>the juge d'instruction</i> in the twenty-first century?</li> </ul>	<ul style="list-style-type: none"> <li>• Using French sources, examined the legislation passed in the early twenty-first century and identified that the socialist government passed a raft of measures to enhance the rights of the suspect and reduce prison overcrowding by encouraging alternatives to custodial sentences, whereas the successor right-wing government introduced more repressive reforms and commenced a prison-building programme.</li> </ul>
<p><b>Part Four</b></p> <p>x. 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of <i>Ndindiliyimana et al</i>' (2013) 11 International Criminal Law Review 743-788.</p>	<ul style="list-style-type: none"> <li>• Are international criminal tribunals able to ensure fairness in prosecuting violent crimes?</li> <li>• Case study: in a very recent case before the ICTR, what are the challenges to securing a conviction for rape – one of the most challenging offences to prosecute?</li> <li>• Considering the work of prosecutors, investigators and judges, where is the process flawed?</li> </ul>	<ul style="list-style-type: none"> <li>• Having previously examined weaknesses in French criminal procedure, discussed flaws in international criminal procedures, demonstrating the impact these can have on the success or failure of prosecution of violent crime, and specifically serious sexual offences.</li> <li>• Analysed in detail the recent case of <i>Ndindiliyimana et al</i> (2011) to conclude that, despite a revolutionary approach to the definition of rape in the first case before the ICTR, charges of sexual violence committed against women are still infrequently prosecuted successfully.</li> </ul>

	<ul style="list-style-type: none"> <li>• Have ICTR prosecution rates for sexual offences improved during the lifetime of the Tribunal?</li> </ul>	
<p>xi. France, universal jurisdiction and Rwandan <i>génocidaires</i>: the Simbikangwa Trial (2016) 14 (1) Journal of International Criminal Justice 195-217.</p>	<ul style="list-style-type: none"> <li>• Are international tribunals better-equipped to prosecute violent crimes than national jurisdictions?</li> <li>• Can French courts offer a viable alternative to international fora in the prosecution of these crimes?</li> </ul>	<ul style="list-style-type: none"> <li>• Using French-language sources, analysed the trial of Pascal Simbikangwa (2014), the first, very recent, trial of a Rwandan genocide suspect before the French courts.</li> <li>• Analysed the possible fora for this trial, explaining the reasons for the choice of the French courts.</li> <li>• Examined the advantages and disadvantages of trying Rwandan suspects in French national courts.</li> <li>• Posed questions regarding the forum for future trials of genocide suspects in France.</li> </ul>



### Appendix 3

#### Impact of publications forming portfolio of work: selected citations and expressions of esteem

Publication	Cited in	Reference
i. 'A Look at French Criminal Procedure' (1994) <i>The Criminal Law Review</i> 735-743.	Ivana Bacik, Catherine Maunsell, Susan Gogan, <i>The legal process and victims of rape, A comparative analysis of the laws and legal procedures relating to rape, and their impact upon victims of rape, in the fifteen member states of the European Union</i> , (The Dublin Rape Crisis Centre, The School of Law, Trinity College Dublin September 1998).	Bibliography, p 380.
	W. Cairns, R.C. McKeon, <i>Introduction to French Law</i> (Routledge 1995).	Bibliography.
	J. Hodgson, <i>French criminal justice: a comparative account of the investigation and prosecution of crime in France</i> (1 <sup>st</sup> edn, Hart 2005).	Footnote 173, p 35, Footnote 5, p 40; Bibliography, p 271.
	J. Hodgson 'Human Rights and French criminal justice,' in S. Halliday and P. Schmidt, <i>Human Rights Brought Home: Socio-Legal Perspectives of Human Rights in the National Context</i> (Bloomsbury Publishing 2004).	Footnote 18, p 189. Bibliography, p 273.
	J. Hodgson, 'Suspects, defendants and victims in the French criminal process: the context of recent reform,' (2002) 51 <i>International and Comparative Law Quarterly</i> 781-816.	Footnote 41, p 788.
	J. Hodgson, 'The Police, the prosecutor and the juge d'instruction: judicial supervision in France, theory and practice,' (2001) 41 <i>British Journal of Criminology</i> 342-361.	Footnote 16, p 345; Bibliography, p 361.
	Peter Johnstone, 'Investigations into white-collar offences and the 'Sick Man' of France' (1999) 7(1) <i>Journal of Financial Crime</i> 37-49.	Footnote 33, p 40.
	W. D. S. McLay, <i>Clinical forensic medicine</i> (2 <sup>nd</sup> edn, Cambridge University Press 1996).	Footnote 16, p 13.

	Bron Mckillop, 'Anatomy of a French murder case' (1997) 45 <i>American Journal of Comparative Law</i> 527-583.	Footnote 41, p 546; footnote 98, p 570.
	D. Pager, 'The Republican ideal? National minorities and the criminal justice system in contemporary France' (2008) 10 <i>Punishment and Society</i> 375-400.	Within main text p 384; Bibliography, p 400.
	P. Roberts and A. Zuckerman, <i>Criminal evidence</i> (OUP 2010).	Footnote 19, p 47.
	E. Steiner, <i>French Law: a Comparative Approach</i> (OUP 2010).	Bibliography, p 295.
	R. Terrill, <i>World criminal justice systems: A Comparative Survey</i> (Routledge 2015).	Referenced within text, p 179; Bibliography, p 700.
	Gordon van Kessel, 'European perspectives on the accused as a source of testimonial evidence' (1998) 100 <i>West Virginia Law Review</i> 799-845.	Footnote 39, p 811.
	Richard Vogler, <i>A world view of criminal justice, International and Comparative Criminal Justice</i> (Ashgate 2005).	Bibliography, p 319.
	Sherriff Albert Sheehan, Falkirk Sherriff Court	Contacted the author by telephone in 1994 to encourage her to join the Fanco British Lawyers Society.
	Sir David Carruthers, Family Court Judge, Wellington, New Zealand; Chief District Court Judge.	Wrote to the author in 1994 for information regarding sources.

<p>ii. 'Le juge d'instruction: a figure under threat or supremely untouchable?' (1994) NS2 (1) Modern and Contemporary France 11-19.</p>	<p>Richard Vogler, <i>A world view of criminal justice</i>, International and Comparative Criminal Justice (Ashgate 2005).</p>	<p>Referenced in text, p 162; Bibliography, p 319.</p>
	<p>M. McColgan and A. Attanasio, 'France: paving the way for arbitrary justice' (report of an international mission of enquiry for <i>Fédération Internationale des droits de l'homme</i>, March 1999) &lt;<a href="https://www.fidh.org/IMG/pdf/271fran.pdf">https://www.fidh.org/IMG/pdf/271fran.pdf</a>&gt; Accessed 22 January 2016.</p>	<p>Bibliography, p 48.</p>
	<p>Eric Cahm, <i>The Dreyfus Affair in French society and politics</i> (Longman 1996).</p>	<p>Referenced in main text, p x.</p>
	<p>The Honorable Gene D. Cohen 'A judge's perspective: comparing the investigating grand jury with the French system of criminal investigations: a judge's perspective and commentary' (1999) 13 Temple International and Comparative Law Journal 87-105.</p>	<p>Footnotes 18 and 20, p 89.</p>
	<p>Request from Professor Eric Cahm (University of Portsmouth) for summary of 1994 reform to <i>Code pénal</i> for Modern and Contemporary France.</p>	<p>Dossier on Reforms to the <i>Code pénal</i> (1994) 2 Modern and Contemporary France 503-8.</p>
<p>iv. 'Secrecy, Privacy and Human Rights in the Fifth Republic' in M.E. Allison and O.N. Heathcote (eds), <i>Forty Years of the Fifth French Republic: Actions, dialogues and discourses</i> (Peter Lang 1999) 223-236.</p>	<p>Invited by Dr Sheila Perry (University of Northumbria) to speak to French Studies students on French privacy legislation.</p>	

<p>v. 'Private Life and Public Image: French Privacy Legislation' (2000) 49 International and Comparative Law Quarterly 199-208.</p>	<p>Gert Brüggemeier, Aurelia Colombi Ciacchi and Patrick O'Callaghan <i>Personality Rights in European Tort Law</i> (Cambridge University Press 2010).</p>	<p>Footnote 35, p 14.</p>
	<p>George C. Christie <i>Philosopher Kings?: The Adjudication of Conflicting Human Rights and Social Values</i> (OUP 2011).</p>	<p>Referenced in main text, p 154; Bibliography, p 181.</p>
	<p>Dervila Cooke 'Connection and Peripheral Encounters: <i>Paris bout du monde</i> (1992) and <i>Les Passagers du Roissy Express</i> (1989)', (2008) 8 (1) <i>Journal of Romance Studies</i> 91-106.</p>	<p>Endnote 4, p 105; Bibliography, p 106.</p>
	<p>John Downey James Stanyer, 'Exposing Politicians' Peccadilloes in Comparative Context: Explaining the Frequency of Political Sex Scandals in Eight Democracies Using Fuzzy Set Qualitative Comparative Analysis' (2013) 30 (3) <i>Journal of Political Communication</i> 495-509.</p>	<p>Referenced twice within main text Bibliography, p 509.</p>
	<p>John Downey and James Stanyer, 'Using Fuzzy Set Qualitative Comparative Analysis in Comparative Political Communication Research: Applying Fuzzy Set Theoretic Thinking to Small-N Case-Oriented Research' in MJ Canel and K Voltmer (eds) <i>Comparing Political Communication across Time and Space: New Studies in an Emerging Field</i> (Palgrave MacMillan 2014) 47-63.</p>	<p>Referenced within main text, pp 56, 63.</p>
	<p>Claire Hameau, (student of translation and interpreting at the <i>Institut supérieur d'interprétation et de traduction</i>) in Paris, chose to translate this article into French for her final translation project (16.09.2001).</p>	
	<p>Lord Jonathan Mance, 'Human Rights, Privacy and the Public Interest—Who Draws the Line and Where?' (2009) 30 (3) <i>Liverpool Law Review</i>, 263-283.</p>	<p>Bibliography, p 283.</p>

	N. D. Zeronda, 'Street shootings: Covert photography and public privacy' (2010) 63 <i>Vanderbilt Law Review</i> 1131-1160.	Footnote 115, p 1147
	James Stanyer, <i>Intimate Politics: Publicity, Privacy and the Personal Lives of Politicians</i> (Polity Press 2012).	Referenced within main text, pp 82, 84, 185; Bibliography, p 208.
	E. Steiner, 'The New President, His Wife and the Media: Pushing Away the Limits of Privacy Law's Protection in France?' (2009) 13 (1) <i>Electronic Journal of Comparative Law</i> < <a href="http://www.ejcl.org/131/art131-4.pdf">http://www.ejcl.org/131/art131-4.pdf</a> > accessed 22 January 2016.	Footnote 8, p 3.
	I.K. Taker, 'An examination of the commercial and non commercial appropriation of persona within the United Kingdom, with a comparative analysis with common and civil law countries,' (2011) Masters thesis, Durham University.	Footnote 1077, p 119; Bibliography, p 151.
	Dennis Thomson 'The Private Life of Politicians' ( <i>Raison publique</i> , 6 February 2010) < <a href="http://www.raison-publique.fr/article206.html">http://www.raison-publique.fr/article206.html</a> > accessed 22 January 2016.	Footnote 3.
	Raymond Youngs <i>English, French and German Comparative Law</i> (Routledge 2014).	Footnote 581, p 447.
vii. 'Holiday Camp or Boot Camp? Where does France stand in the Prison Reform Debate?' (2000) 13 <i>The Justice Professional</i> 391-403.	H. Clout, 'La Grande Reconstruction, 1918–1935' (2001) 9 (4) <i>Modern and Contemporary France</i> 523-537.	Bibliography, p 537.
	J. Stewart <i>Public Policy Values</i> (Palgrave Macmillan 2009).	Referenced in text, p 95; Bibliography, p 223.
	Michael Welch <i>Corrections: A Critical Approach</i> (Routledge 2013).	Bibliography, p 682.

<p>xiii 'French prisons: <i>une humiliation pour la République</i>' (with Pascale Feuillée-Kendall), (2004) 12 (2) <i>Modern and Contemporary France</i>, 159-175.</p>	<p>M. Hawtin, <i>Representations of prisons in contemporary photography</i> (2010) Masters Thesis, University of Sheffield, available at &lt;<a href="https://www.scribd.com/document/40312428/Representations-of-Prisons-in-Contemporary-French-Photography">https://www.scribd.com/document/40312428/Representations-of-Prisons-in-Contemporary-French-Photography</a>&gt; accessed 3 September 2016.</p>	<p>Bibliography, p 98.</p>
<p>ix. <i>Justice on Trial: The French juge in question</i>, P. Feuillée-Kendall and H. Trouille (eds) (Peter Lang 2004).</p>	<p>Joëlle Godard, lecturer in law, University of Edinburgh.</p>	<p>Following the conference giving rise to this volume, invited the author to participate in a research seminar in France in 2002, organised for legal professionals and academics, consisting of interviews with key figures in French legal and political institutions.</p>
	<p>M. Harvey, 'La langue, le discours et la culture en anglais du droit' in Rosalind Greenstein (ed) <i>Incroyable mais vraie: la traduction juridique</i> (Publications de la Sorbonne 2005) 57-68.</p>	<p>Bibliography, pp 67, 68.</p>
	<p>J. Hodgson, <i>French criminal justice: A comparative account of the investigation and prosecution of crime in France</i> (1<sup>st</sup> edn, Hart 2005).</p>	<p>Footnote 70, p 117; Bibliography, p 264.</p>
	<p>Sir Thomas Legg KCB QC, Permanent Secretary of the Lord Chancellor's Department and Clerk of the Crown in Chancery.</p>	<p>Presented a paper at the conference giving rise to this edited volume; contributed a chapter.</p>

<p>x. 'How Far Has the International Criminal Tribunal for Rwanda Really Come Since <i>Akayesu</i> in the Prosecution and Investigation of Sexual Offences Committed Against Women? An Analysis of <i>Ndindiliyimana et al'</i> (2013) 11 International Criminal Law Review 743-788.</p>	<p>Ruby Mae Axelson 'Akayesu: A short case note on an old but very important case' (Ruby's Legal Thoughts, November 28, 2014) &lt;<a href="https://rma26.wordpress.com/2014/11/28/akayesu-a-short-case-note-on-an-old-but-very-important-case/">https://rma26.wordpress.com/2014/11/28/akayesu-a-short-case-note-on-an-old-but-very-important-case/</a>&gt; accessed 22 January 2016.</p>	<p>Footnote 4.</p>
	<p>F. Lagarde, <i>Rwanda 2013: Bibliographie</i> (University of Texas 2014).</p>	<p>Gender-based violence, p 64.</p>
	<p>G. Werle and F. Jessberger, <i>Principles of international Criminal Law</i> (3<sup>rd</sup> edn, OUP 2014).</p>	<p>Footnote 100, p 304.</p>
<p>xi. France, Universal Jurisdiction and Rwandan <i>génocidaires</i>: The Simbikangwa Trial (2016) 14 (1) Journal of International Criminal Justice 195-217.</p>	<p>K. Ambos, <i>Treatise on International Criminal Law: Volume III: International Criminal Procedure</i> (OUP 2016).</p>	<p>Footnote 153, p 229; footnote 244, p 243.</p>
	<p>International criminal law round up, PluriCourts - Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, &lt;<a href="http://www.jus.uio.no/pluricourts/english/topics/criminal-law/news/2016-02-12-icl-news.html">http://www.jus.uio.no/pluricourts/english/topics/criminal-law/news/2016-02-12-icl-news.html</a>&gt; accessed 2 September 2016.</p>	<p>listed week 6.</p>
	<p>Comments retweeted by David Whitehouse (Bloomberg journalist), Thijs Bouwknecht (Lecturer, Researcher, Netherlands Institute for War, Holocaust and Genocide Studies, NIOD).</p>	<p>September 2016.</p>

## Appendix 4

### Additional publications not forming part of the portfolio of work

- i. H. Trouille 'The *juge* and the European Union,' in P Feuillée-Kendall and H Trouille (eds) *Justice on Trial: the French juge in question*, (Peter Lang 2004) 137-159.
- ii. H. Trouille 'Criminal law and criminal procedure and the challenge of Europeanisation: the French perspective' in eds Francesca Astengo and Nanette Neuwahl, *A constitution for Europe? Governance and policy-making in the European Union*, collection Etudes européennes, Bibliothèque Nationale du Québec/Bibliothèque Nationale du Canada, 2004, vol II, pp 297-312.
- iii. H. Trouille 'Legal translation in the classroom: a case study' (with Farid Aitsiselmi), in eds C.Bocquet et al, *La traduction juridique - histoire, théorie(s) et pratique*, Association Suisse des Traducteurs, Terminologues et Interprètes/Ecole de Traduction et d'Interprétation, Berne et Genève, 2000, pp 371-393.
- iv. H. Trouille 'Reforms to the *code pénal* March 1st 1994' *Modern and Contemporary France*, vol NS 2, No 4, September 1994, pp 503-508.
- v. J.-M.Trouille and H. Trouille 'The position of Flemish in Northern France' *Dutch Crossing* (UCL); no 49, Summer 1993; pp 83-96.



## Appendix 5

### Papers delivered at conferences and research seminars

- i. May 2016: 'Judging Rwandan genocide suspects: the French experience,' University of Bradford, Faculty of Management and Law Research Seminar series.
- ii. June 2004: 'Globalisation, Europeanisation and national policies: French criminal procedure examined', at *Implications of a wider Europe: politics, institutions and diversity*, The European Consortium for Political Research (ecpr) Standing Group on the European Union, Second Pan-European Conference on EU Politics, Bologna Center, John Hopkins University, Bologna, Italy.
- iii. June 2004: 'Criminal law and criminal procedure and the challenge of Europeanisation: the French perspective', Sixth Biennial Conference of the European Community Studies Association, Canada, on *A constitution for Europe? Governance and policy-making in the European Union*, Université de Montréal, Canada.
- iv. June 2002: 'France in the European judicial area: an examination of French support for European legislation on cross-border crime', Fifth Biennial Conference of the European Community Studies Association, Canada, on *Bigger and better? The European Union, enlargement and reform*, University of Toronto, Canada.
- v. June 2001: '*L'Affaire Urba*: opening a can of worms', paper presented at *Political scandals past and present*, international conference organized by the European Studies Research Institute at the University of Salford.
- vi. April 2001: 'The European judicial area: Europe pulling together or torn apart?' paper presented at *Global (dis)connections conference*, Bloomington Normal, Illinois, USA.
- vii. September 2000, organization of two-day conference With P. Feuillée-Kendall (University of Reading): 'Faut-il avoir peur des juges? Institut Français, French Embassy, London.
- viii. June 2000: 'Public service interpreting in the legal context', seminar for visiting European Parliament interpreters.

- ix. February 2000: (with F. Aitsiselmi) 'Legal translation in the classroom: A case study', paper presented at international conference on *La traduction juridique*, Ecole de Traduction et d'Interprétation, Geneva, Switzerland.
- x. September 1999: 'Kill or cure? French penal policy in question' - Session on: Re-inventing French Justice', at *Reinventing France*, annual conference of the Association for the Study of Modern and Contemporary France, University of Cardiff.
- xi. July 1999: 'Crime reality shows', seminar for Eastern European conference delegates, University of Bradford.
- xii. July 1999: 'Court interpreting', seminar for Eastern European conference delegates, University of Bradford.
- xiii. September 1998: 'Secrecy, privacy and human rights in the Fifth Republic', paper presented at *Forty Years of the Fifth French Republic: Actions, dialogues and discourses*, annual conference of the Association for the Study of Modern and Contemporary France, University of Bradford.
- xiv. January 1998: 'Crime reality shows in France', paper presented at Northern Media Research Group, Bradford.
- xv. September 1997: 'The Crime reality show as detective', paper presented at conference on *The European detective*, University of Exeter.
- xvi. October 1996: 'Thierry Jean-Pierre: examining magistrate extraordinaire or bounty hunter?' Research seminar presented at University of Bradford.

## Appendix 6

### Statement of independent work

**Pascale FEUILLÉE-KENDALL**  
*Avocat à la Cour*

Versailles, le 27 août 2016

### Statement of Independent Work

To whom it may concern

*Re* the paper: H. Trouille and P. Feuillée-Kendall, 'French Prisons: *une humiliation pour la République*' 2004 12 (2) *Modern and Contemporary France*, 159-175

I confirm that my contribution to the above-mentioned publication was to carry out the research relating to and writing of the Historical overview, pages 161-2 of the manuscript, the concluding paragraph of the introduction, bottom of page 160-1, and the first paragraph of the conclusion, page 173.

Helen Trouille's contribution was to carry out the research relating to and writing of the following sections on pages 162-173 of the manuscript: France's prisons today (pages 162-4), Official reactions to Vasseur's revelations (164-5), Lebranchu and reform: one step forward, two steps back (pages 165-7), The impact of the *juges* decisions (page 167), Perben's reforms (pages 170-2), The way forward (pages 172-3), as well as the first part of the introduction, pages 159-160, and the concluding paragraph of the Conclusion, pages 173-4.

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## **Appendix 7**

### **Statement of prior submission**

The journal article H. L. Trouille, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*' (2013) 11 International Criminal Law Review 743-788 included in the portfolio of publications is in part the result of research carried out for the completion of a degree of Master of Laws submitted to Leeds Metropolitan University (now Leeds Beckett University), 'An examination of the shortcomings of the International Criminal Tribunal for Rwanda in the prosecution and investigation of sexual offences committed against women during the 1994 Rwandan genocide.' The degree of Master of Laws was awarded in 2012.

## The Portfolio of publications

### Part One

#### Reforms to French criminal procedure in the 1990s: enhancing the rights of the defence

- (i) Trouille HL, 'A look at French criminal procedure' (1994) *The Criminal Law Review* 735
- (ii) Trouille HL, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' (1994) *2 Modern and Contemporary France* 11

- (i) Trouille HL, 'A look at French criminal procedure' (1994) *The Criminal Law Review* 735

## Criminal Law Review

1994

### A look at French criminal procedure

Helen Trouille

**Subject:** Criminal procedure

**Keywords:** Criminal procedure; Detention; France

**Legislation:** Code on Criminal Procedure 1992 (France)

**\*Crim. L.R. 735** This article looks at French criminal procedure over the years, and in particular at the 1993 Socialist government's reforms to the Code of Criminal Procedure and the counter reforms of the right-wing government which succeeded it.

A series of recent miscarriages of justice in England, where we have witnessed long prison sentences served by people wrongfully convicted, has led many to call into question the workings of English criminal procedure. Across the Channel, French criminal procedure is also in the dock, and although the grounds for casting doubt on its ability to conclude a criminal investigation fairly are different, the aims of both countries are the same: to increase the rights of the defence, for the defendant may well be innocent, at the same time as ensuring the punishment of the guilty.

The systems in the two countries differ quite considerably, since one is essentially accusatorial, the other based on an inquisitorial past, but each has its shortcomings, which reformers are currently seeking to tackle. In England, the contentious issues are the long sentences served by innocent people, such as the Guildford Four, the Birmingham Six, Stefan Kiszko and Judith Ward. In France, of particular concern has been the number of detainees held for unacceptable lengths of time before trial during the preliminary investigation, or *instruction* <sup>1</sup> and the obstacles which confront both themselves and their lawyers as far as access to their files and defending their cases are concerned. Different as the systems are, it may be of interest to consider the reforms contemplated in France and the solutions the French are seeking to the failings which, for historical reasons, are entrenched in their system. Some French reformers have, in fact, been considering an accusatorial-type procedure, abandoning their *juge d'instruction* <sup>2</sup> at a time when, ironically, the possibility of adopting just such a feature of a more inquisitorial system, the examining magistrate, has been mooted in England.

#### **\*Crim. L.R. 736 Origins**

But first let us consider the origins of the French system. The current *Code de procédure pénale* <sup>3</sup> has its roots in the *Code d'instruction criminelle* <sup>4</sup> elaborated by Napoleon in 1808, one of the five *Codes* prepared by the Empire in the early 1800s to standardise rights and legal procedures across the realm. It has, in fact, undergone comparatively few fundamental changes since that date. During the pre-Revolution days of the *Ancien Régime*, the gathering of information was often a particularly barbaric practice. The *instruction*, or investigation, was carried out

via "the preparatory questioning; that is torture inflicted on suspects to extract a confession, ... the preliminary questioning--torture intended to obtain from those condemned the names of their accomplices ... "5 and the cross-examination on the *sellette* --a low stool on which the accused was forced to sit for questioning. One could be forgiven for feeling that extracting a confession and thus settling the affair was at times more important than finding the true perpetrator of the crime.

An inquisitorial system of justice had taken root over the years, a system which gave considerable power to the judge in the legal process and in the collecting of evidence, tending to disadvantage the accused. Indeed, Louis XIV effectively reinforced the maintenance of an inquisitorial system in an ordinance of 1670, which denied the accused legal assistance during the investigation, access to his file, confrontation with witnesses, inspection of evidence amassed against him or public debate. The process was secret, written and non-confrontational. This state of affairs was naturally open to many abuses and, in the mid-eighteenth century, the legal system was the source of severe criticism by certain learned people, culminating in a veritable campaign for a reorganisation of French justice.<sup>6</sup> Thanks to a growing liberalism during at least some of the Revolution years, the accused was eventually allowed the services of a lawyer,<sup>7</sup> and ultimately both "preliminary questioning" and "preparatory questioning" and the associated torture were abolished.

Many changes to the legal system took place during the Revolution, but these were often short-lived and it was only the compiling of Napoleon Bonaparte's *Code d'instruction criminelle* in 1808 that brought about a total reform of criminal procedure. In fact, many aspects of the *Code d'instruction criminelle* were harsher than the revolutionary reforms, for it was felt that the investigation procedure had become too liberal and that this had paralysed inquiries. Under Napoleon's *Code d'instruction criminelle*, the investigation process became the responsibility of the freshly created *juge d'instruction*, or examining magistrate, who was granted quite considerable powers--the issue of warrants, the examination of the suspect, decisions regarding detention prior to trial, all carried out in secrecy and allowing the suspect, who could not participate in the inquiry, little chance to build his case before trial, for the examining magistrate was not obliged to pass on any information concerning his case to the suspect. Although not granted the authority to pass judgment as to the guilt or innocence of **\*Crim. L.R. 737** the accused, thanks to these responsibilities the examining magistrate rapidly earned the title of the most powerful man in France. The *Code d'instruction criminelle* was to stand the test of time and was still in force at the time of General De Gaulle's constitutional reforms of 1958, when it was replaced by the *Code de procédure pénale*; naturally, certain changes had been made during the course of time--notably, the inquisitorial nature of the preliminary investigation process was relaxed over the years, and the law of December 8, 1897, eventually allowed a lawyer with access to details of the case to aid the accused--but, quite remarkably, the basic structure set in place by Napoleon had remained unchanged for one-and-a-half centuries.

The 1958 reforms to the *Code d'instruction criminelle* sought to offer greater guarantees for the accused and addressed the controversial issues of pre-trial detention<sup>8</sup> and the *garde à vue*,<sup>9</sup> issues which still cause concern today. In 1958,



and likewise nearly 40 years later, the French are still questioning the practice of imprisoning a person prior to trial--therefore innocent until proved guilty--and of forbidding him access to a lawyer during the early stages of the police investigation. These are issues which, some feel, strongly contradict the Human Rights Charter<sup>10</sup> to which France emphasises her commitment in her Constitution. The 1958 reforms stressed the exceptional nature of pre-trial detention and underlined the fact that the examining magistrate should prioritise the cases of such detainees. As for the *garde à vue*, attempts were made to regularise this practice--subject to frequent abuse--of holding a suspect for questioning by the police without the support of his lawyer. The duration was to be 24 hours from the moment he first appeared before the police, but the possibility also existed to extend this period upon written authorisation from the examining magistrate or public prosecutor, and only if there seemed to be genuine grounds to suggest that the individual concerned would subsequently be charged. As a further protection to the suspect, abnormally long interrogations by the police were to be avoided, adequate breaks between questioning allowed and medical examinations provided at the end of the *garde à vue*, or even during, on the request of the suspect's family or the public prosecutor, the whole procedure to be recorded in the crime report and overseen by the *Chambre d'accusation*,<sup>11</sup> which could impose penalties on police officers infringing these directives.

Despite these conditions, which were still valid on December 31, 1992, concern was continually being voiced about pre-trial detention. The frequency with which detainees were actually found guilty suggested that the very fact that they had been detained pre-judged them. Furthermore, although they were supposedly held separately from convicted prisoners, more often than not, space limitation led to them *\*Crim. L.R. 738* being confined alongside them. The high incidence of the *Aids* virus amongst the prison population, the risk of contamination, and the worrying suicide rate of detainees<sup>12</sup> caused many to question the practice of pre-trial detention, especially at a time when prisons were known to be bursting at the seams.<sup>13</sup>

### **The Reform Movement**

During the 1980s, a succession of Justice ministers had endeavoured to tackle these issues, but their proposed reforms had never materialised, thwarted by frequent elections and the arrival of a different party and different Justice Minister in power, who then set about reversing their predecessor's proposals. These vacillations were leading nowhere, and at last, with the arrival of a Socialist majority in 1988, the then Justice Minister, Pierre Arpaillange, decided, rather than following in the footsteps of his predecessors, to form a commission of legal experts to examine the criminal justice system and investigation process. The Commission "*Justice pénale et droits de l'homme*",<sup>14</sup> set up in August 1988 and presided over by Mireille Delmas-Marty, professor in law at the *Université de Paris-Sud*, a pioneer in matters of criminal law reform and also a member of the commission revising the criminal law,<sup>15</sup> was to report back with its findings two years later. On June 28, 1990, it presented its report<sup>16</sup> suggesting reforms in criminal procedure which were much deeper and more far-reaching than anything

previously undertaken. The main principle was a desire to increase the rights of the defence and to avoid the unnecessary suffering of innocent people mistakenly accused, at the same time maintaining an efficient and effective penal system. A first step in this process was the suggestion to do away with the examining magistrate--a suggestion which had already been made in 1949--transferring his powers to other authorities, and thus surmounting the ambiguity of his position, which combined the powers of both investigator and judge. The Commission advocated conferring the powers of investigation into a case on the public prosecutor's department,<sup>17</sup> and the legal responsibilities on a *juge des libertés*. The public prosecutor would interview the suspect, accompanied by his lawyer (an innovatory step), and any witnesses, and would be obliged to pronounce an official accusation speedily if the charges were not to be invalidated, for an official accusation allows the suspect access to his file and to legal advice. The *juge des libertés* would take responsibility for decisions affecting the basic rights of the accused, such as the extension of the *garde à vue*, the authorising of custody warrants, bail, telephone tapping or searches and the length of pre-trial **\*Crim. L.R. 739** detention, if the public prosecutor were to recommend this. The *juge des libertés* was also to oversee the investigation process and deal with any complaints relating to procedure or to the behaviour of the public prosecutor and the police. One of the major innovations recommended by the commission was to allow the suspect a one-hour audience with his lawyer during the 24-hour *garde à vue*. Previously, this had not been authorised, and a suspect was all too often unaware of his rights and in particular of his right to silence, of which he was not necessarily informed by the police. Equal status was to be granted to defence and accusation, and the defence should have the right to ask for specific investigations to be carried out. Defence lawyers should have constant access to a client's file, a privilege hitherto not allowed, with lawyers only being able to consult the file in the two days leading up to an interview with the examining magistrate. As we can see, the Commission had turned its mind to increasing the rights of the suspect and had suggested greater freedom of action for defence lawyers.

These recommendations were put forward in June 1990, but although they provided material for reflection, they were not to be implemented in their proposed form. Indeed, it was some considerable time before any of them were to become reality in any shape or form. Certainly, eliminating the examining magistrate was felt to be far too radical a step to take, and the change in status of public prosecutors, endowing them with the powers to carry out the preliminary investigation, would have required constitutional reform.<sup>18</sup> On December 19, 1992, the revised Criminal Procedure Code was approved. Having delayed and deliberated for many years, the Socialist Party in power finally saw the urgency for reform, thanks possibly to a series of scandals involving prominent socialist politicians<sup>19</sup> who found themselves the victims of the French criminal justice system, discredited, hands tied in their defence, in the run-up to the parliamentary elections scheduled for March 1993, in which, according to all political pointers, the Socialists would suffer a massive defeat. In fact, abolishing the examining magistrate at such a time would have been politically dangerous. Although the examining magistrate must be appointed to a case by the public prosecutor and can be removed from it if he is deemed to be handling it badly, he is not directly

answerable to the Minister of Justice and is therefore seen as independent of the political party in power. This makes it difficult for a government to sweep embarrassing incidents of corruption under the carpet. The examining magistrate is therefore a popular figure and seen to symbolise the independence of the judiciary. To abolish this function would have suggested that the Socialists genuinely did have something to hide and that this was a very underhand way of preventing their misdemeanors from coming to light.

### **The 1992 law**

The reforms to the criminal procedure were to be introduced progressively, staggered over a 22-month period, but the first changes were to come into effect as early as *\*Crim. L.R. 740* January 1993. First on the agenda for reform and to be implemented from January 1993 were measures to protect the presumption of innocence of any individual involved in a court case. Despite the existence of article 11 of the *Code de procédure pénale*, which enforces the secrecy of the investigation process and forbids anyone to divulge information relating to a case before it comes to trial, it has long been commonplace to read detailed press reviews incriminating the as yet still officially innocent, or conversely exonerating those subsequently proven guilty. Indeed, in the well-known Grégory Villemin<sup>20</sup> case, eventually concluded in late December 1993, Jean-Michel Lambert, the first of the succession of examining magistrates investigating the case, had published a book relating the effects the case had had on his life, long before the final verdict was reached. In January 1993, the *Code Civil* was amended to include an article allowing those under the jurisdiction of the courts to request the publication of a statement in the press or on the television or radio which would correct any impression the media might have given as to the guilt of any party, before the final verdict, or to announce, as in the case of Christine Villemin, a *non-lieu* --the decision that there are no grounds for prosecution.<sup>21</sup> Since the introduction of this law, some regional papers have indeed been required to print corrections to previously made statements.

Also reinforcing the presumption of innocence was the move to replace the previously used term *inculpation* (meaning the official charging of a suspect and signifying the moment the accused was legally entitled to call upon his lawyer) with a two-stage procedure: the *mise en examen*, or opening of the investigation, of a suspect would allow him recourse to his legal rights and would be followed, at the end of the examining magistrate's preliminary investigation, by the official communication of the presumptions of criminal charges.<sup>22</sup> The examining magistrate would be obliged to request the *mise en examen* of a suspect from the public prosecutor and to inform the suspect in writing, mailed by recorded delivery, of his impending fate.

Of particular importance were the proposed reforms to the *garde à vue*. The new law allowed the detainee access to a lawyer from the twentieth hour of the *garde à vue*, with effect from March 1993; from January 1, 1994, access should be allowed from the very beginning of the *garde à vue*, although exception would be made for those held in connection with drug trafficking and terrorist offences. In such cases, detainees could be held for 48 hours before being entitled to consult

their lawyer. It was stated that detainees should also be informed "immediately" and "in a language they understand"<sup>23</sup> of their right to inform their family by telephone of their whereabouts, \*Crim. L.R. 741 to request a medical examination (to be carried out by a doctor chosen from a list drawn up by the public prosecutor) and to request a second medical examination in the event of the *garde à vue* being prolonged beyond 24 hours. Importantly in the defence of the presumption of innocence, those detained in *garde à vue* should not be subjected to the wearing of handcuffs, unless considered dangerous either to themselves or to others. It was also decided to abolish the then current practice of holding witnesses in *garde à vue* during a preliminary inquiry, other than in exceptional circumstances, and in which case the public prosecutor should be informed immediately.

To assist the accused further in presenting his case, the law was revised to allow defence lawyers far greater access to their client's file. Until the 1993 law, defence lawyers were only able to consult documents in the 48 hours leading up to an interview with the examining magistrate. From March 1993, they were to be granted constant access to their client's file on week days, from the four days preceding the accused's first appearance before the examining magistrate. Furthermore, the right of the defence to request certain investigations was consolidated; requests expressed by the defence to be allowed to confront a witness, to return to the scene of the crime, or that a particular person be interviewed had to be treated seriously, and replied to within a month, in writing, by *ordonnance motivée* ,<sup>24</sup> against which an appeal to the *Chambre d'accusation* was possible.

The authority of the examining magistrate was further restricted in questions of pre-trial detention. Formerly the prerogative of the examining magistrate, from January 1, 1994, decisions relating to pre-trial detention were to be made by a team consisting of a judge and two assistants, none of whom being the examining magistrate responsible for the case.<sup>25</sup> In the meantime, all decisions regarding pre-trial detention made by the examining magistrate were to be approved by the presiding judge. This step towards shared decision-making could also affect the actual inquiry procedure, for March 1993 was to see the introduction of a system allowing a presiding judge to nominate additional examining magistrates to assist the examining magistrate already investigating a case, should it prove particularly complex or serious, or even on the request of the examining magistrate in charge. Additionally, from March 1993, the laws on *nullité* --the declaring as nul and void of any evidence obtained in violation of the *Code de procédure pénale* --were to be widened considerably. The new law formalised clearly in its paragraphs certain acts which could lead to the invocation of the laws on *nullité* and lead to cases collapsing in court due to procedural irregularities. These consisted of contravening the law as far as searches, telephone tapping and the *garde à vue* were concerned; furthermore, defence lawyers were to be able to pinpoint these irregularities at any point during the preliminary investigation and to refer them directly to the *Chambre d'Accusation* , rather than being obliged to wait until the court hearing.

Finally, and very importantly, it was decided to reinforce the contradictory nature

of the procedure at the cost of the inquisitorial element. The presiding judge was to have no part in the questioning of the accused or the witnesses, but to take the role of arbitrator. The accused and witnesses would be questioned by the public prosecutor, **\*Crim. L.R. 742** the accusation, defence lawyers--even the accused himself could question witnesses if he wished. It was stressed, too, that the trial should centre around a discussion of the facts pertaining to the case, before proceeding to a character examination of the accused himself.

## Retrenchment

From the very start, the new law was unpopular, first amongst the opposition parties, who voted against it and secondly amongst the examining magistrates, who saw in it a reduction of their powers and an increase in their workload--although welcomed by lawyers,<sup>26</sup> who saw their task facilitated, even at the cost of extra, often unpaid, work.<sup>27</sup> In January 1993, several examining magistrates handed in their resignation, and others protested by systematically requesting that all people interviewed be kept in *détention provisoire*. The future of the new legislation must always have seemed fragile, for, as the parliamentary elections of March 1993 approached, it became ever more inevitable that the Socialists would suffer a crushing defeat, that the right-wing parties would be victorious--precisely the parties which had voted against the reforms to the Code of Criminal Procedure--and that the likelihood of retrograde reform was very high.

Already in May 1993 following the return to power of the Right, the new right-wing Justice Minister, Pierre Méhaignerie, announced the outlines of his proposed reforms to the Code of Criminal Procedure. Predictably, these consisted to a great extent of reversing paragraphs of the January 4, 1993, law, and they themselves became law on August 25, 1993.

The powers of the examining magistrate, curtailed by the previous legislation, were restored. No longer obliged to request the *mise en examen* of a suspect from the public prosecutor, the examining magistrate was also dispensed from the necessity of informing the suspect beforehand, in writing, of his forthcoming interview, an element of the Socialist legislation which had particularly exasperated examining magistrates. In addition, the official communication of the *présomption de charges* was abolished, these measures trimming back the extra bureaucracy created by the January 1993 law and so ferociously criticised by the magistrates. In similar vein, the defence lawyer's constant access to his client's file, granted by the January legislation, was whittled down. It would still be possible for the defence to consult documents four working days before the examining magistrate's first interview with the accused, but from then on, access to the file would be determined by the "conditions necessary for the smooth-running of the examining magistrate's practice"<sup>28</sup>; in other words, the examining magistrate would theoretically, once more, have considerable powers to withhold information from the defence. Defence lawyers would still, however, be entitled to request that certain investigations be carried out, and to be present from the examining magistrate's first interview with the defendant.

**\*Crim. L.R. 743** A further step in restoring the powers of the examining

magistrate was the restitution of his authority concerning pre-trial detention. Such issues were no longer to be team decisions. However, in order to limit the number of people held pending trial in French prisons, it was stipulated that a detainee should have the right to request from the *Chambre d'accusation* the reversal of this decision, and to receive a verdict within three working days. Furthermore, the anticipated change to a more accusatorial, confrontational style of trial, due to take effect from January 1, 1994, in which the presiding judge's role would be purely to judge and not to question, was also revoked in preference for a maintenance of the status quo.<sup>29</sup> New legislation on the "garde à vue" was perhaps awaited with most concern. The Socialist legislator had allowed for far greater legal assistance at an earlier stage; would such liberalism survive the Conservative onslaught? In fact, the ultimate legislation allowed for intervention of the lawyer from the twentieth hour, as stipulated in the previous reform, but eliminated the possibility of bringing this forward to the very start of the "garde à vue" from January 1, 1994. This privilege was to be withheld until the thirty-sixth hour in cases of conspiracy, extortion, gang land crime and procurers. M.P.s voting the new law initially proposed quite simply to dispense with this assistance where drug traffickers and terrorists were concerned, but the *Conseil Constitutionnel*<sup>30</sup> ruled that the principle of equality was being contravened if a person suspected of a drug-related offence was refused access to a lawyer, whilst someone suspected of an offence carrying a similar sentence was not.<sup>31</sup> The previous time-limit of 48 hours was thus maintained. The element of choice granted to the suspect in selecting a doctor to perform his medical examination from a prescribed list was also removed. The public prosecutor's department would nominate a doctor. Furthermore, the majority of the *nullités textuelles*, stipulating in writing irregularities in procedure which could lead to the closing of a case, were suppressed. However, clarification was made as to the notification of a suspect's detention in *garde à vue* --previously allowed to inform his family, the new legislation authorised him to contact the person he was living with, a parent, a brother or sister or an employer.

### **\*Crim. L.R. 744 Conclusion**

We see, then, in the deliberations of recent years, that there has been a recognition by the legislator of the need for reform of criminal procedure. Actually deciding upon the appropriate reform and putting this reform into practice poses greater problems. It would appear that steps towards a more accusatorial type of procedure are slowly being taken, but at the same time, there is a desire on the part of the political party in power not to alienate a part of its electorate by introducing unpopular measures. The "ping-pong" effect of recent reform is in fact quite likely to be, at least in part, a reflection of party political considerations as much as concern for an efficient legal process. The Socialists had every reason to increase the powers of the defence, with prominent Socialist politicians falling foul of the law; the Conservatives, on the other hand, would be less inclined to want to ease the embarrassment of their political opponents, and certainly not at the cost of alienating the typically conservative electorate of the magistrature. Furthermore, the tightening up of the Code of Criminal Procedure follows a pattern

set by the present government, currently debating the revision to the nationality laws and anticipating a hard-line approach to immigration. Whatever the case may be, the fact remains that, in recent years, the Code of Criminal Procedure has come close to quite considerable reform, and that, in France today, there exists a strong current of support for measures which will allow greater freedom of movement to the suspect in defending his case. It is perhaps also of interest to note the visit to London of French Justice Minister, Pierre Méhaignerie, in February 1994. Officially not culling information on accusatorial procedures, but rather taking a good long look at the role of lay magistrates in English courts and their potential to reduce delays in bringing cases to trial, maybe Méhaignerie was also looking for solutions to the "... very negative view of justice ..." <sup>32</sup> held by many French citizens today.

Crim. L.R. 1994, Oct, 735-744

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1. In 1992, 40.5 per cent of the prison population was made up of pre-trial detainees; see Claude Bernard, "Qui est en prison?" *Le Monde--Dossiers et documents* , Numero 205, December 1992, p. 2.
  2. *Juge d'instruction* --the examining magistrate, whose task it is to "... conduct judicial investigations of serious offences ...", C. Dadomo and S. Farran, *The French Legal System* (1993), p. 69. In England, this function is carried out by the police.
  3. *Code de procédure pénale* --Code of Criminal Procedure.
  4. *Code d'instruction criminelle* --Code of Criminal Procedure, in existence before the 1958 reforms, and replaced by the *Code de procédure pénale* .
  5. Translated from Jacques Godechot, *Les institutions de la France sous la Révolution et l'Empire* (2nd ed., Paris, PUF, 1968), p. 140.
  6. e.g. see Montesquieu in his *L'Esprit des lois* (1748); Morellet in his *Traité des délits et des peines* (translated into French from Beccaria's Italian in 1766).
  7. *Loi du 10 octobre 1789* .
  8. Pre-trial detention--*détention provisoire* . The examining magistrate can, but does not have to, require a suspect or key witness in a trial to be held in detention during the preliminary investigation. This should usually only be requested in the case of potentially dangerous individuals, or those who may possibly "disappear" before the case comes to trial. A suspect may also be detained for a short period of time and then released, as in the case of Bernard Laroche (see n. 20 on the Villemin affair).
  9. *Garde à vue* --police interrogation procedure, in which the suspect is held by police for questioning, without access to his lawyer. The *garde à vue* runs for 24 hours from the first appearance of the suspect before the *police judiciaire* , but is subject to extension upon authorisation by the *juge d'instruction* or the public prosecutor.
  10. *La Déclaration des Droits de l'Homme et du Citoyen* , voted by the *Assemblée Constituante* in 1789 and highlighted in the preambles of both 1946 and 1958 constitutions.
  11. *Chambre d'accusation* --Indictment Division. A division of the appeal court handling appeals against decisions made by the examining magistrate.
  12. In 1983, 39 of the 58 prison suicides were pre-trial detainees; see Bertrand Le Gendre, "Nombre record de détenus et de suicides", *Le Monde* , April 19, 1985, p. 12.

- [13.](#) In 1990, the prison in Nice, built for 280, housed 900 prisoners; see Sylviane Stein, "Justice: les clignotants au rouge", *L'Express*, May 11, 1990, p. 16. In the years between 1971 and 1991, there was a 60 per cent increase in the prison population. In July 1992, just before President Mitterrand's official amnesty, (amnesties are a regular feature of French politics) 54,811 prisoners were being held in France's prisons, as compared with 29,549 in 1971, the highest figure since 1948; see Anne Chemin, "L'inflation carcérale", *Le Monde --Dossiers et documents*, numéro 205, décembre 1992, p. 2.
- [14.](#) The Criminal Justice and Human Rights Commission.
- [15.](#) Mireille Delmas-Marty is also a member of the consultative committee revising the Constitution and adviser to the European Community, the European Council and the United Nations in her capacity as member of the committee for the creation of an international system of criminal law.
- [16.](#) *La mise en état des affaires pénales* (1991, La Documentation française, Paris).
- [17.](#) The *parquet*.
- [18.](#) The public prosecutors (*le parquet*) are appointed by and answerable to the Justice Minister in office. It is felt to be essential to keep the preliminary investigation independent from political intervention.
- [19.](#) Henri Emmanuelli accused of fraudulently obtaining funds to finance the 1988 presidential election campaign; Laurent Fabius, Georgina Dufoix and Edmond Hervé held responsible for the deaths of many young haemophiliacs following HIV-contaminated blood transfusions; Bernard Tapie and the OM-Valenciennes football scandal.
- [20.](#) Five-year-old Grégory Villemin was found floating in the river Vologne on October 16, 1984, hands tied behind his back. Ten years later, both parents have spent a considerable length of time behind bars: Christine Villemin suspected of murdering her own son; Jean-Marie Villemin for shooting the man he considered to be the assassin, Christine's cousin Bernard Laroche. Since then, Christine Villemin has been formally found innocent (February 1993) and the dead Laroche declared to be the probable guilty party. In December 1993, Jean-Marie Villemin was found guilty of manslaughter, but released some weeks later, on the grounds that he had already served several years in prison before trial, and that his crime had been provoked by Jean-Michel Lambert's mishandling of the case.
- [21.](#) Law of January 4, 1993. For a discussion of the application of this legislation, see Anne Chemin, "Magistrats, avocats et journalistes s'interrogent sur les rapports entre la presse et la justice", *Le Monde*, May 15, 1993, p. 21.
- [22.](#) *Présomptions de charges constitutives d'infraction pénale*.
- [23.](#) Translated from: Anne Chemin, Frédéric Bobin, "Les principales dispositions", *Le Monde*, December 23, 1992, p. 10.
- [24.](#) *Ordonnance motivée* --well-founded decision.
- [25.](#) The decision to exclude the examining magistrate from the team was made by the members of the National Assembly debating the law, and was contrary to the recommendations of the Cabinet and the Upper House. See "Les principales dispositions", *Le Monde*, December 23, 1992, p. 10.
- [26.](#) Lawyers or *avocats* --members of the bar, whose function is to plead for the defendant and to assist him throughout the preliminary investigation. They do not act for the prosecution.
- [27.](#) Upon enactment of the January 4 law, lawyers were horrified to discover the insalubrious conditions in which police worked and detainees were held. Furthermore, legislation on legal aid had not been revised simultaneously, therefore making it necessary for intervention during the "garde à vue" to take place on a voluntary basis. See Anne Chemin, "Les commissariats sous



l'oeil de la défense", *Le Monde* , June 9, 1993, p. 9.

- [28.](#) "Les exigences du bon fonctionnement du cabinet du juge d'instruction "; quote in "La réforme de la procédure pénale est publiée au Journal officiel; *Le Monde* , August 26, 1993, p. 9.
- [29.](#) This decision is already under fire. Following the recent case of Omar Raddad, a Moroccan gardener sentenced in February 1994 to 18 years in prison for the murder of his employer, Ghislaine Marchal, in Nice, serious questions have been raised about the excessive influence on the jury of the presiding judge's questions. Considerable doubts still surround the conviction, and many feel that the judge's interventions swayed more pliable members of the jury to support his own personal convictions about the young man's guilt. Subsequent to this case, Roland Kessous, president of the Commission on Police and Justice of the *Ligue des droits de l'homme* , has called for the introduction of a more adversarial system, with examining and cross-examining of witnesses by prosecution and defence lawyers, and "... with English-style judges, who supervise proceedings and sum up, but who do not question witnesses and defendants." (Adam Sage, "The model of criminal justice?", *The Independent* , February 25, 1994, p. 28.)
- [30.](#) The Constitutional Court--"... the only court competent to review the constitutionality of legislation and, consequently, to declare an act of parliament unconstitutional ... The powers of the *Conseil* are defined by article 61 of the Constitution. All *Lois organiques* and the rules of procedure of both parliamentary assemblies must be submitted to it before promulgation to confirm that they conform with the Constitution." C. Dadomo and S. Farran, *The French Legal System* (1993), p. 108.
- [31.](#) "Le législateur ne pouvait, sans méconnaître le principe d'égalité, priver totalement le justiciable du droit à un entretien avec un avocat au cours de la garde à vue, même en matière d'infractions de terrorisme ou de trafic de stupéfiants, alors que d'autres justiciables bénéficieraient de ce droit dans le cadre d'enquêtes sur des infractions punies de peines aussi lourdes et reposant sur des faits aussi complexes " in "La réforme de la procédure pénale", *Le Monde* , August 26, 1993, p. 9.
- [32.](#) Tony Allen-Mills, "France looks at British justice", *The Sunday Times* , February 20, 1994.

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- (ii) Trouille HL, 'The *juge d'instruction*: a figure under threat or supremely untouchable?' (1994) 2 Modern and Contemporary France 11

## ARTICLES

### The *Juge d'Instruction*: a figure under threat or supremely untouchable?

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Réformer l'instruction: qui n'en a un jour rêvé? Satanés 'petits juges' qui se croient tout permis et agacent quand ils manifestent trop ouvertement leur indépendance. Ou, au contraire, s'obstinent dans la facilité du mandat de dépôt automatique, à étaler un pouvoir qu'on croirait sacré.

Qui n'a rêvé de mettre autre chose à leur place? Le justiciable, étonné du pouvoir d'un homme seul de le mettre en prison sans autre forme de procès; l'avocat, placé dans l'obligation de solliciter – 'sans vouloir vous froisser, surtout, monsieur le juge' – des expertises, des mesures d'enquête, des confrontations que le magistrat n'accorde que selon son bon plaisir. L'avocat, toujours, qui, lorsqu'il croit avoir débusqué une nullité de procédure, demande à celui-là même qui l'aurait commise de saisir la chambre d'accusation qui tranchera le litige.<sup>1</sup>

In recent years, there has been much concern expressed about the rôle of the *juge d'instruction* and the position which he holds within the French criminal justice system today: that controversial examining magistrate referred to both as 'le petit juge' and as the most powerful man in France; the figure who holds the power to remove a suspect's liberty and to return it once more, and to determine the conditions in which a suspect will spend the period of time awaiting trial. In the wake of too frequent controversy, many attempts have been made to reform the *instruction* process – the gathering of information and evidence relating to criminal offences – and these have naturally centred around the *juge d'instruction* as the key figure in the process. For, in the last decade, numerous questions have been asked about a criminal justice system under strain from the demands placed on it; about prisons bursting at the seams and filled with excessive numbers of detainees awaiting trial, placed in prison on the whim of the *juge d'instruction*; about a system which weights the scales heavily against the defendant in his efforts to prove his innocence, about blunders committed by young and inexperienced *juges d'instruction*, about a judge on the one hand called the most powerful man in France, on the other hand known to be overworked and underpaid. There have even been suggestions that this pillar of the criminal law establishment should be dispensed with altogether.

The most significant threat to date to the *juge d'instruction* has come from the changes put forward by the Commission Delmas-Marty, set up in August 1988 to investigate the criminal justice system and the *instruction* process in France. The Commission, presided over by Mireille Delmas-Marty, lecturer in law at

the Université de Paris-Sud and a member of the Commission de Révision du Code Pénal since 1981, was to report back with its findings and proposals two years later. On 28 June 1990, the Commission presented its report, suggesting reforms to the *procédure pénale* which were much deeper and more far-reaching than anything previously proposed. The main feature was a desire to increase the rights of the defence and to avoid the unnecessary suffering of innocent people mistakenly accused, at the same time maintaining an efficient and effective penal system:

N e pas désarmer l'Etat au moment où l'on découvre à quel point dans certains pays la criminalité peut menacer son intégrité même; mais ne pas admettre pour autant que l'individu soit écrasé par une machine pénale qui ne respecterait pas ses droits fondamentaux . . . <sup>2</sup>

Significant changes to the tasks of the *juge d'instruction* had been anticipated, but the Commission went further even than this and advocated a complete reorganisation, re-distributing the tasks of the *juge d'instruction* between the *parquet*<sup>3</sup> for the investigation process, and a newly created *juge des libertés*, for all the decisions relating to the defendant's liberty – imprisonment before trial, custody warrants, bail, searches, telephone tapping and the like. However, before preceding to a more detailed look at Delmas-Marty's proposals, let us first consider why any such changes should appear necessary.

Over the centuries, France has adopted an inquisitorial system of justice, a system which gives considerable power to the judges in the legal process and in the collection of evidence, often to the disadvantage of the accused, who is hampered in the defence of his case by procedural restrictions imposed on him and his lawyer. This is opposed to an accusatorial system such as that operating in England, where the court case is oral, public and '*contradictoire*' – that is to say, a public debate takes place between the two parties, who both operate on an equal footing in the finding and presenting of evidence. Centuries ago, the maintenance of an inquisitorial system of justice in France was formally upheld by Louis XIV in an ordinance of 1670 denying the accused legal assistance during the *instruction*, access to his file, confrontation with witnesses, inspection of evidence or public debate of his case. The instruction process was '*secrète, écrite et non-contradictoire*'<sup>4</sup>, and despite constant criticism, and numerous reforms, which helped to improve the lot of the accused somewhat, it can be said that, in some ways, the same basic structure and ethos still prevail to this day.

Over time, it became obvious that change was necessary and reforms tended towards a more accusatorial system – although it should not be assumed that the latter is perfect. For the French criminal justice system, a major part of the problem lay in the considerable powers granted to the *juge d'instruction* in the process of his investigation, and in the fact that the rôle of the *juge d'instruction* is a dual one – he is responsible for directing and carrying out a thorough investigation of the case and at the same time required to make important judgments concerning a suspect's basic rights dependent upon his own investigation. In the words of former Garde des Sceaux Henri Nallet:

I l y a un problème avec le mécanisme de l'instruction [. . .] Le juge d'instruction, dans notre système, c'est celui qui enquête et qui ensuite va devoir juger sa propre enquête, décider s'il inculpe, s'il perquisitionne et même s'il incarcère. Tout cela laissé à un seul homme, c'est trop.<sup>5</sup>

Of special concern amongst the powers of the *juge d'instruction* was the issue of *détention provisoire*, a practice whereby the *juge d'instruction* is empowered to imprison, pending trial, any suspect accused of a serious offence so that the suspect is easily available for questioning, neatly prevented from re-offending and unable to put pressure on key witnesses. In reality, this supposedly exceptional measure appears to be quite widely used, and an alarming proportion of the prison population is detained before trial, though innocent until proved guilty. Naturally, a number of criticisms have been levelled at this state of affairs. First, should one imprison so easily someone who is still theoretically innocent, and against whom, all too often, there is scant evidence to prove the contrary? For although the *juge d'instruction* must have good grounds for demanding '*détention provisoire*' – and state these reasons – in practice, his 'intime conviction' alone is sufficient justification. As a consequence of incarceration before trial, a detainee not only suffers the loss of liberty, but also inevitably becomes to some extent marked as a criminal. Lawyers maintain that a lengthy stay in prison before trial will inevitably prejudice any jury against the accused: 'Ils se disent qu'il n'y a pas de fumée sans feu, que l'inculpé est forcément coupable.'<sup>6</sup> *Détention provisoire* could then actually hinder the course of true justice, by not only leading to the condemnation of the 'wrong person', but by leaving the guilty to go unsought. Quite aside from this, an innocent person detained in prison before trial may suffer traumas – rejection by family and friends, financial hardship, interruption of a career, breakdown of a relationship – and compensation for this form of injustice is meagre. Leaving aside certain obvious negative repercussions on the unfortunate detainee, the decision to incarcerate a defendant before trial puts great pressure on an already strained prison system, a problem which any government seeking re-election ignores at its peril. In 1988, 42.8 per cent of the prison population were detained awaiting trial,<sup>7</sup> supposedly accommodated separately from convicted prisoners, but actually imprisoned alongside them, often side by side with hardened criminals, due to constraints on space and facilities. Statistics show, too, that the majority of suicide cases amongst prisoners occur amongst these detainees. In 1983, 39 of the 58 suicides were pre-trial detainees.<sup>8</sup> Society is becoming increasingly aware of the problems encountered by the prison population: overcrowding (in 1990, the prison in Nice, built for 280, housed 900 prisoners),<sup>9</sup> inadequate facilities, homosexuality and the threat of Aids (up to 13 per cent of those held in some Parisian prisons were HIV positive, compared to a national average of 0.04 per cent, in 1988).<sup>10</sup>

Bearing all this in mind, the 'intime conviction' of a *juge d'instruction* hardly seems a sound measure by which to remove a suspect's liberty, and closer examination of the hierarchy of legal personnel reveals certain factors which emphasise the unreliable nature of such judgments. It is widely held that injustices and blunders often occur because of the inexperience of *juges d'instruction*, who are frequently amongst the youngest members of the legal profession due to the fact that pay and promotion prospects for *juges d'instruction* are comparatively limited. For the magistrature is divided into two 'grades', each one containing two levels; the *juge d'instruction* belongs to the lower of the two 'grades', and usually to the lower level of this 'grade', with only the *premier juge d'instruction* of a district reaching the higher level – a promotion obtained after a minimum of seven years' service. Apart from the occasional *juge d'instruction* in the Paris area, it is unheard of for a *juge d'instruction* to reach the

second, higher-paid 'grade'. Normally, he may only progress from the lower 'grade' to a higher 'grade' and salary scale by abandoning his function in 'instruction' and by orienting his career towards the *parquet* (as a public prosecutor) or the *siège* (as a judge), which are represented in the higher 'grade'. For this reason, many *juges d'instruction* are young and comparatively inexperienced, and not necessarily well-placed to be making major decisions influencing a suspect's liberty simply on grounds of their 'intime conviction'.

A further important criticism of the criminal justice system and of the rôle of the *juge d'instruction* relates to the independence of the magistrature, an issue which has raised many questions in France in the wake of the Urba-Technik affair. The principle of the separation of powers adopted during the Revolution dictates that the administrative and legislative authorities should be free of interference from the judiciary and that in return justice should be impartial, completely independent from State intervention and from interference or influence by outside authorities. Many felt that the Urba-Technik affair showed that this principle had been ignored and that the legal system was the victim of party politics. For, in this case, a young *juge d'instruction*, Thierry Jean-Pierre, who was handling the case, saw himself 'dessaisi' (removed from the case) by the *procureur général* (the public prosecutor) when his investigations began to suggest that a part of the funds used to finance the 1988 election campaign of the Parti Socialiste had been illegally obtained, diverted from a construction company, via the intermediary Urba, to the PS. As the *procureur général* is appointed directly by the Ministère de la Justice, therefore by the party in power, it was a natural step to suspect shady dealings. Furthermore, the Garde des Sceaux in office at the time was Henri Nallet, who had been treasurer for Mitterrand's 1988 election campaign. However, at the same time, it was suggested that Jean-Pierre had overstepped the mark, had unlawfully opened the case on his own initiative without waiting for the necessary permission from the *procureur* and had, in short, taken the law into his own hands. This case, then, demonstrates two deficiencies – outside interference exercised towards a *petit juge* with a possible cover-up campaign by the State, or excessive power granted to one individual – the *juge d'instruction* – enabling him to stir up allegations of corruption against the party in power.

Two other aspects of the 'instruction' process also gave cause for concern. The powers of the defence were considered very limited, for, from the moment of detention, the *police judiciaire* had the authority to detain a suspect for interrogation under 'garde à vue' for a period of 24 hours without allowing him access to, or advice from, a lawyer. Additionally, once the investigation was under way, a *juge d'instruction* was only required to allow a defendant's lawyer access to his file two days before a meeting between the two parties was due to take place, a practice which severely restricted the defence lawyer's knowledge of the case against his client, and thus tied his hands in his attempts to prove his client's innocence.

There were, then, several issues which appeared to call for considerable reforms of the 'instruction' process. As the main aim was to increase the rights of the defence, this naturally implied a chipping away at the powers of the *juge d'instruction*, and it was with this in mind, and following two unsuccessful attempts at reform by his predecessors Robert Badinter (1985) and Albin Chalandon (1987), that the Garde des Sceaux in office in 1988, Pierre Arpaillange, formed the Commission Delmas-Marty. The Commission went

further in its proposals than had either Badinter or Chalandon and threatened the very existence of the *juge d'instruction* himself.

The Commission sought not to do away with the functions of the *juge d'instruction*, but rather to overcome the ambiguity of his position, which combined the powers both of investigator and judge, and thus to redistribute his powers elsewhere. The members of the Commission proposed to do this by conferring the powers of investigation into a case on the *parquet* and the legal responsibilities onto a *juge des libertés*. In the course of the investigation, a member of the *parquet* would be responsible for officially accusing the suspect by serving a *notification d'accusation*. To streamline the investigation process and make it more efficient, it was intended that each investigation carried out by the *parquet* should be limited to six months (the last available figures in 1980 give the average length of 'instruction' as nine months), although it should be possible to extend this period if necessary in order to complete the investigation. This should also ease the situation as regards *détention provisoire*. The *parquet* would also have the task of interviewing the suspect – accompanied by his lawyer – and would be obliged to pronounce an official accusation promptly if the charges were not to be invalidated, for this step then allowed the suspect access to his file and to legal advice. One major problem, however, had to be circumnavigated – that of giving independence from state intervention to the member of the *parquet* carrying out the investigation, for no change to the status of the *parquet* – subordinate to and appointed by the Ministère de la Justice and thus to the political party in power – was envisaged. In order to overcome this obstacle without reforming the Constitution, a measure which was at the time not envisaged, the Commission advocated that the Ministère de la Justice be allowed only to give advice of a very general nature on any particular case, that this advice should be expressed formally in writing and made public, and that the members of the *parquet* should feel themselves under no obligation to follow the advice, should it seem inappropriate.

As mentioned above, the second function of the *juge d'instruction*, that of judge, was to be carried out by a *juge des libertés*, who would be the sole person responsible for making decisions which directly affected the basic rights of the accused. These decisions were to include the extension of the length of the *garde à vue* and the authorising of custody warrants, bail, telephone tapping or searches. The *juge des libertés* was also to have a supervisory rôle as far as the investigations by the *parquet* were concerned; if he felt that the case was not receiving adequate attention, he could request from the *chambre d'accusation* the *dessaisissement* of the member of the *parquet* responsible for it. He could likewise request an investigation into the behaviour of an officer of the *police judiciaire* if he felt there were grounds for complaint. The *juge des libertés* would also set the length of *détention provisoire*, should this be requested by the *parquet*, fixing a time appropriate for the sentence which would be handed down in the event of a guilty verdict. During the investigation, the *parquet* could request the *détention provisoire* of a suspect, but where a decision to resort to *détention provisoire* were to be made, the *parquet* would be obliged to state clearly its grounds for requesting this measure and not simply invoke the maintenance of law and order. Appeals against decisions made by the *juge des libertés* would be heard by a *chambre d'accusation* with increased powers.

Another considerable change proposed by the Commission tackled the issue of the restricted powers of the defence lawyers in defending their client. It was

proposed that the suspect held in *garde à vue* should have access to his lawyer, to whom he should be able to speak confidentially for up to an hour in person or 30 minutes on the telephone; his lawyer should be able to inform him of his rights and in particular of his right to remain silent, although the lawyer would not yet be able to see his client's file nor attend the interview between suspect and officer of the *police judiciaire*. The Commission advocated equal status for defence and prosecution – the defence should be able to ask for investigations to be carried out, should be able to choose additional specialists to perform these, draw attention to improper practices or illegalities in procedure, have constant access to the client's file and to copies of relevant documents. The defence lawyer should also be able to question the accused directly and request that witnesses be called for questioning. As a further measure, an accused should have the opportunity to plead guilty (*plaider coupable*), recognising an offence in front of both his lawyer and the *juge des libertés*, but at any moment be allowed to retract without jeopardising his case. Under the present system, a guilty plea serves no purpose, as the decision as to an accused's guilt or innocence has to be reached by the court alone, upon consideration of all the evidence. In general, the proposals were to offer considerably increased rights for the suspect and far greater freedom of action for his lawyer, previously powerless to direct the course of the investigation and with restricted access to documents or witnesses.

The Delmas-Marty Commission had given its thoughts to equity between defence and prosecution and to redefining the rôle of the *juge d'instruction*, but it had not addressed the question of the financing of the French legal machinery, seen by many as the key to the problems encountered in attempting to see justice done and recognised as such by Delmas-Marty:

**L**a France consacre à sa justice 1,35 pour cent du budget d l'Etat, soit deux à trois fois moins que dans les démocraties comparables.<sup>11</sup>

Pour beaucoup, rien ne sera vraiment résolu tant que le gouvernement ne s'attaquera pas au problème essentiel de la justice française: son extrême pauvreté. En 1990, le budget de la Justice est de 16,8 milliards de francs, soit un peu plus de la moitié du budget du ministère des . . . Anciens Combattants. Autre comparaison? La SNCF a un budget six fois supérieur à celui de la Justice.<sup>12</sup>

Although the proposals of the Delmas-Marty Commission were received in June 1990, they have still not been adopted. Possibly they were perceived as too radical, for they demanded a thorough overhaul of the criminal justice procedures, although projected reforms have in any case been thwarted by changes on the political stage: Gardes des Sceaux come and go at speed, and France's constitutional agenda has been dominated by Maastricht.

However, other attempts were made to improve the functioning of the legal system, notably by examining the status of the *juge d'instruction*, who still exists despite Delmas-Marty's proposals. As mentioned previously, it was often felt that injustices and blunders had occurred due to the inexperience of *juges d'instruction*, frequently amongst the youngest members of the legal profession due to the fact that pay and promotion prospects are limited to the first 'grade' of the two 'grade' scale. To counter this problem, Henri Nallet – successor to Arpaillange – proposed certain changes. The Urba affair and juge Thierry Jean-Pierre's handling of the case, convinced Nallet that urgent measures were



needed to tackle the issue of inexperience amongst *juges d'instruction*, an issue which had come to light due to this case. When the Urba affair came to a head in April 1991, research had already been under way at the Ministère de la Justice, Place Vendôme, on plans to overcome the problem of the rank and status of *juges d'instruction*. It was intended to abolish the notion of profession linked to a particular 'grade', and therefore to liberate a *juge d'instruction* from the need to change career direction in order to obtain promotion. Promotion should be granted on grounds of seniority, and progress through the 'grades' should take place as in other areas of the legal profession, with *juges d'instruction* not held down at the bottom of the pay scale. A *juge d'instruction* should thus be able to progress in his chosen career and gain experience through years of practice. In the long run, it was hoped that this would attract more potential judges to the job. To further improve their lot, it was decided to abandon the somewhat infantile assessment procedure whereby a *juge d'instruction* was given a mark by the first président of the *Cour d'appel*, after consultation with the *présidents* of the *Chambre d'accusation* and *Cour d'assises*, to gauge his performance. This would be replaced by a system of evaluation resembling that undergone by civil servants in other sectors of public life.

At the same time, Nallet hoped to counter attacks on the lack of independence of the magistrates via the first reform of the Conseil Supérieur de la Magistrature (CSM) to take place since 1958. The Conseil Supérieur de la Magistrature exists precisely in order to oversee and guarantee the independence of legal decisions. Its president is the President of the Republic and its vice-president the Garde des Sceaux; and the additional nine members of the Conseil are appointed by the President himself. These appointment procedures have inevitably caused questions to be raised as to the degree of the Conseil's independence from party politics. Radical changes were in view, whereby two of the six members of the judiciary on the Conseil would be nominated in a more democratic fashion, and the sphere of influence of the CSM would be extended. Previously only convened by the President to review matters relating to the independence of individual judges, it would in future be consulted on all matters pertaining to legal reform. Any further modification of the CSM would have required constitutional reform.

Further to this, Henri Nallet announced his intention to introduce a reform of the 'instruction' process, to be debated in autumn 1991, separating the power to investigate a case and the power to make decisions concerning any individual's liberty, as recommended by the Delmas-Marty Commission. He proposed that decisions affecting personal liberty should be decisions to be made collectively and reserved for a collège, and not entrusted to one man alone.

The government appeared to adhere to Nallet's project and, on 15 October 1991, Michel Sapin, then Ministre Délégué à la Justice, announced his intention of submitting to parliament in the spring of 1992 a series of reforms relating to the criminal justice system. These prospective reforms, set to be further debated in the course of November 1991, were predominantly based on the proposals of the Delmas-Marty report, with one outstanding exception. The *juge d'instruction* was to be maintained, although the precise outline of his function remained unclear. The intentions were to reinforce the rights of the defence. The term 'inculpation', previously used to formally accuse a suspect, would be replaced with three terms: *la mise en examen*, *la mise en cause* or *la mise en*

*accusation*. The hope was to avoid any kind of pre-judgment on the defendant when he came to trial or any suggestion that, until proved guilty, he was anything other than presumed innocent. The right to appeal was also to be extended to include the possibility of appealing against conditions laid down by bail. Defence lawyers were to find the task of defending their clients facilitated: it was proposed to allow them constant access to their client's file – previously, they were only able to consult the dossier two days before an interview with the *juge d'instruction* – and they were also to be able to request, in the interests of their client, that the *juge d'instruction* carry out certain investigations.

As regards the 'instruction' process itself, Sapin expressed the rather vague desire that complex cases be handled by a team of *juges d'instruction*, rather than by one person alone, and stressed that matters relating to *détention provisoire* should ideally be decided upon by a group of magistrates. Yet the rôle of the *juge d'instruction* in this process was still to be determined.

For several reasons Sapin's reforms appeared to have no more success than those of his predecessors. By spring 1992, a new Garde des Sceaux was in office in the shape of Michel Vauzelle, who, although also committed to similar reforms, was in no hurry to implement them before negotiations of the Maastricht treaty were complete, along with any changes to the Constitution that that might entail. Indeed, it began to seem as if the proposed reforms would never be realised, particularly in view of the prospect of legislative elections to take place in March 1993, a decline in popularity of the Left and a probable victory for the parties of the Right, who were known not to favour reform of the criminal procedure. However, the indictment of Henri Emmanuelli in the summer of 1992 spurred President Mitterrand to promise that measures to improve the lot of the defendant would be taken in the very near future and, on 19 December 1992, Parliament accepted the revised *Code de procédure pénale* presented by Sapin and Vauzelle. The major changes made, to be introduced gradually over a period of twelve months between January 1993 and January 1994, were essentially those previously outlined by Sapin and aimed to underline the fact that a defendant must be assumed to be innocent in the first instance, and to reinforce the rights of the defence. The indictment of a suspect was to be replaced by his *mise en examen*, thus ensuring him of the rights allowed to the defence. This was to be followed by the communication of any 'présomptions de charges constitutives d'infraction pénale', the whole an attempt to avoid the impression that a defendant had already been tried and found guilty. Further to this, the defendant was ultimately to be granted access to his lawyer during the *garde à vue*, the defence lawyers were to be allowed to consult their clients' files on any normal working day, and to request that the *juge d'instruction* perform whatever investigations they might deem necessary, or at the very least justify his refusal to do so. In addition, a group of three magistrates, excluding the *juge d'instruction*, were to be responsible for decisions relating to *détention provisoire*. Predictably, these reforms were only ever partially implemented – their unpopularity with the parties of the Right and certain members of the judiciary guaranteed that they would be unlikely to survive a Right-wing victory in the 1993 spring legislative elections. Reactions from the *juges d'instruction* themselves were openly hostile, with many threatening to resign from their posts. Their position within the judiciary was still assured, but their powers had been limited and they saw the reforms as generating an increased workload for the already overburdened. It was not long

before yet another Garde des Sceaux, Pierre Méhaignerie, was endeavouring to re-shape the Socialists' reforms.

As can be seen above, the last decade has shown an increasing awareness of the need for reform in the criminal justice procedure, particularly as far as protecting the personal liberties of the suspect is concerned. Plans have naturally centred on the *juge d'instruction*, the 'most powerful man in France', and on methods of limiting these powers. But these years have also been a time of frustration, of proposed laws which were never to reach fruition due to the frequent changes of Gardes des Sceaux during the late 1980s and early 1990s, and with political issues of greater immediacy taking precedence. Nevertheless, some agreement seems to have been reached on the general direction that change should – and will – take, to improve the lot of the defendant and the status of the *juge d'instruction*. Nearly 200 years after the creation of the *juge d'instruction*, there has been a recognition of certain major deficiencies in the 'instruction' process and of the need to re-examine and adapt the rôle of the *juge d'instruction*.

The *juge d'instruction* is therefore still very much with us. His position has been threatened, but suggestions that he should be replaced with alternatives have not yet been put into practice and have simply resulted in plans to limit his powers, with a view to improving the lot of the defence. Indeed, such a delicate issue as removing the *juge d'instruction* from the French legal system altogether would need to be tackled very gradually and cautiously. All the indications at present show that the *juge d'instruction* will – at least for the time being – live on, albeit with reduced powers.

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## Part Two

### Criminal justice, confidentiality and the role of the media

- (iii) Trouille HL, 'Media, politics and justice: spotlight on Thierry Jean-Pierre' (1999) 13 *Contemporary French Civilization* 81
- (iv) Trouille HL, 'Secrecy, privacy and human rights in the Fifth Republic' in Allison ME and Heathcote ON (eds), *Forty years of the Fifth French Republic: actions, dialogues and discourses* (Peter Lang 1999)
- (v) Trouille HL, 'Private life and public image: French privacy legislation' (2000) 49 *International and Comparative Law Quarterly* 199
- (vi) Trouille HL, 'Modes of detection in the crime reality show' in O'Beirne E and Mullen A (eds), *Crime Scenes: Detective Narratives in European Culture since 1945* (Rodopi 2000)

- (iii) Trouille HL, 'Media, politics and justice: spotlight on Thierry Jean-Pierre' (1999) 13 Contemporary French Civilization 81

## MEDIA, POLITICS AND JUSTICE: SPOTLIGHT ON THIERRY JEAN-PIERRE

*by Helen Trouille*

The recent proliferation of corruption scandals in French public life during the 1980s-1990s has taken France by storm. We have seen high-level politico-public scandals, such as the "affaire du sang contaminé"; the illicit financing of political parties and court cases involving high-ranking political figures (the Emmanuelli case); suspicious get-rich-quick practices operated by certain company directors (for example Jacques Crozemaire's lucrative "fund-raising" for the ARC—Association pour la recherche contre le cancer) and self-interest conquering all on the Paris housing market (we need only glance in the direction of the Tiberis), to name but a few. This profusion of scandal provokes two interpretations: the first suggests that French public and political figures have become decidedly more corrupt (or at the very least more careless and caught more frequently with their hands in the till); the second that the forces of law and order are proving more efficient at tracking down and more dogged in their determination to investigate and bring to court crimes committed by high-ranking notables. It is no doubt unlikely that human nature has changed dramatically over the centuries and not difficult to accept that shady dealings have always gone on in these spheres. Therefore, we must conclude that the second of these interpretations is most likely to be the more accurate. A deep sense of injustice seems to prevail amongst some who feel that, in the past, those in power have been able to abuse their positions and have placed themselves beyond the Law. Recently, we have found a number of still comparatively young *juges d'instruction*—examining magistrates responsible for leading investigations in criminal cases—anxious to redress the balance, keen to "take on" those in authority. The most well-known of these are probably Edith Boizette, expert in investigat-

ing financial scandal, Eric Halphen, known for his role in delving into the Tiberi dealings, Eva Joly and Laurence Vichnievsky, noted for their investigations into Roland Dumas' affairs, and Thierry Jean-Pierre and Renaud van Ruymbeke, who hit the headlines in connection with the Urba affair and illegal financing of the Parti socialiste. These battles, pitting Davids against Goliaths, have often appeared exceptionally aggressive and have led many to question whether those heading the inquiries are simply extending justice to a historically previously privileged class, as they maintain, or are seizing eagerly upon a chance to make important public figures "pay," gaining public recognition in the process. The *affaires* themselves have filled column after column in the press; the *juges d'instruction* investigating them have also, in unprecedented manner, been the subjects of many interviews and news articles, often likened, in their attempts to clean up society, to the legendary character Zorro, Mexican hero and *justicier masqué*, who anonymously rode to the assistance of those oppressed by the rich and powerful. Apart from the obvious differences—not least in terms of garb and mode of transport—there is one other major consideration which makes the comparison rather inappropriate: the identity of the *Zorros de la justice* is no mystery. They do not hide behind a mask, and if not actually playing to the media, manage with difficulty to resist that vital interview with that key journalist. One cannot refrain from asking—are their attempts to tackle high-level crime purely altruistic and aimed at providing a better society in which to live, or are these people cold and calculating "ayant simplement trouvé un chemin rapide vers la notoriété?"<sup>1</sup> Is the mix of media, politics and justice a happy one?

Here, I would like to examine this question, taking one particular example of a *juge d'instruction* frequently in the news in recent years, Thierry Jean-Pierre. Following his election as a *député européen*, in fourth place on Philippe de Villiers' list, L'Autre Europe, in the June 1994 European elections, Thierry Jean-Pierre first became a household name in 1991, after his spectacular handling of the Urba case and his discovery of the illicit financing of the Parti Socialiste electoral campaign in 1988. He would appear to be a particularly appropriate figure to consider, since his actions have been both praised—by those who see in him a leveler of social injustices—and vehemently criticized, essentially by socialist politicians who have fallen foul

of his investigations, who denounce him as being in the pay of the parties of the Right and describe him as a "*killer de la gauche*."<sup>2</sup>

Let us first consider the elements in his own *dossier* which have propelled him to fame and fortune and which have gained him the reputation of being something of a "Mr. Clean." This "Tintin contre les socialistes" (Greilsamer et Schneidermann, p. 237)—complete with blond curly hair and intellectual air—has, just like the comic strip hero, entered many French people's homes via the television screen as well as the printed word. One significant television appearance which emphasized this image followed the announcement of Henri Emmanuelli's sentencing for his part in the illicit financing of the socialist party's 1988 electoral campaign. The programme, "Les juges sont-ils justes?," part of the France 2 series *La France en direct*, was shown at twenty to eleven on the evening of Monday, 25 March 1996 and opened with two major questions directly arising from the Emmanuelli case. A star-studded cast of politicians and notables from the judiciary were asked:

1. Les juges veulent-ils se payer du politique? Veulent-ils s'acharner sur les hommes politiques?
2. Les politiques ne seraient-ils pas tentés de se croire au-dessus de la loi?

Absent from the television studio in person but featured *en duplex*, projected larger than life onto an enormous screen suspended above the heads of the other participants, a *deus ex machina* in some ways appearing as the ultimate authority on things legal and consulted at regular and appropriate moments, was former *juge d'instruction* Thierry Jean-Pierre. Perhaps his role as unearther of the scandal justified this attention—it certainly granted him the right to open the debate—but with such prestigious figures as Mireille Delmas-Marty (expert in criminal law at the Sorbonne and regularly a member of government commissions), RPR député of Haute-Vienne and former *juge d'instruction* Alain Marsaud, former socialist *garde des sceaux* Michel Vauzelle and reputed *avocat* Henri Leclerc present, the prominent position in the discussion granted to this one-time *petit juge*—a phrase often used to refer to the *juge d'instruction* and perceived as rather derogatory—is quite remarkable.



However, his elevation to this status is by no means a freak occurrence peculiar to France. Thierry Jean-Pierre has been the subject of many interviews in the press, of a chapter in Daniel Schneidermann and Laurent Greilsamer's book of interviews with well-known magistrates, *Les juges parlent* (Fayard, 1992), and of an entry in Cara Barszcz' pocket manual *Les juges* (Hachette, series: Qui? Quand? Quoi?, 1995, p. 19), and this "star à Paris" (Tezenas du Montcel, p. 78) is considered suitable enough company to dine with politicians—or at least by Alain Madelin, whose banquet *Le Monde* reports that he attended.<sup>3</sup> Certainly, at the origin of much of this attention is his role in the Urba scandal in Spring 1991. Originally required to investigate a fatal accident on a building site in Le Mans, during the course of his inquiries Jean-Pierre stumbled on information regarding the illegal financing of the 1988 PS electoral campaign. Unperturbed by the rank of those implicated, he pursued his investigations into this possible corruption case, only to be removed from the case by the public prosecutor, who deemed him to have gone beyond the bounds of his duty: a *juge d'instruction* is only to investigate cases which are allotted to him or her by the public prosecutor and does not have the right to act independently of that authority by choosing to expand those investigations to another case. Jean-Pierre's attempts to bring to account potentially corrupt political figures, his belief then as now that "le droit s'impose également à tous"<sup>4</sup> and his removal from the case in relatively undignified haste projected him into the limelight and transformed him, in the eyes of some, into a hero of the masses, determined to root out corrupt practices amongst the privileged classes. Indeed, the Urba affair was surprising for several reasons. Not only was it one of the first occasions where high-ranking political and business figures were taken on by a young and relatively inexperienced and insignificant *petit juge*, but it also shows a fine example of the Socialist government trying to hush up the scandal by clumsily ordering—via the justice minister and public prosecutor—that Jean-Pierre be removed from the case. The damage that Jean-Pierre did to the Socialists both in actual terms—Henri Emmanuelli, who was the treasurer of the party's electoral campaign in 1988, subsequently received an 18-month suspended sentence and was stripped of his civic rights—and in terms of their image—the party of corruption, ready to bend the law for its own good and to bend it again to make sure their secrets re-

main hidden—is not to be underestimated. But this was not all, for Jean-Pierre himself was deeply affected by his investigations during the late 1980s and early 1990s. Initially an ardent supporter of the Left, a *militant de gauche*,<sup>5</sup> inspired by the appointment as *garde des sceaux* in 1981 of Robert Badinter, whom he saw as *une bouffée d'oxygène* (Greilsamer et Schneidermann, p. 241), one-time regional representative of the left-wing *syndicat de la magistrature*, Jean-Pierre was to be bitterly disappointed by the Socialist government, particularly during Mitterrand's second *septennat*. Following the January 1990 amnesty, concocted with the specific aim of extricating Christian Nucci from his entanglement in the Carrefour du développement scandal, by pardoning any offence committed before 15 June 1989 relating to financing election campaigns or political parties, Thierry Jean-Pierre and several of his colleagues had had their first brush with the media. Frustrated at the number of corruption cases opened against political figures that simply had to be abandoned, they had drawn public attention to themselves by releasing from prison a number of petty criminals detained prior to trial, in protest at the blatant manipulation of the law to allow the release and exoneration of politicians guilty of far more serious offences.

At this point, the rebel *juges* had agreed only to accord interviews to the written press, deliberately shunning television and radio, and had not intended to create a national furor. Indeed, their explanations of their actions were amateurish and unclear to the general public, and their intention had clearly been to protest as a group against the political leaders rather than to draw media attention to themselves as individuals. As we have seen, Jean-Pierre's role in the Urba affair a year later was already a more public one and it was by no means his last appearance. In November 1990, he had founded the Forum de la justice, during the period when he was investigating the Urba case, as an organization comprising legal professionals, police inspectors, journalists, and providing a forum in which to air concern over the administration of every-day justice and in particular over high-level corruption, a forum which also wished to nominate a committee of experts on justice to suggest a recasting of the legal framework. This obsession with rooting out corruption and fraud at high levels can be attributed to the idealism of a young *juge d'instruction* at the start of his career wishing justice

to be applied to all, irrespective of social category, but also reflects an earlier career as a tax inspector in the Tax office at Bourges, where he worked for five years as a young man in his twenties. His experience in this domain in fact made him a particularly formidable legal opponent, meticulous in his unraveling of financial wrangles, and his competence in these areas led to his subsequent appointment by the Balladur government, between December 1993 and May 1994, to a post at the justice ministry, where he was to head a *mission sur le blanchiment et la corruption*, a post to which some maintained he was appointed by the conservative government in grateful thanks for services rendered in discrediting the Socialists, while others suggested he was offered the post in order to keep him out of further potential mischief-making for the new majority. Such hypothesizing was probably not simply idle gossip, for this was certainly an appointment which was most significant, seen in the context of his career at the time. For early in 1993, the year of Prime Minister Pierre Bérégovoy's suicide after the spring legislative elections, which had been so disastrous for the Socialists, Jean-Pierre had been responsible for investigating the highly suspect interest-free loan made by millionaire Roger-Patrice Pelat to Bérégovoy. In fact, he found himself investigating the Pelat/Bérégovoy case completely by chance. Apart from his government appointment, his own feelings were that, post-Urba, he had been entrusted no further interesting cases and that his anti-corruption crusade was being carefully blocked by those in power. As with the Urba Scandal, Jean-Pierre had been investigating a different case when certain irregularities attracted his attention and induced him to broaden his search. His findings led him to point the finger, on grounds of corruption, at a number of VIPs, even going as far as naming President Mitterrand himself and his son Gilbert. With the suicide of Bérégovoy and the subsequent tirades against the intense media coverage of the affair, Thierry Jean-Pierre, in his role as examining magistrate, was inevitably to find himself in the firing line. It is true that in this context, the tag *killer de la gauche* seems to take on another dimension. Attacked on television by the Socialists' *garde des sceaux* Michel Vauzelle, accused alongside the media of mercilessly hounding the Prime Minister, he twice requested to be taken off the case, but to no avail. This was only to come about in December 1993, following the departure of the Socialist government and with his new appointment in the justice ministry, which he took up,

leaving behind for his successor

. . . la liste complète des 'découvertes judiciaires' qui ont émaillé les deux années d'instruction. Elle concerne principalement la fortune de Roger-Patrice Pelat, ses sources de revenu, parfois extravagantes, comme la vente d'une entreprise surévaluée à une société nationale avec le soutien de l'Elysée. Il révèle également le détail de ses dépenses et de ses largesses, parfois surprenantes. C'est tout un système d'influence, d'entremise dans les coulisses du pouvoir qui est ici mis à nu avec une méticulosité de chasseur de papillons.

(Pontaut, J-M.,  
"Affaire Pelat: le rapport explosif,"  
*Le Point* [31 décembre 1993] p. 43)

These investigations into the Pelat case, carried out so fastidiously, were, almost predictably, declared null and void in 1995, and the suspects let off the hook for the same reasons as those given when Jean-Pierre was removed from the Urba case: he had once again gone beyond his remit, violating article 80 of the *Code de la procédure pénale*<sup>6</sup>:

La chambre d'accusation estime que ces investigations étaient illégales car effectuées en dehors de toute saisine judiciaire du juge Jean-Pierre pour les faits visés. . . . En conséquence, tous les actes d'instruction alors menés dans le cadre d'investigations sur un ami du Président Mitterrand, Roger-Patrice Pelat, mort le 7 mars 1989, 'sont nuls et d'une nullité absolue pour avoir été exécutés en violation de l'article 80 du code de la procédure pénale.'

(Paringaux, R.  
"L'instruction du juge Jean-Pierre visant  
Roger-Patrice Pelat est annulée,"  
*Le Monde* [5 août 1995] p. 6)

The Bérégovoy incident possibly epitomizes public reactions in general to Jean-Pierre and others like him, doggedly determined to take on those in high places and to plead for "l'égalité de tous devant les lois de la République."<sup>7</sup> On the one hand, we see support for an idealist as yet still convinced that justice applies equally to all:

Thierry Jean-Pierre n'est pas un envieux, mais un jeune juge issu de ce qu'on appelle aujourd'hui la génération morale. Une génération imprégnée des idées de Mai-68,

croyant aux vertus de l'éthique, de la vérité. Thierry Jean-Pierre, avec un nom si banal, sort de l'ordinaire.

Raffy, S.

"Les accusateurs en procès,"

*Le Nouvel Observateur* [6 mai 1993] pp. 28-29)

On the other hand, we see violent criticism of the young *juge d'instruction*:

Une chose est de chercher la vérité, de la faire connaître, d'être intraitable sur l'information, une autre de supputer, de harceler, de persécuter. Entre le silence et la persécution il y a toute une place pour une information correcte qui ne doit jamais, en aucun cas, être dissimulée.

Giroud, F.

"L'honneur, richesse des pauvres,"

*Le Nouvel Observateur* [6 mai 1993] p. 27)

In any event, this episode appears to have marked a turning point in Jean-Pierre's career. The pressures associated with investigating such a delicate affair and the subsequent government post encouraged Jean-Pierre to change the orientation of his career, leaving behind his relatively short-lived but much talked of profession as a *magistrat* to embrace the world of politics—a move which, according to Greilsamer and Schneidermann (p. 259), he had already been pondering as early as 1992. Possibly hoping for greater things at the end of his contract—a ministerial or advisory responsibility perhaps, rather than the attractive promotion abroad reputedly offered by Matignon and the Elysée, and turned down<sup>8</sup>—Jean-Pierre contented himself with standing (and being elected) as a Euro MP in the 1994 European elections on Philippe de Villiers' list for the far Right, L'Autre Europe. (de Villiers had been one of the 250 members of the Forum pour la justice.)<sup>9</sup> For his critics, this was the moment for which they had been waiting to voice their anger at his behavior over the years. The PS was particularly vehement in its attacks on Jean-Pierre. Having suffered at his hands in the past, this was their chance for revenge. Jean Glavany, PS spokesman, talked of Jean-Pierre's exploitation of the independence of the judiciary for political ends:

... celui qui se drapait dans l'indépendance de la justice pour s'acharner sur certains socialistes apparaît aujourd'hui sur une liste de la droite extrême. . . . Y a-t-il encore des Français pour ne pas voir que l'essentiel des

attaques à propos des pseudo-affaires contre les dirigeants socialistes n'étaient en fait qu'une indigne manoeuvre de la droite extrême?

("La préparation des élections du 12 juin,"  
*Le Monde* [13 mai 1994] p. 6)

Ségolène Royal, socialist MP for Deux Sèvres, spoke of her concern at such a political liaison from a "juge qui s'est toujours prétendu neutre" (see "La préparation des élections du 12 juin"). At last, for the PS, everything fell into place. Jean-Pierre's determination to brand the Socialists as corrupt and to ruin the careers and lives of their leaders had not been due to an anti-corruption crusade or clean-up campaign, a desire to extend justice to all, but had simply been a base matter of political profiteering. Furthermore, questions were raised as to the political sincerity and even stability of someone who had supposedly begun his career as a *militant de gauche* (see Reverier, p. 46) but who was now a supporter of the far Right. Jean-Pierre protested, of course, that as a *juge d'instruction*, he had simply been doing his job: "En tant que juge d'instruction, je n'ai fait qu'appliquer la loi" ("La préparation des élections du 12 juin," p. 6), and that the Socialist *gardes des sceaux* who had tried to prevent him from so doing had been shown for what they were. He also insisted that his support for L'Autre Europe was not party political, but based on many similar views shared with the leader of the list and founder of the "Combat pour les valeurs," notably on Europe and on the fight against corruption. He stressed that their views on the death penalty, abortion and the family were not common ground. Some years before, he had re-asserted his Left-wing loyalty but taken care to make clear that for him the Left was not the Socialist government in office at the time:

Ce [la gauche pour Jean-Pierre] n'est pas l'Etat PS. Ce n'est plus qu'une idée, une éthique, celle de 81, trahie aujourd'hui, mais qui est à reconstruire. La gauche devrait passer dans l'opposition . . . ce n'est pas le socialisme en R25. (Greilsamer et Schneidermann, p. 257)

In November 1994, he clarified his political position still further, insisting: "je n'appartiens à aucun parti politique."<sup>10</sup> An indication of his disillusionment with the corrupt practices of the political class, exploited by the socialists in an attempt to salvage some threads of credibility, Thierry Jean-Pierre's involvement in the political arena also caused unease amongst

members of the legal profession. Although dissatisfied with the agendas imposed on them in the guise of constant reforms, attacks on their independence, and underfunding, few seemed convinced by the "image brouillée"<sup>11</sup> of Thierry Jean-Pierre, i.e., his criticisms of a profession too stolid to rebel and his recourse to politics, precisely the world he had taken to task with such determination. Eric de Montgolfier, *procureur de la République* in Valenciennes, famous for his role in the Tapie investigations, sums up the view of many that it should not be necessary to turn to politics to fight corruption: "Pour faire passer ma vision des choses, la loi me suffit" (Dupuis, p. 55).

Politics has been one of the tools used by Thierry Jean-Pierre to fight corruption. Another, used apparently without compunction is the media. Accused of *excès médiatiques*, of *méthodes de cowboy* (Tezenas du Montcel, p. 78), Jean-Pierre freely admits to using the media for his own ends, and sees no shame in so doing. Described as a *juge médiatique*, of the opinion that "l'administration de la justice en cette fin de siècle, ne peut se faire sans les médias" (Raffy, pp. 28-29), he openly encourages the use of the media: "Il faut mettre en place le couple presse-justice" (De Rudder, p. 10). Many of his former colleagues hold similar views, maintaining that if they do preserve the *secret de l'instruction* when working on a high-profile case, resisting the temptation to have recourse to the media to aid them, then they are probably the only ones involved to strictly observe the law in this matter. It is interesting at this point to note the quotation from Marcel Pagnol's *César* displayed—with humour and resignation?—on the door of *juge* Jean-Pierre Murciano's office in Grasse, a reflection upon the lamentable flouting of the *secret de l'instruction*: "Un secret, ce n'est pas quelque chose qui ne se raconte pas. Mais c'est une chose qu'on se raconte à voix basse et séparément" (De Rudder, p. 10).

In corruption cases against political leaders, Jean-Pierre says: "On est seul, on manifeste notre puissance. En se servant des médias comme bouclier, on se met en dehors des répressions de manière temporaire" (De Rudder, p. 10). However, this use or abuse of the media is very much criticized, by those who are its victims, naturally, and also by some members of the legal profession who see the *concubinage notoire*<sup>12</sup> between justice and media as damaging, degrading the profession, awarding too

much power to the journalists "qui se prennent pour des auxiliaires de la justice."<sup>13</sup> The violating of the *secret de l'instruction* can lead to many ills, but one significant consequence is the annulling of a prosecution on grounds of procedural irregularities. Daniel Soulez-Larivière, well-known *avocat* and author of a number of works on justice and the relationship between justice and the media, is highly critical of what he refers to as the *cirque médiatico-judiciaire*,<sup>14</sup> and openly condemns Jean-Pierre for his exploitation of the media, maintaining that prosecutions associated with the Urba case were compromised due to the publication of a book, *Bon appétit Messieurs* (Fixot, 1992), by Jean-Pierre in which he recounts his version of events. The hostility is returned—Jean-Pierre bitterly regrets Soulez-Larivière's denigrating references to the status of the *petit juge* (Greilsamer and Schneidermann, pp. 160-161).

Another of Jean-Pierre's publications actually led to a court case. *Le livre noir de la corruption*, published in 1994, immediately prior to the European elections in which he was standing and just after the end of his contract with the justice ministry, and drawing from his investigations when in post, accused two major French companies of being responsible—via funding of election campaigns—for 80% of political corruption in France.<sup>15</sup> Although the two companies were not actually named in the document, they were deemed to be easily recognizable as the Lyonnaise des eaux and the Compagnie générale des eaux. The Lyonnaise des eaux instigated proceedings on grounds of libelous accusations, emphasizing at the same time that, on the eve of the European elections, Jean-Pierre, who was standing on an anti-corruption platform, had personal interests in making such defamatory allegations.<sup>16</sup> Required to pay a nominal one franc in compensation to the Lyonnaise des eaux, Jean-Pierre had chosen for his defense lawyer the notorious and flamboyant Jacques Vergès, and was found not only guilty of the offense, but also of putting forward a defense "constitué de coupures de presse et non de faits soigneusement vérifiés."<sup>17</sup>

Thierry Jean-Pierre's assertion that "sans cela [la presse], je n'avancerais pas" (Tezenas du Montcel, p. 78) is open to interpretation. He is by his own admission someone who turns to the media (in its broadest definition) in circumstances when, in the letter of the law he should not, but this statement can also re-



flect the ambitions of a *petit juge* apparently desiring to stand out from the crowd, seeing the media as a means of furthering both his cause and his career, a career, which as we have seen, has followed an unusual pattern. Born in 1955 in Lozère, son of a mathematics teacher and the headmistress of an *école maternelle*, choosing an early career in the tax office in Bourges and then, for a year, as an *intendant* in the Collège Guy Môquet, Gennevilliers, Jean-Pierre's early career is nothing out of the ordinary. It is true that, despite his decision to retrain as a *juge d'instruction*, the chosen profession of his wife, even from the early days, doubts appeared to hang over his future in this profession. A report from the Ecole Nationale de la Magistrature, which Jean-Pierre is happy to publicize, reads as follows: "Monsieur Jean-Pierre manifeste un très grand esprit d'indépendance. Il n'apparaît pas opportun, pour cette raison, que ce magistrat occupe des fonctions de juge d'instruction" (Greilsamer et Schneidermann, p. 242). Indeed, in 1992, he was already openly talking of becoming an *avocat*, clear in his own mind that the *magistrature* would not be his final resting place, declaring "Je ne ferai pas carrière dans la magistrature" (Tezenas du Montcel, p. 79). He has now changed course again to espouse the world of politics, albeit campaigning in his specialized domain, the battle of justice against political corruption, but the combination media-politics-law is an explosive one, which holds considerable potential.

The varied career pattern to date of this "sprinter" (Raffy, p. 29), the number of occasions when this young man of modest origins has hit the headlines and caused considerable embarrassment in the highest possible places, the numerous works on corruption he has published in defiance of the *secret de l'instruction*, expressing through the written word what he has been prevented from acting upon in law, the founding of non-political associations to discuss corruption—for example, in 1994, he founded the Forum Démocratie Justice, an association open to all, not affiliated to any political party, whose aim was to serve as a pressure group denouncing those who impede the true course of justice through corruption, be they *patrons, magistrats ou hommes politiques*—have certainly caused some to question both his motives and his projects for the future. Despite his official exit from the legal profession in 1994 when he became a Euro MP, his principal *chevaux de bataille* continue to be cor-

ruption and justice, and he is still frequently in the media. For someone committed to a morality campaign within the framework of the law, will the straight-jacket imposed on the legal profession be too constraining to wear in the long term? Is the way forward rather via a career in the media or in politics? Whatever the answers to these questions may be, one thing is sure: Thierry Jean-Pierre will continue to make himself heard, for "Sans cela, je n'avancerais pas."

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## NOTES

<sup>1</sup> L. Greilsamer et D. Schneidermann. *Les juges parlent*. (Fayard, 1992), p. 237.

<sup>2</sup> A. Tezenas du Montcel. "Je suis un ovni judiciaire." *Le Nouvel Economiste*. (5 novembre 1993), p. 79.

<sup>3</sup> D. Schneidermann. "Images—Vertiges de la transparence." *Le Monde* (15 octobre 1994), p. 25.

<sup>4</sup> J-L. Reverier. "Débat—l'instruction au menu." *Le Point* (20 juillet 1996), p. 46.

<sup>5</sup> J. Dupuis and J-M. Pontaut. "Pourquoi la justice ne va plus s'arrêter." *Le Point* (22 octobre), p. 39.

<sup>6</sup> Article 80 of the *Code de la procédure pénale* states: "Le juge d'instruction ne peut informer qu'en vertu d'un réquisitoire du procureur de la République. . . . Lorsque des faits, non-visés au réquisitoire, sont portés à la connaissance du juge d'instruction, celui-ci doit immédiatement communiquer au procureur de la République les plaintes ou les procès-verbaux qui les constatent" (Jérôme Rabenou, <http://www.fdn.fr/~rabenu/cpp/PILIT3.html>).

<sup>7</sup> Les colères d'un juge." *Le Point* (12 octobre 1995), p. 12.

<sup>8</sup> J-M. Pontaut. "Le juge Jean-Pierre ne s'arrête pas." *Le Point* (25 septembre 1993), p. 29.

<sup>9</sup> C. De Rudder. "Ces hommes qui font trembler le pouvoir." *Le Nouvel Observateur* (16 avril 1992), p. 4.

<sup>10</sup> J. Dupuis. "Le j'accuse de Thierry Jean-Pierre." *Le Point* (5 novembre 1994), p. 55.

<sup>11</sup> J-M. Dumay. "Le réveil des juges—I." *Le Monde* (20 octobre 1994), p. 1.

<sup>12</sup> L. Greilsamer. "Six enjeux pour la France." *Le Monde* (29 mars 1993), p. 6.

<sup>13</sup> D. Soulez Larivière. *L'Avocature* (Seuil, 1995), p. 278.

<sup>14</sup> The title of one of Soulez Larivière's recent books, *Du cirque médi-*

*atico-judiciaire et des moyens d'en sortir* (Seuil, 1993).

<sup>15</sup> R-P. Paringaux. "Thierry Jean-Pierre met en cause deux grands groupes français." *Le Monde* (1er juin 1994).

<sup>16</sup> R-P. Paringaux. "Les diffamations électorales du juge Jean-Pierre." *Le Monde* (11 novembre 1994), p. 10.

<sup>17</sup> "Diffamation: Thierry Jean-Pierre condamné." *Le Monde* (16 décembre 1994), p. 12.

- (iv) Trouille HL, 'Secrecy, privacy and human rights in the Fifth Republic'  
in Allison ME and Heathcote ON (eds), *Forty years of the Fifth French  
Republic: actions, dialogues and discourses* (Peter Lang 1999)

HELEN TROUILLE

## Secrecy, Privacy and Human Rights in the Fifth Republic

No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.  
(Article 12, *Universal Declaration of Human Rights*, 1948 (United Kingdom Committee for Human Rights Year 1977, 19))

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.  
(Article 8, *European Convention on Human Rights*, 1950 (Harris 1995, 302))

These two texts, from the *Universal Declaration of Human Rights* (adopted in 1948) and the *European Convention on Human Rights* (adopted in 1950) respectively, emphasize quite clearly the importance which, during the years preceding the founding of the Fifth Republic, was placed upon privacy, upon the right to lead one's life away from the interference of the State or prying gaze of the general public. When we consider the extravagances of the media today, and particularly the role of the press, we could be forgiven for thinking that these principles had become lost. The aim of this chapter is to ask why a country such as France, which regularly treats us to the most flamboyant spreads in magazines such as *Paris Match*, complete with full-colour photographs and outrageous revelations about people in high places, can also be a country which pledges itself to be *le pays des droits de l'homme* and can reputedly have extremely stringent laws relating to privacy and secrecy. And ask how this same country can commit flagrant indiscretions about those 'helping the police with their inquiries', innocent until proven

otherwise in law, yet apparently proclaimed guilty by the press. It will, therefore, be useful to look at legislation relating to privacy and to secrecy in France, particularly in relation to the role played by the press and in relation to the 'interference in the privacy' of well-known public figures, and to the pre-trial indiscretions which apparently are so regularly committed.

## Privacy

Where English practice relating to divulging information about celebrities through the press depends to a great extent on self-regulation, French law contains a number of texts intended to restrict quite severely intrusion into the privacy, or *vie privée*, of the individual. The Fifth Republic has seen a reinforcing of privacy laws in line with commitments expressed in the European Convention on Human Rights and the Universal Declaration of Human Rights, with recent additions to existing legislation certainly deemed necessary due to changing times and attitudes to public figures (even if we idolize them, we still want to know all the sordid details about their private lives), to modern technologies (powerful telephoto lenses, for example, and sophisticated video cameras and recording equipment), increased competitiveness amongst newspapers and periodicals in a world in which it has become difficult to survive financially (many newspapers have had to close down or 'modernize' radically to attract new readers), and global markets where newspapers are prepared to pay vast sums of money for a scoop. For example, Laurent Sole, of the SD picture agency, had offers of up to one hundred thousand pounds and two hundred and fifty thousand dollars from 'dozens and dozens of media agencies' for photographs of the Princess of Wales' fatal car crash (Bremner and Farrell 1997, 4). And the infamous photographs of the Princess embracing Dodi al-Fayed, which appeared in early August 1997, snapped off the Coast of Sardinia by an Italian paparazzo named Mario Brenna, were reputedly sold to the *Sunday Mirror* for its exclusive coverage for the equivalent of two and a half million francs. The *Sun* and the *Daily Mail*, publishing the photographs the following day, had paid the

equivalent of one million Francs, and *Paris Match* had paid 1.8 million francs for its coverage. It has been calculated that the series of shots will have been sold for somewhere between ten and thirty million francs in total, it being immensely difficult to arrive at an exact figure (Cordelier 1997, 79).

Despite a tightening up of privacy laws, we should not, of course, presume that, prior to legislation passed during the Fifth Republic, anything was permissible, but it is rather the case that, at that stage, judges ruling on interferences in privacy were obliged to resort to legislation on authorship and copyright, on the right to one's name, on *les droits du modèle photographié* (which dictated that any person was master of his effigy and of the use which was made of it), to Commercial Law in fact, and to general laws relating to privacy, as well as to a substantial body of jurisprudence, in which they were noted for being rigorous in their interpretation of violations. Nonetheless, at this point, judgements made were often based on the principle that the *publication* of photographs taken without the express authorization of the subject was not tolerated. For example, in the early years of the Fifth Republic, in 1965, a magazine which intended to publish photographs of Gérard Philippe's son, taken whilst he was in hospital and without the family's knowledge, was seized and publication prevented, on the grounds of this being an 'immixtion intolérable dans la vie privée' of the family (Malherbe 1968, 4), and an incident only deemed worthy of interest because the injured party was the child of famous parents (Robert 1996, 413), the emphasis here being upon the publication of the photographs, not on the taking of them.

It is clear from the above that a formalization of activity was essential, and eventually took the shape of the law of 17 July 1970 specifically devoted to enforcing the *respect de la vie privée*. What is, however, noticeable is that, in reinforcing the concept of the invasion of privacy, the legislators deliberately did not attempt to define exactly what constitutes *vie privée*, since it was felt that this could – or indeed should – vary with time and changes in society, and therefore any definition of *vie privée* still depends on judges' interpretation and examination of past judgements and *arrêts*, i.e. on jurisprudence. Indeed, the creators of the European Convention on Human Rights and the Universal Declaration of Human Rights could hardly have imagined the form or extent of media intrusion into the lives of those who become famous or infamous – even for only a brief moment – today. The accepted definition is that *vie privée*

corresponds to the 'sphère secrète où l'individu aura le droit d'être laissé tranquille' (Morange 1995, 165), a definition which can be seen either as very broad or quite constraining, but one definitely open to a variety of interpretations, depending upon the circumstances and individuals. After this introduction to the issues and the problems we can now turn to the major texts themselves which refer to violation of *vie privée* in the context of intrusions by the press.

## Legislation

Mention has already been made of the law of 17 July 1970, thanks to which Article 9 of the *Code civil* reads thus:

Chacun a droit au respect de sa vie privée.  
 Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l'intimité de la vie privée; ces mesures peuvent, s'il y a urgence, être ordonnées en référé.  
 (Article 9, *Code civil*, loi du 17 juillet 1970)

and altered 5 articles (articles 368-372) of the *Code pénal* – revised in 1994 – the most significant of which now reads as follows:

Est puni d'un an d'emprisonnement et de 300 000 F d'amende le fait, au moyen d'un procédé quelconque, volontairement de porter atteinte à l'intimité de la vie privée d'autrui:

1. En captant, enregistrant ou transmettant, sans le consentement de leur auteur, des paroles prononcées à titre privé ou confidentiel;
2. En fixant, enregistrant ou transmettant, sans le consentement de celle-ci, l'image d'une personne se trouvant dans un lieu privé.

Lorsque les actes mentionnés au présent article ont été accomplis au vu et au su des intéressés sans qu'ils s'y soient opposés, alors qu'ils étaient en mesure de le faire, le consentement de ceux-ci est présumé.  
 (*Nouveau code pénal*, article 226-1, loi du 17 juillet 1970)<sup>1</sup>

This law at the time was nicknamed the *loi BB*, since it was aimed principally at protecting film stars from the over-zealous attentions of the paparazzi, and since, in the 1960s, France's main prey, stalked inces-



santly, was none other than Brigitte Bardot. Prior to the 1970 legislation, Bardot had protested against intrusions, and won, notably on one occasion when she had been photographed in *petite tenue* on her own premises. The Court deemed that the use of a telephoto lens to take pictures without her knowledge, in her own home and when she was not engaged in any professional activity was an unreasonable invasion of her privacy, and that 'le droit de la personne sur son image ne saurait souffrir d'exception pour les vedettes de l'art ou les personnalités publiques',<sup>2</sup> unless they were on public duty and their permission had therefore been presumed to have been given. The law of 17 July 1970 ensures that there are explicit civil and criminal sanctions available to deal with violations, article 9 in the *Code civil* clearly mentioning seizure as a preventative step and even authorizing the vague and far-reaching threat of 'toutes mesures', all to be carried out as emergency or urgent measures if deemed necessary by the judge and providing for compensation for hurt – usually proportionate to the gravity of the fault and the amount of money made (or potentially made) from the revelations (Morange 1995, 170). Under the terms of the *Code pénal*, an offender can receive a prison sentence accompanied by a fairly heavy fine. The person to suffer the penalty in such a case would normally be the perpetrator of the offence, although the editor of the publication, the printers and those making the publication available for sale can also be sued as accomplices, and in any event the editor of the publication is ultimately liable if the perpetrator of the offence is unknown or unavailable (Bilger and Lebedel 1991, 43-44).

### Droit à l'image

As we have seen, article 9 of the *Code civil* simply refers to *respect de la vie privée* and *l'intimité de la vie privée*, but the *Code pénal* goes further and outlines certain specific violations of *vie privée*, and notably, of interest for the purposes of this paper, taking or publishing the *image d'une personne* without their consent. This *droit à l'image*, also described by Professor Jacques Robert as the *droit au secret de l'être* (Lebreton 1996, 258), is seen as an extension of the rights that each individual has over his own body, of which the image is a visual

representation (Rivero 1977, 75), and understands one's image or photograph to be an item of one's private property, a concept completely foreign to English law. The *Code pénal* also refers specifically to the intrusion of a private place (*lieu privé*), suggesting perhaps therefore that those snapped in public places are 'fair game'. However, even this appears to be open to interpretation. For example, the *Tribunal de Grande Instance* of Nanterre made the following ruling on 15 February 1995:

Tout individu, fût-il célèbre, a droit au respect de l'intimité de sa vie privée et est fondé à en obtenir la protection en fixant lui-même les limites de ce qui peut être diffusé à ce sujet.

Dans les mêmes conditions, chacun dispose sur sa propre image, attribut de sa personnalité et sur l'utilisation de celle-ci, d'un droit exclusif qui lui permet de s'opposer à sa reproduction et à sa diffusion sans autorisation de sa part. (*Gazette du Palais*, 1995, 'Vie privée', (4 1500), 348)

This ruling was made in connection with several articles published in *France-Dimanche* dedicated to an alleged rift between Yves Montand's adopted daughter, Catherine Allégret, and Carole Amiel, his companion in later years, articles which were accompanied by four photographs of Catherine Allégret.<sup>3</sup> Although it is true that in this case the entire spread came under fire, the articles being deemed as having 'porté atteinte à l'intimité de la vie privée de Catherine Allégret', the photographs are given a special mention – three were taken in public places, and therefore possibly excusable, but two of them showed purely private circumstances (Catherine Allégret grieving at Montand's funeral, and another with him before his death), and were used in such a way as to give credibility to the offending text. The Court considered that there had indeed been an infringement to Allégret's *droit sur son image*.

### Lieu privé

So what *is* considered to be a *lieu privé*? It would seem that the Courts consider the *respect de la vie privée* as an extension of the *inviolabilité du domicile* (the sanctity of the home), a concept which existed in French law long before the founding of the Fifth Republic, formalized by decree in

1791 and subsequently recognized by various constitutions and charters.<sup>4</sup> Regularly considered as a person's *domicile*, and therefore inviolable, are not only a person's principal residence, but also any other residences or holiday homes, their grounds, balconies, courtyards and so on, regardless of their state of repair or of the fact that they may not actually be inhabited, so long as this could theoretically be a possibility. Boats and caravans, hotel rooms and occasionally the place of work are also considered as *domiciles*, but not, however, cars, nor yet restaurants, cafés or shops during opening hours (Morange 1995, 174-75). So cases have been brought – and won – by film stars and princesses photographed on boats (the Grimaldi family),<sup>5</sup> and by the Duchess of York against *Paris Match* for its coverage of the famous toe-nibbling incident with her financial adviser, featured in its edition of 3 September, 1992, for which she was unable to gain any sympathy in this country against the English tabloids (Chatelain and d'Antoni 1998, 34).

In 1995 Éric Cantona was also successful in a case against the magazine *But*, but not under article 9 of the *Code civil*, since the photographs concerned in this incident had not been taken 'dans un lieu privé ou dans des circonstances de cet ordre'<sup>6</sup> (note the reference to *circonstances de cet ordre*, seeming to extend the definition of what constitutes a *lieu privé*). However, it was felt that the rights to his image had been violated, and that compensation should be awarded under the terms of article 1382 of the *Code civil*, relating to compensation.<sup>7</sup> Although a celebrity is presumed to consent tacitly to being photographed in a public place while going about his professional business, as soon as this consent is *seen* to be withdrawn by a deliberate refusal from the victim to see photographs of himself published, then an offence has been committed. For Cantona, this was all the more the case since his image was already associated with various commercial activities, and was therefore a source of revenue, and it was clear that *But* was using photographs taken without the star's consent to attract purchasers. However, Courts are known to be rather less sympathetic in their judgements towards stars who, by the nature of their profession and of their own behaviour, appear to be drawing the attention of the media in order to benefit from it. In other words, you cannot both have your cake and eat it. In the Cantona case, the bottom line was that he had not consented to use of his image, because rights had already been sold to others. The Court did not hesitate to underline that:

Il ne s'agit pas d'informations d'ordre intime excédant ce qu'une personnalité notoirement connue, ayant accepté d'exercer son activité professionnelle en s'exhibant sous les yeux du public, spécialement exposée en cela au 'feu' des médias qui contribuent d'ailleurs à sa notoriété, et dont la sphère de la vie privée ne peut dès lors recouvrir les mêmes limites restrictives que celle d'un particulier anonyme, doit s'attendre à voir divulguer sur elle. (*Gazette du Palais*, 1995, 'Vie Privée' (41500), 347)

## Relations familiales et sentimentales

There would appear to be yet another strand to *vie privée*, which protects human relationships. Traditionally, in France, family relationships have been protected by jurisprudence, and also more recently, under the Fifth Republic, by article 8(i) of the European Convention on Human Rights, which declares that everyone has the right to respect for his private and family life, his home and his correspondence, and this right would appear to be extended to sentimental relationships outside of the family circle as well. Thus, although François Mitterrand's double life and illegitimate daughter, Mazarine, were no secret to the press, their existence was only revealed when it suited Mitterrand to do so (Chatelain and d'Antoni 1998, 34), contrasting strongly with the leaking of sleaze which obsesses the Anglo-Saxon world. Furthermore, Article 226-13 of the *Code pénal*,<sup>8</sup> divulging information which can be of the most intimate nature, legislation of which Mitterrand's doctor, Gübler, fell foul in his book *Le Grand Secret*, whose publication was withheld on the grounds of 'intrusion particulièrement grave dans l'intimité de la vie privée familiale du Président F Mitterrand et dans celle de son épouse et de ses enfants'.<sup>9</sup> We can now turn to look briefly at the matter of secrecy in criminal trials.

## Secrecy

As well as exuberant coverage given to confidential information and photography of the rich and famous, another type of unwelcome publicity is the violation of the *présomption d'innocence* and of what is referred to in France as the *secret de l'instruction*, and it can, of course, be particularly dangerous. The *instruction* is the investigation process carried out by the examining magistrate, or *juge d'instruction*, in a criminal case, a function carried out by the police in Britain. According to French law, as in other democratic countries, a person is innocent until proven guilty, a principle underlined by article 6(2) of the European Convention on Human Rights.<sup>10</sup> However, many have had cause to doubt this principle – including some celebrities, with a recent victim being none other than Robert de Niro, questioned in connection with a scandal involving call-girls whilst filming in France in February 1998 (Brandeau 1998, 12) and treated, he claimed, as a criminal by the *juge d'instruction* responsible for the case. De Niro was so horrified to see his photograph, the name of his hotel, and details of the case in the newspapers that he decided to sue *juge* N'Guyen, the *juge d'instruction*, for violation of the *secret de l'instruction* under the terms of article 9-1 of the *Code civil*, which states:

Chacun a droit au respect de la présomption d'innocence. (*Code civil*, article 9-1, loi 4 janvier 1993)

Lorsqu'une personne placée en garde à vue, mise en examen ou faisant l'objet d'une citation à comparaître en justice, d'un réquisitoire du Procureur de la République ou d'une plainte avec constitution de partie civile, est, avant toute condamnation, présentée publiquement comme étant coupable de faits faisant l'objet de l'enquête ou de l'instruction judiciaire, le juge peut, même en référé, ordonner l'insertion dans la publication concernée d'un communiqué aux fins de faire cesser l'atteinte à la présomption d'innocence, sans préjudice d'une action en réparation des dommages subis et des autres mesures qui peuvent être prescrites en application du nouveau Code de procédure civile et ce, aux frais de la personne, physique ou morale, responsable de l'atteinte à la présomption d'innocence. (*Code civil*, article 9-1, loi du 24 août 1993)

The *secret de l'instruction* is also protected by article 11 of the *Code de procédure pénale*, which reads as follows:

Sauf dans les cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète.

Toute personne qui concourt à cette procédure est tenue au secret professionnel dans les conditions et sous les peines des articles 226-13 et 226-14 du Code pénal. (*Code de procédure pénale*, article 11)

Article 226-13 of the *Code pénal* promises heavy fines of one hundred thousand francs and a year in prison to those violating the *secret professionnel*, and article 226-14 simply outlines occasions when the law authorizes or requires the revelation of such confidential information. A newspaper publishing information which violates the *secret de l'instruction* becomes an accomplice, and also liable to prosecution. So, if the *secret de l'instruction* and *présomption d'innocence* are so well-protected, how does it happen that they are apparently so frequently flouted? Part of the reason would appear to lie in the interpretation of the terms of article 11 of the *Code de procédure pénale*. 'Toute personne qui concourt à cette procédure' is usually interpreted by the courts as referring to the judges, the prosecution, the police and lawyers of the various parties, i.e. the legal professionals, but not to the accused, the victim or the witnesses involved in an investigation in progress, who may speak freely, within certain limits, of course, beyond which one transgresses laws on defamation. The accusation is often made that 'ceux qui ne savent rien parlent et ceux qui savent quelque chose sont tenus au silence'.<sup>11</sup> However, the *juge d'instruction* and the public prosecutor are also legally entitled to publish information relating to the case if they feel this may help advance the case, and in particular, if they feel it is necessary to correct a wrong impression which has been gained through media coverage. This somewhat ambiguous state of affairs regarding a commitment to the *présomption d'innocence* goes some way to explaining the constant leaking of information, coupled with a desire by often overburdened *juges d'instruction* to further their investigations, especially where the culprit is unknown, to 'nail' high-ranking offenders, hitherto often perceived as out of the reaches of the law. Publicity can be seen as the only way to avoid a scandal being hushed up (we need only consider the wave of scandals involving political and business personalities in the eighties and nineties) aided by the rise in investigative journalism and technological advances in the media. It may, of course, also be true that a fine of one hundred thousand francs is considered a fairly light penalty to

pay for being the first newspaper to break a story. Unfortunately for the victim of such indiscretions, the results can be devastating, leading to sullyng the name of the innocent – for many will think that there is no smoke without fire – or influencing the chances of a fair trial for the suspect who ultimately is charged.

In the course of the Fifth Republic, it has become virtually impossible for public figures to keep their private life private. Powerful telephoto lenses and an ever-increasing interest in investigative journalism are able to satisfy the curiosity of all but the most avid fans, and it has become necessary to develop laws which will control the use of hot information. The legislation is in place to protect the interests of the individual in terms of privacy and secrecy, and, from rulings which have been made, we can see the will of judges and courts to enforce this legislation. There is, however, a certain unease and this is seen especially in matters where confiscating or seizing a publication is concerned, and judges are loath to take this step unless they consider an ‘immixtion intolérable’ in the privacy of an individual has been committed, since this is seen as a very real threat to the freedom of expression, a principle defended by the *Déclaration des droits de l’homme et du citoyen*,<sup>12</sup> by the European Convention on Human Rights<sup>13</sup> and the Universal Declaration of Human Rights respectively,<sup>14</sup> and a principle especially dear to the French since the restrictions imposed on news communications during the two world wars. Numerous laws, regularly updated, dictate what the press may or may not do, with legislation passed on 29 July 1881 still being the basis. It is, of course, all too easy to see journalists as reprehensible here, although, as they themselves point out, they also play an important role in protecting human rights, delving into miscarriages of justice conveniently ignored by the authorities, focussing media attention on the shady deals of politicians and leading industrialists. In any event, despite legislation on privacy and secrecy developed during the Fifth Republic, despite calls from the general public to protect these rights, journalists will no doubt continue to find a way to print their stories – and we will no doubt continue to buy them.

## Notes

1. The original text of the *Code pénal*, loi du 17 juillet 1970, reads thus: Sera puni d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000, ou de l'une de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:
  1. en écoutant, en enregistrant ou transmettant au moyen d'un appareil quelconque des paroles prononcées dans un lieu privé par une personne, sans le consentement de celle-ci;
  2. en fixant ou transmettant, au moyen d'un appareil quelconque, l'image d'une personne se trouvant dans un lieu privé, sans le consentement de celle-ci.
 Lorsque les actes énoncés au présent article auront été accomplis au cours d'une réunion au vu et au su de ses participants, le consentement de ceux-ci sera présumé (Article 368, *Ancien code pénal*, loi du 17 juillet 1970).
2. Decision of the *Cour de Paris*, on appeal, 27 February 1967, see Malherbe 1968, 5.
- 3 'Montand – deux femmes, deux façons d'aimer', *France-Dimanche*, 28 May-3 June, back page and 'Montand – Autour de son souvenir et de l'amour qu'elles lui ont porté', *ibid.*, 24.
- 4 Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton 1996, 257.
- 5 Decision of the *Cour d'Appel de Paris*, 30 March 1981, see Costa 1986, 79.
- 6 *Gazette du Palais* 1995, 'Vie privée' (4 1500), 347.
- 7 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer' (*Code civil*, article 1382).
- 8 La révélation d'une information à caractère secret par une personne qui en est dépositaire, soit par état soit par profession soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100 000 francs d'amende (*Code pénal*, article 226-13).



- 9 Decision of the *Tribunal de Grande Instance*, Paris, 18 January 1996. The author and editor were found guilty of *violation du secret professionnel* (*Tribunal de Grande Instance*, Paris, 5 July 1996); see Turpin 1996, 224.
- 10 Article 6(2) of the European Convention on Human Rights reads: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.
- 11 Commission justice pénale et droits de l'homme, *La Mise en état des affaires pénales*, Paris: La Documentation française 1991, 309.
- 12 La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi (Article 11, *Déclaration des droits de l'homme et du citoyen*).
- 13 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises (Article 10 (1), *European Convention on Human Rights*).
- 14 Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19, *Universal Declaration of Human Rights*).

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(2000) 49 International and Comparative Law Quarterly 199

## International & Comparative Law Quarterly

2000

### Private life and public image: privacy legislation in France

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**Subject:** Human rights

**Keywords:** Celebrities; France; Press; Privacy

**\*I.C.L.Q. 199** IN October 1998, at the height of the Monicagate scandal, the publication by the French publisher Plon of a novel which recounts the adulterous relationship in the 1960s between a politician bearing a marked resemblance to François Mitterrand, and a journalist, provided an interesting comparison between the attitudes of the French and of the Americans to the romantic dalliances of their respective leaders. For Jeanne Dautun's work of fiction *Un ami d'autrefois* is most certainly no *Monica's Story*, and French reactions to their President's lengthy extra-marital relationship with Anne Pingeot have been at the very least understanding, if not even compassionate. In France, the small gathering of graveside mourners amongst whom Mitterrand's mistress and illegitimate daughter Mazarine took their places shocked no-one, although many an eyebrow was raised in the United States. In truth, Mitterrand manipulated the release of information about his private life all along the line, "coming clean" only progressively with his approaching death. Although the general public knew nothing of his double life, journalists had been very much aware of the existence of this second family for a great many years, but had revealed nothing. The respect of his privacy in this relationship and the reactions of fellow French politicians to his unashamed infidelity contrast sharply with the fate reserved for Bill Clinton, the indiscretions of his private life exposed in the nation's press for all to enjoy. We may ask ourselves if French journalists are perhaps more gentlemanly, less cut-throat than their Anglo-Saxon counterparts. Or are the clichés which describe latins as inveterate romantics and lovers true after all? Or are these irrational judgments supported by powerful French legislation protecting the individual's right to privacy? This article aims to examine the main texts relating to infringements of privacy in France, highlighting in particular those committed by the press against public figures and celebrities.

For the French, public life and private life are quite separate; being slightly less than truthful about events occurring in one's private life is considered completely irrelevant to one's role in public office. The private and the public do not mix. A survey carried out by *Ipsos-Le Point* in September 1998, at the height of Clinton's troubles, demonstrated clearly French feelings on the whole Monicagate episode. On press reporting, a massive 88% of those questioned felt that the American media had gone too far in its treatment of the affair, only 8% felt that Clinton should consider resigning and a resounding 85% of respondents replied "non" to the question "Un homme politique est-il condamnable quand il ment sur sa vie privée?" (Should a politician be taken to court when he lies about his private life?).<sup>1</sup> In fact, remarkably little is published in French newspapers and magazines relating to the private lives of French public figures. Under the Fifth Republic there

have been only three notable exceptions to the silence of the press in this respect. The first of these in 1974 revolved around President Valéry Giscard **\*I.C.L.Q. 200** d'Estaing's nighttime peregrinations, from which he returned in the early hours of the morning to the Elysée Palace. Concerns were expressed at the potential indiscretions of the President in a system where he is seen as the sole repository of power, and they quite overshadowed the faint murmurings there had been about the declining health of his predecessor, Georges Pompidou. In 1991, the silence was broken once again, but this time of his own volition, by former socialist prime minister Michel Rocard who disclosed the news of his divorce in an interview with the weekly newsmagazine *Le Point* (2 November 1991). During the interview, he voiced his hopes that the press would thereafter respect his privacy in the matter, adding "We are fortunate enough not to experience the American syndrome, where the private lives of any public figures are exposed in minutest detail".<sup>2</sup> The third occasion was precisely that of the disclosure of the existence of President Mitterrand's illegitimate daughter Mazarine, revealed to the public in a spread in *Paris Match* in November 1994. Interestingly, this step was denounced by some as an invasion of privacy, despite the fact that, in journalistic circles, the relationship had been an open secret.

This state of affairs does not mean to say, of course, that no salacious stories at all appear in the French press, nor that the French do not enjoy reading about the intimate secrets of the rich and famous. For of course, there is a flourishing sensational press which thrives on publishing full-colour photographs and outrageous revelations about well-known figures. It would appear, however, that those who fall prey to the highly intrusive telephoto lenses of photographers from magazines such as *Parish Match*, *Ici Paris* and *Void* are selected differently. Members of foreign royal families, celebrities of the stage, screen and sports field are all fair game, with few holds barred. Politicians *can* expect to be victims--but they will usually be implicated in some fraudulent or otherwise corrupt affair, as opposed to a sex scandal. Roland Dumas, for example, has seen his dirty linen washed in public; however, the starting point for this was not his relationship with Christine Deviers-Joncour, but rather accusations of corruption at a financial level. The possibility of an image of the French president embracing an administrative assistant at the Elysée appearing in the national and international press and on television in the way we have all seen Clinton and Lewinsky captured is remote.

The constant desire to know more and more about those in the public gaze has caused journalists to go to ever greater lengths to snap the definitive shot, to sell it for a small fortune and then wait for the compensation claims to roll in. Ten million francs are reputed to have exchanged hands for photographs of Diana and Dodi's kiss in the summer preceding her death in 1997. However, since the furore surrounding the role of the paparazzi in the Princess of Wales' fatal accident and the vast sums of money paid for photographs of the kiss and of the crash, news editors have been rather more cautious in terms of what they will print and how much they will pay. Fifteen million francs were paid out to stars by way of compensation for violation of privacy through intrusive photography by the **\*I.C.L.Q. 201** magazine *Void* (the French version of *Hello* ) in 1997 alone--and this not counting the lawyers' fees! Indeed, the Daniel Agnelli news agency confesses that--post Diana--it will now pay only 10,000 francs for a photograph

which would have fetched ten times that sum in the past, and to reduce the risks of expensive compensation claims, French magazines have turned to running features on foreign stars, as opposed to their own (entitled to the same justice, but less likely to know it), even though these have proved less popular with their readership.<sup>3</sup>

In Britain, self-regulation is the basis for press-reporting on celebrities. French Law, by contrast, contains a number of texts intended to restrict quite severely violation of the privacy, or *vie privée*, of the individual. Traditionally, judges ruling on interferences in privacy turned to jurisprudence and to texts from Commercial Law, supporting their judgements with legislation on authorship and copyright, on the right to one's name, on *Us droits du modèle* (legislation which ruled that an individual was the owner of any likeness made of him, be it painted engraved or sculpted, and of the use which was made of it), including *Its droits du modèle photographié* (legislation relating purely to one's rights over one's photographic image) as attributes of his own person, and to general legislation relating to privacy. Indeed, judges tended to adopt a hard-line approach to infringements of the "*droit à l'image* " of an individual. Courts ruled that it was unlawful to photograph an individual without his consent, even if the photograph was not for subsequent publication, and the victim could expect compensation. However, the whole issue of consent was a problematic one--and remains so--since consent for the photograph to be taken may appear to be given, in so far as the subject may pose willingly for the camera, without necessarily wishing to authorise the subsequent *publication* of the image. In the 1960s, Advocate General Lindon outlined the hypothetical example of a couple snapped arm in arm at a car show, admiring an expensive car. A successful protestation could be made against the publication of the photograph, for, in this fictitious example, the outing was a clandestine one, of which the gentleman's lawful wife was unaware ... In such a case, he felt that it was reasonable to expect payment of compensation for violation of his private life.<sup>4</sup>

In France today, rulings on infringements of privacy committed by the press refer to legislation found in the Civil Code (*Code civil* ), the Criminal Code (*Code pénal* ) and the European Convention on Human Rights, which emphasise concepts such as the *droit a l'image* (right to one's image), *lieu privé* (private place) and the inviolability of *relations familiales et sentimentales* (family and private relationships), as well as continuing to support judgements by referring to jurisprudence. A contentious issue in this area has been what is actually understood by privacy or *vie privée*, and judges must form their own definition from judgements previously made. The starting point is generally taken to be that *vie privée* is the "secret domain where every individual has a right to be left in **\*I.C.L.Q. 202** peace" (*la sphère secrète où l'individu aura le droit d'être laissé tranquille*<sup>5</sup> ). However, the lack of precision of this definition--which was intentionally left open in order for changes in the perception of privacy--naturally allows considerable flexibility in interpretation, which may vary according to the circumstances and to the person dealing with them.

Today, the mainstay of legislation on violation of privacy in the context of intrusions by the press is the law of 17 July 1970. This law modified both the Criminal and Civil Codes, providing a framework for sanctions in both criminal and

civil courts, sanctions which are not to be taken lightly in terms either of the extent of the definition of the offence or the limit of the penalty imposed. Article 9 of the Civil Code states the following:

Everyone should be able to expect their privacy to be respected. The judges may, without adversely affecting a compensation claim, prescribe any measure whatsoever, such as sequestration, seizure of goods, or any other measure with a view to preventing or bringing to an end an intrusion into the intimate nature of the private life of an individual. These measures may be implemented by the judge as emergency measures if necessary (See notes for original text).

It would indeed be a bold newspaper editor who would risk seizure of his printing presses in exchange for titillating his readership for a brief season. In the 1970s, Advocate General Lindon ruled that the sentimental life of an individual was something strictly private, and that article 9 of the Civil Code forbade revealing to the general public a genuine or fictitious liaison.<sup>6</sup> However, a distinction is made between the privacy (*vie privée*) of an individual and the intimate nature of his or her private life (*intimité de la vie privée*), the legislation only punishing severely an infringement of the latter. This second notion is more restrictive and is taken to relate to matters concerning marital or sentimental relationships usually kept hidden from other parties.<sup>7</sup> Even so, such legislation in the States would perhaps have saved Clinton some embarrassment, and it certainly enabled Mitterrand to keep his relationship with Anne Pingeot under wraps. Article 1382 of the Civil Code provides for compensation to be made to the person whose privacy has been invaded, stating: "Any act performed by an individual which causes hurt to another obliges the person responsible for that hurt to make compensation for it" (see notes for original text). The protection offered to family relationships has been reinforced by article 8 of the European Convention on Human Rights, which states the following:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or **\*I.C.L.Q. 203** morals, or for the protection of the rights and freedoms of others. (Article 8, European Convention on Human Rights, 1950.)<sup>8</sup>

Judges, it appears, consider extra-marital, sentimental relationships to be covered by "private and family life". A woman, following the instructions of the court which required her to gather evidence confirming the infidelity of her husband, was nevertheless found to be acting illegally when she revealed her findings to the husband of her rival, without the consent of the latter. The court ruled that she had contravened article 9 of the Civil Code, and that her intention had been to seriously damage the quality of her husband's mistress' private life. It was the cheated wife who was ordered to pay compensation to her rival.<sup>9</sup> Compensation to be made has traditionally been calculated by the judges to be in proportion to the harm done to the injured party and to the amount of money made or potentially made from the disclosures, which can naturally, in the case of a well-known public figure, reach

very high sums.[10](#)

For its part, the Criminal Code saw five of its articles altered by the law of 17 July 1970 (articles 368-372), the most noteworthy of these now reading, since revision of the Code in 1994:

The act of intentionally infringing the privacy of another individual using any process whatsoever by

1. Picking up, recording or transmitting words spoken in private or confidentially, without the consent of the speaker,
2. Imprinting, recording or transmitting the image of a person in a private place without his or her consent;

carries a sentence of one year in prison and a fine of 300,000 francs. If the acts mentioned in this paragraph are performed in the sight and with the knowledge of those concerned without their opposition, at a time when they could have protested, the consent of the individuals is presumed to be given (Revised Criminal Code, article 226-1, law of 17 July 1970; see notes for original text).

This will remind many of the actions of the Princess of Wales in France, when, pursued by photographers, she demanded they hand over film of photographs they had shot without her permission. This paragraph would also certainly have posed problems in the use of secret recordings of conversations as any form of evidence, such as those made by Linda Tripp of conversations with Lewinsky in the Clinton case. In France, the recording of telephone conversations by private individuals is also, of course, strictly illegal and is punishable under article 225 paragraph 15 of the revised Criminal Code, a paragraph which also incriminates tampering with another person's electronic mail--certainly retrieving erased messages from the waste bin!

The act, committed with malicious intent, of opening, destroying, delaying or diverting mail which may or may not have reached its destination and which is addressed to a third party, or to gain knowledge of the correspondence by fraudulent means, carries a sentence of one year in prison and a fine of 300,000 francs. Likewise liable to the same sentence and fine is the act, committed with malicious intent, of intercepting, diverting, using or making public correspondence sent, **\*I.C.L.Q. 204** transmitted or received by the means of telecommunications, or of installing equipment designed to carry out such interception (Revised Criminal Code, Article 226-15. See notes for original text).

This legislation is rigorously applied by the courts, but of course does not present an obstacle to the police or examining magistrate, who may waive such constraints in the search for the truth (articles 56 and 81 of the Code of Criminal Procedure).

At the time the law of 17 July 1970 was passed in France, the intention was not specifically to protect the president, nor even other political figures. The law was actually referred to with some humour as the *loi BB*, after the principal personality who would probably need to have recourse to it: Brigitte Bardot. Brigitte Bardot had already brought cases against intrusions in her privacy, which were numerous. She had been photographed scantily clad in her own home at Bazoches, sitting on a bench, and in a car in the street setting out for her home. Despite murmurings that, by the very nature of their work, stars are always on public show, the courts



ruled that the use of a telephoto lens to take pictures without her knowledge, in her own home and when she was not engaged in any professional activity was an unreasonable invasion of her privacy, and that "the rights an individual has over his own image must not exclude showbusiness artistes or public figures" (le droit de la personne sur son image ne saurait souffrir d'exception pour les vedettes de l'art ou les personnalités publiques)<sup>11</sup>, unless they were on public duty and their permission had therefore been presumed to have been given. The final decision reached, the person to pay the price in cases of invasions of privacy is usually the person who has committed the indiscretion, although the editor of the publication, the printers and those making the publication available for sale can also be sued as accomplices, and it is the editor of the publication who is ultimately held responsible if the perpetrator of the offence is unknown or unavailable.<sup>12</sup>

The *droit à l'image*, outlined above, does not figure in English Law. French Law perceives the individual's image to be an item of his or her private property, since the rights over one's image are seen as extension of the rights that each individual has over his own body, of which the image is a visual representation.<sup>13</sup> Therefore, contravening the rights to someone's image is invading his or her privacy. More recently than the above example, the French television channel TF1 was successfully prosecuted for showing in its reality show *Les marches de la gloire* images of a man, Laurent Gilles, falling from a burning building, dragging a woman with him. An interview with the plaintiff, given solely for use by a German programme, had been used by TF1 alongside footage of the fire, in the form of a montage relaying the most dramatic shots in slow motion with selected parts of the interview in voice-over, as if the main protagonist were actually commenting his acts. In fact, this was not the case, although negotiations were underway for his participation in the show. The court ruled that TF1 had contravened article 9 of the Civil Code, in addition to exploiting this incident for commercial ends rather than for the documentation and education of the television audience, by showing **\*I.C.L.Q. 205** the scenes at peak viewing time, and granted compensation of 100,000 francs. The ruling emphasised the following:

Everyone has the right to expect the intimate nature of his or her private life to be respected, and is entitled to its protection by defining himself or herself the limits of what may be revealed in this respect.

Likewise, every individual also possess the exclusive rights to his or her image, an attribute of one's own person, and to the use which is made of it, and consequently may oppose the reproduction and publication of this image without his or her permission being explicitly given or being understood to have been given (Ruling of the Tribunal de grande instance, Nanterre, 18 April 1995, reported in the *Gazette du Palais*, 1995, volume I, p.279, see notes for original text).

Other rulings made in the case of celebrities emphasise the universality of this legislation, adding "fut-il célèbre" (even if he is famous) to the definition of the person concerned.

The second paragraph of article 226-1 of the Criminal Code also talks of the intrusion of a private place (*lieu privé*) as an offence, appearing to make a distinction between the public and private domains in this respect. This emphasis would appear to indicate that an individual photographed in a public place is

knowingly exposing himself or herself to the public gaze and can therefore expect no special protection from the law, in other words, you can only expect to be entitled to privacy in a private place. However, French courts appear to look sympathetically on incidents which can genuinely be described as violations of privacy even though they take place in public places, as can be seen in the above example. The court ruled that, although this episode took place in public, it recounted a particularly tragic incident in Monsieur Gilles' private life, since it was a life-threatening incident, and therefore his privacy had been invaded. A similar judgement was made concerning photographs taken at the funeral of the actor Yves Montand, photographs taken in a public place, but of infinitely private scenes of grief. The offending party, the weekly magazine *France Dimanche*, was ordered to pay 80,000 francs in compensation to Catherine Allégret, Montand's adopted daughter.<sup>14</sup>

The idea of *lieu privé* is a projection of a concept that the French have long revered, the sanctity of the home (*l'inviolabilité du domicile*); The law of 3 July 1877 stated "The inhabitants of a property will never be evicted from the room and the bed where they regularly sleep".<sup>15</sup> Jurisprudence, too, gives a broad definition to the term *domicile*. It is not simply an individual's home address, but any place where he has the right to describe himself as being at home, whether he actually resides there or not. Into this category fall caravans, outhouses, balconies, terraces, courtyards, grounds, even those poorly protected from prying eyes and badly maintained. Holiday flats and hotel rooms can also be considered *domiciles*, as can the place of work, although this is generally less well-protected by law, and boats, but not cars. Commercial premises such as restaurants, cafés and shops during opening hours are not considered as *domiciles*.<sup>16</sup> Many a royal has **\*I.C.L.Q. 206** protested against photographers directing telephoto lenses at her yacht. A recent case of note is probably the attempt by Mohammed Al Fayed to incriminate the photographers who hounded his son and the Princess of Wales during the summer of 1997, which they spent in the south of France and on the Mediterranean. The Duchess of York, too, was successful in her case against *Paris Match* for its reporting on her holiday in France with her two young daughters and the "shrimping" episode with her financial adviser featured in the edition of 3 September 1992; in this country, the English tabloids also exploited this incident mercilessly, but were untouchable.<sup>17</sup> However, taking photographs or fingerprints during a police investigation is not an infringement of an individual's privacy or *droit d'image*, since a police station cannot be considered to be a private place. And the seizure of Madame Tiberi's personal diary during a search of the Mayor of Paris' private apartment in June 1996, although most definitely a violation of privacy, was justified by the need to further the enquiry.<sup>18</sup>

Another text protecting the private life of the individual is article 226-13 of the Criminal Code, which concerns professional secrecy:

The divulging of confidential information by a person entrusted with such information, either due to his function or the nature of his profession on a temporary or permanent basis is liable to a sentence of one year in prison and a fine of 100,000 francs (see notes for original text).

President Mitterrand's family were to avail themselves of this legislation in relation

to the intended publication of a book, *Le Grand Secret*, by Mitterrand's doctor, Gübler, who cared for him in the period leading up to his death. On 18 January 1996, the Tribunal de Grande Instance in Paris ruled that the author and editor were guilty of violating professional secrecy and had invaded the intimate nature of Mitterrand's, his wife's and his children's privacy. This legislation enabled both Presidents Mitterrand and Pompidou to keep secret the fact the country was being run by men seriously ill, the fact that their illness could conceivably have rendered them less than competent to remain at the leadership of the country apparently taking second place to their right to privacy. This again forms an interesting contrast with United States' president Ronald Reagan's candid admissions of suffering from both cancer and Alzheimer's disease.

We can see, therefore, that a number of texts exist in order to protect the privacy of the individual, laws which are enforced in the case of public figures and the more humble man or woman in the street. There is also, however, a strong cultural context which insists that a person's private life has no bearing on his public function and refuses to indulge in the spreading of sleaze which has become a feature of Anglo-Saxon politics. Ironically, shock at the treatment of the United States president has even hindered the Justice Minister Elisabeth Guigou in her proposed reforms of the legal system aimed at according greater rights to the defence. For Madame Guigou aims to grant greater independence to the public prosecutor's department (*le parquet*), currently answerable to the Justice Minister, who is of course a member of the government in power. In addition, **\*I.C.L.Q. 207** under debate for some time now has been the shifting of some of the responsibility for pre-trial incarceration of suspects from the already over-burdened shoulders of the examining magistrate (*juge d'instruction*) to the *parquet*, thus quashing the accusation that the examining magistrate is responsible not only for collecting evidence in a case, but also for judging his own case, empowered to remove the liberty of an individual based purely upon his own findings. The famed Starr Report, which revealed only too clearly the extent of the powers of the US independent prosecutor, was read in fear and trepidation by the French political class, who saw in this report an unhappy marriage of the excessive powers of the American judiciary and the pressure of the media. The tension between an individual's right to privacy and the freedom of the press to report has been highlighted recently by a photo campaign protesting at the bill on the presumption of innocence. A full-page advertisement in the newsweekly *Le Point* shows three photographs: a joyful crowd scene shot after the French football team's World Cup victory in 1998, in which the face of a jubilant supporter is clearly seen; a gruesome photograph of prisoners at Buchenwald concentration camp and an action shot of the assassination of President Kennedy. The rubric "On veut tuer la photo--on tue ainsi la liberty d'informer" (They want to kill photography--that's how you kill the freedom of information) expresses journalists' stance on the interpretation of legislation on the *droit à l'image* and the presumption of innocence.<sup>19</sup>

These three shots would all have earned their authors a heavy fine and a prison sentence, having been published without the permission of the subjects of the photograph. In any event, for the time being both the legislation and the attitude of the general public in France appears determined to support the protection of

privacy--even if the price to pay is less openness in the pages of their newspapers.

## NOTES

### **Article 9, Code civil, loi du 17 juillet 1970**

Chacun a droit au respect de sa vie privée.

Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l'intimité de la vie privée; ces mesures peuvent, s'il y a urgence, être ordonnées en référé. (Article 9, Code Civil, loi du 17 juillet 1970.)

### **Article 226-1 Nouveau code penal, loi du 17 juillet 1970**

Est puni d'un an d'emprisonnement et de 300.000F d'amende le fait, au moyen d'un procédé quelconque, volontairement de porter atteinte à l'intimité de la vie privée d'autrui:

1. En captant, enregistrant ou transmettant, sans le consentement de leur auteur, des paroles prononcées à titre privé ou confidentiel;
2. En fixant, enregistrant ou transmettant, sans le consentement de celle-ci, l'image d'une personne se trouvant dans un lieu privé.

**\*I.C.L.Q. 208** Lorsque les actes mentionnés au présent article ont été accomplis au vu et au su des intéressés sans qu'ils s'y soient opposés, alors qu'ils étaient en mesure de la faire, le consentement de le ceux-ci est présumé. (Nouveau Code Pénal, article 226-1, loi du 17 juillet 1970.)

### **Article 226-15, nouveau Code pénal**

Le fait, commis de mauvaise foi, d'ouvrir, de supprimer, de retarder ou de détourner des correspondances arrivées ou non à destination et adressées à des tiers, ou d'en prendre frauduleusement connaissance, est puni d'un an d'emprisonnement et de 300.000F d'amende.

Est puni des mêmes peines le fait, commis de mauvaise foi, d'intercepter, de détourner, d'utiliser ou de divulguer des correspondances émises, transmises ou reçues par la voie des télécommunications ou de procéder à l'installation d'appareils conçus pour réaliser de telles interceptions. (Article 226-15, nouveau Code pénal.)

### **Article 1382, Code civil**

Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer. (Article 1382, Code civil.)

## **Gazette du Palais, 1395, Ruling of the Tribunal de grande instance, Nanterre, 18 April 1995**

Tout individu a droit au respect de l'intimité de sa vie privée et est fondé à en obtenir la protection en fixant lui-même les limites de ce qui peut être divulgué à ce sujet. Dans les mêmes conditions, il dispose sur sa propre image, attribut de sa personnalité, et sur l'utilisation de celle-ci, d'un droit exclusif qui lui permet de s'opposer à sa reproduction et à sa diffusion sans autorisation expresse ou tacite (*Gazette du Palais*, 1995, vol.1, p.279).

### **Code Pénal, article 226-13**

La révélation d'une information à caractère secret par une personne qui en est dépositaire, soit par état soit par profession, soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100,000 francs d'amende (Code Pénal, article 226-13).

HELEN TROUILLE<sup>20</sup>

I.C.L.Q. 2000, 49(1), 199-208

1. Dufay, F., "La bonne mesure française", *Le Point*, 19 Sept. 1998, pp.72-73.
2. "Nous avons la chance de ne pas connaître le syndrome américain, la vie privée de tout homme public *italic en long et en large*"; *Le Point*, 2 Nov. 1991, quoted in Courtois, G., "En France, par convention, la vie privée des hommes politiques est respectée", *Le Monde*, 17 Sept. 1998, p.7.
3. Guerrin, M., "La mort de Diana a bouleversé les mœurs des paparazzis et de la 'presse people'", *Le Monde*, 1 Sept. 1998, p.19.
4. Malherbe, J., *La vie privée et le droit moderne* (Librairie du journal des notaires et des avocats; comment faire? Paris, 1968) p.4.
5. See Morange, J., *Droits de l'homme et libertés publiques*, 3<sup>e</sup> édition (PUF, Paris, 1995), p.16.
6. Decision of the Tribunal de grande instance, Paris, 2 Jun. 1976, *Dalloz*, 1977, p.364.
7. Decision of the Tribunal de grande instance, Bayonne, 29 May 1976, *Semaine juridique* 1976, second part (Jurisprudence), paragraph 18495, commentary by Bonnais.
8. Harris, D.J. *et al.*, *Law of the European Convention on Human Rights* (Butterworths, 1995) p.302.
9. Decision of the Cour d'appel, Lyon, 2 Jul. 1991, *Dalloz* 1991, p.252 and Cour d'appel, Dijon, 2 Jul. 1991, *Gazette du Patois* 1994, Vol.1, p.237.
10. Morange, J., p.17.
11. Decision of the Cour de Paris, on appeal, 27 fév. 1967, see Malherbe, J., p.5.
12. Bilger, P. et Lebedel, P. *Abrégé des droits de la presse*, 3<sup>e</sup> édition (CFPJ, Paris, 1991), pp.43-4.
13. Rivero, J., *Les libertés publiques*, vol.2 (PUF, Paris, 1977), p.7.
14. Tribunal de grande instance, Nanterre, 15 Feb. 1995, *Gazette du Palais*, 1995, volume I.p.282.
15. "Les habitants ne seront jamais délogés de la chambre et du lit où ils ont l'habitude de coucher."

Morange, J., p.175, note 2.

- [16.](#) See Morange, J., p.174.
- [17.](#) Chatelain, C. and d'Antoni, D., "La presse a-t-elle le droit du tout raconter?" *Ça m'intéresse*, Jun. 1998, p.34.
- [18.](#) Turpin, D., *Les libertés publiques*, 3e édition (Mémentos, Paris, 1996) p.224.
- [19.](#) *Le Point*, 18 Jun. 1999, p.137. "On veut tuer la photo--on tue ainsi la liberté d'informer. Le projet de loi sur la présomption d'innocence présenté au parlement, l'interprétation abusive du droit à l'image et l'arbitraire des procédures créent de nouvelles censures. Elles nous priveront des photos essentielles qui font notre histoire."
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- (vi) Trouille HL, 'Modes of detection in the crime reality show' in O'Beirne E and Mullen A (eds), *Crime Scenes: Detective Narratives in European Culture since 1945* (Rodopi 2000)

Helen Trouille

## Modes of Detection in the Crime Reality Show

This article sets out to examine the function in the solving of crime of two well-known crime reality shows and the various detective roles of elements in the two series. The crime reality shows I have chosen to study are *Crimewatch UK* and its French counterpart, *Témoin numéro un* ('Chief Witness'). However, before I come to consider the programmes themselves, a few words about the genre—the crime reality show—will be appropriate.

Firstly, the crime series in general is a genre which is immensely popular. A quick glance at the television viewing schedules can leave one in no doubt about that. In the United Kingdom, titles such as *A Touch of Frost*, *Taggart*, *Dalziel and Pascoe*, *Inspector Morse*, *Prime Suspect*, to name but a few, have long held audiences enrapt at peak viewing times, and they (in dubbed version) or their French equivalent are also extremely popular across the Channel—programmes such as *Taggart*, *Les Cordier juge et flic*, and *Navarro*. For example, an episode of TF1's *Navarro* starring Roger Hanin, screened at short notice in place of the scheduled programme, was watched by 16.7% of viewers on 14 November 1996. This allowed TF1 to record the highest viewing figures for the prime-time viewing slot (9-11pm) in the week 11-17 November 1996.<sup>1</sup> It seems unlikely that the popularity of such programmes will wane in the foreseeable future.

Likewise, acquiring an ever-increasing status in the schedules in both countries are the omnipresent reality shows. Ricki Lake, Leeza, Oprah Winfrey have their regular slots and are real crowd-pullers. But reality shows—shows 'in which ordinary viewers appear on television to enact and discuss their lives, problems or fantasies'<sup>2</sup>—can cover a vast range of subjects and are far from limited to the chat-show format. They do, however, have a number of things in common, and one stands out above the others: 'Le but recherché [...] c'est de faire entendre qu'on veut parler. C'est de permettre à des individus qui ne sont pas des ayant droit, socialement, de pouvoir dire des choses qu'ils ne se sont jamais dites.' ('The aim [...] is to let it be known that you want to talk. It is to allow those who are not empowered, socially, to be able to say things which they have never said to one another.') Thus said Serge Leclair,<sup>3</sup> a leading French psychoanalyst, in defence of the Antenne 2 (the television channel now called France 2) programme *Psy-show*. The forerunner of the French reality show, it features members

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1 'Médiamat Médiamétrie', *Le Monde*, 25 November, 1996, p. 5.

2 Hugh Dauncey, 'Reality Shows on Television: Télévérité, Télé-service, Télé-civisme or Télé-flicaille?', *French Cultural Studies*, 5 (1994), 85-97 (p. 85).

3 Quoted by Chasika Kaden in 'Le Psychanalyste: le théâtre de boulevard, c'est le même principe', *Le Quotidien de Paris*, 26 October, 1983.



of a couple who confront each other to expose to the studio and television audiences the problems in their relationship. Other shared characteristics are the working through of a human crisis, a desire to depict reality, which is often mixed with fiction (e.g. use of reconstructions), audience participation, and a wish to perform some kind of public service by assisting or even replacing the professionals or institutions which have been unable to resolve the crisis exposed. These may be members of the police force, or the judiciary, or the medical profession, or the school, or even the family. This throwing open of the studio to the general public certainly seems to be a formula which has worked.

In the United Kingdom, the crime reality show has proved very successful, with programmes such as *Crimewatch UK* a long-running favourite, and *999*, devoted to all of the emergency services, carving out a niche for itself. These two series feature reconstructions of crimes or calamities, interviews with victims, witnesses, or heroes, and, in the case of *Crimewatch UK*, requests to the general public to call in with information. There is also ITV's *Murder Squad*, a series in which cameras follow police officers as they tackle cases, and a recent addition to the genre is *Trial and Error Live*, a 'new studio show asking viewers for help in investigating people who say they have been falsely convicted',<sup>4</sup> also described as 'a kind of *Crimewatch* in reverse',<sup>5</sup> and shown for the first time on 8 July, 1997. The French crime reality show is also a feature of the schedules. *Perdu de vue* ('Missing'), a series tracing missing persons based on the Italian model *Chi l'ha visto?* ('Who's Seen Him?', screened for the first time by the Italian television channel RAI 3 in April 1989), draws particularly large audiences. In 1993, *Perdu de vue* scooped 15.6% of the audience share when it was broadcast.<sup>6</sup>

There appears to be a fascination for the genre, for what Pascale Breugnot, creator of the French series *Témoin numéro un* amongst many others, calls 'une télévision pour les gens et sur les gens' ('television for people and about people').<sup>7</sup> Typically, such series call upon the *fait divers*,<sup>8</sup> that juicy type of news story that defies definition,

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4 *The Times*, 'The Directory', 5-11 July 1997, (p. 36). *Trial and Error Live* was first broadcast on 8 July, 1997 on Channel 4, 8-8.30pm, and presented by David Jessel and Fi Glover.

5 A. Gulf, 'Crimewatch "in reverse" aims to free innocent', *The Guardian*, 12 March, 1997, p. 5.

6 See 'Typologie', in *De la télévrité au reality show*, ed. by L. Lattanzio (Paris: Documentation française, dossiers de l'audiovisuel, 1994), pp. 59-66 (p. 59).

7 D. Psenny, 'De Lacan au reality-show', *Le Monde Télévision-radio-multimédia*, 9 December, 1996, p. 2.

8 'fait divers' - for a comprehensive definition of the expression 'fait divers' see the introduction to David Walker's excellent book *Outrage and Insight: Modern French Writers and the 'fait divers'* (Oxford and Washington DC: Berg, 1995). Dictionary definitions of the expression range from Oxford-Hachette's 'the "news in brief" column', to Collins-Robert's '(short) news item; trivial event; (news) in brief'. The *Petit Robert* gives: 'nouvelles peu importantes d'un journal' ('unimportant news in a newspaper'), and the *Petit Larousse*: 'événement sans portée générale qui appartient à la vie quotidienne' ('an event without consequence which is part of everyday life'), although these are all somewhat limited.

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as the source of inspiration for their programmes. This interest in the *fait divers* is by no means new. Nor is the *fait divers* merely of interest to a small, socially or culturally deprived minority, but as we have seen through the popularity of its televised, and indeed written form, it has considerable appeal to a great many people. Indeed, many would say now that the television news—and this certainly applies to French television news - has a tendency to give ever greater coverage to minor news items which could justifiably be described as *faits divers*.

Today's television, or 'néo-télévision', to use Umberto Eco's appellation, concerns itself to a great extent with its relationship with its audiences, and seeks to establish some kind of interaction between studio and viewers, between professionals and audience, establishing links between fiction and reality. It is the product of a slide from the rational to the emotional, and is a very real manifestation of postmodernity, as emphasised by Michel Maffesoli of the Sorbonne:

On quitte la *Modernité*, pour entrer dans la post-modernité [...] A la place de la raison est en train de succéder quelque chose qui est de l'ordre de l'émotionnel, de l'affectuel, qui met davantage l'accent sur l'image [...] qui est beaucoup plus sensible qu'intelligible [...] Enfin, au lieu de la société parfaite, à venir, là au contraire ce qui semble mobiliser davantage les gens, c'est ce qui est de l'ordre de la *proxémie*, du localisme. On passerait donc d'une société fondée sur des valeurs rationnelles, de lointain, à des valeurs de participation émotionnelle. (in Lattanzio, pp. 25-6)

(We are leaving modernism to enter the age of postmodernism [...] Something which is of the order of the emotional, involving the feelings, which places more importance on the image [...] which relates more to the senses than to the intellect [...] is taking over from reason. In short, instead of the perfect society of the future, it is rather things which relate to the close-at-hand, to the local which appear to mobilize people more. We would therefore appear to be moving from a society built on distant, rational values to values requiring emotional involvement.)

Nowhere is this more clearly so than in the case of the crime reality show which owes its very existence to the emotional response created within viewers who are sufficiently moved by what they have witnessed on television to pick up their telephones and provide a genuinely interactive dimension to the genre.

### *Background*

*Crimewatch UK* and *Témoin numéro un*, although launched in different decades, are both inspired by the same model, the German television station ZDF's long-running *Aktenzeichen XY ungelöst* ('Case XY Unsolved', as translated by Nick Ross and Sue Cook).<sup>9</sup> This series also gave rise to the Netherlands' *Opsporing Verzocht* (which translates roughly as 'Information Wanted'), screened first in 1974, and America's *Most Wanted*, shown for the first time in 1988. *Aktenzeichen XY ungelöst* was first shown as early as 1967, and was devised by television producer Eduard Zimmermann.

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9 N. Ross and S. Cook, *Crimewatch UK* (London: Hodder and Stoughton, 1987).

following the success of one of his earlier series which has been running for over thirty years, *Vorsicht, Falle!* ('Watch Out! It's a Trap'). This precursor aimed to warn viewers against potential fraud, not by denouncing the criminals themselves, but by exposing their tricks, and was produced in close collaboration with the police. The abundance of correspondence received from viewers in connection with the frauds and fraudsters was indicative of a market to be exploited, a public interest to be put to the test. *Aktenzeichen XY ungelöst* set out, with the aid of viewers across the German-speaking world via the German, Swiss, and Austrian television services and in conjunction with the police, to track down the authors of crimes which the police, using more conventional methods, had been unable to solve.

*Crimewatch UK* was first broadcast in June 1984. It had been brought to the attention of the BBC by a freelance TV researcher, John Stoneborough, who was in possession of a tape of the German programme *Aktenzeichen XY ungelöst*. BBC producer Peter Chafer, who was in the process of compiling a documentary on crime, was immediately intrigued and elaborated the idea. The concept was not completely foreign, since ITV's *Police Five*, a five-minute weekly programme presented by Shaw Taylor, had been running in the London area for a number of years. Here, crimes committed in the capital were exposed, and photofit pictures and car registration numbers released. *Crimewatch UK* was to be 'rather like an extended version of Shaw Taylor's *Police Five*, but it had a magical ingredient. Viewers could actually participate in the programme simply by picking up the telephone and giving information directly to police officers whom they could see, live in the studio' (Ross and Cook, p. 9).

This time, however, the intention was to provide national coverage, to enable all fifty-five police forces to go on the air to appeal for information from the public. Certain features set *Crimewatch UK* apart from *Aktenzeichen XY ungelöst*: the German model, conceived at a time when West Germany was prey to terrorist attacks, somewhat inevitably concentrated its interest on political crises, whereas Peter Chafer was at pains to avoid such a political element, not least because of the delicate situation existing due to the troubles in Northern Ireland. He felt that, far from helping to arrest dangerous terrorists, including terrorist incidents on his programme could be highly problematic, since he would be unable to guarantee anonymity or security to callers, nor to conclude with certainty that an act of violence had been perpetrated for political or simply 'anti-social' ends. Another difference was to be in the representation of the crimes. Chafer felt that the German series tended to play on anxiety, and that some of the reconstructions (for example, a rape viewed through the assailant's eyes) were in particularly bad taste, and that this should be avoided at all costs.

*Témoin numéro un*, inspired by the British model, was launched by the French channel TF1 much more recently in 1993. Television producer Patrick Meney had seen an episode of *Crimewatch UK* whilst on a trip to London, and had been impressed by the potential offered by this series. Despite his fears that such a format, in which the forces of law and order would approach the general public via the television screen to ask for information about crimes, could not possibly work in France, where memories

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of the Occupation and its aftermath, and the scourge of the informant or *délateur*, were all still keenly felt, he nonetheless sought further precisions about the programme from the BBC team. These discussions revealed to him that *Crimewatch UK* had become a veritable national institution, one which worked within certain clearly defined limits, which gave excellent results—both in terms of fighting crime and winning audiences—and which was supported by reports in the press as well. He shared his experiences with Étienne Mougeotte (Vice-President of TF1) and Pascale Breugnot who saw potential for this series, provided that the French Justice Ministry granted its blessing. Acquiring approval from the police and *juges d'instruction*, the members of the judiciary who lead criminal investigations, proved no mean feat, and even when *Témoin numéro un* was officially launched, there were still very mixed feelings and much dragging of feet about this potentially dangerous liaison.

Despite this scepticism, the first episode of *Témoin numéro un* recorded 9 million viewers, although this stabilised later to between 6 and 7 million viewers.<sup>10</sup> Indeed, all three programmes, despite or because of their differing formats, have been highly popular. *Aktenzeichen XY ungelöst* regularly has audiences of 4 million Austrian viewers and 2 million Swiss viewers in addition to its 11 million German viewers (Tomé, p. 36). *Crimewatch UK* has an average audience of 9 million viewers each time it goes on air, and receives some 1,500 telephone calls, either to the studio or to the various police incident rooms.<sup>11</sup>

### *The super sleuth*

The success of the genre in terms of audience ratings has been shown above. But are these series really successful in what they claim to do, that is to say in supporting the forces of law and order in their fight against crime? If we believe their own statistics, then we must recognise quite a considerable degree of success. In July 1997, *Crimewatch UK* boasted of having handled 1,632 cases since the series began in 1984; 514 arrests had been made as a direct result of *Crimewatch's* intervention in what were for the most part very serious offences, and out of these arrests, 42 miscreants had been sentenced to life imprisonment.<sup>12</sup> *Témoin numéro un* is perhaps a little more coy about its success rate, and publication of information is certainly hampered by the secrecy laws which apply to cases under investigation, but nonetheless, within its first year, out of a total of fifteen cases of identification of corpses, eight were successfully concluded (Lattanzio, p. 36), although we are told that the programme was unable to solve any of the major crimes featured during this period (Lattanzio, p. 31). Assassins were

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10 See Françoise Tomé, 'Témoin numéro un - histoire et principes', *Franco-British Studies*, 21 (spring 1996), 35-44 (p. 44), for a full breakdown of the viewing figures for 1993-94.

11 W. Greaves, 'The Crimewatchers', *Radio Times*, 12-18 April, 1997, pp. 28-30 (p. 28).

12 *Crimewatch UK*, broadcast 8 July, 1997, BBC1, 10.20 pm.

apprehended, but *Témoins*'s greatest success was judged by the team to be the re-opening of enquiries which had previously stagnated, and the encouraging of witnesses to assist the police, witnesses who previously may have felt unable to do so. Patrick Meney quotes the classic example of a witness to a crime not daring to report what he had seen as he was in the company of his mistress. Several years later and following a divorce, the entire scenario could so easily have changed, and the witness feel able to speak at last (Lattanzio, p. 36). Meney himself had a personal incentive to make his programme succeed: the murder of the ten-year-old daughter of a friend. The murder enquiry was eventually to conclude that the young girl was the victim of a recidivist known to the police, and that a vital witness had been in possession of essential information for some considerable time, without being aware of its importance. This possibly avoidable tragedy led Meney to believe that it was a civic duty ('devoir civique') to make use of television and the other media in the quest for truth.<sup>13</sup> The success record, however, must be held by *Aktenzeichen XY ungelöst*, which claims a clear-up rate of 891 cases for 2,159 processed (Tomé, p. 36). The genre would appear then to be perceived as having a fairly clear detective role, and one legitimised by its success in terms of arrests. Indeed, a BBC study carried out in the late 1980s found that as many as 80% of the British viewing public actually watched *Crimewatch UK*, and that 75% of these considered the programme interesting. Those interviewed remarked on its role in fighting crime and also in raising personal awareness of crime<sup>14</sup>—a true public service, and an indication of a move from what Françoise Tomé calls a *télévision miroir*, which broadcasts a simple reflection of life, to a television which, by showing examples and appealing to a spirit of solidarity, actually modifies the behaviour of its audiences (Tomé, p. 37). Indeed, in the August 1997 episode of *Crimewatch*, a kind of summing-up of past successes. Nick Ross explained that calling *Crimewatch* really does work, supporting his comments with actual figures, and exhorted viewers to keep on doing so. On a purely practical level, crime reality shows also have an obvious function in providing a free helpline number for members of the public with information. These might be hesitant to contact the police due to their own—possibly criminal—status or fears for their own safety, or because they are unsure whether what they have to offer is of any value and do not wish either to appear foolish or to waste precious police time; or they may simply be ignorant of whom to contact or how to go about doing so. The television helpline, repeatedly flagged on both French and British programmes, is a safe haven for the 'man in the street' and, incidentally, *Crimewatch UK* also now has its own e-mail address (cwuk@bbc.co.uk). The indictment that the reality show '*écoute mais ne guérit pas [...] montre mais n'accuse pas*' ('listens but

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13 See Patrick Meney, 'Témoins numéro un: l'instrument du recours?', *Franco-British Studies*, 21, (1996), 44-8 (p. 45).

14 BBC *Broadcasting Research 1988*, p.18, quoted in P. Schlesinger and H. Tumber, 'Don't have nightmares... Do sleep well!', *Criminal Justice Matters*, 11 (1993), 4-5.

docs not cure [...] shows but does not accuse')<sup>15</sup> would seem to be unjustified in the case of the crime reality show, although it must be admitted that there has been a drift towards a presentation more akin to the psychoanalytical therapy session in some broadcasts of *Témoin numéro un*.

This presentation is of course to some extent dictated by the host chosen to present the show— in the case of *Crimewatch UK*, Nick Ross and, until her tragic and mysterious murder in April 1999, Jill Dando (who replaced Sue Cook as part of the original partnership); in the case of *Témoin numéro un*, Jacques Pradel and Patrick Meney. All of these presenters have an image of complete respectability, of gravity, of sincerity, but a sincerity which is on occasion derided as sheer hypocrisy: Jacques Pradel, host of so many similar reality shows on French television<sup>16</sup> and anchorman of *Témoin numéro un*, is the object of frequent criticism, accused of exploiting human misfortune, of grotesquely maintaining suspense behind his 'masque de *pater dolorosus*' ('mask of father of sorrows') as he charts a careful course between filth and modesty.<sup>17</sup> However, his shows have also been described as an attack of 'hygiène sociale'<sup>18</sup> and it must be admitted that there is a kind of simpering niceness, an aura of Mr Good about the main male presenters of these shows. Even the far less controversial Nick Ross can seem condescending in his exhortations to call in. His closing words on each month's show: 'Don't have nightmares... Do sleep well!' are supposed to allay any allegations of arousing unnecessary fear of crime, but researcher Philip Schlesinger, following a detailed study on the effects on female viewers of watching *Crimewatch UK*, concluded: 'The attempt by the presenter to reassure at the end of the broadcast by stressing that the crimes shown are unusual and urging viewers not to have nightmares was sometimes viewed with derision and dismissiveness.'<sup>19</sup>

The presenters themselves would deny any attempt at sensationalism and would emphasise their intentions to provide a public service, and they use their good clear-up rate to justify their existence in the face of critics. The presenters *are* in fact doing police work. They appeal for witnesses as do the police, and they also take telephone calls made by the general public in response to their appeals, as do their co-stars from the police forces represented in the studio and those in the various local incident rooms. Nick Ross voices this commitment still further: 'When *Crimewatch UK* reached its tenth birthday, [...] I could see ways of developing the format, and in any case had by then become interested and involved in finding and promoting ways of

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15 *Le Point*, 20 January, 1996, p. 11.

16 *L'Amour en danger* ('Love at risk', 1991-93, TF1), *La vie de famille* ('Family Life', from 1990, TF1), *Perdu de vue* ('Missing', from 1990, TF1).

17 N. Le Caisne, 'Télé-flic, télé-choc', *L'Express*, 25 March 1993, pp. 52-4 (p. 52).

18 E. Schemla, 'Jacques Pradel sur le gril - Démagogie? Non, hygiène sociale!', *Le Nouvel Observateur*, 12 March, 1992, pp. 43-4.

19 P. Schlesinger et al, *Women Viewing Violence* (London: BFI Publishing, 1992) p. 69. quoted in Schlesinger and Tumber, 'Don't Have Nightmares... Do Sleep Well', p. 4.

cutting crime'.<sup>20</sup> An interesting development in the August 1997 *Crimewatch UK* was the inclusion of a sequence in which Ross gave advice on how to check out bogus callers, information usually disseminated through leaflets distributed by the police. There is in fact an exchange of roles for both parties—the television presenters become detectives for the purposes of the show, the detectives become television stars. Indeed, David Hatcher and Jacqui Hames, the key members of the police force who feature monthly on *Crimewatch UK*'s incident desk—a pre-recorded sequence of quick-fire appeals covering a vast range of minor and major crimes, simple in format so that it can be easily changed—are now household names.

Each of the main presenters has his or her own role and style. For example, Patrick Meney appears principally to receive telephone calls and to recapitulate on the level of general interest in particular incidents, although giving no precise details about responses. The information is handed directly to the *juge d'instruction* handling the case in question. The roles of Ross and Pradel in some ways resemble each other—each imploring the public to call in with information, each appearing deeply and personally involved in each incident and echoing the appeals of the victims or their families, creating a form of solidarity between the aggressed or aggrieved and the television audience. However, Pradel's role is far more similar to that of the chat-show host, in so far as he actually interviews victims or their families in the studio. Patrick Meney, co-presenter of *Témoin numéro un* and the oldest of the presenters, talks of a need to introduce a profoundly humane element into the series, and of the team's overestimating at first the abilities of the audience to cope with the harsh realities broadcast (Lattanzio, p. 36). The lengthy two-hour viewing slot for *Témoin numéro un* means that careful handling of such emotive material is necessary, and this helps to explain the tendency to digress, with long, intimate homilies from grieving families about the loss of their loved ones. This catharsis via the cathode tube is to some extent present in *Crimewatch UK*, but to a far lesser extent, covered in perhaps a few words tagged on to the end of an appeal. The British programme lasts only forty minutes, deals with each case more rapidly, and, despite the vividly realistic reconstructions (which do indeed cause nightmares), has arguably fewer dramatic flourishes than its French equivalent. Peter Chafer deliberately chose directors with a documentary background, determined to avoid producing some kind of drama-documentary. Patrick Meney, for his part, aimed to avoid showing scenes of violence which would evoke the murder itself, and to appeal to viewers by building up a portrait of the victim. This has not always been highly successful. The first time *Témoin numéro un* went on the air, it was to appeal for information about the body of a little girl found dumped on the side of the motorway near Blois. She had been beaten and her body was marked with burns from cigarette stubs. The reconstruction showed nothing distasteful—in fact, it showed nothing of consequence at all other than how workmen had come across the body, including several shots of the dead girl's body broadcast in an attempt to identify her. However, the dramatic, discordant music accompanying it, the emotive voice-over and

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20 N. Ross, 'Don't call Nick Ross', *The Guardian*, 24 February, 1997, G2, p. 24.

### *The Crime Reality Show*

the crazy camera angles and close-ups of car wheels flashing past did more to conjure up a highly charged atmosphere than a re-enactment of the crime would ever have done, and laid the series open from the start to accusations of sensationalism which contrasted with the crime-detecting function it purported to have.

The style of presentation of reality shows in general is a curious mixture of fact and fiction, of documentary, reporting, debate, drama, when intimate details of a life are exposed in a type of spectacle or sideshow. For such a sport to be justifiable, success of some description must ensue. Meney speaks this series's results in terms not only of pure detection but also of 'valeur pédagogique' (Lattanzio, p. 36) ('pedagogical value'): the workings of the justice system are shown, or more intimately, the consequences of a tragedy for a family. In the French model, there are fewer lessons to be learned about the police forces, and indeed little contact with the police who very rarely appear in the studio, the forces of law and order being represented by the *juge d'instruction*, the examining magistrate responsible for the case. For the French, whose relationship with their police forces is far less happy than in the UK, the appearance of police officers in the studio, appealing for help from the public, would be difficult to accept and would create considerable tension, a conflict between duty and a genuine fear of descending into the depths of informing. In France, police officers are often caricatured as unintelligent, as macho—all brawn and no brain—and any self-respecting citizen will be more inclined to try to 'get one over' on the custodians of the law than to collaborate with them. *Témoin numéro un* can, then, be seen as a particularly useful bridge between a public which is shy of the police and the officers themselves. It should not be overlooked, however, that the investigative role carried out by chief police officers in the UK is in fact carried out by the *juge d'instruction* in France, who directs any criminal operation and masterminds the detective work. His or her appearance on *Témoin numéro un* is therefore perfectly normal.

Let us now turn, finally and briefly, to the role of the television audience in the solving of crime. Reality shows as a genre bring together members of the public to form the global village of which people talk so freely these days. The victims whose misfortunes are laid bare on screen become our next-door neighbours, even if in reality they live several hundred miles away, and we grieve with them at their loss. Television these days is a *télé du frère* ('fraternal television') as opposed to the *télé du père* ('paternal television') of the early days, and viewers will feel compelled by a moral duty to assist their neighbour as well as by their civic duty as upright citizens. The viewer ringing the studio with information about a crime is an informer, but also becomes a member of the police force, and participation in the man-hunt is further egged on by an intertextual relationship between all media forms. In Britain, both the national and local press take up stories broadcast on *Crimewatch UK*, in the form of articles published in the following day's newspaper. The murder of Lin Russell and her daughter Megan featured in the press the day after *Crimewatch UK* went on the air with new information in the July 1997 broadcast. Louise Auty, in her article 'Jail Theory in Rape Hunt' in the *Ilkley Gazette*, picks up the previous month's *Crimewatch* story about Operation



Lynx and the hunt for a serial rapist operating in Yorkshire.<sup>21</sup> Nick Ross acknowledges this overflow with comments such as 'I think you'll see more in the papers tomorrow', arguably an intrusion into the intimacy of the daily habits of each individual viewer.

### Conclusion

It would appear clearly, then, that the crime reality show does indeed have a role to play in the solving of crime, and that each individual element of the show can function as detective, be it the audience, the presenters, the victims or their relatives, the forces of law and order, or the genre itself. Notwithstanding this, there have been many criticisms levelled against this formula, some of which have been touched upon above. Accusations include voyeurism, sensationalism, exploitation of emotions, gratuitously showing violence, aggravating individual fear, generating an atmosphere of moral panic, encouraging copycatting and informing, infringing privacy laws and contempt of court, and destroying the confidence of the general public in the ability of the machinery of the state to function efficiently. In the United Kingdom, such qualms of conscience have not affected the success of *Crimewatch UK* which continues to broadcast, drawing sizeable audiences and cracking crimes. Even the usual summer break was forgone in 1997 and the gap filled with an August programme devoted to crimes which had been solved, and flashbacks to the previous appeals for help.

The tale is not so happy for the French version, for in fact *Témoin numéro un* has not been broadcast since December 1996. Plagued by unease with regard to collaboration with the forces of law and order, and the difficulty of not breaching the very stringent contempt of court laws (*secret de l'instruction*), curiously regularly flouted by the written press but ignored by television at its peril, *Témoin numéro un* finally gave up the ghost due to falling audiences and a number of indiscretions committed by Jacques Pradel relating to the profanation of the Jewish Cemetery at Carpentras and to the episode of the Roswell alien. Pradel's programme had always maintained on the air that the Carpentras profanation had been carried out by the idle sons of local wealthy families and thus conveniently exonerated the French National Front from all responsibility. No adjustment to these views was forthcoming following the confessions of a number of skinheads. Furthermore, an unshakeable belief in the Roswell alien expressed by Pradel in *L'Odyssée de l'étrange* ('Odyssey of the Bizarre') finally discredited him sufficiently for Pascale Breugnot to decide to cease production and concentrate her efforts on improving her other more successful product, *Perdu de vue*. The continuing success of *Perdu de vue* in terms of viewing figures shows that there is space for a form of crime reality show in France, but the different cultural environments have obviously dictated a different format across the Channel.

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<sup>21</sup> Jason Bennetto, 'Mother's Killer was a Robber, says Josie', *Independent*, 9 July, 1997, p. 1.  
Louise Auty, 'Jail Theory in Rape Hunt', *Ilkley Gazette*, 10 July, 1997, p. 9.

### **Part Three**

#### **Crime and punishment and the condition of French prisons: the responsibility of the state for its prisoners**

- (vii) Trouille HL, 'Holiday camp or boot camp? Where does France stand in the prison reform debate?' (2000) 13 *The Justice Professional* 391
  
- (viii) Trouille HL and Feuillée-Kendall P, 'French prisons: *une humiliation pour la République?*' (2004) 12 *Modern and Contemporary France* 159
  
- (ix) Trouille HL, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the *'juge'* in the new legal framework?' in Feuillée-Kendall P and Trouille HL (eds), *Justice on trial: the French 'juge' in question* (Peter Lang 2004)

- (vii) Trouille HL, 'Holiday camp or boot camp? Where does France stand in the prison reform debate?' (2000) 13 The Justice Professional 391

## HOLIDAY CAMP OR BOOT CAMP? WHERE DOES FRANCE STAND IN THE PRISON REFORM DEBATE?

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This paper looks at contemporary debates in French prison provision, taking as its starting point the difficulties experienced over recent years of implementing a coherent and consistent policy which will tackle the most flagrant problems in the prison system in France. The uproar following the publication in January 2000 of Véronique Vasseur's book *Médecin-chef à la prison de La Santé* (2000; le cherche midi éditeur) denouncing publicly the state of one particular French prison, La Santé, has brought this matter firmly into the public gaze and added a new urgency to the question.

**Keywords:** Prisons; reform; penal system; prison reform; French prison system; prison reform in France

In her recent book, *Médecin-chef à la prison de la santé* (2000, Paris: le cherche midi éditeur), Véronique Vasseur denounces vehemently the conditions in which prisoners are held in the Parisian prison of La Santé, describing vividly the physical and sexual abuse, the deplorable conditions of hygiene, the age and inadequacy of the buildings and the frequent humiliations which are part of the inmates' lives. Amidst the furor surrounding its publication, it is now more clear than ever that decisions regarding committal to custody cannot be undertaken lightly. In the last decades of the twentieth century, different justice ministers have constantly adopted widely differing strategies in their attempts to tackle the apparent failings of the French prison system: the death penalty and the life sentence on the one hand, community service and electronic tagging on the other;

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prison-building programmes versus measures to reduce the numbers of those incarcerated, especially remand prisoners not yet convicted; the harsh reality of the permanently fixed-term sentence (*la peine incompressible*) or the equally realistic recognition of the need to facilitate the reinsertion of the offender into his family and society upon release. These are just some of the policies debated in recent years by the French Ministry of Justice.

The approach to penal policy by different governments over the last three decades illustrates perfectly the difficulty of putting in place a fool-proof and effective prison system, for widely divergent philosophies have led to a fairly confusing battery of reforms over the years. Our starting point in this study is a spate of riots in the years between 1971 and 1974 by prison inmates protesting at conditions in French prisons, which forced authorities to look seriously at the question of detention and led to a volley of liberal decrees on the part of Giscard d'Estaing's government. These improved the lot of the prisoner, began to examine the status of prison warders and, tentatively, to develop alternatives to custodial sentences, alternatives which in the 1970s still only accounted for less than 2% of all sentences.<sup>1</sup> This liberalism was short-lived, however, and the release of unfavourable statistics on the rising crime rate forced a dramatic change in policy by the Giscard government in its closing years. For example, 1978 saw the passing of a law introducing the *peine de sûreté à durée incompressible*, a sentence imposing a period of unconditional imprisonment of which the duration could not be shortened for any reason, even following good behaviour. The trend was maintained when, early in 1981, sentences for certain of the most serious categories of crimes were raised. Change was afoot, however, and the new socialist majority voted into power in the spring of 1981—the first true socialist government France had known—pledged a commitment to social policies “educating” or reforming the offender. One of the first steps taken by the Left after its election, and the most significant in terms of penal policy, was to abolish the death penalty, and ministers reinforced their approach to penal policy with the introduction of some new non-custodial sentences, notably the *jour amende* (the daily fine) and *le travail d'intérêt général* (community service), which were truly innovative: The *jour amende* is a sentence in which the offender is required to pay a fine of up to a maximum of 2000 Francs per day for a specified number of days according to his income, with failure to pay leading to the imposition of a custodial sentence of half the length of *jours amende* handed down. The *travail d'intérêt général*, or TIG, directly influenced by

the British model of community service, for its part consists of working in and for the community, and has been extended over the years so that it is now a common sentence for a vast range of offences, from the minor to the serious. Indeed in 1993, fourteen TIG sentences were passed for every 100 custodial sentences,<sup>2</sup> a great step since the early days of non-custodial sentences under the Giscard government. These progressive measures, of course, not only had the effect of forming part of a less repressive system but also of, theoretically, stopping the increase in prison population, a highly desirable outcome to both prison officials, and to politicians seeking re-election, who had been accused of incompetence in the face of rising delinquency in the first months of office. However, the tide was soon to turn and the legislative elections of 1986 and Right wing victory brought a return of more repressive policies—notably, the *période de sûreté* (period of unconditional imprisonment) was extended from twenty to thirty years for crimes such as the murder of children, the elderly and the handicapped, accompanied by brutality. But, lengthier sentences signified increased pressure on prisons to house inmates for longer periods of time, and to tackle this issue, Albin Chalandon, justice minister at the time, undertook the creation of new prisons by launching his *programme 15,000 places*, a prison expansion programme aimed at creating 15,000 new prison places. With the re-election of the socialists in 1988, this programme was immediately cut down to the *programme 13,000 places*; these 13,000 places have been realised by the building of new prisons, largely by private enterprises and the creation of more places in existing prisons. From 1988 onwards, the socialist majority focussed once again on reintegration of the offender upon release, the development of non-custodial sentences, and reducing pre-trial detention by requiring the *juge d'instruction*, the examining magistrate who heads criminal investigations and who is empowered to order the detention of a suspect or witness prior to trial, to motivate or justify his decision to deprive an individual of his freedom. These were all measures that would be effective in reducing the size of the prison population. It is indeed true that France has little to be proud of in this respect, having, between 40 and 50% of the total prison population, the highest proportion of remand prisoners (innocent until proven guilty) of the European Union countries, and French justice ministers recognise that this figure should be reduced. However, a flurry of emotion around the rape and murder of several young girls in the early 1990s led the next right wing justice minister, Pierre Méhaignerie (in office from 1993) to propose the

introduction of the true life sentence (*la peine à perpétuité réelle*) in 1993, for those guilty of raping, abusing and murdering a child under 15 years of age. Initially intended to be a true life sentence, the highly controversial *peine à perpétuité réelle*, after much debate, was to become subject to reconsideration after the prisoner had spent 30 years behind bars.

The current left-wing justice minister, Elisabeth Guigou, in post since the victory of Lionel Jospin's Socialist party in 1997, has not neglected prisons in her vast reform. Amongst her most forward-thinking projects are the development of *unités de visites familiales* in a score of French prisons—small flats within prisons where prisoners can live with their families for a short period of time unobserved by the prison authorities. These *unités de visite familiale* are based on a successful Canadian model, in place since 1980, and aim to facilitate the reintegration of the offender into family life, to ease the trauma experienced by children of prisoners, whose full-time parent overnight becomes someone they see for a brief half hour once in a blue moon in a crowded visiting room, to maintain family ties and to resolve the humiliation experienced by many couples who try (despite strict regulations to the contrary) to continue their sexual relationship during the half hour visiting times in full or half view of warders. They also provide a very effective reward for good behaviour, but as yet (Spring, 2000), not one is in operation in France. Alternatives to custodial sentences, such as experimental use of electronic tagging (*le bracelet électronique*), improved psychiatric support to reduce suicides in prison and better hygiene figure alongside attempts to direct assistance towards members of the prison population who are drug addicts, young unemployed and mothers of small children.

In this rapid sketch of prison policy over the last thirty years, the lack of continuity in policy due to constant changes of political leadership will be evident, and likewise the difficulties of really getting to grips with flaws in the prison system. At the same time, of course, the problems for the offenders themselves become apparent. The public at large may feel there are disparities in sentencing policies: a certain crime may appear to receive a harsher sentence in—for example—the south of France than the capital city.<sup>3</sup> Yet how much more so this must seem to inmates, for whom the length of custody depends not only on geographical location of the courtroom, but also on who is justice minister at the time they are sentenced. Will the sentence be harsh, to serve as an example for all and indicate that the government is doing its job to fight crime, or generous, aimed at

reinsertion of the offender and reducing the size of the prison population? It is not difficult to imagine the tensions this creates “inside”, tensions which must somehow be managed by the prison staff, when prisoners sentenced for apparently similar crimes may receive quite different sentences.

Whatever the situation in France’s prisons today, one thing is certain: they have come a long way from the prisons of previous eras. Conditions in French prisons may not always be ideal, for a variety of reasons, but a basic change in attitudes towards crime and perpetrators of crimes, a move from the purely repressive towards a philosophy of rehabilitation and education has had a considerable impact on the life of most inmates. Even in the late 1960s, Clairvaux prison—originally a Cistercian monastery founded by Saint Bernard in 1115 and now one of France’s most well-known but least open prisons—still boasted and made use of a certain number of *cages à poules* (hen houses), tiny cages in a vast dormitory where the prisoners slept at night-time. At that time, silence was imposed at mealtimes (as it would have been for the brothers who were the first occupants of the premises) and in the evenings. Communication by letter was limited to one page of writing. Inmates wore grey overalls. Those nearing the end of their sentences were granted access to the radio, but not allowed to hear the news, and any newspapers distributed had all articles relating to judicial affairs or crimes removed. Clairvaux became a prison in 1813, after Napoleon purchased for the State the monastery, which had been confiscated during the Revolution. In 1994, nearly two hundred years later, the prison housed some 202 inmates, but in 1819, there had been 1450 of them, a figure which rose to 1650 in 1858. At that time, the problems of overcrowding were resolved easily: prisoners, who laboured all day, died in their droves, at a rate of 117 deaths for 1968 prisoners in 1847, at one point reaching 700 deaths in a two-and-a-half-year period. Hygiene was poor, clothes ragged, and child inmates went naked due to shortage of clothing. Food was insufficient and of little nutritional value. At one point, nuns denounced the practice of mixing lime with flour to whiten the bread, for this also had the effect of burning the intestines.

Fortunately, prison authorities no longer have to contend with such issues, but more recent horror stories are not uncommon either. At a press conference given in 1994 by the Observatoire international des prisons<sup>4</sup> (OIP), an organisation created in 1990 to monitor conditions in which “normal” prisoners are detained, a number of disturbing events were highlighted. In July that same year, riots had taken place in the prison in Rouen;



as a result, a number of prisoners were punished by being placed in solitary confinement on the Sunday evening following the riots. Here they were stripped, left naked until the middle of the night when their underclothes were returned, and only permitted to dress fully on the Monday evening, a full day and night later. This coincided with their first meal after the events. Mattresses, sheets and blankets were distributed after six days of confinement, and during the first five days, they were not released to shower or clean their teeth. Bernard Bolze of the Observatoire international des prisons criticised particularly harshly the practice of stripping prisoners, describing it as a desire to humiliate profoundly the individual concerned. Another incident brought to light by the OIP was the "suicide" of Algerian prisoner Djillali Ben Mostefa, said to have hanged himself in his cell on 15 June 1994 at Digne-les-Bains (Alpes-de-Haute-Provence); however, according to another inmate, the blanket supposedly used to commit the act had already been confiscated before the tragedy; The *Ligue des Droits de l'Homme* (the League of Human Rights), likewise concerned about the tragedy, affirmed that another prisoner had heard shouts followed by a silence, and that a prison warder had intimated that there were grounds to believe that in fact this was an "unfortunate accident" (*une bavure*) rather than a suicide. A third cause for concern highlighted by the OIP centred on medical treatment in prisons. The OIP maintained that Mourad Bourti, an insulin-dependant diabetic imprisoned at Bapaume (Pas-de-Calais), had not received appropriate medical care, had not been able to consult a specialist and had on one occasion even been deprived of the five insulin injections daily prescribed. Medical care at night-time was virtually non-existent and he was not allowed to keep supplies of sugar in his cell in the event of an attack at night. Such tales shock nowadays, when many may express the idea that life inside is one long holiday. It is, indeed, true that much has been done recently to improve the lot of the prisoner, and to reinforce the concept of human rights within penitentiary circles. For instance, many aspects of the above incidents should never have occurred. In France, the emphasis today in the use of solitary confinement is supposed to be on disciplinary sanctions rather than on humiliation and degradation of the culprit. Since 1969, the maximum duration of solitary confinement authorised has been halved from 90 to 45 days, and it is no longer permitted to confiscate mattresses and blankets at night-time, to shave the hair of offenders nor to deprive them of access to natural light via a window. In 1972, these rights were extended to forbid the practice of

putting offenders on a diet of bread, water and soup three days in each week for the first fortnight of solitary confinement, and then one day per week thereafter. In 1975, official talk became less of punishment than of measures aimed at “encouraging” the prisoner. In 1983, smoking was no longer banned, restrictions on correspondence with relatives removed and the compulsory convict’s attire at last became a thing of the past. However, as a measure to guard against suicides, article D 273 of the *Code de procédure pénale*, (The Code of Criminal Procedure), still states that any item—and particularly items of clothing—may be confiscated at night “pour des motifs de sécurité” (“for reasons of safety”).<sup>5</sup> A note from the prison services (*administration pénitentiaire*) in 1984 reminding prison governors that “même guidé par un souci de prévenir tout risque suicidaire, la pratique de dénuder complètement un détenu n’est pas compatible avec le respect de la dignité humaine”(even if the intention is to avoid all risk of suicide, the practice of stripping a prisoner totally is not compatible with the respect of his dignity) suggests that nonetheless this practice has been, if not widespread, then not uncommon either. In February 1996, the daily newspaper *Libération* carried a report of a young prisoner placed in solitary confinement at the *maison d’arrêt* (prison) in Nanterre, for unruly behaviour in his cell with his two cell-mates. Disciplinary action consisted of a stay in the *fridaire* (refrigerator), prison terminology for solitary confinement cells. His clothing was confiscated and he was given no blanket, in order to avoid the risk of suicide. In this case, suicide was certainly not the problem, but the young man’s experience did take him to hospital. He was found in a coma, suffering from hypothermia after a night spent naked in a cell with a broken window, with sub zero temperatures outside.<sup>6</sup> The fact that interpretation of the vague term *motifs de sécurité* is left to prison warders can inevitably lead to abuses, with property confiscated as a form of punishment via humiliation rather than through any genuine fear for personal safety. In this case, the system proved very flawed, for theoretically the *maison d’arrêt* is a type of prison which houses detainees who are awaiting trial (not yet convicted, therefore technically innocent) and those serving short sentences for comparatively minor offences or at the end of their sentence, and in individual cells<sup>7</sup>—the trouble might never have erupted had this regulation been observed.

As for medical care in prisons, it has never been exemplary, and, in her book, Véronique Vasseur draws the attention of the general public to a number of disturbing issues, which have been more than hinted at for quite

some time already. Although the mission of a prison system cannot be to act as a Mother Teresa caring for the sick, it would seem reasonable to expect those deprived of their liberty by the State for a certain period of time to return to the outside world in no worse state of health than that in which they left it. It is true that many of those admitted to prison come from the lowest social classes (ironically, the same social classes providing those watching over them) and that they are often in poor health before embarking on their sentence. Poor diet and living conditions, shortage of money, lack of adequate (nutritional) education, drink, tobacco, drugs—all combine to produce an unhealthy population. In 1994, on the verge of a major reform concerning prison health, the French Health Ministry revealed that over 50% of detainees suffered from some kind of health problem, ranging from problems of mental health (20% of all inmates), dermatological complaints, pulmonary diseases (three times more inmates than those outside suffer from tuberculosis), cardiovascular and digestive illnesses, and dental health problems (80% of detainees). Furthermore, 30% were heavy drinkers before incarceration, 80% smoked more than one packet of cigarettes a day and 15% were drug users of some kind. Of the prison population, 30% were on regular medication, but by contrast, of the 4000–5000 men admitted annually to the aptly named Paris prison La Santé (*la santé* means health in French), most had never in their lives consulted a doctor before the compulsory medical check up, and were in a dire state of health, with any illness developing rapidly following the shock of incarceration, prison overcrowding and poor hygiene.<sup>8</sup> We have here a glimpse of an unhealthy population either constantly under medication or never seeking medical assistance. The law of 18 January 1994 reforming medical care in prisons undertook to tackle some major issues relating to prison health. The aims, which were set in the framework of a twinning of each prison with its local hospital, were to emphasise prevention and continuity of care already embarked upon, even after release from prison. Prison health was to become the responsibility of the hospitals, and hospitals and prisons were to elaborate an agreement leading to the creation of *Unités de consultation et de soins ambulatoires* or UCSA (Mobile Consultation and Care Units), which would be based in prisons but linked directly to a hospital. Such arrangements were initially to be in place by 31 December 1994, this deadline was then postponed until 1 July 1995, but many have dragged their heels much longer than this. This streamlining of health care, intended to replace the often criticised and fairly ad hoc measures operating

previously, should have eased concerns over poor care in prisons. But if the prison population is more susceptible to health problems than the population at large, then there is an obvious discrepancy in the level of hospitalisation of prisoners, who are still one and half to two times less likely to be transferred to hospital for short stay treatment than those outside. Such excursions are, of course, a genuine headache in terms of security, which explains the restricted access to health care in this domain. Furthermore, although the intention was clearly to improve the sometimes deplorable care regime in place, the law of 18 January 1994 did not really look closely at a number of specific areas. According to the OIP, some lacunae remained: introduction of a regular medical check up, clear legislation on the wearing of handcuffs and shackles by the sick, weekly showering for all, education on the risks of drug-taking, the introduction of studies and statistics on prison health, and monitoring of the relationship between psychological and medical health and social integration. In 1997, three years after its introduction, the verdict by the Health Ministry was that an “*amélioration indéniable de la qualité des soins*” (an undeniable improvement in the quality of care)<sup>9</sup> had taken place, particularly concerning the systematic health check up of all prisoners upon arrival in prison, general health care and twenty-four hour emergency staffing, and a dramatic reduction in the use of the *fioles*, “watered down” medication distributed in cells by prison warders, but that they regretted the lack of progress made in other areas, such as rapid screening for tuberculosis, and the difficulties of recruiting specialist staff to cover needs relating to dental and psychiatric health, which left inmates vulnerable in these domains. Problems relating to medical secrecy were also raised, for it is clear that prisoners will be accompanied by warders on medical visits. And it is equally clear that they may feel unable to discuss certain health issues with the medical staff, especially if these are of a personal or sexual nature—and in a prison environment, many are precisely this—either through embarrassment or for fear of abuse of confidential information by warders subsequently. This highlighted the ignorance of prison staff on matters such as infringements of medical secrecy, which is protected under the terms of the Criminal Code.<sup>10</sup> Inadequate co-ordination about release dates between the prison staff and the *Unités de consultations et de soins ambulatoires* led to problems monitoring prisoners completing their sentences, an issue of obvious importance where psychological disturbances were in evidence.

Such policies reinforcing contacts with the outside world and with the civilian population are completely in line with the Rapport Bonnemaïson,<sup>11</sup> a report commissioned by the prime minister and justice minister in 1988, and required to tackle the modernisation of the prison service. In his report, Gilbert Bonnemaïson underlined the importance of links with the outside, of opening up prisons and their administration, of furthering the intervention of external agents within the prison service, a trend which had already evolved noticeably during the previous decade. Partnerships on a financial level had already been set up, and had proven to be very beneficial to the justice ministry in removing certain financial burdens from its shoulders (for example, the simple provision of a television set in a cell is regularly assured by an outside agency which charges rental, removing any financial responsibility from the prison authorities in the case of the equipment ceasing to function correctly or being damaged). It was hoped that the development of other partnerships—perhaps on a cultural level—would follow and would help to reduce the ostracism to which both inmates and warders often fall victim. Bonnemaïson also advocated the transforming of the profession of prison warder, so that this should be seen precisely as that—a profession, with career promotion prospects or even the possibility of reorienting ones career to another public sector. Indeed, such considerations have become necessary in the light of a work force which has changed in the course of time. In the wake of the prison riots, the 1970s witnessed a mass of retirements, which, accompanied by a wave of job creations to cope with the rising prison populations and in a climate of widespread unemployment, had the effect of radically transforming the character of the profession. New recruits were increasingly younger and equipped with some form of academic qualification, and less prepared to accept the idea of a dead end job with little in the way of doctrinal aims towards which to work, despised by the more prestigious members of the judiciary with whom they had dealings, and by society at large, seen as “keepers” in contrast to the far less numerous educational specialists alongside whom they worked. The idea of simply being a *maton* (slang expression for prison warder) for life was no longer adequate for many. This followed on from the creation of a new class of prison director, no longer recruited from amongst the ranks of the prison staff, but since 1975, selected via national open competition. However, although these should be signs of a more positive attitude to the incarcerated and the way they spend their time inside, we still hear accounts of abusive treatment of prisoners at the hands of their

warders. A report by the prison inspection services, made public in June 1999 by the newspaper *Libération* and the OIP, denounces the behaviour of certain warders and their superiors at Beauvais prison, encouraged by the prison governor himself. Amongst the “*graves fautes professionnelles*” (serious professional misconduct) brought to light, were regular insults used on inmates, ranging from the purely derogatory to offence-related insults like *salopards de violeur*, used against those accused of rape, and racist name-calling. Warders were incited (by the governor) to use violence against certain inmates; rowdy parties took place, where alcohol flowed (against regulations laid down in the Code of Criminal Procedure) and male warders indulged in humiliating their female colleagues (using a rubber stamp to tattoo female warders or flashing). One warder was even accused of improper behaviour with female prisoners. Such abuses, which were dismissed (*classés sans suite*) by the public prosecutor’s department in Beauvais, have highlighted the vulnerability of prisoners and led to demands that the prison service fall under the jurisdiction of the future *Commission nationale de déontologie de la sécurité*, an independent committee whose brief will be to monitor the activities of the police forces, customs services and all those employed in activities relating to security. The current Justice Minister, Elisabeth Guigou, has resisted this step, maintaining that the mechanisms are already in place to oversee the prison services. Indeed, a number of agencies do have the right to inspect prisons. The prison service (*administration pénitentiaire*) has its *inspection générale*; the judicial system has its public prosecutors and, since 1958, the *juges de l’application des peines*, members of the judiciary whose responsibility it is to monitor the enforcement of a prisoner’s sentence once inside. All of these, plus the *préfets*, and since 1983, the mayor of the town in which the prison is situated, are empowered to inspect France’s prisons. However, since the Liberation of 1944, the prison service has retreated further and further into itself, becoming self-regulating and no longer under the aegis of the *Inspection générale des services administratifs*, which was external to the Ministry of Justice. The result: reports of inspections went unpublished after 1950, and the silence has only comparatively recently been broken thanks to external agencies invited into prisons. For example, in 1983 the Health Ministry took on responsibility for monitoring hygiene and medical provision in prisons. A report by the *Inspection générale des affaires sociales* (IGAS) in 1984 was damning in its verdict on health care in prisons. Since then, as we have seen, reforms have been undertaken, and

the IGAS carries out regular inspections, handles complaints from prisoners and investigates suspicious deaths. As for *préfets* and mayors, their role has proved to be nominal rather than genuinely effective, and the *juge de l'application des peines*, enjoying a dubious position as a member of the privileged judiciary parachuted into the prison environment, treads a difficult and often resented path which is any event limited in terms of his powers—dealing with the composition of the sentence (parole, semi-custodial treatment, home leave) rather than conditions of detention or discipline. In the climate of the 1990s, the latest outrages have, however, demanded reactions and Elisabeth Guigou has proposed the introduction of a *Code de déontologie* (code of conduct) emphasising the behaviour required of all those involved in prison circles, and created a working party to investigate further external monitoring of prisons. The words of the code of conduct express one of the principle concerns, that warders should indulge in “*aucun acte de violence, ni... aucun traitement inhumain et dégradant*” (no violent act, ... nor any inhuman or degrading treatment), with the threat of disciplinary sanctions evoked for contravening the code.<sup>12</sup>

All this is a very far cry from the Clairvaux of last century, but although conditions inside are no doubt far better than in the past—as Alain Jégo, governor of La Santé, endeavoured to show when he threw open the doors of the prison to journalists on 15 January 2000—it must surely be admitted that life behind bars is no picnic. Despite increased use of non-custodial sentences and fewer incarcerations, overcrowding—the root of many problems in France’s prisons—is still an issue, due to the imposition of lengthier sentences for serious crimes.<sup>13</sup> Guigou has recently announced the construction of seven brand new prisons in France to replace the oldest currently in use, and the renovation of five others, amongst them La Santé.<sup>14</sup> But even this is not uncontroversial—new prisons built outside of town to replace old establishments in town centres create often insurmountable problems for families and friends wishing to visit the incarcerated. Furthermore, the political tit for tat—repression versus liberalism—is almost certainly not over, and politicians will always be influenced by an electorate afraid of rising crime figures and outbreaks of violent crime, but in the future the move has to be towards non-custodial sentences. Guigou’s decision to display the 1789 *Déclaration des droits de l’homme et du citoyen* (Declaration of the Rights of Man and the Citizen) in visiting rooms in all French prisons may be symbolic but it is also a

sharp reminder that even prisoners have rights, which prison authorities ignore at their peril.

### Notes

1. Faugeron, C. "La crise des prisons françaises", *Regards sur l'actualité*, July–August 1990, p. 19.
2. Chemin, A. "Le sens de la sanction pénale", *Le Monde*, 23 November 1993, p. 12.
3. See "Le tour de France des sanctions pénales", *Le Point*, 5 February 1994, pp. 44–53.
4. Chemin, A. "L'Observatoire international des prisons dénonce des cas de mauvais traitements à l'égard de détenus en France", *Le Monde*, 7 October 1994, p. 14.
5. *Les détenus ne peuvent garder à leur disposition aucun objet, médicament ou substance pouvant permettre ou faciliter un suicide, une agression ou une évasion, non plus qu'aucun outil dangereux en dehors du temps de travail. Au surplus, et pendant la nuit, les objets laissés habituellement en leur possession, et notamment tout ou partie de leur vêtements, peuvent être retirés pour des motifs de sécurité.* (Prisoners may not keep in their possession any article, form of medication or substance which could be instrumental in or facilitate an attempted suicide, an assault or an escape, nor may they have in their possession any dangerous instrument outside of working hours. Furthermore, and at night-time, items normally left in their possession, and in particular all or part of their clothing, may be removed from them for reasons of safety). Article D273, Code de procédure pénale.
6. Ehrel, C. "Le frigidaire . . . 18 mois après", *Libération*, 4 February 1996, quoted in Bolze, B. et al. (Observatoire international des prisons) *Le guide du prisonnier* (Paris, Les éditions de l'atelier/Editions ouvrières, 1996) p. 207.
7. Article D 83 of the Code de procédure pénale states that prisoners should be incarcerated in individual cells at night-time. However, in French *maisons d'arrêt*, 40.5 % of remand prisoners, 33% of those sentenced to less than a year in prison, and 25.8% of those sentenced to between 1 and 3 years are obliged to share a cell. Pédrón, P. *La prison et les droits de l'homme* (Paris, LGDJ, 1995), in Bolze, p. 83.
8. Bolze, pp. 150–151.
9. See "La réforme de 1994 a permis une 'amélioration' des soins en prison", *Le Monde*, 14 November 1997.
10. The *Code pénal* (Criminal Code) states: *La révélation d'une information à caractère secret par une personne qui en est dépositaire, soit par état soit par profession soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100,000 francs d'amende* (The divulging of confidential information by a person entrusted with such information, either due to his function or the nature of his profession on a temporary or permanent basis is liable to a sentence of one year in prison and a fine of 100,000 Francs). Article 226–213.
11. Bonnemaison, G. *La modernisation du service pénitentiaire*, rapport au premier ministre et au garde des sceaux, Paris, ministère de la justice, 1989.
12. Prieur, C. "Les surveillants de prison seront soumis à un code de déontologie", *Le Monde*, 10 July 1999, p. 9.
13. "Le sens de la sanction pénale", p. 12.
14. Mme. Guigou confirme un plan de rénovation, *Le Monde*, 18 January 2000, p. 10.



(viii) Trouille HL and Feuillée-Kendall P, 'French prisons: *une humiliation pour la République?*' (2004) 12 *Modern and Contemporary France*

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## **French prisons: *une humiliation pour la République?***

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### **Abstract**

*In France in recent years, the spotlight has been on the state of French prisons. The incarceration of well-known figures who have chosen to publish details of the conditions of their detention, and prison doctor Véronique Vasseur's revelations about the Paris prison La Santé shocked the nation, forcing politicians to act. Two major reports by the Assemblée nationale and Senate concluded that France's prisons were une humiliation pour la République. But the grande loi pénitentiaire envisaged by Jospin did not come to fruition. Several reports later (on non-custodial sentences, prison work and prison suicides), will the massive prison-building campaign aimed at tackling the overcrowding at the source of the crisis be the only solution implemented? The article commences with a brief historical overview of the origins of the French prison system, outlining the evolution in attitudes towards incarceration. We then review the state of France's prisons today and examine recent attempts at prison reform.*

In January 2000, the publication of Véronique Vasseur's book *Médecin-chef à la prison de La Santé*<sup>1</sup> created a public outcry. In this book a prison doctor exposes, in diary-like form, the conditions in which prisoners in the Paris prison of La Santé are detained. She talks of the appalling conditions of hygiene, the squalor and the vermin, the drug abuse, the dilapidated and inadequate buildings, the physical and sexual abuse, the humiliations at the hands of staff and fellow prisoners which are a part of inmates' daily lives.

There has, of course, been no shortage of literature on the prison experience. Indeed, since the 1970s, much research on imprisonment has been carried out by sociologists, legal experts and historians.<sup>2</sup> Moreover, in recent years, a number of celebrities from the worlds of politics and business have found themselves experiencing life behind bars at

first hand, and several, such as Alain Carignon, Pierre Botton, Loïk Le Floch-Prigent and Bernard Tapie have published their experiences of prison or have exposed them to the media.<sup>3</sup> Vasseur's blunt revelations, however, were exceptional, since they came not from an inmate with an axe to grind, but from a member of the prison staff with no personal interest at heart, and who subsequently found herself criticised by the *Administration pénitentiaire* (prison services) for allegedly having breached professional confidentiality. Although, hardly surprisingly, Vasseur was not to remain at La Santé for long following the publication of her book, extracts of which were published in *Le Monde* on 14 January 2000, virtually immediately after it appeared in the bookshops, the impact of her work was considerable. Politicians and journalists rushed to inspect La Santé, both the Assemblée nationale and the Senate commissioned reports on the state of France's prisons, and Prime Minister Lionel Jospin and Garde des Sceaux Elisabeth Guigou declared their intention to devise *une grande loi pénitentiaire* to remedy the ills denounced by Vasseur. In fact, Vasseur is certainly not the first person to have raised these issues, which go some way to explaining both the multitude of prison riots that take place all over France, and the dissatisfaction of the prison warders. In perhaps more discreet fashion, well before Vasseur's book, Hélène Dorlhac de Borne, to name just one specialist, a doctor who had been *secrétaire d'État à la condition pénitentiaire* from 1974 to 1976, was already denouncing the state of France's prisons: 'des prisons vétustes, indignes de notre fin du XIXe, j'en ai vu beaucoup lors des visites que j'ai multipliées, tout au long de ce dédale pénitentiaire'.<sup>4</sup> But it must be the repeated and regular imprisonment of well-known public figures, a 'nouvelle catégorie de délinquants', which explains the extensive media coverage of this issue today. Since the publication of Vasseur's book, a new generation of specialists—philosophers, sociologists, psychiatrists and lawyers—appointed by France's politicians, are endeavouring to 'repenser la prison', continuing along a path first embarked upon in the 1960s. This is not without its difficulties in a climate where the most insignificant offences can be quite severely reprimanded: for example, it is not uncommon today to hear of a prostitute receiving a two-month prison sentence for soliciting. Moreover, the atmosphere of *insécurité* and the attitude of an Interior Minister keen to reassure the public via repressive policies is not likely to encourage judges to hand down moderate sentences. For French judges are not tolerant, and those members of the general public viewing judges as *laxistes* are seriously misguided: one simply has to observe a trial for a criminal offence to observe that the fate of the defendant and the circumstances leading him to the dock appear completely immaterial to those enforcing the law.

In this article, we will begin with a brief historical overview of the origins of the French prison system, highlighting the growing interest which some observers of the situation in France have for the history of incarceration. For, as Jean-Claude Farcy—the historian to whose work we have already referred—explains, it is principally historians who have examined the concept of imprisonment in the course of the last 30 years. Rémi Lenoir, in his homage to Michel Foucault's seminal work 20 years on,<sup>5</sup> explains that specialists from a variety of backgrounds—sociologists, historians, lawyers, economists—combine their research with the work of the philosophers. Jacques-Guy Petit, in the same volume, states that an undeniable widening and diversification of historical research into justice, sanctions and prison can be observed, and attributes to

Foucault both the legitimisation and the acceleration of historians' research into fringe groups. In fact, prisons have not always had the same vocation as they do today, as our overview will demonstrate. Following this historical overview, we will examine recent attempts to tackle the present malaise in French prisons and to focus on the well-being of the prisoner, looking at the concepts of 'detention' and 'the sentence'—decisions reached by judges living in a climate dominated by the fear of crime and also by issues of human rights for every category of society.

### Historical overview

The history of incarceration in France began in the 16th century, when François Ier decided to lock up poor *marauds*, *vagabonds*, *incorrigibles*, *belistres*, *ruffians*, *caymans* et *caymandeuses* in small premises. In the mid-16th century, 'reformatories' opened in England and the Netherlands, where delinquents and vagabonds were locked away to be reformed and set to work. According to Michel Foucault, however, mass imprisonment dates from the 17th century, after which this new method of controlling individuals by marginalising them through imprisonment became more widespread. In *Histoire de la folie* (1961), Michel Foucault mentions the creation in 1656 of the *hôpital général* in Paris, which at that time was not yet a medical establishment but resembled rather more a semi-legal, administrative structure, reaching decisions, passing judgements and imposing sentences independently of the judiciary. The directors of this type of establishment resorted to the use of the iron collar, prisons and dungeons. In 1676, a royal edict declared that there should be one *hôpital* per town in the kingdom, and the Church played an active role in this initiative. In 1662, there were already 6000 people imprisoned, of whom the vast majority were without resources and socially deprived. In 1657, Vincent de Paul, a man of the Church who devoted himself to improving the lot of the poor and of the convicts in the galleys, gave his seal of approval to this decision to 'ramasser tous les pauvres en des lieux propres pour les instruire, les entretenir et les occuper'. Thus, the elderly, orphans and the sick were all assembled together in these institutions. *Quartiers de force* were also set up to imprison women who could not be sent to the galleys. But throughout this time, prisons were considered a solution to problems of public safety rather than representing a predetermined punishment for a specific crime, and institutions to detain the poor and put them to work multiplied across Europe. The prisons of the *ancien régime* were first and foremost *entrepôts*, and sentences as we understand them today were not served out there. The royal aim was to 'correct' those who had wandered from the straight and narrow and to draw them back to '[de] meilleurs sentiments envers leurs proches et la Société'.<sup>6</sup> In order to make the most of the inmates (in the interests of profitability) and to 'correct' their weaknesses, these institutions endeavoured to establish workshops and to manufacture goods. Here, as in the galleys and penal colonies (*les bagnes*), we can already see taking shape the penal approach which was to be adopted in the 19th century, when, following the committing of an offence, a criminal investigation would be carried out, a trial would take place, and a sentence would be pronounced commensurate with the type of offence committed. In fact, the criminologists of the late 18th century considered detention in the galleys or penal colonies to be a prison sentence because it had been preceded by a

criminal investigation. However, the writers of the Enlightenment tend, in general, to confuse the notions of 'détention' and prison. Practices show us that the detention of an individual was carried out essentially in order to extract a confession (very often under torture), and this therefore did not represent a punishment or sentence handed down for a crime the individual had been proved to have committed, as we understand in the prison sentences of today. We note the terms of the *ordonnance criminelle* of 1670: 'l'*ordonnance criminelle* assure le repos public et contraint, par la crainte des châtimens, ceux qui ne sont pas retenus par la considération de leur devoirs'. Of course, in practice, detaining an individual in order to extract a confession is also a punishment. The appearance of prison in the modern sense of the word dates from the French Revolution; by this time, prison was no longer considered as a transitory phase before physical punishment, but as the chastisement of the soul.

As Robert Badinter has often reminded us, penal institutions have given rise to conflicting emotions depending on the moment in history: at times, such as following a revolution, there has been a passionate interest in them, at others a complete indifference, as during the Second Empire. The Third Republic saw the founding of a genuine republican prison policy. In the run up to the Second World War, the number of delinquents decreased continuously and only two prisons were built, Fresnes in Paris and Les Baumettes in Marseille. After the Second World War, penal policy revolved around attempts to improve the poor conditions of hygiene in prisons, but this was done with only limited resources, and this area was subsequently neglected until the 1970s.

### France's prisons today

The current situation of French prisons appears, to say the least, very worrying, and Vasseur is not the only person to denounce them. According to the annual report of the Observatoire international des prisons (OIP),<sup>7</sup> conditions in French prisons have continued to decline. The root of the problem lies in prison overcrowding, which is due to hardline policies on public safety (constantly being reinforced) and also in the age of the buildings and poor conditions of hygiene. According to the OIP, the 185 French prisons, which were built for 48,600, held more than 61,000 prisoners (convicted prisoners and those on remand awaiting trial) in the 2001–2002 period, although the figures published in 2003 by the Justice Ministry, Place Vendôme, are a little more optimistic (*see* further below). The OIP's figures correspond to an overall occupancy rate of 125.4 per cent, with the rate of occupancy at over 200 or 250 per cent in some institutions. Historian and observer Michelle Perrot reminds us that prisons are bursting at the seams,<sup>8</sup> and Véronique Vasseur that prison overcrowding leads to riots. Furthermore, overcrowding also has an influence on the functioning of the prison services, with the result that prisons simply become 'dumping grounds' for delinquents. Interestingly, this situation is not peculiar to the French and we should note that both British and French systems suffer similar rates of overcrowding.

Vasseur's book has much to say about the conditions of hygiene and the state of the inmates' health (both mental and physical) in prisons, and the implications of overcrowding are clear: promiscuity caused by the phenomenon of overcrowding naturally has an impact on the morale and mental well-being of inmates and not

uncommonly translates into violence, which is in turn either directed against the individuals themselves (self-harming)—there were 73 suicides during the first six months of 2003<sup>9</sup>—or against others. Prison warders are perceived by detainees as police officers or even as members of the military, and their job has become increasingly difficult and dangerous over the years.<sup>10</sup> Moreover, the situation in French prisons limits the possibilities of reinsertion for some prisoners who may have been disturbed psychologically by the conditions of their detention. Already, in the 1980s, despite limited room for manoeuvre and a reticence from the general public, Robert Badinter, only too aware of the crisis brewing in French prisons, and moved by Foucault's work and by his recent death, had been able to impose a certain number of reforms as Justice Minister: the elimination of, or improvement of, high security areas, the removal of separation screens in visiting rooms, abolition of the convict's uniform, authorisation of television sets in cells. Yet the idea that one should be able to have a reasonable lifestyle in prison was still unacceptable to many, and Badinter emphasised that it was folly to believe prison was really a place where prisoners were prepared for reinsertion into society. Badinter formulated his assessment that the general public would never be able to tolerate prisoners experiencing a better lifestyle than that of the most underprivileged category of society as the 'loi d'airain':

Je l'ai appelée 'loi d'airain', car je ne l'ai jamais vue démentie: vous ne pouvez pas, dans une société démocratique déterminée—je ne parle pas des prisons totalitaires, car l'idée même de respect de la dignité humaine n'existe pas—porter le niveau de la prison au-dessus du niveau de vie du travailleur le moins bien payé de cette société.<sup>11</sup>

If we look to France's neighbours, we can see that the prisons without incident are in the northern European countries, nations which have a strong social conscience and sense of equality, and where the social protection offered to the least privileged classes of society is the most generous (Sweden, the Netherlands and Norway; the 'loi d'airain' sets them well above France).

Despite Badinter's reforms, in 1994, on the verge of a major reform concerning prison health, Simone Veil had revealed that over 50 per cent of detainees suffered from some kind of health problem, ranging from problems of mental health (20 per cent of all inmates), dermatological complaints, pulmonary diseases such as tuberculosis, cardiovascular and digestive illnesses, dental health problems and alcohol-related illnesses; 80 per cent of inmates had been heavy smokers and 15 per cent were drug users of some kind; 30 per cent were on regular medication, but of the 4000–5000 males admitted annually to La Santé, most had never in their lives consulted a doctor before they were admitted, were in bad health, and illness often developed rapidly with the shock of incarceration and poor conditions of hygiene in prison.<sup>12</sup> There is also a considerably higher incidence of HIV among the prison population than the national population, a condition alarming by its irreversible nature, but also by the risk of contamination of fellow inmates due to the comparatively widespread drug abuse in prisons and use of shared syringes, and the incidences of sexual violence and rape. We can see that different governments, whatever their political allegiance, have been familiar with the appalling dysfunction of the prison system recounted by Vasseur, and the

conditions described above explain how Vasseur's revelations—in reality an open secret divulged to a political class in denial—could give rise to such uproar.

### Official reactions to Vasseur's revelations

The two parliamentary committees which had been charged with investigating the state of French prisons following Vasseur's revelations, set up in February 2000 under the leadership of Louis Mermaz and Jacques Floch (Assemblée nationale) and Jean-Jacques Hiest (Senate) constituted an historic event, representing the first committees on this matter since 1875. They led ultimately to considerable reforms on the execution of sentences (*application des peines*), but disappointingly most of their proposals were not to become reality. The committees reported in June 2000, publishing their findings on 5 July in two reports entitled respectively *La France face à ses prisons* and *Prisons: une humiliation pour la République*.<sup>13</sup> As the titles indicate, both reports were highly critical of the state of French prisons, and united politicians across the whole political spectrum and from both chambers. In the course of the inquiries, senators Jean-Jacques Hiest and Guy-Pierre Cabanel had interviewed more than 60 people and visited 28 penal institutions, proposing 30 emergency measures that should, in their view, be taken. These ranged from reducing overcrowding, overhauling prison buildings, enhancing the career pattern of personnel and improving the daily experience of inmates, who should be offered better possibilities for work and training and free access to television in each cell—for politicians discovered that prisoners may have to spend very large amounts of their day locked up in their cells, left to their own devices, with few constructive activities to occupy them—a sure recipe for disaster. The report said that the inflated costs of materials bought from the prison trolleys (*la cantine*) should be lowered and that there should be greater openness for families coming to visit inmates, who were often allowed only brief and irregular visits to loved ones, which took place in crowded and impersonal visiting rooms. Subsequently, two years after the reports, it was revealed that, in the absence of any official regulations concerning the granting of visitors' permits to children wishing to see their incarcerated parents, some *parquets* (public prosecutor's departments, responsible for granting visitors' permits in the case of prisoners who are in the process of being tried or appealing against a judgement) implemented a practice of systematically refusing all requests made by children to visit a parent, on the grounds that exposure to the prison environment would have a negative impact on the children. A completely haphazard system led to a situation such that the Versailles *parquet* refused to allow children aged between seven and 16 to visit a parent in prison, the Lyon *parquet* only allowed such visits by children of the prisoner, but not, for example, by their partner's children; the Paris *parquet* recognised that the situation was not ideal but authorised visits, and the Douai and Bordeaux *parquets* felt it was important to maintain family ties wherever possible.<sup>14</sup> This contrasts with the spirit and terms of the *Code de procédure pénale*, which clearly authorises visits by family members for remand prisoners (article 145-4).

The Assemblée nationale report, for its part, advocated a major debate on French prisons, on the role and mission which prison should have, on the meaning of the sentence, and the urgent development of legislation. It proposed the introduction of a

*numerus clausus* as in the Netherlands: prisons should not admit more prisoners than places available to house them; those admitted should receive more attention in terms of management of their time and the type of activities available to them, with greater possibilities for professional training; there was a need for more probation officers and social workers; the report supported the institution of a method of independent external auditing of penal establishments. However, it was the findings of the committee led by Guy Canivet, *premier président* of the *Cour de Cassation*, which made the most impact. Canivet had been charged with investigating the possibility of an independent monitoring board to supervise prisons; his committee, convened in the autumn of 1999, reported back to Guigou on 6 March 2000, just two months after the publication of Vasseur's book, with a damning account of prison law, or rather lack of prison law. He concluded that there appeared to be virtually no national legal framework governing prison law; that prison law seemed to emanate solely from the Administration pénitentiaire (AP), and that even the most sensitive issues—such as matters relating to the respect of an individual's dignity (body searches, monitoring of prisoners' correspondence) were tackled through circulars from the AP. Furthermore, he noted widely divergent treatment of prisoners from one establishment to another, due to the fact that each prison abided by its own set of internal regulations. Canivet's commission thus proposed that legislation should be drawn up—a codification of prison law, which would outline clearly the role of the AP, the rights of prisoners and the conditions in which they were to be detained. He also advocated a re-examination of the procedure regulating the execution of sentences (*application des peines*), to enable the prisoner to contest in adversarial fashion decisions regarding the conditions of his sentence made by the *juge de l'application des peines* (JAP), who monitors the implementation of the sentence and follows its progress, reviewing and judging any requests for parole. Access to support from a lawyer should be provided to do this and legal aid if necessary. Finally, in respect of the initial purpose of the commission, Canivet recommended the setting up of an independent monitoring board, to be headed by a general inspector of prisons (*contrôleur général des prisons*). Thus, when Marylise Lebranchu was appointed Justice Minister in October 2000, taking over the reins from Elisabeth Guigou, who had been transferred to the Ministère de l'Emploi et de la Solidarité, she found herself instructed almost immediately by Prime Minister Lionel Jospin to elaborate a *grande loi pénitentiaire*, to be presented to the cabinet by the summer of 2001, and for debate before the Assemblée nationale by the autumn of 2001.

### **Lebranchu and reform: one step forward, two steps back**

From her appointment in autumn 2000, Lebranchu applied herself vigorously to the *grande loi pénitentiaire*, setting up a *Conseil d'orientation stratégique* of 30 experts in prison affairs, and organising a massive consultation of prison warders. In July 2001, she was able to present the first draft of her law, an ambitious text, influenced by the more humane philosophy of increasing the rights of the defence enshrined in the recent *loi no. 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*, elaborated by her predecessor Elisabeth Guigou, and which had come into effect on 1 January 2001. This draft included the major changes advocated in



previous studies: the setting up of an independent inspector of prisons, to be nominated by the cabinet for a non-renewable period of six years; a commitment to respecting the human rights of detained persons, notably their right to privacy, family rights, extending from 18 months the age limit at which mothers are separated from their children, their right to work,<sup>15</sup> and restricting body searches and restraint only to cases when this was strictly necessary; a redefining of the role of the prison officer and a classification of penal institutions, with the aim that prisoners should be incarcerated in institutions according to their profile and not according to the length of sentence remaining to be served. The text met with violent opposition from prison staff and their unions, due to the emphasis on respect of prisoners' rights and the difficulties of observing these, and the revised text, presented in November 2001, coloured already by the pre-2002 presidential election hype on *insécurité*, was somewhat watered down. For example, Lebranchu had to abandon her proposal to reduce the maximum length of time to be served in solitary confinement from 45 days to 20 days. With the focus on the elections well underway, it was decided to put on one side the plans for the *grande loi pénitentiaire* until after the elections—elections which were won by the opposition, and therefore saw the arrival of a right-wing Minister of Justice, Dominique Perben.

The *grande loi pénitentiaire* appeared to have been shelved, much to the dismay of all those who had participated in the debates and been affected by them, and to the outrage of associations such as the Observatoire international des prisons, Act Up-Paris and the Association française de criminologie. However, there were constant reminders of the need to act and constant reminders that not enough was being done. Guigou's *loi sur la présomption d'innocence* had tackled the status of decisions made by the *juge de l'application des peines* in relation to the execution of sentences. In fact, these new measures had not been part of the initial bill, but were introduced by members of both houses—in the aftermath of Vasseur's revelations—in the course of debate. Before the *loi sur la présomption d'innocence* was passed, the greater part of the decisions made by the *juge de l'application des peines* had been considered as administrative ones as opposed to judicial ones, and therefore could not be challenged by the offender on an equal footing. The law made certain decisions relating to the execution of sentences those of a board which would respect the rights of the defence, allowing the prisoner access to a lawyer. Decisions would be reached via adversarial procedures, would be justified and be subject to appeal.

The *loi sur la présomption d'innocence* also intended to lower the number of people detained in France's overcrowded prisons, and more specifically the *prévenus*, those detained on remand prior to trial, and consequently innocent until proven guilty. The state of France's prisons can be seen as the by-product of a system of criminal procedure which uses imprisonment as a weapon to encourage a suspect to confess, apparently not an uncommon practice. No sign here then, of the presumption of innocence, and imprisonment becomes the norm for a suspect under investigation when it should be an exceptional measure. The consequence of this practice is a high prison population, and between 1975 and 1995, the French prison population had doubled, an increase ten times that of the national population, which grew by only 10 per cent at the same time. It reached a peak in June 1996 at 58,856 inmates, compared to only 27,000 in 1976. Forecasts of a prison population of 70,000 by the year 2000 if the trend continued set

alarm bells ringing and spelled trouble in terms of prison infrastructures. Furthermore, approximately 40 per cent of France's total prison population consists of remand prisoners, an area where France has a particularly bad reputation with human rights observers. In order to reduce this number, the *loi sur la présomption d'innocence* created the post of *juge des libertés et de la détention*. The two functions of investigating a criminal offence and ordering the pretrial detention of the suspect under investigation had previously both been the domain of the *juge d'instruction*—a long-criticised practice, since it essentially required the *juge d'instruction* to make judgements on the progress of his own investigation. Following the new law, decisions relating to remand (remanding in custody of a suspect, extending a period of remand, and release from remand, if this has been refused by the *juge d'instruction*) must be submitted by the *juge d'instruction* to the newly created *juge des libertés et de la détention*. Thus, from being the remit of the *juge d'instruction* alone to remand in custody, it has now become the responsibility of two *juges*. Despite initial concerns that the *juge des libertés et de la détention* would simply be the *juge d'instruction*'s 'yes man' and would therefore have no impact, the number of prisoners remanded in custody dropped significantly from 17,842 at the time the law was adopted in June 2000<sup>16</sup> to reach 15,698 in October 2001. And at this point the trend was dramatically reversed. Jean-Claude Bonnal, a multiple recidivist arrested in 1998 for a robbery on a department store in Paris, was released from remand just before the *loi sur la présomption d'innocence* came into force, in December 2000, with no trial date set. Two armed raids committed in October 2001, which left six people dead, among them two police officers, were thought to be the handiwork of Bonnal. The Bonnal Affair gave rise to a series of demonstrations and protests by police unions in late 2001, criticising the lax attitude of *juges* and declaring the *loi sur la présomption d'innocence* to be a 'loi pour les voyous', and coincided with the growing debate on *insécurité* or the fear of crime, which was to dominate the 2002 presidential electoral campaign. Judges reacted with a more severe approach to sentencing and remanding in custody, and the prison population began to climb from 46,698 in October 2001.

The Justice Ministry's most recent statistics, released on 8 April 2003, show an alarming increase again, with as many as 59,155 prisoners detained in 185 prisons offering 48,603 places. This represents the highest number since prison statistics began to be recorded, in 1852, with the exception only of the Liberation, when there were 60,000 prisoners in French jails, a third of them suspected collaborators.<sup>17</sup> However, it still compares favourably with UK statistics, which stood at 73,379 in June 2003, about 7000 higher than the system's uncrowded capacity.<sup>18</sup>

### **The impact of the *juges*' decisions**

For the *juges*, it is a difficult balancing act. Releasing an offender or suspect too soon may have serious consequences. But so may incarcerating him. Official statistics gave annual prison suicide figures in France as 120 in 2002,<sup>19</sup> an increase of 16 compared to 2001 figures,<sup>20</sup> seven times that of the civil population (OIP) and higher than the equivalent for England and Wales, which stood at 72 in 2001 and 81 in 2000, despite a higher prison population.<sup>21</sup> In France, a prison suicide occurs every three days.

Following a month-long enquiry, the organisation Informations sans frontières noted that Justice Ministry criteria were vague and that information on geographical incidences of prison suicides was non-existent. Along with the association Ban public, Informations sans frontières set up the Observatoire du suicide en prison on 13 April 2002, using information provided by the families of prisoners, support agencies, doctors and the prisoners themselves, which communicates news of every suicide to local and national media. This move has been prompted by a serious deterioration in conditions of detention. Indeed, in 2002, for the first time in history, the Administration pénitentiaire was found guilty of *non assistance à personne en danger*, following the suicide of a prisoner, and in July 2003, the former director of La Santé, Alain Jégo, was placed under investigation for involuntary homicide in connection with the suicide of a prisoner.<sup>22</sup> It is shocking to note that the number of prison suicides has risen by 200 per cent in the course of the last 20 years, but even more so that 60 per cent of suicides concern detainees awaiting trial, therefore presumed innocent, and that one-third of suicides take place during the first month of detention.

Furthermore, as already outlined, the prison population tends to be an unhealthy one. Despite reforms following these revelations, in May 2003, a *Pôle de réflexion et d'action* was to highlight the number of sick inmates dying in prison. It seemed that the *loi du 4 mars 2002* elaborated by Health Minister Bernard Kouchner, in order to authorise the suspension of sentences for those who were terminally ill or whose state of health was incompatible with the prison environment, was not being applied consistently. This state of affairs must have been made all the more irksome since Maurice Papon had benefited from this law, being released from prison on health grounds in September 2002.

In the absence of major reform, the inadequacies of the prison system continued to hit the headlines at regular intervals. Cases such as that of Michel Lestage, a victim of violence, murdered by his cellmate on 15 March 2001 in Gradignan prison, Bordeaux, caused outrage. Lestage had served, as a remand prisoner, all but two days of the sentence he finally received in court, and was sent back after sentencing on the decision of the *juge de l'application des peines* to serve the remaining two days in the overcrowded prison of Gradignan. Unfortunately, he found himself sharing a cell with a violent and unbalanced criminal just released from solitary confinement. Guislain Yakoro reputedly found his talkative cellmate irritating and silenced him for good with a homemade iron hook.<sup>23</sup> This tragic incident clearly should never have occurred, but was made all the more poignant by the fact that the *juge de l'application des peines* had overstepped the mark in returning Lestage to prison, this being the remit of the *parquet*; and that Yakoro had been released from solitary confinement a day early on the order of a prison warder who had not checked the computerised records carefully. The French public was also deeply moved by the case of Patrick Dils, released from prison in 2002 after 15 years, and who appeared on TF1's *Sans Aucun Doute* to describe his experiences. Dils had been found guilty of the murder of two young children in 1986, when he himself was only 16 years old, and, a shy young man with the social skills of an eight-year-old, confessed to the crime under the pressure of police questioning. Before his successful appeal court appearance, he declared:

Je ne suis pas un monstre, mais un humain qui a dû se construire tout seul pour se protéger de l'univers carcéral destructeur ainsi que des adultes qui m'ont, dans la majorité de mon parcours, trahi ou abusé de ma gentillesse et de mon honnêteté et surtout ont profité de ma naïveté et de mon jeune âge! La torture psychologique et mentale est pire que tout et je ne sais pas si un jour je n'en souffrirai plus ...<sup>24</sup>

As an adolescent remand prisoner, Dils had been denied visits from his parents for over a year, due to the nature of his alleged crime, and once sentenced had been the victim of brutality and rape in prison, experiences which he said made it difficult to contemplate the relationships he might normally have hoped to have in life.

The *machine à broyer* was also publicly denounced by a group of well-known *dangereux repris de justice*, regulars in the VIP cells of French prisons, who founded the association 'Mialet', naming it after a former police officer who hanged himself in his cell. In February 2002, just before the presidential elections, 'Mialet' organised a conference entitled *Justice et Citoyen* to draw attention to the conditions of their detention and the horrors of their interviews with the *juge d'instruction*. Loïk Le Floch Prigent (five months on remand for the Elf affair), Jean-Michel Boucheron (mayor of Angoulême, sentenced to 18 months for fraud), Jean-Christophe Mitterrand (three weeks remand for the Angola affair), Jean-Jacques Prompsy (sentenced in the Lyonnaise des eaux affair) and Olivier Spithakis (five months on remand) had all been deeply marked by their brush with the law.<sup>25</sup> Jean-Christophe Mitterrand was appalled at finding himself in prison:

Ma garde à vue était totalement inutile. Ils savaient déjà tout ... Je considère intolérable que pour sortir d'une prison où l'on a jugé que je ne devais pas entrer, il faut que je paie alors qu'il n'y a pas de partie civile et aucune victime à indemniser, que je suis toujours présumé innocent et que je ne suis redevable d'aucune amende.<sup>26</sup>

He was also deeply shocked at the apparently deliberate humiliation of being handcuffed to be taken from the *juge d'instruction*'s office to the Palais de Justice: 'J'avais le sentiment d'être traité comme un meurtrier, d'avoir assassiné je ne sais qui.'

Despite a slightly different régime and VIP accommodation, which often consists simply of an individual cell in a reserved area of the prison, even for celebrities prison life is not an easy experience. Pierre Botton, a businessman from Lyon and son-in-law of Lyon's mayor, Michel Noir, was sentenced in 1996 to five years in prison for fraud. Despite the preferential treatment he received at Grasse prison, of which prison warders were scathing, Botton bore his incarceration badly, even attempting to commit suicide. By the time he had been transferred to La Santé and released early on parole, he was in a very fragile state of health.

Accounts such as these, and the saga of Patrick Henry, released in 2001 after serving 25 years for child murder, and returned to prison in 2002 for a string of new offences, have led observers to question the true mission of French prisons: are they really returning offenders to society as reformed and improved characters? And is there any hope for improvement in conditions of detention?

### Perben's reforms

Following the 2002 presidential elections, Nicolas Sarkozy, the new Minister of the Interior, outlined his proposed law on *sécurité*, and shortly afterwards, Dominique Perben, Justice Minister, unveiled the proposals for his *programme pour la justice*. The two reforms aimed at reassuring the electorate that the government was taking seriously the preoccupations with *insécurité*, which had dominated the election campaign. The emphasis of Perben's reform—the *loi no. 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice*, or LOPJ—was on reinforcing the rights of the victim, reducing the number of sentences not carried out and implementing a prison-building and modernisation campaign. His *ultra-sécuritaire, tolérance zéro* policy led Perben to plan the creation of 13,200 prison places, signifying the building of some 30 new prisons by 2007, at a cost of some 1.4 billion euros. Of the new establishments planned, eight were to be for young offenders, each to house between 40 and 60 juveniles, with the remaining adult prisons not exceeding a capacity of 600 inmates. The newly appointed *secrétaire d'état aux programmes immobiliers de la justice*, Pierre Bédier, was to oversee the programme and René Eladari, an engineer who had masterminded former right-wing justice minister Albin Chalandon's (1986–1988) planned 15,000-place prison-building programme, was entrusted with a mission to design the prison of the future. Perben's new prisons were to be built, as with those commissioned by Guigou, according to the instructions of the state, but by private enterprises. A number of high profile escapes in 2002 put the emphasis firmly on increased security thanks to modern technologies (i.e. the disabling of mobile telephones, anti-helicopter netting, bullet-proof glass),<sup>27</sup> but the brief was also to provide decent living conditions for inmates: showers in cells, private toilets and possibly even family visiting quarters (*unités de visite familiale*), with improved sports facilities, cultural activities, opportunities for professional training and visiting rooms. Some progress had already been made on this front, building on Elisabeth Guigou's initiatives, of which, Liancourt's new prison, set to open in late 2003, is an example. This prison has been designed by Architecture Studio, newcomers to prison design, who have studied the sensitive use of colour, lighting and space to improve the prisoners' experience of their surroundings and thus help reduce some outbreaks of violence resulting from the frustration of incarceration.

A further long-awaited development was the opening of the first *unité de visite familiale* inaugurated in experimental fashion in September 2003. A small apartment complete with garden in the women's prison in Rennes, this project will enable women prisoners serving long sentences to receive members of their family in total privacy for periods ranging from six to 72 hours. An initiative first announced in the mid-1990s, criticised severely by prison staff, who described them as *parloirs sexuels déguisés*, and relaunched in 2000 by Guigou, the *unités de visite familiale* nearly fell victim to the change of parliamentary majority in 2002. Should the Rennes model prove successful, two further units will be set up, one in the high-security prison of Saint-Martin-de-Ré (Ile de Ré) and one in Poissy (Yvelines). Essentially intended to maintain and improve relationships between members of a family, the units are not only meant to allow inmates to continue a sexual relationship with a partner—although forbidden in prison, these tend

to take place furtively in public view during visiting hours, to the humiliation and embarrassment of inmates, partners and warders—but also to compensate for the very short visiting hours which can be a traumatising experience for children visiting a parent. Indeed, many of the women incarcerated in Rennes have been abandoned by their partners, or have partners who are themselves in prison, and their main priority will be to receive their children or parents. Bédier, however, is reserving judgement on the future of *unités de visite familiale*, does not have definite plans to include them in the new prison developments. Perhaps of more pressing need is the re-examination of Guigou's aim to move towards single-occupancy cells: the law ruled that remand prisoners had to be detained in an individual cell, not held with convicted offenders. In order to allow the prison authorities time to tackle the overcrowding of French prisons, this requirement was only to be applied from 16 June 2003, but by the spring of 2003, it had already become apparent that, despite the prison-building campaign, it would be impossible to comply with such a measure, which was abandoned in March 2003.

Another element of Perben's reform is the construction of *centres éducatifs fermés* (CEFs). The first CEFs opened on 17 March 2003 as centres where young offenders aged 13 and over, on probation or under judicial supervision, can be detained. Sixty CEFs are to be built by 2007, each to cater for eight juveniles, and to be staffed by 27 adults including teachers, medical staff, physical education specialists and psychologists, at a cost of 600 euros per youth per day—five or six times the cost of other forms of detention.<sup>28</sup> These CEFs should not be confused with the *quartiers des mineurs* located in prisons,<sup>29</sup> and the emphasis is to be on prioritising the continuation of the young person's education during rehabilitation. But if the young offenders fail to respect the conditions of their detention in the CEF or their judicial supervision, they can be remanded in custody in a prison, a measure not previously possible for those aged under 16.<sup>30</sup> CEFs are also distinct from *établissements pénitentiaires spécialisés pour mineurs* (EPSM) which will replace the *quartiers des mineurs* under the LOPJ, and will be modelled on the tough young offenders institutions in other European countries such as Great Britain, Italy, Spain, Belgium and Sweden. The need to tackle, as a matter of urgency, the treatment of young offenders was highlighted in April 2002, when two 17-year-olds died in their cell in the *quartier des mineurs* of a Lyon prison after having set a mattress alight. The appalling state of the two Lyon prisons, built in 1832 and 1860, and the inadequate staffing ratios were condemned, but also the fact that the two youths had been found guilty of *délits* (major offences) rather than *crimes* (serious offences), and that one of the youths had in fact only committed an offence against property.<sup>31</sup>

CEFs were seen by their creators as the last resort before prison, but they did not have the support of the *Protection judiciaire de la jeunesse*, whose teaching personnel disapproved strongly of the coercive measures of the government. Cooperation came rather from the non-state sector in the shape of the Union nationale des associations de sauvegarde de l'enfance, de l'adolescence et des adultes (UNASEA). A further measure to remove child benefits from families of the young person detained in a CEF if the family does not attempt to participate in 'la prise en charge morale ou matérielle de l'enfant', or else try to ease his or her reintegration into the family unit met with serious criticism. It was argued by some that this measure, aimed at making the troubled housing estates safer for their inhabitants, was simply targeting the deprived and depriving them

still further: 'On est dans une logique de pénalisation et de guerre aux pauvres. En suspendant les allocations familiales, on va sanctionner des familles entières déjà précarisées'.<sup>32</sup>

### The way forward

Following his appointment, Perben rapidly commissioned a number of further reports: Paul Loridant's 'Prisons: le travail à la peine' (26 June 2002), Jean-Luc Warsmann's 'Les peines alternatives à la détention, les modalités d'exécution des courtes peines, la préparation des détenus à la sortie de prison' (28 April 2003), and psychiatrist Jean-Louis Terra's report on prison suicides. Loridant's report revealed that less than one prisoner in two was granted the chance to work, that the work proposed was unskilled and did not motivate offenders to acquire skills, that rates of pay in 2002 were below 200 euros a month, that there were frequent periods of inactivity and that health and safety regulations were applied erratically. It is difficult to square this picture with the mission statement of the legislator, which says that the aim of prison work is to prepare the inmate for social and professional reinsertion into the society which he is destined to rejoin one day or another. Prison work is also essential for a certain share of the prison population who are of very limited means and who have no family nearby to provide them with the money they need to purchase items from the prison trolleys (*cantiner*). The punishment is very real, in that a prisoner will emerge from prison financially less well-off than he entered prison, and also less well-equipped professionally to earn his living in the outside world. Loridant proposed 62 measures towards a new prison work policy, suggesting advantageous financial arrangements for industries employing prisoners, a gradual introduction of employment law regulations, payment of an hourly minimum wage to be set at half of the SMIC and professional training—measures which were received as better than nothing, but nonetheless continuing to exploit this workforce.

For his part, Warsmann was horrified by what he described as the *scandale de l'exécution des sanctions pénales*: several months after sentences had been passed, these still had not been implemented. He noted the case of a man sentenced to four months in prison in September 2001 who had still not commenced his sentence in April 2003. In the meantime, his sentence had been reduced by the annual presidential pardon on 14 July 2002.<sup>33</sup> He discovered that, in general, the paperwork required between the passing of the sentence and its commencement signified a seven-month delay before entering prison, making something of a mockery of the punishment. Warsmann advocated greater recourse to non-custodial sentences: electronic tagging, community service orders, suspended sentences, and semi-custodial sentences which he hoped would lead into a safer parole routine less likely to fail. Use by the *juges* of these alternatives to custodial sentences had declined, due to a lack of confidence in their application, according to Warsmann. One only has to consider the public outcry and blame attached directly to the *juges* when a dangerous criminal released on parole reoffends, to understand the reticence of the *juges* to apply these non-custodial sentences.

Furthermore, Jean-Louis Terra, in his report into prison suicides, presented to Perben on 4 November 2003, summed up the situation as follows: 'La prévention du suicide

n'est toujours pas considérée comme un risque à gérer.<sup>34</sup> Refusing to accept the comfortable and widespread opinion that those who attempt suicide will do all they can to avoid detection and are determined to die whatever the preventative measures in place may be, he maintains that the medical and psychological facilities in place to assist those at risk are not common knowledge to inmates: 'Un silence total est fait sur les actions sanitaires pour prévenir le suicide et sur le traitement de la souffrance psychique liée aux maladies mentales.' Suicide rates were found to be higher among those in solitary confinement and in conditions of overcrowding, and the inexplicable presence in prison of the mentally ill was highlighted. There was found to be little consideration of the state of mind of prisoners punished with solitary confinement, very infrequent medical checks were carried out among those in solitary confinement, medical opinions were not sought regarding allocation of cell mates, and in 37 per cent of prisons, no advice or notification was given to prisoners as to the risk status of their cell mates. Terra proposed the obvious solutions of training prison officers in spotting risks, of training prisoners also, so that someone can be on hand round the clock for an inmate at risk. Ironically, morbid thoughts lead to aggressive outbursts and self-harming, offences punishable by solitary confinement, where the condition is exacerbated and the risk of suicide attempts is highest... Terra insisted that being deprived of one's freedom should not be tantamount to being deprived of one's human rights, for this represented a double sentence, and he repeated Canivet's recommendations of 1999 that an independent authority should be created charged with making recommendations to the AP. Finally, he proposed the objective of reducing prison suicides by 20 per cent within the next five years.

### **In conclusion**

According to Michel Foucault, a nation has the criminal system it deserves; equally, one could say a society has the prison system it deserves, and the situation in contemporary France is far from exemplary. Prison can be described as the hidden side of society, and as such it is a reflection of the shortcomings of that society. There has certainly been an opening of eyes and minds to the situation of French prisons, demonstrated in the considerable number of reports commissioned on the subject in recent years. But will these reports be acted upon, or will they be put on one side and ignored until crisis point is reached again? More than 20 years after Badinter's moving speech for the abolition of the death penalty, in which he lists the rights to which we should all be entitled, it is only too obvious that these do not extend to the prison environment:

Les droits de l'Homme sont universels parce que tous les êtres humains ont des droits fondamentaux que l'on ne peut nier sous peine de nier l'Humanité elle-même. Partout, on doit respecter l'intégrité de la personne humaine, partout, les êtres humains ont le droit de ne pas être torturés, tués, mutilés, de ne pas être réduits en esclavage, de recevoir des soins, d'avoir accès à l'éducation, à la culture, partout, les êtres humains doivent pouvoir penser et s'exprimer librement ...<sup>35</sup>

It will be particularly interesting to follow developments in France, at a time when the UK public is focusing on the state of its own criminal justice system. Justice Ministers' and Home Secretaries' responses to the crisis in prisons usually begin with plans for



massive prison-building campaigns, with modern institutions and sophisticated technology, promising better conditions, increased security and more space. Overcrowding is always one of the culprits of prison crises, and the annual Bastille Day presidential pardon is a godsend for the French prison services, releasing pressure before the hot summer period, when the situation in prisons is particularly volatile. However, it is difficult not to conclude that the development of non-custodial sentences should form an important part of the solution. Prisons are a little like motorways. The more you build, the more people use them.

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8. See PERROT, M., *Les ombres de l'histoire* (Flammarion, 2001).
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14. PRIEUR, C., 'Les visites des enfants à leurs parents détenus soumises à l'arbitraire', *Le Monde* (15 June 2002).
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26. Agence France Presse (AFP), 'Jean-Christophe Mitterrand dénonce l'"expression de haine" du juge Courroye' (10 January 2001).
27. In September 2002, two prisoners escaped by rope ladder from Ploemeur (Brittany); in November, a prisoner was killed trying to escape from Arles prison (southern France); in March 2002, well-known criminal Joseph Menconi escaped from Borgo prison (Corsica), aided by accomplices with fake weapons.
28. PRIEUR, C., 'Les premiers centres éducatifs fermés prêts à accueillir des mineurs', *Le Monde* (15 March 2003).
29. As of 1 July 2002, 901 juveniles were incarcerated in 55 *quartiers des mineurs* in French prisons ('La réforme de la justice, 24 juillet 2002', <http://www.vie-publique.fr/actualite/>).
30. *Ibid.*
31. VICTOR, E., 'Polémique entre magistrats lyonnais sur le danger d'incarcérer les mineurs', *Le Monde* (30 May 2002).
32. Michel Tubiana, director of the *Ligue des droits de l'homme*, quoted in CHAMBON, F., KRÉMER, P., MATHIEU, M., 'La loi sur la justice alarme les syndicats et les associations', *Le Monde* (7 August 2002).
33. PRIEUR, C., 'Le député Jean-Luc Warsmann presse le garde des sceaux de relancer les alternatives à l'incarcération', *Le Monde* (30 April 2003).
34. See SIMONNOT, D., 'Une nouvelle peine de mort derrière les barreaux', *Libération* (3 November 2003).
35. Quoted from Robert Badinter's speech for the abolition of the death sentence, Assemblée nationale, 17 September 1981.

- (ix) Trouille HL, 'Conclusion: from the twentieth century into the twenty-first: should we still fear the *'juge'* in the new legal framework?' in Feuillee-Kendall P and Trouille HL (eds), *Justice on trial: the French 'juge' in question* (Peter Lang 2004)

Helen Trouille

### Conclusion:

From the twentieth century into the twenty-first:  
should we still fear the *juge* in the new legal  
framework?

The chapters in this volume discuss the fear the public may have of the *juge*. In this concluding chapter, I will examine some major changes in legislation at the end of the twentieth century and at the very beginning of the twenty-first century, setting them in their context. With the drafting of the *loi sur la présomption d'innocence*, Elisabeth Guigou, formerly minister for European Affairs and subsequently Justice Minister in Lionel Jospin's socialist government, set about bringing certain aspects of French criminal procedure into line with the expectations of the European Convention on Human Rights, notably the right of appeal against rulings of the *cour d'assises*, the sometimes very lengthy delays in bringing cases to court (and consequently stays in prison for remand prisoners), and the creation of a *juge des libertés et de la détention*. This law appeared to create a climate in which the defendant could expect his rights to be respected, and to be presumed innocent in the first instance. However, following the 2002 presidential election campaign dominated by the issue of the fear of crime, the next Justice Minister, Dominique Perben, introduced a more repressive package of measures: a serious prison-building campaign, non-professional *juges de proximité* to tackle delinquency, and weighty measures against major road traffic offences, including prison sentences for offenders. It seems the *juge* and the politicians attempting to guarantee their re-election should still be feared in the twenty-first century.

*Les chapitres de ce volume discutent la peur que le public peut avoir des juges. Dans cette conclusion, j'examinerai quelques-unes des principales réformes législatives de la fin du vingtième siècle et du tout début du vingt et unième siècle, en les replaçant dans leur contexte. En rédigeant la loi sur la présomption d'innocence, Elisabeth Guigou, d'abord ministre des affaires européennes, puis Garde des Sceaux dans le gouvernement socialiste de Lionel Jospin, tenta d'accorder certains aspects de la procédure pénale française avec les attentes de la Convention européenne des droits de l'homme, en particulier le droit d'appel des décisions de la cour d'assises, s'agissant*

*notamment des très longs délais qui précèdent parfois l'audience des affaires (et, par conséquent, l'emprisonnement en détention provisoire), et la création d'un juge des libertés et de la détention. Cette loi parut créer un climat dans lequel l'inculpé pouvait espérer le respect de ses droits, et être présumé innocent de prime abord. Toutefois, à la suite de la campagne présidentielle de 2002, dominée par la peur de la criminalité, le Garde des Sceaux suivant, Dominique Perben, introduisit un ensemble de mesures plus répressives: un programme important de construction de prisons, des juges de proximité non-professionnels pour s'attaquer à la délinquance et des mesures sévères pour réprimer les délits routiers les plus importants, y compris des peines de prison pour les coupables. Il semble bien qu'au vingt et unième siècle l'on doive encore craindre le juge et les politiciens qui s'efforcent de garantir leur réélection.*

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The conference which gave rise to this volume was entitled '*Faut-il avoir peur des juges?*' The chapters included here demonstrate the power of the *juge*, but also describe the safeguards which have been put in place and the reforms made with a view to ensuring the right of every citizen to fair treatment at the hands of the law, and the protection of democratic principles (Godard, Siniscalchi). Some are more pessimistic than others in their interpretation of the situation in France today (Sainati, Lombroso); some realistic in their appreciation of how theory is applied to reality (Hodgson). Most show that the rôle of the *juge* is in constant flux. In this concluding chapter, we would like to reflect upon the situation at the turn of the millennium, as France moved from the twentieth into the twenty-first century. Should we still fear the French *juge* in the twenty-first century? In our examination of this question, we will consider what is arguably the most significant reform to French criminal procedure since 1958, when the current *Code de procédure pénale* was adopted, the *loi sur la présomption d'innocence*, and contrast the reforms it introduced in 2001 to the more repressive ones proposed by the subsequent justice minister.

## Context

The presidential elections of May 2002 brought more than one shock with them. No-one had foreseen the extent of the support which would be expressed for National Front leader, Jean-Marie Le Pen, in the first round. He had tuned into the fears of a large section of the electorate with his programme based on *insécurité* in a way which the leaders of the other key political parties failed to match. The ensuing second round landslide victory for Jacques Chirac, the R.P.R. candidate, supported by voters from the left and the right alike to keep Le Pen out of the Elysée at all costs, marked the beginning of a period of change in French politics. In July, the victory of the traditional right was confirmed by the voting in of a considerable right wing majority to the Assemblée Nationale – with the prospect of five years of undiluted right wing control ahead – but by then President Jacques Chirac had already set to work on tackling the voters' fears of *insécurité*. In the weeks and months immediately after Chirac's re-election, a battery of legislation unfurled which contrasted as strongly with the policies of his two previous socialist justice ministers, Elisabeth Guigou (May 1997–October 2000)<sup>1</sup> and Marylise Lebranchu (October 2000–May 2002) as could be conceived of in modern day France. For the new justice minister, Dominique Perben, and interior minister, Nicolas Sarkozy, had prepared a package of legal and police reforms which were described by many as repressive, and which contrasted markedly with the attempts of Guigou and Lebranchu to improve the rights of the defence, reduce the number of remand prisoners – thus tackling prison overcrowding – and improve France's reputation for human rights at European level.

As has already been alluded to, France had not distinguished itself in human rights matters with the European Court of Human Rights (Trouille), and was seen as a persistent offender of certain of the European Convention's articles, due to the character of its

1 Elisabeth Guigou moved to the *Ministère de l'emploi et de la solidarité* when Martine Aubry took up office as maire of Lille in October 2000. Marylise Lebranchu replaced Guigou at the *Ministère de la justice* in the cabinet reshuffle which followed.

criminal system. For example, the absence of the right to appeal against decisions of the *cour d'assises*, the court judging the most serious crimes carrying the heaviest penalties, was seen as infringing basic human rights as expressed in article 5.4 of the Convention, in which the detained person's right to have his case examined by a second instance court is evoked:

Toute personne privée de sa liberté par arrestation ou détention a le droit d'introduire un recours devant un tribunal, afin qu'il statue à bref délai sur la légalité de sa détention [...] (Convention européenne des droits de l'homme, article 5.4)

The continuation of this apparent anomaly was justified in France by the fact that the verdict had been reached by a popular jury and that appeal against these decisions was possible, to the *Cour de Cassation*, although appeal to this court was essentially only on grounds of procedural technicality (Harvey), and the outcome was very rarely successful for the person lodging the appeal. Further offences were noted with regard to the right to a fair trial – the E.C.H.R. had ruled that the *procédure de mise en état* had deprived Maurice Papon of a fair trial (Trouille) and also that Abdelhamid Hakkar, tried and sentenced to life imprisonment in 1989, *in absentio* and without the presence of his lawyer, should be retried (Prieur 2001, 7) – and the right to have ones case heard within a *délai raisonnable*, two principles stated clearly in the Convention:

Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable [...] (Convention européenne des droits de l'homme, article 6.1)

Toute personne arrêtée ou détenue [...] a le droit d'être jugée dans un délai raisonnable, ou libérée pendant la procédure. (Convention européenne des droits de l'homme, article 5.3)

The contravening by the French of the *délai raisonnable* has been frequent, due notably to the apparent ease with which *juges d'instruction* have in the past requested the imprisonment of suspects prior to trial and the length of the *instruction* itself, and has been a source of concern to the French for other reasons too. The large

number of *prévenus* (remand prisoners imprisoned prior to trial) in French prisons has not just been a blot on the French copybook in terms of the European Convention, but creates genuine and serious problems of prison overcrowding, and all the accompanying difficulties associated with the confining of large numbers of prisoners – some guilty, some innocent until proven otherwise – in a confined space intended for far fewer (Trouille 2000). Reducing the number of remand prisoners – calculated in the late nineties at about 40% of the total prison population, including those awaiting the results of appeals (Descombres 1997) – was therefore a priority for Elisabeth Guigou when she took up office in the Ministère de la justice in 1997, but the *loi sur la présomption d'innocence* put forward by Guigou and passed in June 2000 clearly shows her aim to bring France into line with the principles of the European Convention in general. The new law (*loi numéro 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*) has inserted a new *article préliminaire* at the head of the *Code de procédure pénale*. At the end of Section III, it refers directly to the importance of reaching a verdict within a *délai raisonnable* and to the right to appeal, but the wording is very reminiscent of the terms of the European Convention. It reads as follows:

- I. La procédure pénale doit être équitable et contradictoire et préserver l'équilibre des droits des parties. Elle doit garantir la séparation des autorités chargées de l'action publique et des autorités de jugement. Les personnes se trouvant dans les conditions semblables et poursuivies pour les mêmes infractions doivent être jugées selon les mêmes règles.
- II. L'autorité judiciaire veille à l'information et à la garantie des droits des victimes au cours de toute procédure pénale.
- III. Toute personne suspectée ou poursuivie est présumée innocente tant que sa culpabilité n'a pas été établie. Les atteintes à sa présomption d'innocence sont prévenues, réparées et réprimées dans les conditions prévues par la loi. Elle a le droit d'être informée des charges retenues contre elle et d'être assistée d'un défenseur. Les mesures de contraintes dont cette personne peut faire l'objet sont prises sur décision ou sous le contrôle effectif de l'autorité judiciaire. Elles doivent être strictement limitées aux nécessités de la procédure, proportionnées à la gravité de l'infraction reprochée et ne pas porter atteinte à la dignité de la personne. *Il doit être définitivement statué sur l'accusation dont cette personne fait l'objet dans un délai raisonnable. Toute personne condamnée a le droit de faire examiner sa condamnation par une autre juridiction.* (Article préliminaire, Code de procédure pénale, emphasis added)



### Reform – the *loi sur la présomption d'innocence*

The law which became widely known as the *loi sur la présomption d'innocence* was finally passed in June 2000, and came into effect on 1 January 2001. From forty or so articles at its inception (Bédier 2001, 3), it had grown to one hundred and forty-two at the time it was adopted, and had generated considerable discussion on its way. It contained a number of very significant measures aimed at enhancing the rights of the defence and bringing France into line with other European democracies: measures relating to the *garde à vue* (police custody), to the rôle of the *juge d'instruction* (the examining magistrate), to the right to appeal against judgments made for serious crimes, to the application process for *libération conditionnelle* (parole), to name just some of the most noteworthy. Those which most caught the attention of the public are outlined below.

#### *The garde à vue (police custody)*

With the arrival of the *loi sur la présomption d'innocence*, a number of major changes affected the character of the *garde à vue*, some directly influenced by Anglo-Saxon models: notably the obligation to inform the suspect of his right to silence under questioning (Article 8, see Annex I), such an unpopular move with those responsible for the enquiry, who maintained they would find it more difficult to obtain a confession and who would have to review their entire questioning procedure, that it was reversed in March 2003, less than a year after the elections returned a right-wing majority; and the presence of the lawyer, for half an hour, from the first hour of the *garde à vue* (Article 11.1, see Annex I). Previously the suspect had only been able to communicate with his lawyer from the twentieth hour of the *garde à vue*. As before, the lawyer was still not entitled to have access to the suspect's file, nor to be present during questioning, but could advise him of his rights and of the approach he should adopt. The suspect had the right to consult his lawyer again at the twentieth hour, and at the thirty-sixth hour, should the *garde à vue* be prolonged beyond the

standard twenty-four hours. However, the law stipulated that the first meeting with the lawyer could not take place before the thirty-sixth hour in cases of organised crime, and before the seventy-second hour in cases of terrorism and drug trafficking (articles 11.4 and 11.5, see Annex I). Another major development borrowed directly from the English system, and one which was fiercely opposed for both practical reasons and on principle, by the police and by the Sénat, was the recording on tape of police interviews. It was felt that such measures would be costly, burdensome and unwieldy for police officers, would create problems of storage of tapes, threw suspicion on the behaviour of police officers during interviews, and would cause suspects to 'clam up' in front of the cameras, thus slowing down the investigation process. The new law was something of a compromise on this issue and required the recording on video tape of all interviews of juveniles during the *garde à vue*, from 16 June 2001, a recording which can only be consulted subsequently to confirm the content of the suspect's statement, in the event of this being contested, and this only prior to the hearing (Article 14, see Annex I).

The new law also provided that suspects only could be held in *garde à vue*, that this measure could no longer be extended to detaining witnesses, and that the suspect must be informed by the police of the precise nature of the offence in connection with which he was being held (article 7). Furthermore, if a body search was to be carried out, then this must only be performed by a member of the medical profession (Article 6, see Annex I).

#### *L'instruction (the investigation)*

The law became more rigorous with regard to the *mise en examen* (placing under investigation) of a suspect, stating that there had to be serious indications to suggest his involvement in the offence and not simple suspicions before he could be placed under investigation (Article 19, see Annex I), and providing that the actual *mise en examen* of a suspect could only take place in front of the *juge d'instruction*, and not be informed by letter (Article 19, see Annex I). At the same time, the law extended the function of the *témoin assisté* to enable a person simply suspected of involvement in an offence to

be interviewed by the *juge d'instruction* in the capacity of *témoign assisté* without being formally placed under investigation, and yet still benefit from certain rights normally only given to those officially under investigation: most significantly, the right to a lawyer and to see their file (Article 33, see Annex I).<sup>2</sup> Previously, the *juge d'instruction* had had no alternative but to place a person under investigation if he wished to question that person in relation to an offence, in order that he should benefit from these rights but, inevitably, in the eyes of the public, such an act tended to prejudge and automatically suggest the person placed under investigation was guilty.

*La liberté de communication (Freedom of information)*

Two new measures introduced by the law were ill-received by journalists. Firstly, the imposition of fines of FF 100 000 upon those presenting as guilty someone under investigation was introduced (Articles 91 and 92, see Annex I). Previously, the 1881 law had dictated that prison sentences be handed down in respect of journalists portraying a person 'helping the police with their enquiries' as guilty – sentences which were in fact no longer applied. This related particularly to the publication of photographs of suspects wearing handcuffs, and the new legislation met with protests from journalists, who decried this measure for infringing the freedom of information. Secondly, a text destined to protect the victim's rights was inserted, forbidding the publication of images which could cause offence to the victim (Article 97, see Annex I), which also displeased journalists for the same reasons as those mentioned above.

*La détention provisoire (remand)*

The law stated that, since the person under investigation is still presumed innocent, he may only be remanded in custody in exceptional circumstances (Article 46, see Annex I). Should he be detained, this had to be in an individual cell and not in a shared one,

2 Jean Tiberi, former *maire* of Paris, was interviewed in this capacity.

but in order to allow time to tackle the overcrowding of French prisons, this requirement was only to be compulsory from 16 June 2003. From being the remit of the *juge d'instruction* alone to remand in custody, it became the responsibility of a newly-created *juge des libertés et de la détention*, who would respond to a request for detention from the *juge d'instruction* (Article 48). The *juge des libertés et de la détention* would then base his decision on a hearing with the suspect, in which both parties could put their case (Article 52), and which could be a public hearing if the defence so wished. The creation of 108 new posts was foreseen to fulfil these functions (Bédier 2001, 7).<sup>3</sup> In order to emphasise the exceptional nature of remand, the threshold of the minimum sentences risked in the event of a guilty verdict and for which remand would be authorised were raised: a *juge d'instruction* could only request that a suspect be remanded in custody if he had committed a major offence (*crime*) or if he risked a prison sentence of three years or more (five years or more for an offence against property or a first custodial sentence exceeding 12 months) for a serious offence (*délit*). A time limit was also set for the maximum length of time which a remand prisoner could remain incarcerated prior to trial: ranging from four months (for suspects having no previous custodial sentences on record) to two years for a serious offence, and from two years (for suspects risking sentences of less than twenty years) to four years for a major offence (Articles 57–59). These new limits remain higher than those of many European states, but still present difficulties for *juges d'instruction* unable to complete their investigations within the allotted time (Bédier 2001, 8).

3 Despite this move to shift the responsibility for the detention of a suspect away from the *juge d'instruction*, in the experience of an *avocat* at the Dijon *cour d'appel*, it is extremely rare for a *juge des libertés et de la détention* to rule against the decision of a *juge d'instruction*.

*La Libération conditionnelle (parole)*

Before the *loi sur la présomption d'innocence* was passed, any reductions in sentences or conversions to non-custodial sentences, including parole, for those serving sentences of five years or less were made by the *juge de l'application des peines* (J.A.P.) and were administrative measures against which there was no appeal. Parole decisions in the case of sentences of over five years were reached by the justice ministry, based on the advice of the *comité consultatif de libération conditionnelle*. Practitioners had long been requesting a change to this procedure, considering it unjust that such decisions – which could have far-reaching consequences – should not be subject to appeal and in September 1999, Daniel Farge, *conseiller* at the *Cour de Cassation* and chair of the *comité consultatif de libération conditionnelle*, was entrusted with the task of reviewing the processes relating to the granting of parole. Indeed, successful applications for parole had dropped from 29% in 1973 to 14% in 1998 (Bédier 2001, 14). The new law (Articles 125–128) provided that, for sentences exceeding ten years, decisions relating to parole should be reached by *juridictions régionales de libération conditionnelle*, on which two J.A.P.s would sit, one being from the applicant's prison, and a representative from the *cour d'appel*, and would be subject to appeal. This removal of direct involvement on the part of the *garde des sceaux* is in line with Guigou's stated approach to her work in general as *ministre de la justice*. Decisions relating to sentences of 10 years or less were made by the J.A.P.: '... à l'issue d'un débat contradictoire tenu en chambre du conseil, au cours duquel le juge de l'application des peines entend les réquisitions du ministère public et les observations du condamné ainsi que, le cas échéant, celle de son avocat ...' (Article 125) and were, likewise, subject to appeal. This measure was to be introduced in June 2001, six months after other aspects of the law came into effect, due to the shortage of personnel, especially clerks of the Court (*greffiers*), and has had the effect of increasing the number of requests made and paroles granted.

### *Decisions of the E.C.H.R.*

Following the cases of Papon and Hakkar, alluded to earlier in this chapter, the *loi sur la présomption d'innocence* undertook to integrate European legislation on human rights into French texts and to show France's commitment to honouring the European Convention. Article 89 (see Annex I) allows for a revision of a trial judged unfair by the European Court of Human Rights, and Hakkar has already benefited from this new measure (the *cour d'assises* des Hauts-de-Seine sentenced him to life on 26 February 2003, thus repeating the decision of the first verdict of the Yonne *cour d'assises* in 1989). The law also repealed the obligation of *mise en état* (handing oneself over to the law) the day before the consideration of an appeal (*pourvoi*) to the *Cour de Cassation*.

### *Cour d'assises*

The most significant of all the reforms was the introduction of an appeal procedure for verdicts reached in the *cour d'assises*, a measure which was in fact not part of the initial reform, but added in the course of its elaboration (See Harvey for a fuller discussion of these measures). This, also the most expensive of all the changes, supported by the creation of a large number of new posts of *magistrat* and *greffier*, saw the introduction of the *cour d'assises* ruling as a first instance court, with its decisions subject to appeal in another *cour d'assises* with a twelve-strong jury. The *loi sur la présomption d'innocence* initially stipulated that appeals against a verdict could only be made by the defence, and by the prosecution only with regard to the length of sentence handed down. The prosecution could not appeal in the event of an acquittal of the accused, since the law saw the right to appeal against decisions of the *cour d'assises* as reinforcing the presumption of innocence and as giving the accused a second chance. However, the feeling that this moved too far in favour of the defence was prevalent, and, following the Dray report (see Harvey), an amendment was made to the provisions on 21 February 2002, which enabled an appeal against acquittals to be lodged by the *procureur général*. The safeguard remains, however, that the accused

may only receive a higher sentence after lodging an appeal if the *procureur général* has also appealed against the initial verdict.

#### *The right to visit*

The law also authorised members of both the Assemblée Nationale and the Sénat to visit police cells, detention centres and prisons at any moment (Article 129, see Annex I), to assess the conditions in which detainees were being held. This was a response to the outcry which had arisen on the publication in January 2000 of Véronique Vasseur's book *Médecin en chef à la prison de La Santé*, which described vividly the appalling conditions in which prisoners were being detained in the Paris prison of La Santé, and which prompted direct and immediate moves towards prison reform.

#### The impact of the reforms

The mood of the reform shows clearly through the measures outlined above: improving the rights of those under investigation and of victims, and bringing France into line with the principles of the European Convention on Human Rights. These measures were generally well-accepted, although were not without their detractors, whose criticisms were based essentially on the impracticality of implementing the new law, with the limited resources available, and some areas still remained where the suspect was at the mercy of the system: for example, the absence of the lawyer during the police interview, and no taped record of it. But despite a certain scepticism in the early days of the application of the law, some changes were rapidly identified: the number of people placed in *garde à vue* declined by 10.2 % between 1 January and 1 June 2001 compared with the same period the previous year, signifying 12 300 fewer cases (Ceaux and Prieur 2001, 10), a reduction resulting from the fact that witnesses could no longer be held in *garde à vue*. And whereas police

felt that the new requirements complicated procedures at the police station and extended the length of the *garde à vue* (Ceaux and Prieur 2001, 10), their fears regarding the right to silence of suspects and the presence of the lawyer from the first hour of the *garde à vue*, if not popular, had nevertheless been somewhat allayed six months after implementation. There was also a drop in the number of suspects remanded in custody as a result of the legislation – one of the principal aims of the reform – with numbers of suspects held in *détention provisoire* declining from 20,527 in January 2000 to 14,537 in August 2001 (Prieur 2002, 11), before rising again as a result of the Bonnal affair<sup>4</sup> and the ensuing accusations of laxism directed at the *magistrats*. These are certainly indications of a climate in which one could start to feel less fearful of the *juges*.

A certain number of amendments were made by Lebranchu as a result of the official report submitted by Jean-Paul Collomp for the *Inspection générale des services judiciaires* (14 June 2001), the *Entretiens de Vendôme*<sup>5</sup> (report produced December 2001) and the Dray and Lazerges<sup>6</sup> reports (both December 2001), culminating in the loi 2002–307. Thus, from early 2002, witnesses could once more be

- 4 Jean-Claude Bonnal, le Chinois, was arrested in 1998 for a robbery on a department store in Paris and released from custody in December 2000, with no trial date set. He was subsequently suspected of being responsible for the deaths of six people, amongst them two police officers, in the course of two armed raids committed after his release in October 2001.
- 5 *Entretiens de Vendôme*: a series of monthly meetings set up by the justice ministry, commencing 5 April 2001, involving representatives from lawyers' unions, legal professionals, the speaker of the Assemblée Nationale, a senator, two elected representatives of the people, and the justice minister. The aim was to enable those directly affected by the terms of the *loi sur la présomption d'innocence* to share their concerns about operational difficulties, thus responding to the anxieties expressed in 2000 and 2001 in the shape of lawyers' street protests.
- 6 Prime Minister Lionel Jospin entrusted Julien Dray with the compiling of a report on the consequences of the *loi sur la présomption d'innocence*, a report which was submitted on 19 December 2001, and which focussed its attention essentially on the law's effect on police procedures. The Assemblée Nationale for its part produced its own report compiled by Christine Lazerges and submitted on 20 December 2001. Her report bore four sections: *l'instruction, la détention provisoire, l'appel de décisions de cours d'assises, la juridictionnalisation de l'application des peines*.



held in *garde à vue*; the length of time in which police officers were to complete administrative procedures relating to the *garde à vue* was extended from one hour to two (notifying the prosecution services of the arrest, finding an interpreter, informing the suspect's family); and the right of appeal against decisions of the *cour d'assises* was granted to the prosecution as well as the defence, as mentioned earlier.

### A change of government and the *loi d'orientation et de programmation pour la justice*

The 2002 presidential elections had barely confirmed Chirac as president when Nicolas Sarkozy, new interior minister, outlined his proposed law on *sécurité*, and following closely on his initiative, Dominique Perben, *garde des sceaux*, the proposals for his *programme pour la justice*, two series of reforms very in similar vein, with at their core, the intention to reassure the electorate that the government was tackling the issues which had led to the preoccupations with crime and the fear of crime so dominant in the election campaign. The emphasis of Perben's reform – the *loi d'orientation et de programmation pour la justice* (L.O.P.J.) – was on reinforcing the rights of the victim, combating juvenile crime, speeding up the trial process, reducing the number of sentences not carried out and implementing a prison building and modernisation campaign.<sup>7</sup> The accent this time was far more on protecting the victims of crime and on punishing the offender than on extending the rights of the defence. In the words of Pascal Clément, chairman of the *commission des lois*: 'Il faut montrer que nous avons compris l'appel désespéré des Français' (Chambon et al. 2002, 5). The L.O.P.J. was passed on 9 September 2002, to the consternation of practitioners from many walks, who, for the past decade, had been applying a more

7 Perben planned the creation of 13,200 prison places, signifying the building of thirty new prisons by 2007, at a cost of 1.4 billion Euros, a programme to be overseen by Pierre Bédier, the newly-appointed *secrétaire d'état aux programmes immobiliers de la justice* (Prieur 21 novembre 2002).

multi-discipline approach to tackling the problems of delinquency and extending the rights of all parties involved in a case. In order to bring about the reforms, the law allocated a budget of 3.65 billion Euros, to be spent on job creations and improving the smooth-running of the system. A further 1.75 billion Euros was earmarked simply to assist the implementation of the programme. During the period 2003–2007, it was anticipated that 10,100 new permanent posts would be created, and in addition to these, an additional 580 full-time *juges de proximité* and *assistants de justice* would be recruited.

One of the most significant innovations of the law was in respect of juveniles. Under the terms of the L.O.P.J., juveniles aged thirteen and over could be detained in *centres éducatifs fermés* (C.E.F.), newly created centres where juveniles on probation or under judicial supervision could be detained, with the threat of *détention provisoire* in a prison (a measure not previously possible for those under sixteen) if they did not respect the conditions of their detention in the C.E.F. (Article 18 lays down the conditions from which these young people must benefit if they are incarcerated), and where they could still continue their education. The two first C.E.F.s, seen by their creators as the *dernière chance avant la prison*, opened their doors on 17 March 2003, set up, not with the co-operation of the *Protection judiciaire de la jeunesse*, whose teaching personnel disapproved strongly of the coercive measures of the government, but with the support of the non-state sector in the shape of the *Union nationale des associations de sauvegarde de l'enfance, de l'adolescence et des adultes* (Unasea). The law planned the construction of sixty C.E.F.s by the year 2007, each to care for eight juveniles, and to be staffed by twenty-seven adults including teachers, medical staff, physical education specialists and psychologists, at a cost of 600 Euros per youth per day – five or six times the cost of other forms of detention (Prieur 2003, 10). The C.E.F.s should not be confused with the *quartiers des mineurs* located in prisons, gradually to be replaced by juvenile detention centres under the terms of the law.<sup>8</sup> Highly controversial was the provision that child benefit would be withdrawn

8 At 1 July 2002, 901 juveniles were incarcerated in 55 *quartiers des mineurs* in French prisons ('La réforme de la justice, 24 juillet 2002', <http://www.vie-publique.fr/actualite>).

from families of the detained young person, unless the family ‘participe à la prise en charge morale ou matérielle de l’enfant’ or else to ease his or her reintegration into the family unit (Article 23; see Annex II). *Sanctions éducatives* were elaborated for children as young as ten years of age (Article 11; see Annex II), authorising the confiscation of property used to commit the offence, forbidding juvenile offenders from frequenting the scene of the offence or forbidding them from seeing any accomplices. It was argued by some that these measures, aimed at making the troubled housing estates safer for their inhabitants, were simply targeting the deprived and depriving them still further: ‘On est dans une logique de pénalisation et de guerre aux pauvres. En suspendant les allocations familiales, on va sanctionner des familles entières déjà précarisées.’ (Michel Tubiana, director of the *Ligue des droits de l’homme*, see Chambon et al. 2002, 5). Monique Sassier, director of the *Union nationale des associations familiales*, went even further:

C’est une mesure de facilité, qui reporte toute la responsabilité sur les familles alors qu’il s’agit d’une question de société, et qui aura des effets pervers [...] On prive les familles des moyens de rester en lien avec leur enfant; on fait porter les conséquences de la délinquance d’un enfant sur les autres enfants de la famille. see Chambon et al. 2002, 5)

The tragic case of Sohane, a seventeen-year-old girl burned to death in the autumn of 2002 by a jealous youth may only have served to reinforce the government’s determination in this direction.<sup>9</sup>

The L.O.P.J. aimed to improve the rights of victims of crime, by offering them the same support as the offender. Thus, the victim also had the right to request legal assistance from a duty solicitor (*un avocat commis d’office*) from the moment of lodging a complaint. Furthermore, victims of the most serious offences (e.g. murder, attempted murder, torture, rape, terrorism) were to be allowed legal aid regardless of their financial status, a measure to take immediate effect and for which Perben had allocated 7.5 million Euros, with an

9 The burned body of Sohane was found dumped next to the rubbish bins of a housing estate in Vitry-sur-Seine (Val-de-Marne) on 4 October 2002. She had apparently flouted the authority of her young tormentor, who had doused her in petrol and threatened her with a cigarette lighter.

additional 0.5 million Euros put aside to assist victim support agencies (Prieur 2002, 10). These measures were seen as complementing those of the *loi sur la présomption d'innocence*, which obliged police to inform victims of their right to compensation and to seek assistance from victim support (Article 103), and *juges d'instruction* to inform them of their right to request that specific investigations or reconstitutions be carried out, and to update them at six-monthly intervals as to the progress of their case (Article 109).

A certain number of changes to criminal procedure were brought in: the procedure of *référé-détention*, which prevents a *juge d'instruction* or *juge des libertés et de la détention* from releasing a suspect from remand without informing the *Procureur de la République*, who is granted four hours in which to appeal against the *juge's* decision to release (see article 38, Annex II). Noteworthy also is the extension of the use of anonymous testimonies. The law of 15 November 2001 on *sécurité quotidienne* introduced a measure whereby witnesses could testify and at the same time retain their anonymity, a measure influenced by the events of 11 September 2001 and aimed at combating terrorism, and only applying in the case of offences carrying a prison sentence of five years or more. The L.O.P.J. extended this provision to cover less serious offences (*délits*) punishable by a three-year prison sentence (Article 39–5). This step was widely criticised by left and right, and denounced by maître Philip Cohen, adviser to the *bâtonnier de l'ordre des avocats de Paris* in these terms: 'On fait le choix d'une société de dénonciation anonyme par des personnes qui agissent derrière leurs rideaux et non pas comme des citoyens responsables.' (Chambon et al. 2002, 5).

In accordance with Chirac's electoral promise, the law created a *juridiction de proximité* for each *cour d'appel*. These were to be staffed by *juges de proximité*, non-professional *juges* who nonetheless, and contrary to practice in the U.K.'s magistrates courts, would have a legal background (e.g. former barristers and solicitors, perhaps) and would work on a part-time basis, sitting alone, to judge civil cases and minor criminal offences, under the guidance of the *juge d'instance*. This measure cannot be implemented until the precise status of the *juges de proximité* has been finalised.

*'Une justice d'en-bas'*

A meeting of human rights associations<sup>10</sup> on 15 July 2002 deplored the repressive approach of the L.O.P.J., which stigmatised the lower social classes in a manner reminiscent of the nineteenth century. It was feared that the emphasis on *sécurité* would aggravate racial tensions amongst the young, and the approach to juvenile offenders was deemed to amount to sabotage of the long-term work invested by the *juges des enfants*. The creation of *juges de proximité* ('une sous-justice, rendue par des sous-juges, pour des sous-citoyens', Bruno Marcus, Syndicat des avocats de France, in Prieur 16 July 2002) was criticised, as these non-professional judges would be empowered to impose sentences with far-reaching consequences, such as fines of up to 45 000 Euros, or the withdrawal of a driving licence, and with no appeal possible. The increased recourse to prison shocked maître Thierry Lévy of the *Observatoire international des prisons*:

Deux ans après une vaste protestation de l'ensemble des partis politiques contre l'état des prisons, on se jette à corps perdus dans le tout carcéral, imitant la politique américaine de pénalisation des laissés-pour-compte. (Thierry Lévy in Prieur 16 July 2002).

For its part, the Paris bar denounced the law which it felt could seriously compromise the presumption of innocence and jeopardise the rights of the defence, considering that it weakened some of the substance of the *loi sur la présomption d'innocence*, and would cause an increase in the number of people incarcerated. To conclude, it felt that the law undermined France's attempts to bring its criminal law in line with the European Convention on Human Rights.

10 The Ligue des droits de l'homme; Syndicat de la magistrature; syndicat des avocats de France; Observatoire des prisons; Association des magistrats de la jeunesse et de la famille; Syndicat des éducateurs S.N.P.E.S-P.J.J-F.S.U.; C.G.T.-pénitentiaire; Mouvement contre le racisme et pour l'amitié entre les peuples.

## Conclusion

The measures outlined above show two very different approaches to tackling the problems of crime in France in the late twentieth and early twenty-first centuries. The approach adopted by the justice ministers in question, Guigou and Lebranchu for the left, Perben for the right, communicate, of course, the philosophies of their parties, but they are also a reflection of other influences: Guigou responded to criticisms of human rights emanating from the E.C.H.R., a heavy cross to bear for the former minister of European Affairs; Perben to the issues of *sécurité* dogging the 2002 presidential elections, which so obsessed the electorate and to which politicians seemed to have inadequate responses. Further measures will follow as a result of Perben's *loi sur la criminalité organisée*, passed in 2003. Hot potatoes were the suggestion of relinquishing the presence of the lawyer at the start of the *garde à vue*, and the obligation to notify suspects of their right to silence during police questioning, already repealed in March 2003; the criminalisation of gathering in entrance halls of blocks of flats; and the status of the *repenti* – the 'super grass' given protection for denouncing his accomplices. Seen in this light, and following the announcement of a repressive *loi sur la violence routière* 'pour apprivoiser les barbares de la route' (e.g. prison sentences for those causing fatal road accidents or driving under the influence of drugs or alcohol, responsibility of the vehicle owner to pay speeding fines if his vehicle is caught on camera, regardless of who is at the wheel; Mathieu 2003), it would certainly seem that we may still need to fear the *juges*, or if not them, then the politicians who elaborate the laws. For, as French critics and observers have noted, a considerable number of French citizens may well find themselves not just living in the more secure environment promised them, but also feeling the sharp edge of Perben's sword themselves.

## Annex I

*Extracts taken from the Loi numéro 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes, (Journal Officiel, no. 138, 16 juin 2000)*

Article 6: Après l'article 63-4 du même code [du C.P.P.], il est inséré un article 63-5 ainsi rédigé: Art. 63-5. 'Lorsqu'il est indispensable pour les nécessités de l'enquête de procéder à des investigations corporelles internes sur une personne gardée à vue, celles-ci ne peuvent être réalisées que par un médecin requis à cet effet.'

Article 8: Le premier alinéa de l'article 63-1 du même code est complété par une phrase ainsi rédigée: 'La personne gardée à vue est également immédiatement informée qu'elle a le droit de ne pas répondre aux questions qui lui seront posées par les enquêteurs.'

Article 11: L'article 63-4 du même code est ainsi modifié:

1. Au premier alinéa, les mots: 'Lorsque vingt heures se sont écoulées depuis le début de la garde à vue' sont remplacés par les mots: 'Dès le début de la garde à vue ainsi qu'à l'issue de la vingtième heure ...'

3. Après le cinquième alinéa, il est inséré un alinéa ainsi rédigé: 'Lorsque la garde à vue fait l'objet d'une prolongation, la personne peut également demander à s'entretenir avec un avocat à l'issue de la douzième heure de cette prolongation, dans les conditions et selon les modalités prévues aux alinéas précédents.'

4. Au sixième alinéa, les mots: 'Le délai mentionné au premier alinéa est porté à trente-six heures' sont remplacés par les mots: 'L'entretien avec un avocat prévu au premier alinéa ne peut intervenir qu'à l'issue d'un délai de trente-six heures.'

5. Au dernier alinéa, les mots: 'Le délai mentionné au premier alinéa est porté à soixante-douze heures' sont remplacés par les mots: 'L'entretien avec un avocat prévu au premier alinéa ne peut intervenir qu'à l'issue d'un délai de soixante-douze heures.'

Article 14: L'article 4 de l'ordonnance no 45-174 du 2 février 1945 relative à l'enfance délinquante est complété par un VI ainsi rédigé: 'VI. Les interrogatoires des mineurs placés en garde à vue visés à l'article 64 du code de procédure pénale font l'objet d'un enregistrement audiovisuel. L'enregistrement original est placé sous scellés et sa copie est versée au dossier. L'enregistrement ne peut être visionné qu'avant l'audience de jugement, en cas de contestation du contenu du procès-verbal d'interrogatoire, sur décision, selon le cas, du juge d'instruction ou du juge des enfants saisi par l'une des parties'. Les huit derniers alinéas de l'article 114 ne sont pas applicables.

Le fait, pour toute personne, de diffuser un enregistrement original ou une copie réalisée en application du présent article est puni d'un an d'emprisonnement et de 100 000 F d'amende. A l'expiration d'un délai de cinq ans à compter de la date de l'extinction de l'action publique, l'enregistrement original et sa copie sont détruits dans le délai d'un mois.'

Article 19: L'article 80-1 du même code est ainsi rédigé: 'Art.80-1. A peine de nullité, le juge d'instruction ne peut mettre en examen que les personnes à l'encontre desquelles il existe des indices graves ou concordants rendant vraisemblable qu'elles aient pu participer, comme auteur ou comme complice, à la commission des infractions dont il est saisi. Il ne peut procéder à cette mise en examen qu'après avoir préalablement entendu les observations de la personne ou l'avoir mise en mesure de les faire, en étant assistée par son avocat, soit dans les conditions prévues par l'article 116 relatif à l'interrogatoire de première comparution, soit en tant que témoin assisté conformément aux dispositions des articles 113-1 à 113-8. Le juge d'instruction ne peut procéder à la mise en examen de la personne que s'il estime ne pas pouvoir recourir à la procédure de témoin assisté.'

Article 33: Après l'article 113 du code de procédure pénale, il est inséré une sous-section 2 ainsi rédigée: 'Sous-section 2 Du témoin assisté:

Art. 113-2. [...] Toute personne mise en cause par un témoin ou contre laquelle il existe des indices rendant vraisemblable qu'elle ait pu participer, comme auteur ou complice, à la commission des



infractions dont le juge d'instruction est saisi peut être entendue comme témoin assisté.

Art. 113-3. Le témoin assisté bénéficie du droit d'être assisté par un avocat qui est avisé préalablement des auditions et a accès au dossier de la procédure, conformément aux dispositions des articles 114 et 114-1. Il peut également demander au juge d'instruction, selon les modalités prévues par l'article 82-1, à être confronté avec la ou les personnes qui le mettent en cause.

Article 46: L'article 137 du même code est ainsi rédigé: 'Art. 137. La personne mise en examen, présumée innocente, reste libre. Toutefois, en raison des nécessités de l'instruction ou à titre de mesure de sûreté, elle peut être astreinte à une ou plusieurs obligations du contrôle judiciaire. Lorsque celles-ci se révèlent insuffisantes au regard de ces objectifs, elle peut, à titre exceptionnel, être placée en détention provisoire.'

Article 89: I. Après l'article 626 du même code, il est inséré un titre III ainsi rédigé: 'TITRE III DU REEXAMEN D'UNE DECISION PENALE CONSECUTIF AU PRONONCE D'UN ARRET DE LA COUR EUROPEENNE DES DROITS DE L'HOMME Art. 626-1. Le réexamen d'une décision pénale définitive peut être demandé au bénéfice de toute personne reconnue coupable d'une infraction lorsqu'il résulte d'un arrêt rendu par la Cour européenne des droits de l'homme que la condamnation a été prononcée en violation des dispositions de la convention de sauvegarde des droits de l'homme et des libertés fondamentales ou de ses protocoles additionnels, dès lors que, par sa nature et sa gravité, la violation constatée entraîne pour le condamné des conséquences dommageables auxquelles la 'satisfaction équitable' allouée sur le fondement de l'article 41 de la convention ne pourrait mettre un terme.

Article 91: L'article 9-1 du code civil est ainsi rédigé: 'Art. 9-1. Chacun a droit au respect de la présomption d'innocence. Lorsqu'une personne est, avant toute condamnation, présentée publiquement comme coupable de faits faisant l'objet d'une enquête ou d'une instruction judiciaire, le juge peut, même en référé, sans préjudice de

la réparation du dommage subi, prescrire toutes mesures, telles que l'insertion d'une rectification ou la diffusion d'un communiqué, aux fins de faire cesser l'atteinte à la présomption d'innocence, et ce aux frais de la personne, physique ou morale, responsable de cette atteinte.'

Article 92: Après l'article 35 bis de la loi du 29 juillet 1881 précitée, il est inséré un article 35 ter ainsi rédigé: 'Art. 35 ter. I. Lorsqu'elle est réalisée sans l'accord de l'intéressé, la diffusion, par quelque moyen que ce soit et quel qu'en soit le support, de l'image d'une personne identifiée ou identifiable mise en cause à l'occasion d'une procédure pénale mais n'ayant pas fait l'objet d'un jugement de condamnation et faisant apparaître, soit que cette personne porte des menottes ou entraves, soit qu'elle est placée en détention provisoire, est punie de 100 000 F d'amende.'

Article 97: I. Après l'article 35 bis de la loi du 29 juillet 1881 précitée, il est inséré un article 35 quater ainsi rédigé: 'Art. 35 quater. La diffusion, par quelque moyen que ce soit et quel qu'en soit le support, de la reproduction des circonstances d'un crime ou d'un délit, lorsque cette reproduction porte gravement atteinte à la dignité d'une victime et qu'elle est réalisée sans l'accord de cette dernière, est punie de 100 000 F d'amende.'

Article 129: Après l'article 720 du code de procédure pénale, il est inséré un article 720-1-A ainsi rédigé: 'Art. 720-1-A. Les députés et les sénateurs sont autorisés à visiter à tout moment les locaux de garde à vue, les centres de rétention, les zones d'attente et les établissements pénitentiaires.'

## Annex II

*Extracts taken from the Loi n° 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice (Journal Officiel no 211 du 10 septembre 2002, p. 14934)*

Article 11: L'article 122-8 du code pénal est ainsi rédigé: 'Art. 122-8. Les mineurs capables de discernement sont pénalement responsables des crimes, délits ou contraventions dont ils ont été reconnus coupables, dans des conditions fixées par une loi particulière qui détermine les mesures de protection, d'assistance, de surveillance et d'éducation dont ils peuvent faire l'objet. Cette loi détermine également les sanctions éducatives qui peuvent être prononcées à l'encontre des mineurs de dix à dix-huit ans ainsi que les peines auxquelles peuvent être condamnés les mineurs de treize à dix-huit ans, en tenant compte de l'atténuation de responsabilité dont ils bénéficient en raison de leur âge.'

Article 23: L'article 34 de l'ordonnance n° 45-74 du 2 février 1945 précitée est ainsi rétabli: 'Art. 34. Lorsque le mineur est placé dans l'un des centres prévus à l'article 33, les allocations familiales sont suspendues. Toutefois, le juge des enfants peut les maintenir lorsque la famille participe à la prise en charge morale ou matérielle de l'enfant ou en vue de faciliter le retour de l'enfant dans son foyer. Les allocations familiales suspendues concernent la seule part représentée par l'enfant délinquant dans le calcul des attributions d'allocations familiales.'

Article 38: I. Après l'article 148-1 du code de procédure pénale, il est inséré un article 148-1-1 ainsi rédigé: 'Art. 148-1-1. Lorsqu'une ordonnance de mise en liberté d'une personne placée en détention provisoire est rendue par le juge des libertés et de la détention ou le juge d'instruction contrairement aux réquisitions du procureur de la République, cette ordonnance est immédiatement notifiée à ce magistrat. Pendant un délai de quatre heures à compter de la notification de l'ordonnance du procureur de la République, et sous

réserve de l'application des dispositions du dernier alinéa du présent article, la personne mise en examen ne peut être remise en liberté et cette décision ne peut être adressée pour exécution au chef de l'établissement pénitentiaire.

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## **Part Four**

### **Statutory reform and universal jurisdiction: do French courts offer a viable alternative to international tribunals in the prosecution of the most serious crimes?**

- (x) Trouille HL, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al'* (2013) 13 *International Criminal Law Review* 747
  
- (xi) Trouille HL, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial' (2016) 14 *Journal of International Criminal Justice* 195

- (x) Trouille HL, 'How far has the International Criminal Tribunal for Rwanda really come since Akayesu in the prosecution and investigation of sexual offences committed against women? An analysis of *Ndindiliyimana et al*' (2013) 13 International Criminal Law Review 747

# How Far Has the International Criminal Tribunal for Rwanda Really Come since *Akayesu* in the Prosecution and Investigation of Sexual Offences Committed against Women? An Analysis of *Ndindiliyimana et al.*

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## Abstract

During the first trial before the International Criminal Tribunal for Rwanda (ICTR), that of Jean-Paul Akayesu, it became evident that many Tutsi and moderate Hutu women had been raped, that “rape was the rule and its absence was the exception”.<sup>1</sup> Although, initially, not a single charge of sexual violence was proffered against Akayesu, presiding Judge Navanethem Pillay interrupted the proceedings, allowing ICTR prosecutors to amend the indictment and include counts of rape and sexual violence. *Akayesu* subsequently became the first case to recognise the concept of genocidal rape. However, post-*Akayesu*, comparatively few defendants appearing before the ICTR have been convicted of sexual violence. An analysis of the recent case of *Ndindiliyimana et al.*<sup>2</sup> reveals that major shortcomings beset the investigation and prosecution procedures, so that crimes of sexual violence go unpunished, although research suggests that adequate legislation is in place at the ICTR to prosecute rape and sexual violence successfully.

## Keywords

International Criminal Tribunal for Rwanda (ICTR); rape; sexual violence; investigation; prosecution; genocide

## 1. Introduction

In 2005, Binaifer Nowrojee, a former researcher for HRW/Africa and expert witness on sexual violence in the Government II trial,<sup>3</sup> lamented the poor

<sup>1</sup> *Report on the Situation of Human Rights in Rwanda submitted by Mr R Degni-Ségui, Special Rapporteur of the Commission on Human Rights under paragraph 20 of resolution S-3/1 of 25 May 1994* (29 Jan 1996) E/CN4/1996/68, para. 16, quoted in UN Division for the Advancement of Women Rome Department of Economic and Social Affairs Sexual Violence and Armed Conflict: United Nations Response (April 1998) p. 16.

<sup>2</sup> *Prosecutor v. Ndindiliyimana et al.*, 17 May 2011, ICTR-00-56-T, *Judgment and Sentence*.

<sup>3</sup> *Prosecutor v. Casimir Bizimungu et al. “The Government II Trial”*, 8 July 2005, ICTR-99-50-T *Decision on the admissibility of the expert testimony of Dr Binaifer Nowrojee*, para. 14 citing *Prosecutor v. Semanza*, 20 May 2005, ICTR-97-20-A, *Appeal Judgment*, para. 303.



performance of the ICTR in the prosecution of crimes of sexual violence: on the tenth anniversary of the genocide, Nowrojee calculated that “only two defendants had specifically been held responsible for their role in sexual violence crimes” committed during the genocide.<sup>4</sup>

This conclusion is alarming when set in the context of a genocide where, according to René Dégni-Ségui, Special Rapporteur of the United Nations Commission on Human Rights, rape was “systematic and was used as a ‘weapon’ by the perpetrators of the massacres” and “according to consistent and reliable testimony, a great many women were raped; rape was the rule and its absence was the exception.”<sup>5</sup> Nowrojee’s frustrations at the paucity of rape convictions are easy to understand.

It is a generally accepted fact that vast numbers of women were raped. Dégni-Ségui informs us that the Ministry for the Family and the Promotion of Women recorded 15,700 cases of women raped during the genocide.<sup>6</sup> Yet this figure, already distressing enough, appears to belie reality. For medical professionals in Rwanda believe that between two and five thousand pregnancies occurred as a direct result of the sexual violence during the genocide. Given that statistics show that just one pregnancy will result from one hundred cases of rape, this would suggest that there could have been between 200,000 and 500,000 instances of rape, and it is Dégni-Ségui’s estimate that between 250,000 and 500,000 women (out of a total population of seven million)<sup>7</sup> were raped during the Rwandan genocide.<sup>8</sup>

Despite the obvious sexual violence, and despite the fact that this had been highlighted at regular intervals in the previous ten years, convictions for sexual violence continued to be relatively few and far between. In November 2008, only thirty-six of the eighty-seven people indicted for crimes committed during the genocide had been charged with rape or sexual violence. Of thirteen completed cases involving an indictment for rape in 2008, nine accused were acquitted of

<sup>4</sup> “No rape charges were even brought by the Prosecutor’s Office in 70 per cent of those adjudicated cases. In the 30 per cent that included rape charges, only 10 per cent were found guilty for their role in the widespread sexual violence. Double that number, 20 per cent, were acquitted because the court found that the prosecutor did not properly present the evidence beyond a reasonable doubt. In real numbers, that means that, at the tenth anniversary of the genocide, only two defendants had specifically been held responsible for their role in sexual violence crimes (a third conviction was reversed on appeal), despite the tens of thousands of rapes committed during the genocide. As of April 2004, none of the rape acquittals had been appealed by the prosecutor. How can this be?” Binaifer Nowrojee, United Nations Research Institute for Social Development (UNRISD) Policy Report on Gender and Development: 10 Years after Beijing, *Your justice is Too Slow: Will the ICTR Fail Rwanda’s Rape Victims?* Occasional Paper Ten (published 15/11/2005) 16 <[www.unrisd.org/unrisd/website/document.nsf/0/56FE32D5CoF6DCE9C125710F0045D89F?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/0/56FE32D5CoF6DCE9C125710F0045D89F?OpenDocument)> accessed 23 January 2013.

<sup>5</sup> Dégni-Ségui, *supra* note 1, para. 16.

<sup>6</sup> *Ibid.*, para. 16.

<sup>7</sup> United Human Rights Council, (*Genocide in Rwanda*) <[www.unitedhumanrights.org/genocide/genocide\\_in\\_rwanda.htm](http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm)> accessed 19 April 2012.

<sup>8</sup> Dégni-Ségui, *supra* note 1, para. 16.

charges of rape or sexual violence and only four found guilty.<sup>9</sup> Furthermore, a report compiled by Gabriel Oosthuizen, Executive Director of International Criminal Law Services,<sup>10</sup> at the request of the Division for Policy, Evaluation and Training of the United Nations' Department of Peacekeeping Operations (DPKO), states that, of twenty-four cases completed before the ICTR by March 2009, only thirteen contained sexual violence agreed facts.<sup>11</sup> There appears, therefore, to be, at least until 2009, a worryingly persistent trend which prevents sexual violence against women being punished before the ICTR.

Yet the widespread sexual violence had been brought to the attention of the Trial Chamber in the very first case to appear before it, that of Jean-Paul Akayesu, *bourgmestre* (mayor) of Taba commune, which concluded on 2<sup>nd</sup> September 1998.<sup>12</sup> This was the first time an international tribunal had enforced the United Nations 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>13</sup> The first person to be convicted by the ICTR, Akayesu was also the first person ever to be convicted by an international tribunal of sexual violence as an instrument of genocide.<sup>14</sup> In addition, Akayesu was the first person to be convicted of rape as a crime against humanity, and, in the absence of a clear definition of rape in international law,<sup>15</sup> the Akayesu Trial Chamber was moved to articulate the elements of the offence, providing the first definitions of rape and sexual violence under international law.<sup>16</sup>

Despite this ruling – truly ground-breaking, since rape is not specifically listed as one of the prohibited acts which may constitute genocidal acts – and the first

<sup>9</sup> Linda Bianchi, Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities, Arusha, 26 to 28 November 2008, *The investigation and presentation of evidence relating to sexual violence is in the interest of justice*, para. 9 <ictr-archive09.library.cornell.edu/ENGLISH/international\_cooperation/papers\_presented/sexual-violence.pdf> accessed 24 January 2013, who refers to the ICTR-OTP Synopsis on charging and convictions for rape, June 2008.

<sup>10</sup> International Criminal Law Services is an organisation providing legal and technical training and advice relating to war crimes, crimes against humanity and genocide <www.iclsfoundation.org/> accessed 23 January 2013.

<sup>11</sup> Gabriel Oosthuizen, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820* (Division for Policy, Evaluation and Training of the Department of Peacekeeping Operations, 1 September 2010) <www.unrol.org/files/32914\_Review%20of%20the%20Sexual%20Violence%20Elements%20in%20the%20Light%20of%20the%20Security-Council%20resolution%201820.pdf> accessed 23 January 2013.

<sup>12</sup> *Prosecutor v. Akayesu*, 2 September 1998, ICTR-96-4-T, *Judgment and Sentence*.

<sup>13</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* (Adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

<sup>14</sup> 'Akayesu, Jean-Paul' (Academic Research, The Hague Justice Portal) available at <http://www.haguejusticeportal.net/index.php?id=8778> (last visited 20 December 2012).

<sup>15</sup> Mark Ellis, 'Breaking the silence: rape as an international crime', 38 *Case Western Reserve Journal of International Law* (2007) 225, 229.

<sup>16</sup> Kelly D. Askin 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 *The American Journal of International Law* (1999) 97, 107.

conviction in international law of a woman on rape charges, Pauline Nyiramasuhuko, in June 2011,<sup>17</sup> even Linda Bianchi, senior appeals counsel at the ICTR's Office of the Prosecution (OTP), has been led to admit the conviction rate for crimes of sexual violence at the ICTR is poor in comparison to rates for other crimes.<sup>18</sup>

Criticisms made for low conviction rates at the ICTR for acts of sexual violence have in the past revolved typically around issues of poor performance by key ICTR staff.

This article attempts to assess whether these accusations still have any basis in fact and whether they continue to affect the outcomes of cases before the ICTR. It analyses the 2011 trial of *Ndindiliyimana et al.*,<sup>19</sup> which is currently under appeal, to evaluate critically the principal shortcomings in the prosecution and investigation of sexual offences committed against women during the Rwandan genocide and attempts to identify why certain charges of sexual violence failed. The study focuses on the performance of ICTR staff – judges, prosecutors and investigators.

The article opens with a description of current legislation used to prosecute crimes of sexual violence laid out in the ICTR Statute<sup>20</sup> and its interpretation in *Akayesu*. Paragraphs from the Tribunal's Rules of Procedure and Evidence (governing the conduct of the pre-trial phase) pertinent to the prosecution of sexual violence crimes are highlighted, such as the admission of evidence and protection of witnesses and victims. Key case law from the ICTR and International Criminal Tribunal for the Former Yugoslavia (ICTY) providing definitions of the elements of rape and sexual violence is also resumed.

## 2. Key ICTR Legislation and Case Law

### 2.1. *Provisions Regarding Rape and Sexual Violence in the ICTR Statute and Interpretation by the Akayesu Trial Chamber*

The ICTR statute provides several different routes to prosecute rape and sexual violence committed during the genocide, and during the trial of Jean-Paul Akayesu, the interpretation of these was debated at length.

<sup>17</sup> *Prosecutor v. Nyiramasuhuko et al.*, 24 June 2011, ICTR-98-42-T, *Judgment and Sentence*, paras. 5828–5836.

<sup>18</sup> Bianchi, *supra* note 9.

<sup>19</sup> *Prosecutor v. Ndindiliyimana et al.*, *Judgment and Sentence*, *supra* note 2.

<sup>20</sup> *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994* (Adopted by Security Council Resolution 955 of 8 November 1994, Amended by Security

On the original indictment against Akayesu, which numbered twelve counts of genocide, crimes against humanity and war crimes committed in Taba, no gender-related crimes had been entered at all, even though, at that stage, it was well-known that rape crimes had been committed systematically. When Witness J testified about the gang rape of her six-year-old daughter by three *Interahamwe* (Hutu militia) and informed the Trial Chamber she had also heard of many other rapes, and Witness H gave evidence that she herself had been raped and had been a witness to other rapes, Judge Navanethem Pillay, the only female judge amongst the nine elected ICTR judges, suspended Akayesu's trial in May 1997.<sup>21</sup> Following further evidence that vast amounts of rapes and sexual violence had taken place in Taba in the presence of Akayesu, the indictment was amended to include charges of rape (Count 13) and inhumane acts (Count 14) as crimes against humanity, charges of outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault, contravening Common Article 3 and Article 4 (2) (e) of Additional Protocol II (Count 15), and charges of genocide accompanied by acts of sexual violence (Counts 1-3).<sup>22</sup> It is undoubtedly largely due to Judge Pillay's considerable expertise as a specialist in women's rights that gender crimes were given the prominence that they were in Akayesu's trial.<sup>23</sup>

The provisions in the ICTR statute to prosecute rape and sexual violence are found in Articles 2, 3 and 4.

Article 2 (2) of the ICTR prohibits genocide, although it does not specifically name sexual violence as a genocidal act.<sup>24</sup> In its celebrated decision, the *Akayesu*

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Council resolutions 1165 of 30 April 1998, 1329 of 30 November 2000, 1411 of 17 May 2002 and 1431 of 14 August 2002).

<sup>21</sup> *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, *para.* 416-417.

<sup>22</sup> *Prosecutor v. Akayesu*, 17 June 1997, ICTR-96-4-I, *Amended Indictment*, Counts 1-3.

<sup>23</sup> Co-founder of the South African Advice Desk for Abused Women (1986) and of Equality Now (1992), an international women's rights organisation (<<http://www.equalitynow.org/>> accessed 2 March 2013).

<sup>24</sup> ICTR Statute Article 2 Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with the intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such:
  - (a) killing members of the group;
  - (b) causing serious bodily or mental harm to members of the group;
  - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;
  - (d) imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
  - (a) Genocide;
  - (b) Conspiracy to commit genocide;
  - (c) Direct and public incitement to commit genocide;

Trial Chamber ruled that rape and sexual violence could constitute acts of genocide “in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such”.<sup>25</sup> Although not expressly mentioned in article 2 (2), the Trial Chamber ruled that rape and sexual violence could be prosecuted as acts of genocide under article 2 (2) (a) Killing members of a group,<sup>26</sup> under article 2 (2) (b) Causing serious bodily or mental harm to members of the group,<sup>27</sup> under article 2 (2) (d) Imposing measures intended to prevent births within the group,<sup>28</sup> and under article 2 (2) (e) Forcibly transferring children of the group to another group.<sup>29</sup>

For its part, Article 3, which refers to crimes against humanity, grants the ICTR the power to prosecute persons responsible for rape (article 3 (g)) and other inhumane acts (Article 3 (i)) when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.<sup>30</sup>

(d) Attempt to commit genocide;

(e) Complicity in genocide.

<sup>25</sup> *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, *para.* 731.

<sup>26</sup> “It appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process”. *Ibid.*, *para.* 733.

<sup>27</sup> “Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims... Sexual violence was an integral part of the process of destruction”. *Ibid.*, *para.* 731.

<sup>28</sup> “In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group”. *Ibid.*, *para.* 507.

<sup>29</sup> “With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another”. *Ibid.*, *para.* 509.

<sup>30</sup> ICTR Statute, Article 3 Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

In addition to the specific elements of each individual crime, the perpetrator must possess the requisite *mens rea*, knowingly having committed the crime, for it to be judged as a crime against humanity; the perpetrator should have had “actual or constructive knowledge of the broader context of the attack, meaning that the Accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan”.<sup>31</sup> Isolated acts carried out for purely personal reasons are thus excluded. It is not necessary that the rapes themselves should have been widespread or systematic in order for them to amount to a crime against humanity; the requirement is that they form a part of the widespread or systematic attack against the civilian population, on national, political, ethnic, racial or religious grounds.<sup>32</sup>

As mentioned above, Akayesu’s conviction for rape as a crime against humanity produced the first definition of the legal elements of rape at an international judicial forum: “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”<sup>33</sup> – a broad definition with no attempt to define rape in the more mechanical terms common to many national jurisdictions, since: “The Chamber considers that ... the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts”.<sup>34</sup>

A more traditional definition of rape along terms of non-consensual sexual intercourse was felt to be too narrow, since the Trial Chamber wished to include clearly under the definition of rape “acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual”, for example thrusting a piece of wood into the sexual organs of a woman as she lay dying.<sup>35</sup>

The *Akayesu* Trial Chamber also defined sexual violence, which falls within the scope of ‘other inhumane acts’ (A 3 (i)), as well as ‘serious bodily or mental harm’ (Article 2 (2) (b)) and ‘outrages upon personal dignity’ (Article 4 (e)).<sup>36</sup> Article 4 of the ICTR Statute reiterates Article 3 Common to the Geneva Conventions and of its Additional Protocol II, and enables the prosecution of rape and sexual violence (Article 4(e)) as war crimes.<sup>37</sup>

<sup>31</sup> *Prosecutor v. Kayeshima and Ruzindana*, 21 May 1999, ICTR-95-1-T, *Judgment*, paras. 133-134.

<sup>32</sup> Kelly Dawn Askin, ‘Gender Crimes jurisprudence in the ICTR: positive developments’ 3 *Journal of International Criminal Justice* (2005) 1007, 1011.

<sup>33</sup> *Prosecutor v. Akayesu, Judgment and Sentence*, *supra* note 12, para. 598.

<sup>34</sup> *Ibid.*, para. 597.

<sup>35</sup> *Ibid.*, para. 686.

<sup>36</sup> *Ibid.*, para. 688.

<sup>37</sup> ICTR Statute, Article 4 Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

Sexual violence, which includes rape, is defined in *Akayesu* as:

any act of a sexual nature which is committed on a person under circumstances which are coercive and as part of a wide spread or systematic attack, on a civilian population or on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.<sup>38</sup>

The indictment further clarified that “acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity”.<sup>39</sup> In its ruling, the Trial Chamber specified clearly that sexual violence did not need to involve penetration of the human body or even physical contact, and gave the example of a student forcibly undressed by the *Interahamwe* (members of the Hutu militia) and made to do gymnastics naked in front of a crowd.<sup>40</sup>

The *mens rea* for establishing outrages upon personal dignity is that the Accused intentionally committed or participated in an act or omission which would generally be considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and that he knew that the act or omission could have that effect.<sup>41</sup> In *Musema*, the ICTR added “subjecting victims to treatment designed to subvert their self-regard” to the definition of humiliating and degrading treatment.<sup>42</sup>

The issue of coercive circumstances was also debated by the *Akayesu* Trial Chamber. The Trial Chamber deemed that coercion was “inherent in certain circumstances, such as armed conflict”,<sup>43</sup> thus removing the necessity for the victim

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- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
  - (b) Collective punishments;
  - (c) Taking of hostages;
  - (d) Acts of terrorism;
  - (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
  - (f) Pillage;
  - (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
  - (h) Threats to commit any of the foregoing acts.

<sup>38</sup> *Prosecutor v. Akayesu, Judgment and Sentence, supra note 12, para. 598.*

<sup>39</sup> *Prosecutor v. Akayesu, 17 June 1997, ICTR-96-4-I, Amended Indictment para. 10A.*

<sup>40</sup> *Prosecutor v. Akayesu, Judgment and Sentence, supra note 12, para. 688.*

<sup>41</sup> Angela M Banks *Sexual Violence and International Criminal Law: an Analysis of the Ad Hoc Tribunal's Jurisprudence and the International Criminal Court's Elements of Crimes* (Women's Initiatives for Gender Justice, Amsterdam 2005) 40-41, citing *Prosecutor v. Kunarac, Kovac, Vukovic*, 22 February 2001, ICTY, IT-96-23-T and IT-96-23/1-T, *Judgment*, para. 514.

<sup>42</sup> *Prosecutor v. Musema*, 27 January 2000, ICTR-96-13, *Judgment and Sentence*, para. 285.

<sup>43</sup> *Prosecutor v. Akayesu, Judgment and Sentence, supra note 12, para. 688.*

to prove that she had not consented to the sexual violence, a major step in a climate in which many victims must not have dared to resist their assailants.<sup>44</sup>

This stance was further debated at some length in the case of *Gacumbitsi*, and the Appeal Chamber confirmed the ruling that:

It is not necessary...for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.<sup>45</sup>

If an Accused raises reasonable doubt by introducing evidence that the victim consented, then the Trial Chamber is free to disregard the evidence if it concludes that, under the circumstances, the consent given is not genuinely voluntary.

In addition to these important provisions, the ICTR and ICTY have also provided Rules of Procedure and Evidence which are very supportive of the victims of rape and sexual violence. The Rules govern the conduct of the pre-trial phase of the proceedings, trials and appeals, and matters such as the admission of evidence and the protection of victims and witnesses.

In matters of sexual violence, the most significant of the Rules of Procedure and Evidence is Rule 96, which states that no corroboration of the victim's testimony shall be required. It also states that, as a defence to the charges, an accused shall not be allowed to rely on the fact that the victim gave consent to a sexual act, in cases where the victim was subjected to or threatened with or had reason to fear violence, duress, detention or psychological oppression, or if she reasonably believed that someone else might be subjected to these if she did not submit. To protect the victim's identity and reputation – essential steps if victims are to be encouraged to testify – before evidence of the victim's consent to a sexual act is admitted to the Trial Chamber, the Accused is required to satisfy the Trial Chamber *in camera* that the evidence is relevant to the case and credible. Evidence as to the prior sexual conduct of the victim is quite simply not to be admitted in evidence or as a defence under any circumstances.<sup>46</sup>

Akayesu was finally found guilty of rape as a crime against humanity (Count 13). The Trial Chamber also found that forced nudity constituted an inhumane

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<sup>44</sup>) "The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal". *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para. 688.

<sup>45</sup>) *Prosecutor v. Gacumbitsi*, 7 July 2006, ICTR-2001-64-A, *Appeal Judgment*, para. 155.

<sup>46</sup>) *International Criminal Tribunal for Rwanda Rules of Procedure and Evidence* (adopted 29 June 1995, entered into force 29 June 1995) UN Doc ITR/3/REV 1, Rule 96 (iv).



act<sup>47</sup> and convicted Akayesu for inhumane acts as a crime against humanity (Count 14).<sup>48</sup> The conviction for genocide emphasised that Akayesu had encouraged his men to rape Tutsi women to destroy them physically and mentally (Count 1),<sup>49</sup> and that many women and girls were killed or had died as a result of injuries inflicted on them in the course of rapes.<sup>50</sup>

Thus, judicial interpretation of the Statute during the *Akayesu* trial, which formally acknowledged the use of rape and sexual violence as a means of wreaking destruction across an entire ethnic group, supported by solid Rules of Procedure and Evidence, ensured that mechanisms were in place for the successful prosecution of the many instances of rape and sexual violence committed during the genocide – as acts of genocide themselves, as specific crimes against humanity or as war crimes.

## 2.2. *The Elements of Rape and Sexual Violence Further Defined through Case Law*

Certain subsequent cases have been significant in assisting the ICTR to define further the crimes of rape and sexual violence in an international context: *Kayishema and Ruzindana*, *Musema*, *Semanza*, *Gacumbitsi* and *Muhimana*.

### 2.2.1. *Kayishema and Ruzindana*

In the joint trial of Clément Kayishema and Obed Ruzindana, which concluded on 21 May 1999, the Trial Chamber concurred, in its discussion on genocide, with the views expressed in *Akayesu*, that “acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that amount to serious bodily harm”<sup>51</sup> and could thus constitute an act of genocide under Article 2 (2) (b) of the ICTR statute if carried out with the intention to cause harm to members of an ethnic group with intent to destroy that group in whole or in part. The Trial Chamber also ruled that deliberately inflicting on an ethnic group conditions of life calculated to bring about its physical destruction in whole or in part (Article 2 (2) (c)) included methods of destruction which do not immediately lead to the death of members of the group, and that rape was one of these conditions of life, provided that it would lead to the destruction of the group in whole or in part.<sup>52</sup> Thus this all-male panel of judges extended further the scope of genocide elaborated by the *Akayesu* judges.

Most regrettably, despite the numerous acts of rape and sexual violence mentioned in the Judgment,<sup>53</sup> once again the indictment contained no charges of

<sup>47</sup> *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para. 688.

<sup>48</sup> *Ibid., Verdict.*

<sup>49</sup> *Ibid.*, paras. 452, 731–734.

<sup>50</sup> *Ibid.*, para. 449.

<sup>51</sup> *Prosecutor v. Kayeshima and Ruzindana, Judgment and Sentence, supra* note 31, para. 108.

<sup>52</sup> *Prosecutor v. Kayeshima and Ruzindana*, 21 May 1999, ICTR-95-1-T, *Judgment*, para. 116.

<sup>53</sup> *Ibid.*, paras. 294, 299, 532, 547.

sexual violence, focusing rather on the use of “guns, grenades, machetes, spears, cudgels and other weapons to kill the people.”<sup>54</sup> Consequently, the Accused could not be convicted of sexual violence. However, the gravity of the sexual violence was confirmed in the judges’ *obiter dicta*. As Kelly Dawn Askin highlights, the courtroom testimony and subsequent references to the crimes “ensures that the historical record of the crimes committed is more accurately reflected,” acknowledging that these crimes inflicted “enormous devastation” and formed part of the genocide.<sup>55</sup>

### 2.2.2. Musema

The *Musema* Trial Chamber, which reached its verdict on 27 January 2000, also confirmed the broad definition of rape elaborated in *Akayesu*,<sup>56</sup> understandably, since it was presided again by Judge Pillay. It referred to “a trend in national legislation to broaden the definition of rape” and stated “that the Chamber considers that a conceptual definition is preferable to a mechanical definition of rape. The conceptual definition will better accommodate evolving norms of criminal justice”.<sup>57</sup> The *Akayesu* definition had also been endorsed in November 1998 by the ICTY in the *Delalić* case,<sup>58</sup> where the Trial Chamber added that rape can constitute torture under certain circumstances.<sup>59</sup> However, subsequent to *Delalić* and prior to *Musema*, the ICTY judges in the trial of Anto Furundžija (concluded on 10 December 1998), appeared to find that the conceptual definition in *Akayesu* did not provide elements precise enough to define rape, declaring that “no definition of rape can be found in international law.”<sup>60</sup>

The *Furundžija* Trial Chamber chose to examine the principles of criminal law common to the major legal systems of the world to find an exact definition of rape, which would satisfy the criminal law principle of *nullum crimen sine lege*

<sup>54</sup> *Prosecutor v. Kayishema and Ruzindana*, 22 November 1995, ICTR-95-1-I, *Indictment*.

<sup>55</sup> Askin, *supra* note 32, 1013.

<sup>56</sup> *Prosecutor v. Musema, Judgment and Sentence*, *supra* note 42, paras. 226-8, 965.

<sup>57</sup> *Ibid.*, para. 229.

<sup>58</sup> *Prosecutor v. Delalić et al*, 16 November 1998, ICTY, IT-96-21, *Judgment*, para. 478.

<sup>59</sup> *Ibid.*, para. 494:

‘In view of the above discussion, the Trial Chamber therefore finds that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows:

- (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
- (ii) which is inflicted intentionally,
- (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
- (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

<sup>60</sup> *Prosecutor v. Furundžija*, 10 December 1998, ICTY, IT-95-17/1-T, *Judgment*, para. 175.

*stricta*.<sup>61</sup> The *Furundžija* Trial Chamber thus concluded that the objective elements of rape consisted of:

- (i) the sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>62</sup>

Judge Pillay, committed to the definition which the *Akayesu* trial Chamber had outlined, opined in *Musema* that “the definition of rape, as set forth in the *Akayesu* Judgement, clearly encompasses all the conduct described in the definition of rape set forth in *Furundžija*,”<sup>63</sup> encapsulating the *Furundžija* definition within the broader *Akayesu* definition.

However, on appeal, although it did not contest the definition of rape, the *Musema* Appeals Chamber demanded a high burden of proof for rape<sup>64</sup> and overturned *Musema*’s conviction for the rape of a young unmarried teacher called Nyiramusugi.<sup>65</sup> The Chamber did not dispute that she had been raped, but stated that the evidence presented in two out-of-court statements from Witnesses CB and EB conflicted with the testimony put to the Trial Chamber by prosecution Witness N, and gave grounds for reasonable doubt that *Musema*, and not someone else, was guilty of Nyiramusugi’s rape on the day in question.

A high burden of proof was also demanded by the Trial Chamber at first instance when *Musema* was charged with rape as a crime against humanity for encouraging his men to rape Tutsi women.<sup>66</sup> Due to inconsistencies in witness testimony, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt that “any act of rape...had been committed by *Musema*’s subordinates and that *Musema* knew or had reason to know of this act and he failed to take reasonable measures to prevent the said act”.<sup>67</sup> Witness J, mother of five children, accused *Musema* and his men of raping and killing her eighteen-year-old daughter in Bisesero. However, she had told the Trial Chamber several times that her three oldest children, who were aged twenty-five, twenty-three and nineteen, had

<sup>61</sup> *Ibid.*, para. 177.

<sup>62</sup> *Ibid.*, para. 185.

<sup>63</sup> *Prosecutor v. Musema, Judgment and Sentence, supra* note 42, para. 227.

<sup>64</sup> Rebecca L Haffajee, ‘Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory’ 29 *Harvard Journal of Law and Gender* (2006) 201, 208-9.

<sup>65</sup> *Prosecutor v. Musema*, 16 November 2001, ICTR-96-13-A, *Appeal Judgment*, para. 193.

<sup>66</sup> The command responsibility offence in Article 6 (3) of the ICTR Statute holds a superior criminally responsible if he had reason to know that one of his subordinates was about to commit an act of genocide, a crime against humanity, or a violation of Common Article 3 or of Protocol II, and he failed to take the necessary and reasonable measures to prevent the act or to punish the perpetrator.

<sup>67</sup> *Prosecutor v. Musema, Judgment and Sentence, supra* note 42, para. 968.

been killed by Charles Sikubwabo, *bourgmestre* of Gishyita, before she fled to Bisesero, and that her only children alive at the time she fled to Bisesero were aged twelve and nine. She was unable to explain this inconsistency to the Trial Chamber, which therefore questioned the accuracy of her account in respect of her daughter's rape. The Trial Chamber was reluctant to disbelieve her account, since it found her testimony to be "generally credible," and considered "that there is likely to be a reasonable explanation [for the inconsistency], based on its evaluation of the witness".<sup>68</sup> The Trial Chamber concluded:

recalling the high burden of proof on the Prosecutor and the lack of any other evidence produced to corroborate the account of Witness J, the Chamber cannot find beyond a reasonable doubt that the allegations have been established.<sup>69</sup>

The broad definition of rape laid down in *Akayesu* was therefore accepted, but the Trial chamber imposed a high evidential burden on the Prosecution to bring about a successful conviction.

### 2.2.3. Semanza

Three years later, in the case of Laurent Semanza, a narrower and more mechanical definition of rape was adopted. The all-male *Semanza* Trial Chamber, which reached its verdict on 15 May 2003, followed the ICTY Appeals Chamber's decision in the 2001 case of *Kunarac*,<sup>70</sup> which was influenced by the ICTY case of *Furundžija*.

The *Kunarac* Trial Chamber accepted the *actus reus* of rape as defined in *Furundžija* under paragraph (i), but felt that further clarification was required regarding the issue of coercion under paragraph (ii) and considered the matter of consent in some detail.

To clarify the issues of coercion and consent, the Trial Chamber carried out a detailed examination of the definition of rape in several major national jurisdictions. The *Kunarac* Trial Chamber followed *Furundžija*, also including oral sex as rape, but stipulated that the free will of the victim to consent must be assessed in accordance with the surrounding circumstances, and that this should not be interpreted in a narrow or restrictive way, since it is unlikely a victim would refuse to consent to a sex act in the prevailing circumstances. The *mens rea* was understood to be the intention to effect the sexual penetration, in the knowledge that it occurred without the consent of the victim.<sup>71</sup> The *Kunarac* Appeals Chamber summed up the situation with regard to consent and force in rape charges. It was of the view that "serious violations of sexual autonomy are to be penalized",<sup>72</sup> and

<sup>68</sup>) *Ibid.*, para. 844.

<sup>69</sup>) *Ibid.*, para. 845.

<sup>70</sup>) *Prosecutor v. Kunarac et al*, 22 February 2001, ICTY, IT-96-23 and 23/1, *Judgement*, para. 460.

<sup>71</sup>) *Ibid.*, para. 460.

<sup>72</sup>) *Prosecutor v. Kunarac et al*, 12 June 2002, ICTY, IT-96-23 and 23/1-A, *Appeal Judgement*, para. 126, citing *Prosecutor v. Kunarac et al, Judgement, supra* note 41, para. 457.

stated that the absence of consent was the *conditio sine qua non* of rape, and force or threat of force provided clear evidence of non-consent. However, it made clear that force is not an element *per se* of rape; there could be “factors other than force which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim.”<sup>73</sup> The Appeals Chamber observed that a narrow, too literal focus on the use of force or threat of force to make a victim consent to a sex act could potentially permit perpetrators to evade liability for sexual activity to which the other party had not consented, if the aggressor took advantage of the pervading climate of fear and did not need to use actual physical force.<sup>74</sup> It agreed with the Trial Chamber’s determination that the coercive circumstances present in Yugoslavia at the time meant that victims were highly unlikely to have consented, of their own free will, to the sex acts which they had endured.<sup>75</sup> This was a major step in eliminating the issue of consent as an evidentiary factor in crimes of sexual violence before the ICTY.<sup>76</sup> A plea that the victim had consented was unlikely to be considered a plausible defence to rape.

Although not binding on the ICTR, ICTY case law holds persuasive authority. Thus, despite accepting that a mechanical definition of rape was rejected by the ICTR in *Akayesu*, and was subsumed into the definition in *Musema*, the *Semanza* Trial Chamber followed *Kunarac* and *Furundžija* and defined the *actus reus* of rape as a crime against humanity as:

the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.<sup>77</sup>

The *Semanza* Trial Chamber recognized that other acts of sexual violence not satisfying this narrower definition of rape could be prosecuted as other crimes against humanity within the jurisdiction of the ICTR, such as torture, persecution, enslavement, or other inhumane acts. It concluded that the *mens rea* for rape as a crime against humanity was the intention to effect the prohibited sexual penetration, with the knowledge that it occurred without the consent of the victim.<sup>78</sup>

Rebecca Haffajee, a lawyer who worked as a legal intern in the ICTR in 2004, saw this as a retrograde step. She felt that the ICTY had made it clear that the surrounding circumstances of conflict rendered it likely a victim would not have consented

<sup>73</sup> *Prosecutor v. Kunarac et al, Appeal Judgement, supra* note 72, para. 129.

<sup>74</sup> *Ibid.*, para. 129.

<sup>75</sup> *Ibid.*, para. 133.

<sup>76</sup> Suzanne Chenault, ‘And Since Akayesu? The Development of ICTR Jurisprudence on Gender Crimes: A comparison of Akayesu and Muhimana’, *New England Journal of International and Comparative Law* [2008] 221, 233.

<sup>77</sup> *Prosecutor v. Semanza*, 15 May 2003, ICTR-97-20-T, *Judgment and Sentence*, para. 344.

<sup>78</sup> *Ibid.*, para. 346.

to the sexual act. In her opinion, the ICTR in *Semanza* demanded evidence of the lack of consent of the victim in order to find an accused guilty of rape.<sup>79</sup>

Semanza was charged with two counts of rape as a crime against humanity (Counts 8 and 10) and two as a war crime violating Common Article 3 (Counts 9 and 13). Rape crimes were also mentioned in counts for persecution and torture. He was found guilty of one count of rape as a crime against humanity (Count 10)<sup>80</sup> but acquitted of the other due to ‘insufficient notice’ being given to the Accused (Count 8).<sup>81</sup> He was found not guilty of the rape offences charged under Common Article 3: Count 13, as it was considered the rape charge was already covered under Count 10,<sup>82</sup> and Count 9 as the Prosecutor had failed to introduce any evidence of the occurrence of the rapes.<sup>83</sup> Semanza was also convicted of torture as a crime against humanity by encouraging the crowd to rape Tutsi women, leading to the rape of Victim A (Count 11).<sup>84</sup> Although the rapes were considered to have been widespread and were mentioned frequently in the indictment, Semanza was only convicted of one specific rape, that of Victim A, as it was not proved that the other rapes had taken place at his instigation, with his knowledge and without the consent of the victims.

The extent to which it was necessary to prove lack of consent of the victim arose again in *Gacumbitsi*.

#### 2.2.4. Gacumbitsi

On 17 June 2004, Sylvestre Gacumbitsi was found guilty of genocide, and extermination and rape as crimes against humanity, each including sexual violence. It was established in court that Gacumbitsi drove around with a megaphone, urging Hutu young men whom Tutsi girls had refused to marry to “have sex with the young girls”, adding that if “they [the young girls] resisted, they had to be killed in an atrocious manner”.<sup>85</sup> The Trial Chamber concluded that the order given by Gacumbitsi to attack and select rape victims was discriminatory on grounds of ethnicity, since only Tutsi girls were targeted. The victims’ lack of consent to the sex acts was established by the fact that Gacumbitsi had exhorted men to kill ‘in

<sup>79</sup> “The application of this narrowed definition of the *actus reus* of rape and the high standard for *mens rea* seemed to reverse the progress made by the ICTR in *Akayesu* with regard to sexual violence crimes. Instead of recognizing rape as a crime of warfare that is committed in situations that are, by their very nature, likely coercive, *Semanza* effectively narrowed the scope of the crime to include only isolated incidents of a very specific and identifiable act of penetration in which the lack of consent of the victim is demonstrated to the perpetrator”. Haffajee, *supra* note 64, 210.

<sup>80</sup> *Prosecutor v. Semanza, Judgment and Sentence, supra* note 68, para. 479.

<sup>81</sup> *Ibid.*, para. 474.

<sup>82</sup> *Ibid.*, para. 552.

<sup>83</sup> *Ibid.*, para. 539.

<sup>84</sup> *Ibid.*, para. 485.

<sup>85</sup> *Prosecutor v. Gacumbitsi*, 17 June 2004, ICTR-2001-64-T, *Judgment and Sentence*, para. 215.

an atrocious manner' those who resisted them, and also by the fact that the victims were attacked by those from whom they were fleeing.<sup>86</sup> This constituted rape as a crime against humanity (Article 3 (g)), the Trial Chamber, presided over by female judge Andresia Vaz, claiming to apply both the *Akayesu* and *Kunarac* Appeal Chamber's definitions of rape:

The Chamber is of the opinion that any penetration of the victim's vagina by the rapist with his genitals or with any object constitutes rape, although the definition of rape under Article 3(g) of the Statute is not limited to such acts alone.<sup>87</sup>

The Trial Chamber also found that the rapes committed had caused serious bodily harm to members of the Tutsi ethnic group and were thus an act of genocide under ICTR Statute Article 2 (2) (b). In defining serious bodily or mental harm, the Trial Chamber stated:

Serious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence. Serious bodily harm does not necessarily mean that the harm is irremediable. Similarly, serious mental harm can be construed as some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim.<sup>88</sup>

The Trial Chamber also emphasised that many women and girls died as a result of rape, notably by inserting sticks into their genitals, incorporating this into the extermination conviction (Article 3 (b)).<sup>89</sup>

At appeal in 2006, the *Gacumbitsi* Appeals Chamber followed the more specific *Kunarac* Appeal Judgment's definition of rape, with no reference to the broad definition in *Akayesu*, focussing rather on issues of consent. It concluded that non-consent and the knowledge of lack of consent were elements of rape, and that the Prosecution therefore bore the burden of proving these elements beyond reasonable doubt in order to obtain a conviction.<sup>90</sup> Rule 96 of the ICTR's Rules of Procedure and Evidence refers to consent as a defence which the Accused may plead and does not allow consent to be admitted as a defence if the victim has been subjected to, threatened with or put in fear of violence, duress, detention or psychological oppression or has reasonably believed that someone else might be so subjected, threatened or put in fear. If it was acceptable to plead as a defence that the victim had consented to the sex act, then the burden of proof would shift to the Defendant, who would need to produce evidence that the victim had consented to the sex act. However, the *Kunarac* Appeal Judgment declared this

<sup>86</sup>) *Ibid.*, para. 325.

<sup>87</sup>) *Ibid.*, para. 321.

<sup>88</sup>) *Ibid.*, para. 291.

<sup>89</sup>) Askin, *supra* note 32, 1016.

<sup>90</sup>) *Prosecutor v. Gacumbitsi, Judgment and Sentence*, *supra* note 85, paras. 153-7.

approach not “entirely consistent with traditional legal understandings of the concept of consent in rape”.<sup>91</sup> It ruled that, rather than turning what was essentially an element of the offence (‘non-consent’) to be proved by the Prosecution, into a defence, Rule 96 should be interpreted as outlining the circumstances under which evidence of consent of the victim would be admissible from the Accused. The *Gacumbitsi* Appeals Chamber, although accepting the burden of proof lay with the Prosecution, underlined that the Prosecution could prove non-consent of the victim beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent was not possible.<sup>92</sup> Therefore, if the Accused raised reasonable doubt by introducing evidence that the victim consented, then the Trial Chamber was at liberty to disregard the evidence if it concluded that, under the surrounding circumstances of genocide, the consent given was not genuinely voluntary. Furthermore, as to the Accused’s knowledge of the absence of consent of the victim, this could be proven if the Prosecution were able to establish beyond reasonable doubt that the Accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent on the part of the victim in the context of the genocide.<sup>93</sup>

#### 2.2.5. Muhimana

In the 2005 case of Mikaeli Muhimana, who was also found guilty of rape as an act of genocide and a crime against humanity, the Trial Chamber endorsed the *Akayesu* definition of rape.<sup>94</sup> The Trial Chamber noted that *Akayesu*’s conceptual definition of rape had not been universally adopted in subsequent case law of the ICTR and ICTY, and that rape had also been interpreted with reference to physical elements of the act. The *Muhimana* Trial Chamber, under the guidance of presiding judge Khalida Khan, an eminent female judge who has published on women’s rights,<sup>95</sup> considered that the *Kunarac* definition served to “specify the parameters of what constitutes ‘a physical invasion of a sexual nature’”,<sup>96</sup> and, as the *Musema* trial judges did, managed to combine the definitions given in both *Akayesu* and *Kunarac*, despite their apparent conflict:

*Furundžija* and *Kunarac*, which sometimes have been construed as departing from the *Akayesu* definition of rape...actually are substantially aligned to this definition and

<sup>91</sup> *Prosecutor v. Kunarac et al, Appeal Judgment, supra* note 72, para. 463.

<sup>92</sup> “It is not necessary...for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim”. *Prosecutor v. Gacumbitsi, Appeal Judgment, supra* note 45, para. 155.

<sup>93</sup> *Ibid.*, para. 157.

<sup>94</sup> *Prosecutor v. Muhimana*, 28 April 2005, ICTR 95-1B-T, *Judgment*, para. 537.

<sup>95</sup> ‘Presidents’ <[www.ictrcaselaw.org/ContentPage.aspx?cid=6](http://www.ictrcaselaw.org/ContentPage.aspx?cid=6)> accessed 5 March 2013.

<sup>96</sup> Chenault, *supra* note 76, p. 232.



provide additional details on the constituent elements of acts considered to be rape. The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application.<sup>97</sup>

However, even with the benefit of the expanded definition, the Trial Chamber did not find that the disembowelling of a victim by cutting her open with a machete from her breasts to her vagina constituted an act of rape. Although acquiescing that the act interfered with the sexual organs, the Chamber clarified that, in its opinion, the disembowelling did not constitute a physical invasion of a sexual nature<sup>98</sup> but instead represented murder as a crime against humanity. On this occasion, one might argue that murder carries a heavier penalty than rape, but it remains to be seen whether the refusal to view this as an act of sexual violence will have any repercussions on the interpretation of rape as an international crime in the future.

The Chamber went on to concur with the opinion that circumstances prevailing in most cases charged under international criminal law would be almost universally coercive, thus vitiating true consent as a defence to rape.<sup>99</sup>

Muhimana appealed against his conviction. He raised the matter of “uncorroborated circumstantial evidence” and contested the validity of witness testimony with regard to the rape of two Tutsi girls. Witness AP had not actually been an eyewitness to the rape and could therefore not establish the *actus reus* of rape. Witness AP had seen the girls taken into Muhimana’s house, heard them scream that they did not expect the Accused “to do that” and emerge “stark naked ... walking ‘with their legs apart’”.<sup>100</sup> In 2007, the Appeals Chamber ruled that it was permissible to base a conviction on circumstantial evidence. This was confirmed previously in the *Gacumbitsi*, *Kajelijeli*, *Niyitegeka* and *Rutaganda* Appeals,<sup>101</sup> where it was stated that a Trial Chamber may prefer to hear corroboration of a witness statement, but neither the case law of the ICTR nor of the ICTY made this an obligation. If testimonies were divergent, it was the duty of the Trial Chamber hearing the witnesses to decide which evidence it deemed to be more probative, and to choose which of the versions of the same event it would admit. This has allowed considerable freedom of movement to ICTR judges in their assessment of evidence. However, the conviction for these two rapes was overturned by the Appeals Chamber in 2007: the rapes were indeed deemed to have taken place, but the Accused had not been the only person present in the house at the time, and it

<sup>97</sup> *Prosecutor v. Muhimana*, Judgment, *supra* note 84, paras. 549-550.

<sup>98</sup> *Ibid.*, para. 557.

<sup>99</sup> *Ibid.*, para. 546.

<sup>100</sup> *Prosecutor v. Muhimana*, 21 May 2007, ICTR 95-1B-A, *Appeal Judgment*, paras. 46-49.

<sup>101</sup> *Prosecutor v. Gacumbitsi*, *Appeal Judgment*, *supra* note 45, para. 115; *Prosecutor v. Kajelijeli*, 23 May 2005, ICTR-98-44A-A, *Appeal Judgment*, para. 170; *Prosecutor v. Niyitegeka*, 9 July 2004 ICTR-96-14-A, *Appeal Judgment*, para. 92; *Prosecutor v. Rutaganda*, 26 May 2003, ICTR 96-3-A, *Appeal Judgment*, para. 29.

was not possible to be sure beyond reasonable doubt that it was Muhimana who had committed them.

The definition of rape preferred in *Muhimana* was not applied by the ICTR in *Ndindiliyimana et al*<sup>102</sup> in 2011. The mechanical definition of the *actus reus* for rape used in *Gacumbitsi* and *Kunarac*, and subsequently *Nyiramasuhuko et al*,<sup>103</sup> was used by the Trial Chamber, as was the *mens rea* (the intention to effect the sexual penetration, in the knowledge that it occurred without the consent of the victim<sup>104</sup>), and the position regarding consent of the victim, which should be given voluntarily and freely, assessed within the context of the surrounding circumstances, force or threat of force providing evidence of non-consent, but not being an element *per se* of rape (see Section 2.2.5).<sup>105</sup>

The efforts made by the *Muhimana* Trial Chamber to reconcile the *Akayesu* and *Kunarac* definitions of rape, reiterated in *Hategekimana* in December 2010,<sup>106</sup> appear to have been abandoned, at least temporarily, in favour of a purely mechanical definition, despite the presence of a female judge, Taghrid Hikmet, on the benches both of *Ndindiliyimana et al* and *Hategekimana*.

It cannot be disputed that there is now a structure in place to prosecute rape and sexual violence committed during the Rwandan genocide. The provisions of the ICTR statute coupled with the definition of rape and sexual violence elaborated by succeeding Trial Chambers provide a framework to prosecute sexual offences against women during the genocide. However, defendants continue to be acquitted on charges of rape and sexual violence in the face of vigorous accusations against them.

The following paragraphs consider factors other than the definition of the offences which may be preventing the successful prosecution of rape and sexual violence at the ICTR, focussing on the case of *Ndindiliyimana et al*.<sup>107</sup>

### 3. Defective Indictments, Inadequate Evidence and Dubious Investigative Practices

In the recent case of *Ndindiliyimana et al*,<sup>108</sup> there were successful convictions for some of the rape charges but not for others. A close study of the *Ndindiliyimana et al* trial reveals failings on the part of prosecutors and investigators and suggests a diffidence on the part of judges to accept charges of sexual violence.

<sup>102</sup>) *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra note 2, paras. 2121-2122.*

<sup>103</sup>) *Ibid.*, para. 2121.

<sup>104</sup>) *Ibid.*, para. 6075.

<sup>105</sup>) *Ibid.*, para. 2121.

<sup>106</sup>) *Prosecutor v. Hategekimana*, December 2010, ICTR-00-55B-T, *Judgment*, para. 723.

<sup>107</sup>) *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra note 2.*

<sup>108</sup>) *Ibid.*

### 3.1. *Focus on Ndindiliyimana et al.*

The Trial Chamber in the case of Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu delivered its verdict in May 2011. It is currently under appeal. Nzuwonemeye, Bizimungu and Sagahutu were charged with Rape as a Crime against Humanity (Count 6) and Rape as a Violation of Common Article 3 (Count 8). Although all were found guilty of certain offences, only Augustin Bizimungu was found guilty of Count 6 (Rape as a Crime against Humanity) and Count 8 (Rape as a Violation of Common Article 3). Even then, he was not found guilty of all the rapes of which he stood accused.

The reasons given by the Trial Chamber for rejecting some significant charges put forward by the Prosecution are outlined below.

#### 3.1.1. *Flawed Indictments*

It appears that, alarmingly frequently, even when rape and sexual violence are charged, and it is accepted that the offences did occur, they are not pleaded in such a way as to enable the Trial Chamber to conclude beyond reasonable doubt that the accused are guilty of them.<sup>109</sup>

##### 3.1.1.1. *Dates of Rapes Outside of Time Period Pleaded*

The *Ndindiliyimana et al* indictment alleged that Rwandan Army soldiers caused serious bodily or mental harm to Tutsi women at different locations from mid-April to late June 1994, while Augustin Bizimungu was Chief of Staff of the Rwandan Army, notably at the Josephite Brothers' compound in Kigali on 8 April 1994. Although Count 3 (Complicity in Genocide) of the indictment<sup>110</sup> does not specifically allege that soldiers committed rapes at the locations identified, the Trial Chamber recognized, following the 2008 *Seromba* Appeal judgment, that nearly all convictions for causing serious bodily or mental harm involved rapes or killings.<sup>111</sup> Bizimungu was therefore deemed to have had sufficient notice that the alleged acts of violence causing serious bodily or mental harm in paragraphs 68 and 69 of the Indictment included rapes, in order to prepare his defence. Furthermore, the Trial Chamber also noted that the Prosecution Closing Brief had

<sup>109</sup>) *Prosecutor v. Kajelijeli*, 1 December 2003, ICTR-98-44A-T, *Judgment and Sentence*, paras. 923-4.

<sup>110</sup>) *Prosecutor v. Ndindiliyimana et al*, 23 August 2004, ICTR-00-56-I, *Amended Indictment*, paras. 68-69.

<sup>111</sup>) "The quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs... Indeed, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings". *Prosecutor v. Seromba*, 12 March 2008, ICTR-2001-66-A, *Appeal Judgment*, para. 46.

specifically included rape within the notion of “serious bodily or mental harm” for the purposes of the genocide charge.<sup>112</sup>

The Trial Chamber found that the Prosecution had proved beyond reasonable doubt that Rwandan Army soldiers killed and caused serious bodily and mental harm to Tutsi at the Josephite Brothers’ compound on 8 April 1994,<sup>113</sup> particularly the rape of a twenty-year-old girl, whose body had been found the following day,<sup>114</sup> although rape was not specifically charged under Count 3, and events at the Josephite Brothers’ compound had been omitted from Counts 6 (Rape as a Crime against Humanity) and 8 (Violation of Common Article: rape). However, Bizimungu was only appointed Chief of Staff, and promoted to Major General, on 16 April 1994, and occupied this office from 19 April. Thus, these rapes fell outside the time period prescribed in the indictment: his period in office, mid-April to late June 1994. The Trial Chamber, consequently, refused to even consider the allegations dated 8 April 1994 in assessing Bizimungu’s responsibility for rape as an act of genocide, as a superior, since he was not in office at the time.<sup>115</sup>

Furthermore, although this was considered regrettable, Bizimungu could not even be held criminally responsible for failing to punish the crimes afterwards: current case law<sup>116</sup> precludes finding superiors responsible for failing to punish crimes committed before they assumed the position of command over the perpetrators.<sup>117</sup> We may reasonably ask whether the wrong person was charged with this offence. However, Bizimungu’s immediate predecessor as Chief of Staff was General Deogratias Nsabimana, who was in President Juvénal Habyarimana’s aeroplane, shot down on 6 April 1994 – the event provoking the genocide. This took place two days before the attacks at the Josephite Brothers’ compound. Bizimungu did occupy a position of responsibility in the military at the time of events at the Josephite Brothers’ compound, having been appointed commander of military operations for the Ruhengeri *secteur* in January 1994.<sup>118</sup> But the ICTR did not hold him responsible for atrocities taking place in Kigali. Charging him

<sup>112</sup> “Paragraph 684 of the Closing Brief states that soldiers under Bizimungu’s command “committed murders and caused serious bodily or mental harm, including rape, to many Tutsi ... in Kigali, Gitarama, Butare, Gisenyi, Cyangugu, Kibuye and Ruhengeri préfectures ...” *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, footnote 1793.

<sup>113</sup> *Ibid.*, *supra* note 2, para. 16.

<sup>114</sup> *Ibid.*, para. 1053.

<sup>115</sup> *Ibid.*, paras. 1140–41. “The Prosecution has proved beyond reasonable doubt that Rwandan Army soldiers killed and caused serious bodily and mental harm to Tutsi at the Josephite Brothers’ compound.... However, the Chamber finds that Bizimungu is not criminally responsible for the participation of soldiers in crimes at the Josephite Brothers on 8 April...because those events took place before Bizimungu assumed his position as Chief of Staff of the Rwandan Army”. *Ibid.*, para. 16.

<sup>116</sup> *Prosecutor v. Hadžihasanović et al*, 8 December 2005, IT-04-83-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, para. 10.

<sup>117</sup> *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, paras. 1960–63.

<sup>118</sup> *Ibid.*, para. 90.

with offences for which he could not be prosecuted as they fell outside the time period prescribed in the indictment as his period in office as Chief of Staff and outside his geographical sphere of influence as commander of military operations for the Ruhengeri *secteur* in early April 1994 was a waste of valuable ICTR resources by prosecution staff.

### 3.1.1.2. Improper Pleading of Events in Butare

Bizimungu was also charged with responsibility as a superior for causing serious bodily and mental harm including rape (Count 2) in Butare, from 19 April to late June 1994.<sup>119</sup> However the Trial Chamber noted that “the Prosecution failed to sufficiently particularise and adequately specify the exact locations at which crimes were alleged to have been committed and observed...” within the three-month date range, so that “an objective reader of the Indictment would not be able to decipher where exactly the alleged crimes were observed ... and consequently what were the nature and circumstances of the crimes alleged at these locations”.<sup>120</sup> The pleading was “defective” with respect to the crimes alleged in Butare, Gisenyi, Cyangugu, Kibuye and Ruhengeri, and the “defects were not cured”.<sup>121</sup> The lack of precision would have prevented Bizimungu from preparing an adequate defence to the charges and deprived him of a fair trial. Consequently, he could not be tried for the alleged rapes in Butare.

Pursuant to the ICTR Statute, an accused must be informed promptly and in detail of the nature and cause of the charges against him.<sup>122</sup> The Prosecution must plead the facts and offence in the indictment with precision,<sup>123</sup> including the relationship of the accused to his subordinates, the acts and crimes of the subordinates, how the accused should know that his subordinates had committed the crimes and how he failed to prevent the crimes or punish his subordinates. Failure to plead the material facts in the indictment with sufficient specificity constitutes a defect in the indictment.<sup>124</sup> Previous ICTY and ICTR case law is clear on this,<sup>125</sup> stating that a defective indictment may cause the Appeals Chamber to reverse a

<sup>119</sup> *Prosecutor v. Ndindiliyimana et al, Amended Indictment, supra* note 110, paras. 68-69.

<sup>120</sup> *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, paras. 159-60.

<sup>121</sup> *Ibid.*, para. 1035.

<sup>122</sup> *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, supra* note 12, Article 20 (4) (a).

<sup>123</sup> *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, para. 120.

<sup>124</sup> *Ibid.*, paras. 125-127.

<sup>125</sup> *Prosecutor v. Kupreškić et al*, 23 October 2001, IT-95-16-A, *Appeal Judgment*, para. 88 citing *Prosecutor v. Furundžija*, 21 July 2000, IT-95-17/1A, *Appeal Judgment*, para. 147; *Prosecutor v. Ntagerura et al* 7 July 2006, ICTR-99-46-A, *Appeal Judgment*, para. 22; *Prosecutor v. Niyitegeka, Appeal Judgment, supra* note 101, paras. 194-5; *Prosecutor v. Ntakirutimana*, 13 December 2004, ICTR-96-10-A and ICTR-96-17-A, *Appeal Judgment*, para. 470.

conviction.<sup>126</sup> In *Bizimungu*, the Prosecution should have supported its allegations by specific evidence regarding the exact crimes and locations in which they were committed in the indictment, against which Bizimungu could prepare a defence.

The genocide charges in Count 2 included rapes committed at Gishamvu Church, Nyumba Parish, Butare, and at the Kicukiro *conseiller's* office, however the Prosecution failed to lead any evidence at all regarding the alleged crimes at those locations,<sup>127</sup> and those offences could not be prosecuted.

### 3.1.2. Evidence

The quality and quantity of the evidence presented to the Trial Chamber was not always adequate to secure a conviction for rape or sexual violence on each occasion that it was charged.

#### 3.1.2.1. Hearsay, Circumstantial Evidence and Absence of Corroboration

With regard to the charges under Count 6 (Rape as a crime against humanity) against Bizimungu, Nzuwonemeye and Sagahutu, the Chamber found the Prosecution had not presented sufficient evidence to prove soldiers of the Rwandan Army, under the command of Nzuwonemeye and Sagahutu, committed rapes against Tutsi women at the *Centre Hospitalier de Kigali* (Kigali Hospital Complex – CHK), the only offences of sexual violence against Nzuwonemeye and Sagahutu. Witness DAR was the only Prosecution witness to testify about rapes perpetrated by soldiers against Tutsi girls at CHK. The Trial Chamber did not find Witness DAR's evidence adequate to convict the accused beyond reasonable doubt. His evidence was indirect – he had not witnessed the rapes himself. In his testimony, he inferred that the Tutsi girls had been raped because he had seen “the sad demeanour of the Tutsi girls when they returned to CHK after having been abducted by soldiers.”<sup>128</sup> In view of the prevalence of rape during the genocide, witness DAR's conclusions were potentially well-founded. Circumstantial evidence is very often the principal evidence available in a criminal trial, from which a judge or jury must reach a verdict. However, Witness DAR's evidence was not only circumstantial but also uncorroborated by reliable witnesses. The only other witness to testify to the Trial Chamber about the killings at the CHK was Witness ZA, who, although testifying about abductions from the wards, did not mention rapes, and whose evidence was also indirect. The Trial Chamber considered it insufficiently detailed to be corroborative of any rapes.

Witness DAR also gave evidence, based on information communicated to him from three colleagues,<sup>129</sup> about the abduction and murder of a young Tutsi woman

<sup>126</sup>) *Prosecutor v. Ntakirutimana, Appeal Judgment, supra* note 125, para. 471.

<sup>127</sup>) *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, paras. 32, 1447, 1896-7.

<sup>128</sup>) *Ibid.*, paras. 1172-3.

<sup>129</sup>) *Ibid.*, para. 1078.

named Chantal, however his colleagues were not called to testify, which constitutes hearsay. Under English criminal law, hearsay is only admissible as evidence under certain specific circumstances, as witnesses should normally be available for cross-examination in court.<sup>130</sup> In contrast, the ICTR does not exclude hearsay evidence.<sup>131</sup> Clearly, locating victims and witnesses can be difficult due to deaths and changes of address engendered by the events of 1994. Furthermore, many Rwandans have been left unfit to testify physically or mentally, or are afraid of testifying for fear of reprisals.

English law also accepts that hearsay evidence is valuable in these circumstances, and allows its admission under sections 114–118 of the Criminal Justice Act 2003 (CJA). Notably, section 116 includes exceptions to the rule against hearsay, which permit relevant hearsay statements to be admitted if the person who made the statement is identified to the court's satisfaction, for example, statements made by eyewitnesses who have since died,<sup>132</sup> by witnesses unfit because of their bodily or mental condition,<sup>133</sup> by witnesses who have left the country and it is not reasonable to call them back,<sup>134</sup> by those who cannot be traced despite reasonable attempts to locate them<sup>135</sup> or, with leave of the court, by witnesses too afraid to testify in person.<sup>136</sup>

At the ICTR, the Rules of Procedure and Evidence allow any evidence to be admitted provided it is relevant and has probative value.<sup>137</sup> Hence, Witness DAR's hearsay evidence relating to the murder of Chantal was admissible. Corroboration is not required either, in order for evidence to be admissible, there being "no place for the Civil Law principle *unus testis, nullus testis*..."<sup>138</sup> in the ICTR.<sup>139</sup>

Circumstantial evidence is treated similarly, and, consequently, a conviction could actually be based solely on uncorroborated circumstantial evidence and/or

<sup>130</sup> Section 114 (1) *Criminal Justice Act 2003*.

<sup>131</sup> William A Schabas, *An Introduction to the International Criminal Court* (3<sup>rd</sup> edn CUP, Cambridge 2007) 294, citing *Prosecutor v. Tadić*, 5 August 1996, ICTY, Case No IT-94-1, *Decision on Defence Motion on Hearsay*, paras. 7-19; *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence*, *supra* note 2, para. 113.

<sup>132</sup> Section 116 (2) (a) *Criminal Justice Act 2003*.

<sup>133</sup> Section 116 (2) (b) *Criminal Justice Act 2003*.

<sup>134</sup> Section 116 (2) (c) *Criminal Justice Act 2003*.

<sup>135</sup> Section 116 (2) (d) *Criminal Justice Act 2003*.

<sup>136</sup> Section 116 (2) (e) *Criminal Justice Act 2003*.

<sup>137</sup> *International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence* (entered into force 29 June 1995) UN Doc ITR/3/REV, 1 Rule 89 (C).

<sup>138</sup> 'one witness is no witness,' Kriangsak Kittichaisaree, *International Criminal Law* (OUP, New York 2001) 302; see *Prosecutor v. Akayesu, Judgment and Sentence*, *supra* note 12, paras. 132-7.

<sup>139</sup> "The Chamber also recalls that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. However, where a single witness gives testimony concerning a particular incident, the Chamber recalls that it must act with particular care before accepting such evidence on its own when making a finding of guilt". *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence*, *supra* note 2, para. 112 citing *Prosecutor v. Muvunyi*, 11 February 2010, ICTR-00-55A-T, *Judgment and Sentence*, para. 128.

hearsay. Nonetheless the Trial Chamber, as the trier of fact, can decide that, under particular circumstances, corroboration is necessary,<sup>140</sup> and judges have the discretion to treat hearsay evidence with caution and expect corroboration.<sup>141</sup> The Chamber may freely assess the relevance and credibility of all evidence presented to it.<sup>142</sup> Hearsay evidence is admissible to the Chamber, and is only rejected if it lacks credibility rather than because it constitutes hearsay, however, in the interests of a fair trial, it was reasonable to expect satisfactory identification of Witness DAR's colleagues, in order for the hearsay evidence to be admissible. In this particular situation, although not obliged by the ICTR's Rules of Procedure and Evidence to require corroboration of witness DAR's testimony, given the indirect and limited nature of his evidence, the judges decided not to accept his evidence without corroboration.<sup>143</sup>

The cases of *Kamuhanda*, *Kajelijeli*, *Musema* and *Niyitegeka*, where rape charges failed, demonstrate that establishing the credibility of hearsay and circumstantial evidence is not straightforward. For each prosecution witness who testified about rapes in these cases, the witnesses and the overall testimony they gave were deemed credible by the Trial Chambers, but when they gave hearsay or circumstantial evidence, this was not deemed credible.<sup>144</sup> This leads Daniel Franklin to conclude that “establishing the credibility of a witness is insufficient to establish the credibility of hearsay or circumstantial evidence from that same witness.”<sup>145</sup> Franklin highlights a significant problem for the Prosecution:

None of these judgments [*Kamuhanda*, *Kajelijeli*, *Musema* and *Niyitegeka*] suggested what would be required to establish the credibility of hearsay or circumstantial evidence.... It thus falls upon the prosecutor to ensure that the hearsay or circumstantial evidence is itself credible.<sup>146</sup>

Catherine MacKinnon, the International Criminal Court's (ICC) Special Adviser for Gender Affairs since 2008, speaks of “a tacit social burden of proof”,<sup>147</sup> according to which corroboration is required to a greater extent for sexual assault cases than for other offences. She feels that “at both prosecutorial and judicial levels, a tacitly higher standard of credibility for witnesses to rape pertains than for witnesses to murder”, citing *Kajelijeli*<sup>148</sup> as an example of a case where the bench

<sup>140</sup> *Prosecutor v. Gacumbitsi, Appeal Judgment, supra* note 45, para. 115.

<sup>141</sup> *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, para. 113 citing *Prosecutor v. Rutaganda, Appeal Judgment, supra* note 101, paras. 4, 275-6 and *Prosecutor v. Muvunyi, Judgment and Sentence, supra* note 139, paras. 12-3.

<sup>142</sup> *Prosecutor v. Musema, Judgment and Sentence, supra* note 42, para. 45.

<sup>143</sup> *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, para. 1175.

<sup>144</sup> Daniel Franklin, ‘Failed Rape Prosecutions at the International Criminal Tribunal for Rwanda’ IX *The Georgetown Journal of Gender and the Law* (2008) 181, 213.

<sup>145</sup> *Ibid.*, p. 213.

<sup>146</sup> *Ibid.*, p. 212.

<sup>147</sup> Catherine MacKinnon, ‘The ICTR's Legacy on Sexual Violence’, 14 *New England Journal of International and Comparative Law* (2008) 211, 215.

<sup>148</sup> *Prosecutor v. Kajelijeli, Judgment and Sentence, supra* note 109.



(Judge Arlette Ramaroson dissenting) appeared reluctant “to hold a man responsible for a sexual violation another man committed, when it is willing to hold the same man responsible for murder committed on virtually the same evidence, at the same time and place, by and against the same people”.<sup>149</sup>

There are clear reasons why Trial Chambers hesitate to accept uncorroborated hearsay and circumstantial evidence: hearsay statements are not made under oath, can be misreported in court and the speaker of the original statement cannot be cross-examined. Circumstantial evidence, for its part, can lead to a conviction based upon flawed assumptions. In *Ndindiliyimana et al*, in contrast to testimony of the events at CHK, testimony regarding rapes at Cyangugu Stadium was accepted as credible, thanks to Witnesses LBC and LAV, who gave consistent, corroborative accounts of their own rapes. Both were able to name another rape victim, Fifi.<sup>150</sup> Furthermore, Witness QBP’s testimony regarding a number of girls taken by soldiers and *Interahamwe* from the *Eglise Episcopale au Rwanda* (EER), who returned “in a pitiful state”, having difficulty walking, was also deemed credible. Witness QBP was able to identify three of them as the daughters of her neighbour, and name one as Suzanne.<sup>151</sup> This provides a clear example of the extent of the evidence required for judges to find accusations of rape credible.

The Chamber’s decision not to convict Nzuwonemeye and Sagahutu on the basis of the circumstantial evidence meant they were not convicted for rape at all. The only allegations of rape against them related to events at CHK.

### 3.1.2.2. Inconsistencies and Lack of Eyewitnesses

The Chamber also noted that Witness DAR’s evidence was inconsistent<sup>152</sup> with his pre-trial statement and was reluctant to accept his evidence without corroboration from other witnesses. The inconsistencies did not relate to the alleged rapes but to i) killings of civilians by soldiers which, in his statement, he maintained he had witnessed, yet, during live testimony, denied having seen; ii) to the identity of dead bodies; and iii) to a misremembered date.<sup>153</sup> These were enough to undermine his evidence and the Chamber did not consider him a credible witness. He also had no recollection of the arrival at CHK of the bodies of the Belgian UNAMIR soldiers who had been protecting Prime Minister Agathe Uwilingiyimana, before being captured, mutilated and murdered.<sup>154</sup> The Chamber felt he should have remembered such a significant event. The inconsistencies and lack of corroboration from further witnesses or victims led the Chamber to question whether he had actually been at the CHK on the dates he said. Witness ZA, the only other

<sup>149</sup> MacKinnon, *supra* note 147, p. 215.

<sup>150</sup> *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, paras. 1517–8.

<sup>151</sup> *Ibid.*, para. 1450.

<sup>152</sup> *Ibid.*, para. 1175.

<sup>153</sup> *Ibid.*, paras. 1159–64.

<sup>154</sup> *Ibid.*, para. 1174.

Prosecution witness who testified about events at CHK, did not testify about any rapes and provided indirect evidence as opposed to eyewitness testimony, which was insufficiently detailed to counter the more credible evidence of the defence witnesses.<sup>155</sup>

For the Prosecution to furnish solid evidence of events at CHK, it would have needed to provide detailed and precise corroborative accounts of events from several sources, preferably from eyewitnesses, and its witnesses would have needed to be credible, with no inconsistencies in their accounts prior to and during trial. In cases where more than one eyewitness is available for cross-examination, the Chamber is more likely to accept prosecution evidence. Rapes of Tutsi women at the *École des Sciences Infirmières*, Kabgayi (ESI) were seen by Eyewitness EZ, and rapes at Musambira *Commune* Office and Dispensary were observed by three Eyewitnesses, DBH, DBA, DBB. The Chamber accepted these had taken place.<sup>156</sup> Furthermore, inconsistencies in Witness DBB's testimony regarding the number of people at the Gaserge roadblock were insufficient to undermine her credibility, because it was largely corroborated by Witness DBH. The Chamber noted that "this variance may plausibly be explained by the difficulties of recalling traumatic events in precise detail years after those events occurred".<sup>157</sup> The inconsistencies in Witness DAR's testimony could also have been due to the passage of time and post-traumatic stress disorder, but clearly the judges did not feel they could justify their discretionary power to accept his evidence without corroboration.

### 3.1.3. *Investigative Practices*

Witnesses highlighted poor investigative practices, which led to subsequent problems with evidence and testimony in court.

Some inconsistencies between witnesses' statements and their live testimony in court are blamed on misunderstandings between the witness and the ICTR investigators conducting the pre-trial interviews. For example, Witness DBJ gave evidence that a soldier raped a female refugee at the Josephite Brothers' compound on 8 April 1994. The Defence maintained that Witness DBJ testified to having seen the soldier rape the girl as he walked past the building where the soldier had taken her. However, in his pre-trial statement, Witness DBJ had stated that he saw the rape while he was sitting in the Josephite Brothers' compound. According to Witness DBJ, the discrepancy was possibly the result of a misunderstanding between himself and the investigators, who may have misunderstood the passage in his statement where he said the soldier told the girl to undress at the compound, taking this to mean instead that the soldier raped her at the compound.<sup>158</sup>

<sup>155</sup> *Ibid.*, paras. 1171, 1175.

<sup>156</sup> *Ibid.*, paras. 1180-1; 1185.

<sup>157</sup> *Ibid.*, para. 1190.

<sup>158</sup> *Ibid.*, para. 1138.

The Chamber accepted Witness DBJ's explanation as plausible and was satisfied he gave a credible account that a soldier raped a young girl during the attack at the Josephite Brothers compound on 8 April 1994.<sup>159</sup> However, in English law, a previous inconsistent statement – which is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible<sup>160</sup> – generally undermines the credibility of witnesses, because they are proffering to the court a different account to that asserted before in their written statement. The court may believe that, on one of these occasions, the witness must have been lying. It is therefore essential that investigators draft witness statements accurately and ensure they have understood fully, via detailed questioning, the witness' account.

Investigators must also devote adequate time to conducting interviews. Although her testimony was believed by the Trial Chamber, inconsistencies arose between Witness LBC's pre-trial statements and her live testimony. She ascribed these to the brevity of the interview. During her first interview, she did not tell investigators that her mother had been killed by *Interahamwe* outside Cyangugu stadium, maintaining the interview had not lasted long enough for her to provide a detailed account of the rapes, abductions, assassinations and escape attempts, taking place over several weeks.<sup>161</sup> In the case of Witness LBC, her live testimony of the incident during which this massacre took place was corroborated by Witness LAV. The fact that their accounts were in general consistent bolstered their credibility.<sup>162</sup>

Witness LBC, who testified during cross-examination that she herself had been the victim of multiple rapes at Cyangugu stadium, also explained that, when she was first interviewed, she had not told investigators about the rapes "because she was not brave enough at that time".<sup>163</sup> Witness DBD was also raped at the coffee co-operative TRAFIPRO, but failed to report this to investigators.<sup>164</sup> In both cases, the Prosecution was fortunate to have corroborative evidence from other witnesses, which ensured the witnesses' live testimony was believed. However, following the revelations of the *Akayesu* trial, investigators should have known that many Tutsi women had suffered sexual violence, that they would be reluctant to talk about this due to the social stigma attached to such attacks, and to secure convictions for rape and sexual violence, specific questions should have been put to them, sensitively, to enable them to divulge such attacks.

<sup>159</sup> *Ibid.*, para. 1138-9.

<sup>160</sup> Section 119, *Criminal Justice Act 2003*.

<sup>161</sup> *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra note 2*, para. 1484, footnote 2636.

<sup>162</sup> *Ibid.*, para. 1516.

<sup>163</sup> *Ibid.*, footnote 2623.

<sup>164</sup> *Ibid.*, para. 1194.

#### 4. Prosecution Procedure and its Shortcomings

None of the incidents outlined above are features of *Ndindiliyimana et al* alone. Human rights organisations, international observers, witnesses and victims regularly complain of stumbling blocks to successful prosecution for crimes of sexual violence, despite the progress in defining rape and sexual violence. This section will examine some of the areas of recurrent criticism.

##### 4.1. Judges

Like Catherine MacKinnon, SáCouto and Cleary, of the War Crimes Research Office at Washington College of Law, believe judges require a higher level of proof in cases of sexual violence than in other types of cases before the *ad hoc* tribunals. They claim that judges are “reluctant to draw meaningful inferences from circumstantial evidence and appear to prefer direct or more specific evidence as to knowledge or causality, even when such evidence is not required as a matter of law”,<sup>165</sup> as we saw in *Ndindiliyimana et al*. Similarly, in *Kajelijeli*, witness testimonies provided strong circumstantial evidence that the accused authorised acts of sexual violence by his subordinates, but the Chamber required proof from the Prosecution that a specific order had been issued to rape or sexually assault the victims on that day.<sup>166</sup> SáCouto and Cleary maintain that:

the jurisprudence of the *ad hoc* tribunals makes clear that an order, even if implicit, may be inferred from the circumstances, including from both acts and omissions of an accused. Unfortunately, while the *ad hoc* tribunals have used circumstantial or pattern evidence to establish that an accused ordered certain crimes, a review of sexual violence and gender-based cases before these tribunals indicates that they appear more reluctant to do so in these types of cases.<sup>167</sup>

Attitudes in court have also given serious cause for concern. Nowrojee recounts how, in the *Butare* Trial,<sup>168</sup> the judges burst out laughing as Witness TA, a victim of multiple rapes, was “ineptly and insensitively” cross-examined by a Defence lawyer. The witness had been hiding for days and not bathed. The implication was that she could not have been raped because she smelt. No apology was forthcoming from, nor admonishment administered to, the judges.<sup>169</sup> This

<sup>165</sup> Susanna SáCouto and Katherine Cleary, ‘The Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court’, 17 *American University Journal of Gender, Social Policy and the Law* (2009) 337, 358.

<sup>166</sup> *Ibid.*, p. 355, citing *Prosecutor v. Kajelijeli, Judgment and Sentence*, *supra* note 109, para. 681.

<sup>167</sup> *Ibid.*, p. 354.

<sup>168</sup> *Prosecutor v. Nyiramasuhuko et al, Judgment and Sentence*, *supra* note 17.

<sup>169</sup> Nowrojee, *supra* note 4.

behaviour suggests a lack of gravity accorded to sexual violence offences and a misunderstanding of the probable purpose of the rapes – to eradicate an ethnic group – and could be attributed to the small numbers of women judges at the ICTR, although, in fact, judge Arlette Ramaroson sat in this Trial Chamber. As a result, in 2002, ten prosecution witnesses refused to testify before the same Chamber.<sup>170</sup>

Furthermore, at the international tribunals, the attitudes of judges and prosecutors do not necessarily reflect a respect for women as equals, as the legislation and norms of the twenty-first-century western world demand. Xabier Aranburu, senior analyst at the Office of the Prosecutor at the ICC, recently gave a lecture to a group of experienced judges and prosecutors visiting The Hague where “references to sexual violence were met with laughter and mocking signs, and I was asked whether international tribunals accepted female investigators, since apparently this was not an option in their country”.<sup>171</sup>

Leading independent international organisation Human Rights Watch (HRW) signalled a number of issues to the UN Security Council in a letter in 2003. It criticised the judges’ lack of professionalism, maintaining some judges lacked experience in managing a courtroom, permitting lengthy and irrelevant examination of witnesses.<sup>172</sup> HRW felt the need to recommend the recruitment of “highest quality staff”.

At the ICTR and ICTY, when women judges have been present on the bench, Trial Chambers often seem to have been more determined to prosecute crimes of sexual violence. As we have seen, Judge Pillay was credited with taking the initiative to question witnesses about rape in *Akayesu*, which led to him being charged with sexual violence. Similarly, at the ICTY, it was only on the insistence of Judge Elizabeth Odio Benito,<sup>173</sup> who “publicly exhorted the Office of the Prosecutor”<sup>174</sup> to include gender crimes in Dragan Nikolić’s indictment, that he was charged with and found guilty of sexual violence.<sup>175</sup> Without their determination, it would seem quite probable that investigating crimes of sexual violence would have been even less of a priority for the tribunals.

<sup>170</sup> ‘Ten Genocide Witnesses Refuse to Testify for UN Tribunal’ *Hirondelle News Agency*, Arusha, 3 April 2002 <[www.hirondellenews.com/content/view/7842/79/](http://www.hirondellenews.com/content/view/7842/79/)> accessed 15 November 2011.

<sup>171</sup> Xabier Agirre Aranburu, ‘Sexual Violence beyond reasonable doubt: using pattern evidence and analysis for international cases’, 23 *Leiden Journal of International Law* (2010) 609, 610.

<sup>172</sup> ‘Rwanda and the Security Council: Changing the International Tribunal’ (Letter to Council Members on the International Criminal Tribunal for Rwanda, 1 August 2003) <[www.hrw.org/news/2003/08/01/rwanda-and-security-council-changing-international-tribunal](http://www.hrw.org/news/2003/08/01/rwanda-and-security-council-changing-international-tribunal)> accessed 11 November 2011.

<sup>173</sup> ICTY judge: 1993–98; ICC Vice President since 2003.

<sup>174</sup> Richard Goldstone, Prosecuting Rape as a War Crime’, 34 *Case Western Reserve Journal of International Law* (2002) 277, 282.

<sup>175</sup> *Prosecutor v. Nikolić*, 18 December 2003, IT-94-2-S, *Sentencing Judgment*, para. 5.

Judge Pillay supports the participation of women judges, “because of the principal of equality. You can’t keep fifty per cent of the population out of the decision-making process. Then you have skewed justice”.<sup>176</sup> She does not believe that women and men decide differently, but that women have more sensitivity about rape, as they understand what happens to women who are raped. Rape can genuinely constitute a death sentence for some, since, aside from those rape victims who died from the physical violence accompanying the rape acts, many of Rwanda’s rape victims contracted AIDS or became HIV positive, and also were psychologically affected, feeling deep shame or becoming outcast as a result. Arguably, this understanding will lead to greater sensitivity in managing the questioning of victims of sexual violence in court, and a determination to put crimes of sexual violence on an equal footing with other violent crimes.

It appears also that women judges are more likely to impose harsher sentences for sexual offences. Nienke Grossman, Assistant Professor at the University of Baltimore School of Law, believes the sexes bring different perspectives to judging. A study of ICTY sentencing practices shows panels with female judges impose more severe sanctions on defendants who assault women, while male judges impose more severe sanctions on defendants who assault men: “Having a female judge on cases with female victims increases the sentences by about 46 months”.<sup>177</sup> A recent survey of rulings in United States sex discrimination cases showed that a complainant was ten per cent less likely to win her case if the judge was male as opposed to female, and that a woman’s presence on a judicial panel actually causes male judges to rule in favour of sex discrimination complainants.<sup>178</sup>

Judge Patricia Wald, ICTY judge between 1999 and 2001, believes that the number of women judges at international tribunals is not adequate,<sup>179</sup> with the exception of the ICC, whose statute mandates representation of women, and the Special Court for Sierra Leone, where four out of eleven judges are women. At the ICTR, only one female judge was appointed to the bench in 1996.<sup>180</sup> In 2012, only three

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<sup>176</sup> Quoted in Daniel Terris, Cesare PR Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World’s Cases* (Brandeis, Lebanon, NH, 2007) 48.

<sup>177</sup> Nienke Grossman ‘Sex Representation on the Bench and the Legitimacy of International Criminal Courts’ 11 *International Criminal Law Review* (2011) 643, 647 citing Kimi Lynn King and Megan Greening ‘Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia’ 88 *Social Science Quarterly* (2007) 1049, 1065-66.

<sup>178</sup> *Ibid.*, p. 647, citing Christina Boyd, Lee Epstein, and Andrew Martin, ‘Untangling the Causal Effects of sex on Judging’ 54 *American Journal of Political Science* (2010) 389, 406.

<sup>179</sup> Patricia M Wald, ‘What do women want from international criminal justice? To help shape the law’ 5 October 2009, available at <http://www.intlawgrrls.com/2009/10/what-do-women-want-from-international.html> (last visited 27 January 2012).

<sup>180</sup> Elizabeth D Heinemann, *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights* (University of Pennsylvania Press, 2011) 243.

out of thirteen permanent judges and two out of eight *ad litem* judges were women.<sup>181</sup> Women, very often the victims of horrendous war crimes, consequently have little role in the punishment of them, but have to content themselves with seeing them “disguised in international law linguistics ... as outrages against dignity or honor”.<sup>182</sup>

Article 12 ter (1)(b) of the ICTR statute includes a recommendation that States take into account the importance of a fair representation of female and male judges when proposing candidates as *ad litem* judges.<sup>183</sup>

However, as Judge Wald points out, a balanced representation will only occur if national governments nominate women for possible selection by the international tribunals from amongst their legal professionals.<sup>184</sup>

At any event, as Grossman states, more research into how the representation of the sexes on the bench affects outcomes of trials is essential.<sup>185</sup> The presence as one of three judges on the bench in the *Ndindiliyimana et al* trial of Taghrid Hikmat,<sup>186</sup> the first woman judge in Jordan and the first Muslim woman judge at the ICTR, did not seem to have a particularly positive impact on prosecuting sexual violence in this case as only one of the accused was convicted of rape and on only one count. It may be that the indictment was so defective as to make conviction for sexual violence virtually impossible. In contrast, there were two female judges at the trial of Pauline Nyiramasuhuko, the first woman to be found guilty of rape in an international tribunal.<sup>187</sup> In the 2012 case of Ildéphonse Nizeyimana, where there were no female judges on the bench, Nizeyimana, was found not guilty of the numerous rapes with which he was charged.<sup>188</sup> It is not suggested that a conviction for crimes of sexual violence against women will only be made where women judges are on the bench, but rather that women judges may be likely to have a more dogged approach to dealing with these crimes than their male

<sup>181</sup> The Chambers, available at <http://www.unictr.org/tabid/103/Default.aspx> (last visited 26 January 2012).

<sup>182</sup> Patricia M Wald, ‘Six Not-so-easy Pieces: One Woman Judge’s Journey to the Bench and Beyond’ 36 *University of Toledo Law Review* (2005) 979, 991.

<sup>183</sup> ICTR Statute, Article 12 *ter*: Election and Appointment of *Ad litem* Judges

1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates.

<sup>184</sup> Wald, *supra* note 179.

<sup>185</sup> Grossman, *supra* note 177, p. 645.

<sup>186</sup> *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, p. 1.

<sup>187</sup> *Prosecutor v. Nyiramasuhuko et al, Judgment and Sentence, supra* note 17.

<sup>188</sup> *Prosecutor v. Nizeyimana*, 19 June 2012, ICTR-2000-55C-T, *Judgment and Sentence*, para. 1581.

counterparts. As there are still so few women judges at the ICTR, many trials will inevitably take place with an all-male bench.

In her recent book *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Professor Nancy Combs, Director of the Human Security Law Centre, William and Mary Law School, Williamsburg, advocates judge education, to acquire a deeper understanding of the culture of the victims and defendants, referring to Australian criminal trials with Aboriginal witnesses “whose cultural attributes and communication style differ sharply from those of courtroom personnel”, and maintains that “Cultural training ... can help judges to place witness demeanour into an appropriate context and to better assess testimonial deficiencies”.<sup>189</sup>

Such training would surely help judges manage more fairly the cross-examination of vulnerable witnesses in court. In Combs’ experience, witnesses who have unsophisticated language skills, such as the unschooled or illiterate women amongst those testifying at the ICTR, have difficulty answering questions during cross-examination “because lawyers rarely modify the format and vocabulary of their cross-examination to take account of the witness’ language abilities”.<sup>190</sup> Using double-negatives, multi-part questions, complex syntax and difficult vocabulary may destabilize witnesses and destroy their credibility. Furthermore, she maintains many ICTR judges are former academics or government officials who have no courtroom experience, or may “hail from new democracies and developing nations that do not boast centuries of commitment to due process norms”.<sup>191</sup> It is reasonable to expect some robust form of continuing professional development for judges arriving at the ICTR in these circumstances.

Regular site visits would also constitute a significant aid in understanding the context of the genocide, and would help fill information gaps created by unclear witness testimony with insufficient detail. In the *Karera* trial, a site visit enabled the judges to conclude that the prosecutor had not proved beyond reasonable doubt that Karera had observed a specific attack.<sup>192</sup> Site visits also have the added advantage of increasing the trial’s profile locally, encouraging potential witnesses to come forward with information, and deter them from lying, since “If on-site visits were a customary practice, witnesses would know that at least some portion of their stories would be personally verified”.<sup>193</sup>

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<sup>189</sup> Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010), 299.

<sup>190</sup> *Ibid.*, p. 299.

<sup>191</sup> *Ibid.*, p. 235.

<sup>192</sup> *Prosecutor v. Karera*, 7 December 2007, ICTR 01-74-T, *Judgement and Sentence*, para. 133.

<sup>193</sup> Combs, *supra* note 189, p. 282.



#### 4.2. OTP Prosecutors

Commentators have highlighted a number of deficiencies in the prosecution of sexual violence crimes at the ICTR but in Binaifer Nowrojee's opinion, the responsibility for the poor conviction rates lies with the OTP:

Given the overwhelming evidence of widespread sexual violence during the genocide, the lack of accountability for these crimes can only be attributed to the lack of a comprehensive strategy on the part of the Prosecutor's Office to effectively investigate and prosecute these crimes.<sup>194</sup>

International war crimes specialist Valerie Oosterveld talks of an "inconsistent prosecutorial focus" leading to inconsistent charging practices.<sup>195</sup> She claims a lack of consistency leads investigators to gather too little or the wrong kind of evidence, the result being that this does not prove all elements of the crimes, so prosecutors:

fail to keep track of the evidence over time; use inappropriate methodology; miss investigatory opportunities; and potentially create a disconnect between the charges in the indictment and what the prosecution can actually prove at trial, which results in the need to amend indictments, to drop charges, or leads to acquittals.<sup>196</sup>

There are numerous occasions where the Prosecution withdraw charges of sexual violence before the trial: in *Muvunyi*,<sup>197</sup> (for insufficiency of evidence) and *Bisengimana*,<sup>198</sup> *Nzabirinda*,<sup>199</sup> *Rugambarara*,<sup>200</sup> and *Serushago*<sup>201</sup> (as a result of plea bargaining, in which the Accused pleaded guilty to other charges against him)<sup>202</sup> and in *Kajelijeli*<sup>203</sup> (the OTP missed the deadline to appeal against the acquittal on rape charges).<sup>204</sup> This seems to demonstrate a lack of commitment to

<sup>194</sup> Binaifer Nowrojee 'A lost Opportunity for Justice: why did the ICTR not prosecute gender propaganda?' 2007, available at [http://www.idrc.org/en/ev-108296-201-1-DO\\_TOPIC.html](http://www.idrc.org/en/ev-108296-201-1-DO_TOPIC.html) (last visited 11 October 2011).

<sup>195</sup> Valerie Oosterveld, 'Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: lessons learned for the International Criminal Court', 120 *New England Journal of International and Comparative Law* (2005) 119, 127.

<sup>196</sup> *Ibid.*, p. 127.

<sup>197</sup> *Prosecutor v. Muvunyi*, 23 February 2005, ICTR 2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to File an Amended Indictment*, paras. 28-34.

<sup>198</sup> *Prosecutor v. Bisengimana*, 13 April 2006, ICTR 2000-60-T, Judgment and Sentence.

<sup>199</sup> *Prosecutor v. Nzabirinda*, 23 February 2007, ICTR-2001-77-T, *Sentencing Judgment*.

<sup>200</sup> *Prosecutor v. Rugambarara*, 16 November 2007, ICTR-00-59-T, *Sentencing Judgment*.

<sup>201</sup> *Prosecutor v. Serushago*, 5 February 1999, ICTR-98-39-S, *Sentence*.

<sup>202</sup> Oosthuizen, *supra* note 11.

<sup>203</sup> *Prosecutor v. Kajelijeli, Judgment and Sentence*, *supra* note 109.

<sup>204</sup> Emma Founds, 'Tanzania: Prosecution of Rwanda Gender Crimes at the ICTR' (Dateline, University of Pittsburgh School of Law, 6 August 2010) <[jurist.org/dateline/2010/08/tanzania-prosecution-of-gender-crimes-in-rwanda.php](http://jurist.org/dateline/2010/08/tanzania-prosecution-of-gender-crimes-in-rwanda.php)> accessed 14 November 2011.

prosecute sexual violence, echoed by Aranburu's experience at the ICTY. Two senior attorneys prevented him from including sexual violence charges in an indictment, claiming there was insufficient evidence; one subsequently explained that in his country he always avoided sexual violence because it was "very annoying and very difficult to prove".<sup>205</sup>

Four years after taking up office as ICTR Chief Prosecutor, Hassan Jallow set up a Committee for the Review of the Investigation and Prosecution of Sexual Violence in 2007, to tackle the worryingly low rate of conviction for crimes of sexual violence, which contrasted with the successful rates for other crimes at the Tribunal. The Committee compiled two reports on the past experiences of the OTP, before starting to implement strategies and procedures for the on-going prosecution of sexual violence, eventually producing a Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict in 2008 (The Manual).<sup>206</sup>

The Committee identified the following: the need to improve communications between investigation teams, OTP trial teams, Witnesses and Victims Support Section and the Registry's gender adviser. It recommended staff-training (of lawyers and investigators), greater respect and support for victims and better preparation of witnesses for trial. It advocated recruitment of more female staff, with attention to gender parity at senior levels.

Yet, despite the work of the Committee, there still appears too often to be an imbalance in the representation of the sexes at the OTP. For example, there was only one woman in the five-strong prosecution team in the trial of *Ndindiliyimana et al.*<sup>207</sup> (only one successful prosecution for rape) and none at all in the *Casimir Bizimungu et al.* trial<sup>208</sup> (none of the four accused found guilty of rape) both completed in 2011. The OTP is clearly concerned that there may be a correlation between this under-representation of women in the prosecution teams and the inadequate preparation of sexual violence charges. In contrast, in the case of Pauline Nyiramasuhuko, the first woman to be convicted of rape by an international tribunal, there were five women on the team of prosecutors, a rare occurrence even now.<sup>209</sup>

The Manual states that prosecutors and investigators should have a thorough understanding of the elements of the crimes to be proven to ensure victims are

<sup>205</sup>) Aranburu, *supra* note 171, p. 610.

<sup>206</sup>) Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda 2008, available at <http://www.unictr.org/Portals/o/English/News/events/Nov2008/EN/Best-Practices-Manual-Sexual-Violence.pdf> (last visited 2 February 2012).

<sup>207</sup>) *Prosecutor v. Ndindiliyimana et al.*, *Judgment and Sentence*, *supra* note 2, p. 1.

<sup>208</sup>) *Prosecutor v. Casimir Bizimungu et al.*, 30 September 2011, ICTR-99-50-T, *Summary of Judgment*, p. 1.

<sup>209</sup>) *Prosecutor v. Nyiramasuhuko et al.*, *Judgment and Sentence*, *supra* note 17, p. 1.

not unnecessarily asked to “recount very painful experiences unless there is a reasonable chance of obtaining a conviction for those crimes”,<sup>210</sup> and reminds staff that corroboration of victims’ testimony is not required.<sup>211</sup> It makes clear the responsibility of the OTP, even so far as emphasizing that prosecutors are tasked with the heavy responsibility of directing the judges in court: “It is the Prosecutor’s responsibility to monitor closely the scope of cross-examination in this regard and to bring these Rules to the Trial Chamber’s attention”.<sup>212</sup>

Despite all these positive steps, and the fact that Bianchi does not believe sexual violence formed a “secondary category” at the ICTR, nonetheless, if the OTP had to make a choice, she admits that, in the past, a genocide charge would take priority over rape and sexual violence charges, due to limited resources. Sexual violence charges might be dropped or not pursued at all if they proved too complex to prosecute. She insists that at the OTP “we’re trying to make a difference in that now”.<sup>213</sup> Special training from the outset is essential to overcome the difficulties of eliciting evidence. Worryingly, since entirely dependent on the luck of the draw, she says that, in successful sexual violence prosecutions, there was “always a prosecutor who was completely dedicated to the cause, who treated the victims in a way that gave the victim a lot of support while not invading her privacy”.<sup>214</sup>

Chief Prosecutor Jallow believed that sexual violence offences should be ‘fast-tracked’, and dealt with ‘very early’ when victims still wanted justice. He felt that if there was delay, victims resettled, had families and simply did not wish to reopen an unpleasant chapter in their lives, but desired closure, which meant the OTP was unable to prosecute.<sup>215</sup> Unfortunately, however, the OTP did not prioritise sexual violence prosecutions in the early days, and as we seen, prosecuting these offences eighteen years after they happened gives very mixed results.

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<sup>210</sup> Maria Warren, ‘OTP Best Practice Manual,’ (Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities, Arusha, 26 to 28 November 2008) para. 28 available at <http://www.unict.org/Portals/0/English/News/events/Nov2008/EN/Best-Practices-Manual-Sexual-Violence.pdf>, (last visited 2 February 2012).

<sup>211</sup> *International Criminal Tribunal for Rwanda Rules of Procedure and Evidence* (adopted 29 June 1995, entered into force 29 June 1995) UN Doc ITR/3/REV 1, Rule 96 (i).

<sup>212</sup> Warren, *supra* note 210, paras 44–45.

<sup>213</sup> Lisa Nathan, Interview with Linda Bianchi, appeals Counsel ‘The challenges of prosecuting rape’ Voices from the Rwanda Tribunal (5 November 2008) available at <http://www.tribunavoces.org/voices/video/165> (last visited 1 February 2012).

<sup>214</sup> Lisa Nathan, Interview with Linda Bianchi, ‘The need for skilled prosecutors in securing rape convictions’ Voices from the Rwanda Tribunal (5 November 2008) available at <http://www.tribunavoces.org/voices/video/166> (last visited 1 February 2012).

<sup>215</sup> Hassan Jallow, ‘Strategies for effective prosecution of sexual violence’ (Voices from the Rwanda Tribunal 2008) available at <http://www.tribunavoces.org/voices/video/142> (last visited 1 February 2012).

### 4.3. OTP Investigators

Regular criticisms have been made regarding investigators' practices in collecting evidence from witnesses and victims. According to Oosterveld, in the early investigations, statements on sexual violence crimes were too 'cursory,' lacking important supporting evidence to prove the elements of crimes, because investigators and prosecuting lawyers did not work in close collaboration. Sexual violence charges then either had to be dropped or new evidence collected hurriedly for trial.<sup>216</sup>

The shortage of evidence is attributed to various factors. A lack of sensitivity on the part of investigators, due to the absence of female investigators<sup>217</sup> (until 1998, the ICTR employed only male investigators<sup>218</sup>), the lack of investigators with relevant experience, and the use of poorly-designed interviews were highlighted. Richard Goldstone (Chief Prosecutor, 1994-96) highlighted a 'gender bias' at the OTP in the 1990s, with large numbers of investigators, mainly police and army officers, seconded to the ICTR from all over the world, whose "culture was not such as to make them concerned about gender-related crime".<sup>219</sup>

Some witnesses have even found genocide suspects employed by the ICTR as defence investigators. Survivor organisations *Ibuka* and AVEGA denounced fourteen ICTR defence investigators as genocide suspects, including Joseph Nzabarinda (in Sylvain Nsabimana's defence team), accused of rape and convicted of murder as a crime against humanity in 2007.<sup>220</sup> Survivors say such ICTR employees regularly 'leaked' information covered by professional secrecy to suspects and their families, with the result that prosecution witnesses and their relatives were hounded from their homes, or even died in mysterious circumstances.<sup>221</sup> There have also been accusations of investigators "watering down" testimonies,<sup>222</sup>

<sup>216</sup> Oosterveld, *supra* note 195, p. 126 footnote 36 citing 'Conversation with Richard Renaud, ICTR Chief of Investigations', 1 December 2004.

<sup>217</sup> John McKay, Interview with Roger Pionana 'Female investigator teams for interviewing witnesses about rape' Voices from the Rwanda Tribunal (15 October 2008) <[www.tribunalvoices.org/voices/video/192](http://www.tribunalvoices.org/voices/video/192)> accessed 14 November 2011.

<sup>218</sup> Founds, *supra* note 204.

<sup>219</sup> Patricia Viseur-Sellers, 'Gender Strategy is Not Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts' (2009) 17 *Journal of Gender, Social Policy and the Law* 327, footnote 26 citing Richard Goldstone, 'Prosecuting Rape as a War Crime', 34 *Case Western Reserve Journal of International Law* (2002) 277, 280.

<sup>220</sup> African Rights and Redress, 'Survivors and post-genocide Justice in Rwanda: their experiences, perspectives and hopes' (November 2008) <<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>> accessed 27 February 2012; *Prosecutor v. Nzabirinda*, 23 February 2007, ICTR-2001-77-T, *Sentencing Judgment*.

<sup>221</sup> African Rights and Redress, *ibid.*

<sup>222</sup> 'Rwanda: Ibuka threatens to cut ties with ICTR' *The New Times*, Kigali, 21 November 2009.

of nepotism and racism in the recruitment of defence investigators and of offers of bribes to testify for one side or the another.<sup>223</sup>

Indeed, the poor performance of investigators, who are sometimes called to the stand to testify about the procedures they followed in gathering statements, is reported in the Judgments: in *Ndindabahizi*, investigators investigating the deaths of two victims, Mukantabana and Nyiramaritete, did not realise that Mukantabana was an alias for Nyiramaritete;<sup>224</sup> On one occasion, investigators failed to attribute statements to the statement-maker correctly.<sup>225</sup> Similarly, in *Akayesu*, identical statements purportedly from Witness DIX and her younger brother Witness DJX were prepared and submitted by the Defence team.<sup>226</sup>

In the early days of the ICTR, when the tribunal was criticised for its slowness, performance reviews were based on the number of statements an investigator took, with renewal of contract dependent on productivity,<sup>227</sup> and it is not difficult to see that this could easily lead to hastily conducted interviews and inadequate detail.

Combs states that, although investigators probably do not make as many mistakes as witnesses claim, errors occur:

Interviews with ICTR...investigators generate off-the-record stories of investigators who at best lack an adequate understanding of the conflict they are investigating and the culture and habits of the people who are to be witnesses, and who at worst are lazy and/or incompetent.<sup>228</sup>

She suggests taping interviews, a practice which has been adopted by the Extraordinary Chambers in the Courts of Cambodia,<sup>229</sup> whose Internal Rules go so far as to provide that, when a suspect is questioned, the interview should be audio- or video-recorded if necessary. Judges may extend this to the questioning of anyone appearing before them, in particular “where the use of such procedures could assist in reducing any subsequent traumatising of a victim of sexual or gender violence”.<sup>230</sup>

<sup>223</sup> ‘Shock as ICTR man turns genocide suspect’ *The East African*, 28 May 2001; ‘ICTR/ Ngirabatware – Defence witness accuses prosecution investigators of intimidation’, *Hirondelle News Agency*, Arusha, 17 August 2011.

<sup>224</sup> *Prosecutor v. Ndindabahizi*, 15 July 2004, ICTR 2001-71-I, *Judgment and Sentence*, para. 40.

<sup>225</sup> The prosecution believed it held statements from two people with the same name, the defence believed that the two statements had been made by just one person, and in reality the investigators had simply noted incorrectly the name of one of the witnesses on their statement, putting the same name on both statements. Combs, *supra* note 189, p. 127.

<sup>226</sup> *Ibid.*, p. 126 citing *Prosecutor v. Akayesu*, *Judgment and Sentence*, *supra* note 12, para. 443.

<sup>227</sup> *Ibid.*, p. 127.

<sup>228</sup> *Ibid.*, p. 126.

<sup>229</sup> *Ibid.*, p. 280.

<sup>230</sup> *Internal Rules of the Extraordinary Chambers of the Courts of Cambodia* Rule 25 (4) (12 June 2007 as amended 12 August 2011) available at <http://www.eccc.gov.kh/en/document/legal/internal-rules> (last visited 21 April 2012).

If it is impracticable to produce a taped interview, a written transcript would be beneficial. The format of written witness statements at the ICTR was debated in 2004. The *Niyitegeka* Trial Chamber noted that neither ICTR nor ICTY had provided a clear definition of the term ‘statement.’<sup>231</sup> The Appeals Chamber outlined an ideal record of a witness interview as:

...composed of all the questions that were put to a witness and of all the answers given by the witness. The time of the beginning and the end of an interview, specific events such as requests for breaks, offering and accepting of cigarettes, coffee and other events that could have an impact on the statement or its assessment should be recorded as well.<sup>232</sup>

The interview should be recorded in a language the witness understands, the witness should read or have it read out to him or her, make any corrections necessary, sign it to attest to its truthfulness and correctness. Finally, it should be signed by the investigator and interpreter.<sup>233</sup>

The Chamber felt it might be impossible to assess the probative value of witnesses’ answers without knowledge of the questions posed, and that the Chamber would have greater difficulty assessing the credibility of witnesses and the reliability of their testimony without a detailed record of their interviews. The Chamber concluded:

The record of the first interview with a witness is of the highest value because it is most likely to capture the witness’s recollection accurately, being closest in time to the events and less vulnerable to any subsequent influence.<sup>234</sup>

Subsequent to the *Niyitegeka* Appeals Chamber remarks, the OTP has not changed the format of its witness statements, and it appears that most statements remain a summary of the information witnesses provide to investigators, without including the questions asked or other explanatory narrative detailing the circumstances in which the statement was taken.<sup>235</sup> Where inconsistencies arise between pre-trial statements and witness testimony in court, Trial Chambers continue to place more weight on oral testimony – which is now given many years after the events – than on written statements. Trial Chambers minimise the discrepancies with pre-trial statements, which are attributed to poor interviewing techniques adopted by investigators. Were the ICTR able to rely on effectively-collected, accurate data, divergent accounts could provide a “valuable mechanism for assessing witness credibility”<sup>236</sup> at the ICTR, where false testimony is, unfortunately, rife.

<sup>231</sup> *Prosecutor v. Niyitegeka*, 9 July 2004, ICTR-96-14-A, *Appeal Judgment*, para. 30.

<sup>232</sup> *Ibid.*, para. 31.

<sup>233</sup> *Ibid.*, para. 32.

<sup>234</sup> *Ibid.*, para. 33.

<sup>235</sup> Combs, *supra* note 189, p. 280 citing interview with Peter Robinson, ICTR defence counsel (personal email correspondence 2 August 2009).

<sup>236</sup> *Ibid.*, p. 281.

As the ICTR relies on UN member states to provide investigators,<sup>237</sup> it is especially important to have procedures in place to ensure investigators, who come from widely different backgrounds, know exactly what is required of them and all follow similar practices. To tackle this, in 2010 the ICTR began work on an International Prosecutors' Best Practice Manual for Investigation and Prosecution of International Crimes, which was due for completion by mid-2011,<sup>238</sup> somewhat late in the day to be of great use to the ICTR, which should have completed all cases by 2014.<sup>239</sup> The ICTR's Best Practices Manual for Sexual Violence Crimes<sup>240</sup> recommends investigators be provided with a model questionnaire and a model witness statement to ensure evidence is correctly documented – this is surely a bare minimum in such circumstances.<sup>241</sup>

There have also been geographical impracticalities. The investigations division, initially entirely based in Rwanda, was separated from the prosecution team which was based in Arusha.<sup>242</sup> Some investigators working on trials with multiple defendants have been relocated to Arusha, where they work alongside prosecutors,<sup>243</sup> but investigators working on single-accused trials remain in Kigali, close to the crime scene. However, for the remaining trials before the ICTR, the OTP is moving away from lengthy and cumbersome trials involving multiple defendants and many witnesses in favour of single-accused trials. The investigations team will no longer be split, but, based in Kigali, will once more be separated from the prosecutors,<sup>244</sup> who operate from Arusha. It remains to be seen how successfully investigators and prosecutors will be able to liaise in these conditions.

<sup>237</sup> Hassan B. Jallow, 'Challenges of International Criminal Justice: The ICTR experience,' (Colloquium of Prosecutors of International Criminal Tribunals, Arusha 25-27 November 2004) available at <http://www.unicttr.org/Portals/o/English/News/events/Nov2004/jallow.pdf> (last visited 15 November 2011).

<sup>238</sup> Statement by Hassan B Jallow (Statement to the United Nations Security Council 6 December 2010) available at <http://unicttr.org/Default.aspx?TabId=155&id=1182&language=en-US&mid=560&SkinSrc=%5BG%5DSkins/UNICTR/PrintSkin&ContainerSrc=%5BG%5DContainers/UNICTR/PrintCo ntainer&dnnprintmode=true> (last visited 3 December 2011).

<sup>239</sup> 'OTP Best Practice Manual,' (Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities, Arusha, 26 to 28 November 2008) paras 44-45, available at <http://www.unicttr.org/Portals/o/English/News/events/Nov2008/EN/Best-Practices-Manual-Sexual-Violence.pdf> (last visited 2 February 2012).

<sup>240</sup> *Ibid.*

<sup>241</sup> Warren, *supra* note 210, para. 25.

<sup>242</sup> Hassan Jallow, 'Session 5: Debates with Prosecutors,' (ICTR: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders, 11 July 2009) 10, available at <http://www.unicttr.org/Portals/o/English/News/events/july2009/SESSION5.pdf> (last visited 30 November 2011).

<sup>243</sup> *Ibid.*, p. 10.

<sup>244</sup> *Ibid.*, p. 7.

## 5. Conclusion

There is now legislation in place to prosecute rape and sexual violence committed during the Rwandan genocide as acts of genocide, crimes against humanity or outrages upon personal dignity, and case law has given clarification as to the elements of these offences. The conceptual definition of rape provided by the *Akayesu* Trial Chamber was a significant development in the prosecution of crimes of sexual violence at the ICTR, likewise the presumption that the surrounding circumstances of conflict are coercive and generally eliminate the necessity for prosecutors to disprove that the victim consented to the sex act. The return to a mechanical definition of rape means proving rape is more complex, in theory, although this does not appear to be the principal stumbling block to successful prosecution; there is a high burden of proof on the prosecution to prove rape, and Trial Chambers are reluctant to accept uncorroborated accounts of rape, despite being permitted to do so.

Cases such as *Ndindilyimana et al* provide examples of barriers to successful convictions. We see evidence of indictments inaccurately and imprecisely drafted, and hear of insufficient time, care and expertise given to obtaining detailed witness statements. Inconsistencies arise between witness statements and live testimony in court. Eyewitnesses and corroborative accounts to boost witness credibility have often not been available. It has been argued that judges do not have the same respect for crimes of sexual violence as for other offences. This has led to poor conviction rates for charges of rape and sexual violence, and a general impression that sexual violence crimes are considered less important than other offences.

Although the ICTR has now commenced its completion strategy prior to transferring jurisdiction to Rwandan national courts, the issues investigated here are still relevant. Thirty-four accused are on trial at first instance and appeal or are at large.<sup>245</sup> Many of the indictments for these cases contain counts for rape. The ICTR therefore still has reason to be diligent in ensuring that indictments have been drafted correctly, charges worded precisely and evidence gathered and presented effectively, so that a full and accurate case can be brought against those still to appear on counts of rape and sexual violence.

Françoise Ngendahayo, former ICTR adviser on gender and victim assistance, recounts her memories of a witness in the *Akayesu* trial, whom she visited afterwards as she lay dying, to take her the French version of the Judgment. Ngendahayo explains:

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<sup>245</sup> 'Status of cases', <[www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx](http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx)> accessed 28 April 2012.



her reaction was contrary to my expectation. I thought she would say, “I don’t need this. I need to survive.” She told me, “Thank you. Now that I have this judgment, even if I’m unable to read French..., I will put it under my pillow and sleep on it until I die.”<sup>246</sup>

This is how important it is for Rwandan victims of rape and sexual violence to see justice delivered. Ngendahayo’s hope, finally, is that the achievements of the ICTR and other international criminal tribunals will “instill a fear of justice” and that it will genuinely be a case of *plus jamais ça*<sup>247</sup> for sexual violence offences as much as for any others.

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<sup>246</sup>) Françoise Ngendahayo, Session 6 ‘Reconciliation,’ ICTR: Model or Counter Model of International Criminal Justice? The perspective of the stakeholders, Geneva Conference at the Institut d’étude du développement économique et social (IEDES) et UMR Développement et sociétés, Université Paris I, 9 July 2009 <genevaconference-tpir.univ-parisi.fr/spip.php?page=impression&id\_article=489& lang=fr> accessed 28 April 2012.

<sup>247</sup>) *Plus jamais ça* – Never again.

- (xi) Trouille HL, 'France, universal jurisdiction and Rwandan *génocidaires*: the Simbikangwa trial' (2016) 14 Journal of International Criminal Justice 195

# France, Universal Jurisdiction and Rwandan *génocidaires*

## The *Simbikangwa* Trial

Helen L. Trouille\*

### Abstract

*In 2014, 20 years after the Rwandan genocide, the first trial took place in France of a Rwandan génocidaire, Pascal Simbikangwa, despite the presence on French territory of a number of genocide suspects for many years, various extradition requests by Rwanda — declined by France — and numerous arrests and investigations. This article looks at questions surrounding jurisdiction in the Simbikangwa case and the reasons why the French courts heard this case. The article examines some issues that may hold significance in the future for the choice of arena in bringing to justice those suspects of the Rwandan genocide living in France.*

### 1. Introduction

On 14 March 2014, Pascal Simbikangwa was found guilty by the *Cour d'assises* in Paris for the part he played in the Rwandan genocide nearly 20 years earlier, when approximately 800,000 Rwandan citizens, mostly Tutsis or moderate Hutus, were massacred by the Hutu majority during a ruthless demonstration of ethnic cleansing. On trial for complicity in genocide as well as in crimes against humanity,<sup>1</sup> Simbikangwa, former head of the Rwandan *Service central de renseignement*, the Central Intelligence Services in Rwanda, and captain of the presidential guard, was convicted and sentenced to 25 years in prison. His was no 'ordinary' crime, but the lengthy delay in bringing Simbikangwa to justice was not due to lack of evidence or inability to track him down. Simbikangwa had been arrested in October 2008 on the French island of

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1 Simbikangwa was initially charged with complicity to commit genocide and complicity to commit crimes against humanity, but during in the course of the trial, the *avocat général* (assistant public prosecutor) requested that charges should be upgraded to include genocide and not only complicity. See 'Premier procès lié au génocide rwandais: perpétuité requise contre l'accusé', *Le Monde*, 12 March 2014.

Mayotte,<sup>2</sup> remanded in custody on Réunion Island in April 2009, and transferred to Fresnes prison in the south of Paris, in mainland France some months later.<sup>3</sup> He remained at Fresnes until his trial in 2014. His trial was also no 'ordinary' trial, marking the first complete trial of a suspect in the Rwandan genocide by a French court. This is despite the presence of a number of suspected *génocidaires* currently living in France and a number of similar trials of *génocidaires* in other countries, in Europe and beyond.<sup>4</sup> This article examines how Simbikangwa came before the French courts and the significance of the *Simbikangwa* trial in France in bringing to justice those Rwandans living in France, who are suspected of committing the 'crime of crimes', a term commonly used to describe genocide since the Nuremberg trials.

## 2. Arrest and Investigation

The journey which was to bring Simbikangwa before the French courts began when he fled Rwanda in July 1995, after the genocide. Simbikangwa was a paraplegic, confined to a wheelchair, following a car accident in which he was involved as a young man in 1986.<sup>5</sup> His first destination was Goma in the Democratic Republic of the Congo (formerly Zaire), and thereafter he travelled to east Africa in October 1996, then to the Comoros Islands in 1998, where various catholic missions assisted him. Finally, in 2005, he obtained passage on a boat, alongside other illegal immigrants, to Mayotte, where he claimed asylum under the name of Safari Senyamuhara. Simbikangwa lived with an assumed name and false identity until his involvement in the production of false identity documents brought him to the attention of the local police in Mayotte in 2008.<sup>6</sup> At that point, his real identity was revealed and it was discovered that he was wanted for offences related to genocide by the Rwandan authorities and was the subject of an Interpol red notice 'to seek the location and arrest of a person wanted by a judicial jurisdiction or an international tribunal with a view to his/her extradition.'<sup>7</sup> The Rwandan authorities in Kigali had classified Simbikangwa as a category one *génocidaire*, the category reserved for alleged

2 M. Barbler, 'Génocide des Tutsi: vingt ans après, un procès en France', *L'Humanité*, 4 February 2014.

3 M. Lugaz and Y. Ronda, *Pascal Simbikangwa devant la Cour d'assises de Paris: quels sont les enjeux du premier procès français lié au génocide rwandais?*, Clinique de droit international pénal et humanitaire, Laval University, available online at <http://www.cdiph.ulaval.ca/blogue/pascal-simbikangwa-devant-la-cour-dassises-de-paris-quels-sont-les-enjeux-du-premier-proces> (visited 20 July 2015).

4 Germany, the Netherlands, Belgium, Norway, Sweden, Switzerland and Canada have all tried Rwandan genocide suspects.

5 Paris Cour d'assises, Judgment No. 13/0033, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)*, 14 March 2014 (hereinafter 'Cour d'assises, Judgment No. 13/0033').

6 B. Tholay, 'Rwanda: qui est le capitaine Simbikangwa, jugé en France pour complicité de génocide?', *L'Express*, 3 February 2014.

7 Interpol, *International Notices System: Fact Sheet* (2015).

orchestrators and organizers of the genocide and crimes against humanity,<sup>8</sup> as opposed to those with a more minor involvement, who occupied categories two to four. Category two offenders, for example, include perpetrators, conspirators or accomplices of homicide and assault causing death, where category three includes those responsible for serious assaults against the person, and category four, persons who committed offences against property. At the time these categories were established by Rwandan Organic Law No. 08/96, dated 30 August 1996, defendants under category one — and this category only — were liable for the death penalty if found guilty.<sup>9</sup>

Once aware of his arrest, the Rwanda government requested Simbikangwa's extradition from France to face justice in Rwanda. The French authorities refused the request in order to try him in Paris with respect to his false documents. Simbikangwa was sentenced to two years in Fresnes prison in 2012 for that crime.<sup>10</sup> Thereafter, France sought to pursue the genocide charges domestically.

However, amongst all the signatories of the European Convention on Human Rights (ECHR), France has one of the worst reputations for violations of Article 5(3),<sup>11</sup> which concerns unreasonable delays in bringing cases to court, and it has taken a considerable number of years to bring Simbikangwa to trial for the offences related to genocide. The *Tomasi* case is regularly used to demonstrate the delays in French justice. Corsican Félix Tomasi was arrested in Bastia in March 1983 on suspicion of involvement in an attack by an independence group in Corsica. He was released immediately after his trial in October 1988, five and a half years after his arrest, when he was found not guilty.<sup>12</sup> Although Simbikangwa's trial for falsifying identity documents was slightly less drawn out than the *Tomasi* trial, with three years of pre-trial detention, it

8 Art. 2 Organic Law No. 08/96, 30 August 1996, on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990 states: 'Persons accused of offences set out in Article 1 of this organic law and committed during the period between 1 October 1990 and 1994 shall, on the basis of their acts of participation, be classified into one of the following categories: Category 1: a) person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; b) persons who acted in positions of authority at the national, prefectural, communal, sector or cell level, or in a political party, or fostered such crimes; c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) persons who committed acts of sexual torture' (hereinafter 'Organic Law'). See also V. Thalmann, 'Rwandan Genocide Cases', in A. Cassese et al. (eds), *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 498.

9 Art. 14(a) Organic Law No. 08/96.

10 Collectif pour les parties civiles pour le Rwanda, *Procès Génocide Rwanda: FAQ*, available online at <http://proces-genocide-rwanda.fr/faq/> (visited 21 May 2015).

11 Art. 5(3) ECHR reads: 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

12 *Tomasi v. France*, Series A, No. 241-A, 1 (1993).

has taken French courts a similar length of time to bring Simbikangwa to trial for the counts related to genocide. Simbikangwa was arrested and detained on 28 October 2008 in Mayotte for the falsification of identity documents, officially remanded in custody for the genocide offences on 16 April 2009, and sentenced to 25 years in prison on 14 March 2014,<sup>13</sup> following a trial which began on 4 February 2014.<sup>14</sup> France had already received a warning about unreasonable delays in dealing with Rwandan cases in June 2004, when the European Court of Human Rights had unanimously decided that the French courts had violated the rights of Yvonne Mutimura, a victim, to be heard promptly. It had taken nine years to investigate the role in the genocide of Rwandan priest, Wenceslas Munyeshyaka, who was arrested in France in 1995 following a complaint by genocide survivors that he was complicit in torture and inhuman or degrading treatment during the genocide.<sup>15</sup> Indeed, although he was officially charged with genocide offences and referred by the International Criminal Tribunal for Rwanda (ICTR) to France for prosecution in 2007,<sup>16</sup> the investigation into Munyeshyaka was only completed in April 2015. Furthermore, a recent decision of the *juge d'instruction* (examining magistrate) investigating Munyeshyaka has ruled that there is no case to answer against him for the offences related to genocide. It remains to be seen whether this decision to not prosecute Munyeshyaka for the offences of genocide, rape as a crime against humanity, extermination as a crime against humanity and murder as a crime against humanity, as outlined on the ICTR indictment, which was drafted before the referral to France was agreed,<sup>17</sup> will be appealed by the *Fédération internationale des droits de l'homme* (FIDH) and the *Ligue des droits de l'homme* (LDH).<sup>18</sup>

The investigation by the French authorities into Simbikangwa's involvement in the genocide was finally completed in February 2013, and passed to the prosecutor's department, in order for the charges to be finalized. April 2013 would mark the end of Simbikangwa's fourth year in detention in France, and the maximum duration which the law allows detention of a suspect pre-trial

13 FIDH and LDH, *Rwanda: The Pascal Simbikangwa Case: Analysis of an Emblematic Trial*, December 2014, available online at <https://www.fidh.org/IMG/pdf/rwandapoces654ang2014.pdf> (visited 14 May 2015), at 6 (hereinafter 'FIDH and LDH, *The Pascal Simbikangwa Case*').

14 J. Hubrecht, *Les Leçons du procès Simbikangwa: une 'révolution judiciaire' en marche*, Institut des hautes études sur la justice, February 2015, available online at <http://www.ihej.org/wp-content/uploads/2015/02/Proces.Simbikangwa.Joel.Hubrecht.fevrier.2015.pdf> (visited 14 May 2015), at 1.

15 *Munyeshyaka, Wenceslas* (ICTR), The Hague Justice Portal, available online at <http://www.haguejusticeportal.net/index.php?id=10679> (visited 10 June 2015).

16 Decision on the Prosecutor's Request for the Referral of Wenceslas's Indictment to France, *Munyeshyaka* (ICTR-2005-87-I), Trial Chamber, 20 November 2007.

17 Indictment, *Munyeshyaka* (ICTR-05-87), 20 July 2005.

18 In August 2015, the French public prosecutor requested dismissal of the case, due to lack of evidence of Munyeshyaka's direct involvement. On 2 October 2015, this request was granted. See 'Génocide rwandais: le parquet demande le non-lieu pour le Père Munyeshyaka', *Le Monde*, 19 August 2015. See also, FIDH, *Non lieu dans l'affaire Wenceslas Munyeshyaka — Les victimes méritent un procès!* (2015), available online at <https://www.fidh.org/fr/themes/justice-internationale/competence-universelle/non-lieu-dans-l-affaire-wenceslas-munyeshyaka-les-victimes-meritent-18554> (visited 15 October 2015).

for a crime punishable by a custodial sentence exceeding 20 years and committed outside of France.<sup>19</sup> Although these limits can be extended by up to eight months in exceptional circumstances — where the examining magistrate requires more time to complete the investigation and releasing the suspect could put property or members of the public at risk —<sup>20</sup> it was becoming urgent to deal with Simbikangwa's case.

Following the investigation of four years, which included four expeditions to Rwanda by the examining magistrates,<sup>21</sup> Simbikangwa was formally indicted for complicity in genocide and complicity in crimes against humanity on 29 March 2013.<sup>22</sup> This indictment covered the role he played in distributing weapons to the guards stationed at the roadblocks in Kigali and for giving them instructions and encouragement which led to the massacre of the Tutsis. Initially, he had been investigated in connection with, and indicted for, a number of other crimes as well — genocide through wilful attacks and attempts on life, crimes against humanity through wilful attacks and attempts on life, torture and barbarity —<sup>23</sup> but, after having interviewed over 100 witnesses, the examining magistrates decided that they were unable to proceed with certain charges initially envisaged, notably relating to the massacre at Kesho Hill. The accounts of the witnesses were too 'fragile' to enable the examining magistrates to pursue Simbikangwa for the charges of genocide through wilful attacks and attempts on life and crimes against humanity through wilful attacks and attempts on life. The extent of Simbikangwa's involvement in the massacre on Kesho Hill was at issue, where between 1400 and 1600 Tutsis were killed, having gathered there to seek refuge from their Hutu aggressors in the aftermath of the assassination of President Juvénal Habyarimana — the incident that set the genocide in motion. Witnesses denounced Simbikangwa as having been not only present on 8 April 1994,

19 Art. 145-2 Code de procédure pénale.

20 *Ibid.*

21 FIDH and LDH, *The Pascal Simbikangwa Case*, *supra* note 13 at 6.

22 Cour d'assises, Judgment No. 13/0033.

23 See Paris Cour d'appel, Ordonnance de Requalification, de non-lieu partiel et de mise en accusation devant la Cour d'assises, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)* 29 March 2013. Simbikangwa was initially charged with 'crimes de génocide (par des atteintes volontaires à la vie et tentatives, et des atteintes graves à l'intégrité physique ou psychique) et complicité de génocide (par des atteintes volontaires à la vie et tentatives, et des atteintes graves à l'intégrité physique ou psychique); crimes contre l'humanité (par des atteintes volontaires à la vie — meurtres/assassinats — et tentatives et autre actes inhumains); participation à un groupement formé ou à une entente établie en vue de la préparation caractérisée par un ou plusieurs faits matériels, de l'un des crimes définis par les articles 211-1, 212-1 et 212-2 du code pénal, actes de tortures et de barbarie'. Most of the provisions cited relate to definitions of genocide and crimes against humanity. The reclassification order is summarized in English in FIDH and LDH, *The Pascal Simbikangwa Case*, *supra* note 13 at 7, as follows: 'for genocide through wilful attacks and attempts on life and wilful and grievous attacks on the physical integrity of persons and for complicity in genocide, for crimes against humanity through wilful attacks and attempts on life and other inhumane acts, for complicity in crimes against humanity, for participation in a group... or in an established agreement created to carry out genocide or crimes against humanity, and for acts of torture and barbarity'.

but also instrumental in the massacre that occurred on that day.<sup>24</sup> Even prior to the genocide, Simbikangwa, who owned a property at Kesho, was feared as merciless and above the law by the Tutsi workforce he employed to look after his farm. The FIDH had already expressed serious concerns as to Simbikangwa's violations of human rights and his reputation as a torturer.<sup>25</sup> However, the Paris *Cour d'appel* found that there was insufficient evidence to try Simbikangwa for the events at Kesho Hill, so charges relating to the Kesho Hill massacre were removed from the indictment. Simbikangwa faced additional charges of torture under the 1984 Convention against Torture,<sup>26</sup> and Articles 222-1 to 222-6 of the *Code pénal*,<sup>27</sup> were also dropped, failing to satisfy the domestic statute of limitations, which prevents the prosecution of most crimes — the most serious offences including offences of torture — more than ten years after they have been committed.<sup>28</sup> Thus, only charges for complicity in genocide and complicity in crimes against humanity remained on the indictment when Simbikangwa went to trial in 2014.

### 3. The Genocide Case and Issues of Jurisdiction

The offences had not been committed on French soil, were not against French nationals and the accused was not a French national — which does not satisfy the normal criteria where issues of jurisdiction are concerned, namely, territoriality or nationality. The *Simbikangwa* case is a classic illustration of the tensions at play when deciding jurisdiction, balancing claims of international tribunals, territorial states where the offences were committed and third party states, which commonly have a more tenuous connection with the

24 'On se souvient de Simbikangwa, premier Rwandais jugé en France pour génocide'. *Jeune Afrique*, 31 January 2014.

25 A report published in 1993 referred to allegations of torture in the presidential buildings. See FIDH, *Violations massives et systématiques des droits de l'homme depuis le 1er octobre 1990*, 8 March 1993, available online at <https://www.fidh.org/La-Federation-Internationale-des-ligues-des-droits-de-l-homme/afrique/rwanda/14463-rwanda-violations-massives-et-systematiques-des-droits-de-l-homme-depuis> (visited 14 May 2015), at 81.

26 Art. 2(1) Convention against Torture holds: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. This Convention was incorporated into French domestic law through Art. 689-2 Code de procédure pénale.

27 Art. 222-1 Code pénal holds that: 'Le fait de soumettre une personne à des tortures ou à des actes de barbarie est puni de quinze ans de réclusion criminelle'. This provision specifies: the fact of subjecting a person to torture or acts of barbarity carries a penalty of imprisonment for a term of 15 years (author's own translation).

28 Art. 7 Code de procédure pénale states: 'En matière de crime et sous réserve des dispositions de l'article 213-5 du code pénal, l'action publique se prescrit par dix années révolues à compter du jour où le crime a été commis si, dans cet intervalle, il n'a été fait aucun acte d'instruction ou de poursuite'. This provision specifies that in the case of serious crimes and subject to the provisions of article 213-5 of the Criminal Code, no action or proceedings shall be taken by the state more than ten years after the date on which the crime was committed if, during this time, no investigation or legal proceedings have been commenced.



accused and the offences.<sup>29</sup> At first sight, a number of alternative routes would have been open to bring Simbikangwa to justice and various jurisdictions could have asserted their jurisdictional rights to try Simbikangwa.

#### A. Trial before the ICTR

It may have been the most logical solution for this case to be heard before the ICTR, established by the Security Council in Arusha, Tanzania, in 1995, to 'prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994'.<sup>30</sup> The ICTR had jurisdiction to deal with the *Simbikangwa* case. The issues of territoriality, that is, violations committed on the territory of Rwanda and neighbouring states, and temporality, namely, between 1 January 1994 and 31 December 1994, were satisfied, and the charges related to crimes of genocide and crimes against humanity, which could be dealt with under Articles 2 and 3 of the ICTR Statute. The ICTR also had primacy over states to deal with the genocide suspects.<sup>31</sup> However, at the time of Simbikangwa's arrest in Mayotte in 2008, the ICTR had already commenced its completion strategy, the Security Council, in August 2003: 'Urging the ICTR to formalize a detailed strategy... to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTR Completion Strategy)'.<sup>32</sup> This was not going to prove the moment for the ICTR to open a new investigation. There had already been referrals of two cases to French jurisdiction, Wenceslas Munyeshyaka and Laurent Bucyibaruta, in 2007, even if their trials have yet to take place. The ICTR has also successfully transferred cases to the Rwandan courts: Jean Bosco Uwinkindi's case was finally transferred to Rwanda in April 2012 and Bernard Munyagishali's in July 2013.<sup>33</sup> Despite the intention to conclude its work in 2010, five years on, in 2015, the ICTR has only just met its target of completing all its cases, concluding the hearing of the *Butare* appeal on 14

29 For a discussion of these issues see L.N. Sadat, 'Transjudicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity', 22 *Leiden Journal of International Law* (2009) 543, at 544.

30 Art. 1 ICTRSt.

31 Art. 8(2) ICTRSt states: 'The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.'

32 SC Res. 1503, 28 August 2003, at 2.

33 Human Rights Watch, *Rwanda: Justice after Genocide: 20 Years On*, 28 March 2014, available online at [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) (visited 21 May 2015), at 8 (hereinafter 'Human Rights Watch, *Rwanda*').

December 2015, involving amongst others Pauline Nyiramasuhuko, who was the Minister for Family Welfare and the Advancement of Women at the time of the genocide. Nyiramasuhuko, who was appealing her sentence of imprisonment for life handed down in June 2011, is the first woman to be convicted of genocide by the ICTR as part of the Butare Group and is also the first woman to be convicted of genocidal rape, having been accused of inciting troops and militia to carry out rape during the genocide.<sup>34</sup> Trying Simbikangwa before the ICTR or, rather, the United Nations Mechanism for International Criminal Tribunals (UNMICT), the temporary body established in 2010 to complete outstanding work on any trial or appeal proceedings of the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY), which were pending, could have been theoretically possible. The UNMICT was still operational in 2014. Indeed, in view of subsequent serious rifts and tensions between Rwanda and France, the UNMICT would certainly have provided a forum to bring Simbikangwa to justice with a little more serenity, on a neutral stage, than other options. However, this would have added to the difficulties the ICTR was already experiencing in completing its work and meeting the ever-receding deadlines by which to close its doors.

A further consideration is that the ICTR was only ever intended to try those with a leading role in the genocide, and certainly, before his trial in France commenced, the ICTR as well as the French authorities did not perceive Simbikangwa as one of the 'big fish' of the genocide, even if the Rwandan authorities had not held the same opinion. Simbikangwa was not on the list of fugitives to be tried by the ICTR. The UNMICT Statute gives the Mechanism the power to prosecute the accused indicted by the ICTR who are among the most senior leaders suspected of being most responsible for the crimes committed under Article 1(2), and to prosecute those who are not the most senior, such as Simbikangwa, but only after it has exhausted all reasonable efforts to refer the case to a state in whose territory the crime was committed, or in which the accused was arrested, 'or having jurisdiction and being willing and adequately prepared to accept such a case', under Articles 1(3) and 6.<sup>35</sup>

### **B. The International Criminal Court**

If the ICTR would not hear the *Simbikangwa* case, neither would the International Criminal Court (ICC). When Simbikangwa was arrested in 2008, the ICC was already in operation in The Hague. Its remit is to 'exercise its jurisdiction over persons for the most serious crimes of international concern'.<sup>36</sup> Article 5 of the ICC Statute specifies that: 'The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) genocide,

<sup>34</sup> Judgment, *Nyiramasuhuko et al.* (ICTR-98-42-T), Trial Chamber, 24 June 2011, §§ 6186, 6200, 6271. See also Judgment, *Nyiramasuhuko et al.* (ICTR-98-42-A), Appeals Chamber, 14 December 2015.

<sup>35</sup> Arts 1(2), 1(3), 6 UNMICT St.

<sup>36</sup> Art. 1 ICCSt.

(b) crimes against humanity, (c) war crimes and (d) the crime of aggression.<sup>37</sup> In terms of *ratione materiae*, the ICC had jurisdiction over the crimes that Simbikangwa was initially alleged to have committed in Rwanda: genocide through wilful attacks and attempts on life and crimes against humanity through wilful attacks and attempts on life. In addition, the ICC is empowered to initiate an investigation or prosecution into individuals, rather than states, in certain specific sets of circumstances: firstly, if situations are referred to the ICC by state parties, secondly, if the Security Council puts forward a request for investigation or prosecution; or thirdly, on the Court's own initiative,<sup>38</sup> additional requirements being that, in the first and third situations cited, the reprehensible conduct must be committed on the territory of a state party or the accused must be a national of a state party.<sup>39</sup> However, the jurisdiction of the ICC is founded on the principle of complementarity. This means that state parties have primary jurisdiction and the primary obligation to investigate, punish and prevent genocide, crimes against humanity, war crimes and the crime of aggression. The ICC will consider a case inadmissible if it has been, or is being, investigated or prosecuted by a state with jurisdiction. The ICC will only intervene if national courts are either unwilling or unable to bring perpetrators to justice, for example, in the event that national justice systems do not carry out proceedings or claim they to do so, but are not genuinely conducting proceedings.<sup>40</sup> Rwanda is not a state party to the ICC Statute, but Article 12 allows for states not a party to accept the jurisdiction of the ICC. This possibility is not inconceivable as Rwanda had already requested the assistance of the United Nations in bringing the genocide suspects to justice, in 1994, at a time when, following the devastation of the genocide, the country lacked the infrastructure and manpower to do this itself. However, the ICC would not provide the arena for Simbikangwa's trial, as, although the ICC was established for precisely this kind of situation, on condition that Simbikangwa's actions had passed the gravity threshold outlined in Article 17, the ICC Statute states clearly that its jurisdiction is limited temporally: 'The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute,'<sup>41</sup> the entry into force being 1 July 2002, and thus, falling six years after the end of the genocide.

### C. Extradition to Face Justice in Rwandan Courts

The third option would have been to extradite Simbikangwa to Rwanda, as requested by the Rwandan authorities in 2008. The French authorities flatly refused this request. Relationships between Rwanda and France had been strained. France had been accused by Rwandan President, Paul Kagame, of

37 Art. 5(1) ICCSt.

38 Art. 13 ICCSt.

39 Art. 12 ICCSt.

40 Art. 17 ICCSt.

41 Art. 11 ICCSt.

having played an active role in supporting the former Hutu government, even training some of the forces which went on to commit the genocide,<sup>42</sup> and France had denied and refused to apologize for any wrongdoing.<sup>43</sup> Tensions had mounted to extreme limits by 2008, when Simbikangwa was arrested. In 1997, the daughter of the French co-pilot of President Habyarimana's aeroplane, Jean-Pierre Minaberry, one of three French crew members who perished on board the aeroplane, filed a criminal complaint and sued for damages for the acts of terrorism and complicity in acts of terrorism which had led to the loss of her father, as is authorized by the *Code de procédure pénale*.<sup>44</sup> As a direct consequence, Jean-Louis Bruguière, France's leading anti-terrorist expert for more than 20 years, examining magistrate and vice-president of the anti-terrorist unit at the *Tribunal de grand instance* in Paris, opened an investigation into President Kagame and nine of his officials, for deliberately assassinating President Habyarimana in order to provoke the genocide against his own ethnic group, with a view to taking power thereafter. Bruguière subsequently recommended the trial of Kagame by the ICTR for complicity in the attack. On the basis of presidential immunity, Kagame could not be tried by French courts, and in 2006, Bruguière requested the issuing of international arrest warrants for the nine other officials, with the intention of trying them in the French courts.<sup>45</sup> The response from Kagame was to sever diplomatic relations with France, to prepare his counter-attack by initiating proceedings before the International Court of Justice.<sup>46</sup> Kagame went further and, in 2008, released a report compiled by a commission of the Rwandan Justice Ministry, which had been charged with gathering evidence into France's implication in the genocide, and which accused 13 French politicians, including former President, François Mitterrand, of having prior knowledge of the genocide, planning it and directly participating in it.<sup>47</sup> Relations between France and Rwanda were resumed late in 2009, but by this time, Rwanda had moved several symbolic steps away from its francophone heritage, joining the Commonwealth in November 2009 and turning towards the teaching of English as a first foreign language in its schools rather than French. Promises to drop Bruguière's investigation and prosecute the genocide suspects in

42 Human Rights Watch, *Rwanda*, at 9.

43 O. Marsaud, 'Le juge Bruguière dément par l'un de ses témoins-clés', *RFI*, 4 December 2006.

44 Art. 85 *Code de procédure pénale* reads: 'Toute personne qui se prétend lésée par un crime ou un délit peut en portant plainte se constituer partie civile devant le juge d'instruction compétent.' This provision holds that anyone who claims to have been the victim of a criminal offence may, when filing a criminal complaint, bring a civil action before the appropriate examining magistrate.

45 Tribunal de grande instance de Paris, Cabinet de Jean-Louis Bruguière, *Délivrance de mandats d'arrêts internationaux, Ordonnance de soit-communié*, 17 November 2006. See also V. Thalmann, 'French Justice's Endeavours to Substitute for the ICTR', 6 *Journal of International Criminal Justice (JICJ)* (2008) 995, at 995.

46 International Court of Justice Press Release, 'The Republic of Rwanda applies to the International Court of Justice in a dispute with France', 18 April 2007.

47 *Ibid.*, at 2.

France were demanded of former President, Nicolas Sarkozy,<sup>48</sup> but progress was slow.

Diplomatic issues aside, France, like other states, would have had immense difficulties extraditing Simbikangwa or other Rwandan genocide suspects to Rwanda for trial for fear of infringing their human rights. The death penalty had been in place in Rwanda until July 2007, and was in use until 1998,<sup>49</sup> and was only abolished following a vote in the Rwandan parliament in June 2007, in which 96% of members of parliament voted in favour of abolition.<sup>50</sup> It was hoped that this move would pave the way for states to extradite suspects back to Rwanda for trial, but states remained reticent to comply with Rwandan extradition requests. For instance, although the request for asylum from President Habyarimana's widow, Agathe Habyarimana, was refused in 2009, on grounds of her potential involvement in the genocide, and she was arrested and questioned immediately following an official visit by Sarkozy to Rwanda in March 2009,<sup>51</sup> France was unwilling to extradite her to Rwanda, preferring to pursue its own inquiries in France.<sup>52</sup> The Paris *Cour d'appel* eventually formally refused Rwanda's request for her extradition in 2011, concluding, in the words of Agathe Habyarimana's lawyer *maître* Philippe Meilhac, that '*les juges ont marqué le coup de façon cinglante vis-à-vis des demandes rwandaises, en soulignant que les faits reprochés sont décrits sans aucune précision et ne sont détaillés par aucun élément à charge et à décharge*'.<sup>53</sup> The Court followed previous rulings by the *Cour de cassation*,<sup>54</sup> which held that the Rwandan courts did not meet international standards and could not guarantee a fair trial, nor access to an independent judiciary.<sup>55</sup>

The first countries to agree to requests to extradite genocide suspects to Rwanda — Norway and Sweden — did not do so until the example was set by the ICTR. In June 2011, the ICTR referred the *Uwinkindi* case from its jurisdiction to Rwanda for trial,<sup>56</sup> acting under the terms of Rule 11bis of the Rules of

48 'Reprise des relations diplomatiques entre Paris et Kigali', RFI, 29 November 2009; E. Petit, 'All eyes on French inquiry', *International Justice Tribune*, 30 March 2011.

49 Rwanda last implemented the death penalty in 1998 when 22 accused, who had been found guilty of genocide related crimes, were put before a firing squad. J. Standley, 'From butchery to executions in Rwanda', *BBC News*, 27 April 1998.

50 'Rwanda scraps the death penalty', *BBC News*, 8 June 2007.

51 C. Gouëset, 'Chronologie des relations Franco-Rwanda (1975-2012)', *L'Express*, 11 January 2012.

52 'L'asile politique refusé à Agathe Habyarimana', RFI, 16 October 2009; 'Rwanda: la demande d'extradition d'Agathe Habyarimana rejetée', *L'Express*, 28 November 2011.

53 'the judges made their point with a resounding response to the Rwandan request, emphasizing that the facts held against her were described with imprecision and accompanied by no supporting details either for the prosecution or the defence' (author's own translation). *Maître* Philippe Meilhac, quoted in Ibukabose, 'Madame Agathe Habyarimana ne sera pas extradée au Rwanda', *Tribune Franco-Rwandaise*, 30 September 2011.

54 *Cour de cassation, Chambre criminelle, Audience publique, M. Claver X.*, 9 July 2008.

55 TRIAL, *Agathe Kanziga Habyarimana*, available online at <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/759/action/show/controller/Profile/tab/legal-procedure.html> (visited 29 May 2015).

56 Decision on Prosecutor's Request for Referral to the Republic of Rwanda, *Uwinkindi* (ICTR-2001-75-11bis) Referral Chamber, 28 June 2011.

Procedure and Evidence, which requires that the trial chamber must be satisfied that the accused will be assured of a fair trial in the state of transfer and not be subjected to the death penalty.<sup>57</sup> Although Uwinkindi's appeal against extradition was not heard until December 2011, when it was dismissed, confirmation that European states would not be violating genocide suspects' human rights if they extradited them to Rwanda came in the form of a ruling by the European Court of Human Rights in October 2011, which upheld the 2009 decision of the Swedish courts to extradite Sylvère Ahorugeze and which the Rwandan had appealed.<sup>58</sup> This particular case demonstrates the difficulty of bringing genocide suspects to trial. Ahorugeze fled to Denmark in the immediate aftermath of the genocide. The subject of an Interpol red notice, he was arrested in 2006, formally charged with killing 25 Tutsis in a suburb of Kigali during the first day of the genocide and detained in custody. Denmark has no extradition agreement with Rwanda and could have heard Ahorugeze's case itself as Danish law allows for trials of Rwandan genocide suspects who are resident in Denmark, but released him without trial in 2007 due to lack of evidence.<sup>59</sup> One year later, Ahorugeze was arrested again, this time in Sweden, after a visit to the Rwandan embassy in Stockholm in 2008. The Swedish government agreed to extradite him to Rwanda, but following his appeal of this decision to the European Court of Human Rights, Ahorugeze was released from custody whilst the Court considered his case, and he took advantage of the opportunity to return to Denmark, where he currently lives with his family. Any discussions regarding his extradition must now be made between Denmark and Rwanda. In the meantime, Ahorugeze remains at liberty.<sup>60</sup>

In Simbikangwa's case, considerations of human rights had been at the forefront. In November 2008, the *Chambre d'instruction* of the *Tribunal supérieur d'appel* in Mayotte had refused Rwanda's request to extradite Simbikangwa for genocide (*complicité et complot/complicity in genocide and conspiracy*), crimes against humanity (*assassination et extermination*) and 'ordinary crimes' (*association de malfaiteurs/criminal association*) on grounds that the sentence he

57 Rule 11b1s Rules of Procedure and Evidence reads: '(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out'

58 Human Rights Watch, *Rwanda*, at 10. See *Ahorugeze v. Sweden*, No. 37075, 09 (2011) (hereinafter '*Ahorugeze v. Sweden*').

59 According to Section 3 Danish Extradition Act, a request for extradition may be denied if the evidence in support of the request is deemed insufficient. See *Ahorugeze v. Sweden*, *supra* note 58.

60 TRIAL, *Sylvère Ahorugeze*, available online at <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/476/action/show/controller/Profile/tab/legal-procedure.html> (visited 21 May 2015).

would be likely to receive, although not the death sentence as it had been by that time been abolished, would be a life sentence with 20 years in solitary confinement, which was unacceptable for international, and French, norms. Furthermore, the Court accepted there were serious concerns whether Simbikangwa would receive a fair trial. Human Rights Watch had published a report in July 2008 questioning the impartiality of the Rwandan courts, highlighting the fact that 'Judges remain subject...to pressure from members of the executive branch and other powerful persons. Basic fair trial rights are not fully assured, including the presumption of innocence, the right of equal access to justice, the right to present witnesses in one's own defense, the right to humane conditions of detention, the right to freedom from torture, and the right to protection from double jeopardy.'<sup>61</sup> It was feared that the defence would have difficulty in bringing witnesses to court safely to testify in a country where, in the words of the Presiding Judge Jean-Claude Sarthou, '*Certains prisonniers ont tendance à se retrouver avec une balle dans le dos s'ils tentent de s'enfuir*'.<sup>62</sup> Simbikangwa's lawyer, *maître* Sylvie Prat, also drew the Court's attention to the appalling conditions of detention in Rwandan prisons, where over 100,000 suspects were detained awaiting trial, emphasizing that her client was a paraplegic who required special care for his medical conditions and was at risk of dying before reaching trial before a Rwandan court.<sup>63</sup> In 2008, no Rwandan genocide suspects had been extradited from France to Rwanda. The sole occasion that a court had agreed to an extradition request, namely, the *Cour d'appel* in Chambéry,<sup>64</sup> in the trial of Claver Kamana, the *Cour de cassation* had quashed the decision and subsequently referred the matter to the *Cour d'appel* in Lyon,<sup>65</sup> which rejected the extradition request, reversing the initial ruling of the Chambéry *Cour d'appel* on grounds that the conviction of Kamana *in absentia* by the Rwandan courts amounted to inhuman and degrading treatment.<sup>66</sup>

Over the course of the years, the *Cour de cassation* has reinforced this situation, also refusing to extradite genocide suspects to Rwanda for prosecution on the ground that genocide and crimes against humanity had not been

61 Human Rights Watch, *Law and Reality: Progress in Judicial reform in Rwanda*, July 2008, available online at <http://www.hrw.org/sites/default/files/reports/rwanda0708.1.pdf> (visited 10 June 2015), at 3.

62 'Some prisoners tend to find themselves with a bullet in their backs if they attempt to escape' (author's own translation). See L.G., 'Mayotte: la justice refuse l'extradition du 'génocidaire' rwandais', 15 November 2008, available online at <http://www.francerwandagenocide.org/documents/Malango15novembre2008.pdf> (visited 20 December 2015).

63 M. Chateaneuf, 'Accusé de génocide, il ne sera pas extradé', *Le Mahorais*, 18 November 2008, at 5; 'Mayotte: un Rwandais accusé de génocide', *Le Figaro*, 20 April 2009.

64 Chambéry *Cour d'appel*, Chambre de l'instruction, Judgment No. 08/00082, *M. Claver X*, 2 April 2008, referred to in Redress, *Extraditing Genocide Suspects from Europe to Rwanda: Issues and Challenges* (2008), at 13, footnote 39.

65 *Cour de cassation*, Chambre criminelle, Audience publique, *M. Claver X*, 9 July 2008.

66 See TRIAL, *Claude Muhayimana*, available online at <http://www.trial-ch.org/fr/ressources/trial-watch/trial-watch/profils/profile/3677/action/show/controller/Profile/tab/legal-procedure.html> (visited 10 June 2015) (hereinafter 'TRIAL, *Claude Muhayimana*').

criminalized in Rwanda at the time of the events of 1994. For example, in the *Muhayimana* case, the extradition of the accused to Rwanda was approved by the *Cour d'appel* in Rouen in March 2012. The Court considered:

*que les conditions légales de l'extradition sont remplies, que les faits reprochés n'ont aucun caractère politique et sont de nature criminelle, que la prescription ne saurait être acquise et que les juridictions rwandaises sont en mesure d'assurer les garanties fondamentales de procédure et de protection des droits de la défense en conformité avec la conception française de l'ordre public international.*<sup>67</sup>

This decision was quashed by the *Cour de cassation* in July 2012,<sup>68</sup> which held that the Rouen court had not assured itself that Muhayimana's rights would be respected and sent the case to be heard before the *Cour d'appel* in Paris. This Court reached the same decision in November 2013 as the Rouen *Cour d'appel* had in March 2012. In other words, that the defendant would receive a fair trial in Rwanda. This decision was finally overturned once more by the *Cour de cassation* on 26 February 2014,<sup>69</sup> on the grounds that Rwanda's request for extradition was based on laws which had not been in place at the time of the facts. Muhayimana could not be extradited for genocide charges, since genocide was not legally defined in the Rwandan Criminal Code at the time the offences were allegedly committed. Paul Bradfield, a member of the Defence team of Ildéphonse Nizeyimana at the ICTR, finds the *Cour de cassation* ruling 'deeply perplexing, as it goes against established norms of international law, and the fact that many other jurisdictions have held the complete opposite — that Rwanda does have the legal competency to try crimes of genocide'.<sup>70</sup> Bradfield remarks that this may appear to be a 'classic case of *nullum crimen sine lege*... [which] holds that a criminal conviction can only be based upon a law which existed at the time the acts or omission with which the accused is charged were committed', but that, in fact, as Rwanda had, in 1975, adopted both the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the ICTR and numerous national jurisdictions considered that Rwanda had the requisite jurisdiction and legal competency to try crimes of genocide.

However, this is the path chosen by France with respect to Rwandan genocide suspects residing on its territory. Precisely at the time the *Cour de cassation* reached its decision in the *Muhayimana* case, the trial of Simbikangwa was underway in France, and Muhayimana was arrested in Rouen in April 2014

67 'The legal conditions of extradition have been fulfilled, the facts of which he stands accused are not political in character but criminal, there is no issue of the limitation period expiring and the Rwandan courts are in a position to provide the essential guarantees concerning procedure and protection of the rights of the defence, in a manner which conforms to the French conception of public international law' (author's own translation). This quotation is cited in TRIAL, *Claude Muhayimana*, *supra* note 66.

68 *Cour de cassation*, Chambre criminelle, audience publique, *M. Claude X*, 11 July 2012.

69 *Cour de cassation*, Chambre criminelle, Judgment No. 810, *M. X*, 26 February 2014.

70 P. Bradfield, 'France vs the rest of the world — who is right?' *Beyond the Hague*, 3 March 2014.



to face genocide charges in France, shortly after the conclusion of Simbikangwa's trial.<sup>71</sup> Muhayimana was released a year later, in April 2015, but is currently awaiting trial at a future date.

To this date, an increasing number of national courts as well as the ICTR itself have approved the extradition of genocide suspects to Rwanda for trial,<sup>72</sup> but as yet France has not done so. The signs indicate that there is little intention to change this situation in the immediate future.

#### D. Trial before the French Courts

Having refused to extradite Simbikangwa to Rwanda for trial, France then tried him in its national courts under the doctrine of universal jurisdiction, which allows states to claim criminal jurisdiction over an accused regardless of where the alleged offence was committed, or of the nationality or country of residence of the accused. As mentioned above, for the French courts to have jurisdiction, the offences concerned should normally have been committed on French soil, by a French citizen or against a French citizen. However, for the most serious violations of international law, generally considered as war crimes, crimes against humanity, genocide and torture, a state may exercise universal jurisdiction over crimes that are neither committed against it nor committed by, or against, its own nationals. In short, these crimes can be tried regardless of whether there is a connection between the offence and the territory of the prosecuting state or its citizens. It is the nature of the offences that creates universal disapproval. The philosophy behind universal jurisdiction holds that certain offences affect the international legal order as a whole, that serious violations of international law affect all states and peoples and that not all states address violations effectively. Consequently, international law endows all states with the right to prosecute international crimes.<sup>73</sup>

Universal jurisdiction in France is defined in Articles 689 and 689-1 of the *Code de procédure pénale*. Article 689, created by Law No. 75-624 of 11 July 1975, and amended most recently by Law No. 2009-1503 of 8 December 2009, extended French jurisdiction to prosecute perpetrators or their accomplices of crimes committed outside French territory either when French law is applicable, under the provisions of first book of the *Code pénal*, any other domestic legislation, or when an international convention or decree in application of the treaty establishing the European Communities, provides jurisdiction to French courts.<sup>74</sup> Legislation passed in France in 1996, Law No. 96-432 of 22

71 See TRIAL, *Claude Muhayimana*.

72 For example, the United States, Canada, Sweden, Norway, Denmark and the Netherlands. See M. Bolhuis, L. Middelkoop and J. van Wijk, 'Refugee Exclusion and Extradition in the Netherlands', 12 *JICJ* (2014) 1115, at 1117.

73 R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), at 56–63. Cited in R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn., Cambridge University Press, 2014), at 57.

74 Art. 689 *Code de procédure pénale*, as amended, reads: 'Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugés par les

May 1996, effectively transposed Security Council Resolution 955 into French law. This resolution created the ICTR and its Statute. Article 1 of Law No. 96-432 states that France will cooperate with the ICTR and participate in the repression of acts of genocide or other crimes against humanity committed in Rwanda or neighbouring states between 1 January 1994 and 31 December 1994. In addition, it makes specific reference to the prosecution of those crimes outlined in Articles 2–4 of the ICTR Statute, namely, genocide, crimes against humanity and violations of Common Article 3 of the Geneva Conventions and Additional Protocol II. Article 689 of the *Code de procédure pénale* and Law No. 96-432 enabled French courts, using the principle of universal jurisdiction, to try Simbikangwa for genocide and crimes against humanity under the ICTR Statute,<sup>75</sup> on condition that he found himself on French territory.<sup>76</sup> This outcome was envisaged by the ICTR Statute. Article 8 states that national courts as well as the ICTR 'shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994'. Thus, French courts were able to apply the provisions of the ICTR Statute governing the crimes of genocide and crimes against humanity committed in Rwanda or by Rwandan citizens in neighbouring countries between 1 January 1994 and 31 December 1994 directly to a criminal trial held in France. This was assisted further by legislation enacted in 1964 that specified that crimes against humanity and genocide were not subject to any statute of limitations.<sup>77</sup>

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juridictions françaises soit lorsque, conformément aux dispositions du livre Ier du code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale ou un acte pris en application du traité instituant les Communautés européennes donne compétence aux juridictions françaises pour connaître de l'infraction.' Perpetrators of offences committed outside of French territory or 'their accomplices may be prosecuted and tried by French courts either when French law is applicable, under the provisions of Book I of the Criminal Code or any other statute, or when an international convention or decree in application of the treaty establishing the European Communities gives jurisdiction to French courts to deal with the offence (author's own translation).

<sup>75</sup> Cour d'assises, Judgment No. 13/0033, at 4; Paris Cour d'assises, feuille de motivation, *Pascal Senyamuhara Safari (alias Pascal Simbikangwa)*, 14 March 2014, § 3.

<sup>76</sup> See Circular No. 203, 31 August 1996, at 13008, Circular of 22 July 1996, applying Law No. 96-432, 22 May 1996, adapting the provisions of SC Res. 955 (1994). This Circular makes reference to Law No. 95-1, 2 January 1995, by which France undertook to prosecute crimes listed in the ICTYSt., using the principle of universal jurisdiction, on the condition that they were present on French soil, under Art. 2, and clarifies that the condition of presence on French territory stipulated in the 1995 law is also applicable to the 1996 law concerning Rwandan suspects.

<sup>77</sup> Law No. 64-1326, 26 December 1964 reads: 'Les crimes contre l'humanité, tels qu'ils sont définis par la résolution des Nations Unies du 13 février 1946, prenant acte de la définition des crimes contre l'humanité, telle qu'elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature.' This states that crimes against humanity, as defined by the SC Res. recognizing the definition of crimes against humanity as enshrined in the International Military Tribunal Charter, are by nature imprescriptible. For a discussion of the

Simbikangwa was indicted for complicity in genocide, under Article 2, and complicity in crimes against humanity, under Article 3, the allegations of torture being covered by the definition of crimes against humanity in Article 3(f) of the ICTR Statute.

Having invoked this legislation to try Simbikangwa, the courts then turned to Article 211-1 of the *Code pénal* for the definition of genocide as found in national law,<sup>78</sup> the investigating judges arguing that, as sentencing was to be carried out under French law, it had to be linked to a crime covered by national law.<sup>79</sup> This was a view not universally shared, and the FIDH has voiced the opinion that, if the crimes are charged under the ICTR Statute, then the broader definition of genocide in the ICTR Statute should apply.<sup>80</sup> Article 211-1 came into effect in March 1994, with the provisions of the revised *Code pénal* and was drafted following a series of trials of high profile Nazi war criminals. Klaus Barbie, the butcher of Lyon, in 1987, Paul Touvier, head of the Lyon Milice and the first Frenchman to be convicted of crimes against humanity in 1994, and Maurice Papon, senior police official in Bordeaux, responsible for sending many Jews to their deaths in concentration camps, tried in 1998, but charged in 1992. The definition of genocide in Article 211-1 of the amended *Code pénal* came too late to be used to incriminate these criminals, who were charged with crimes against humanity instead, but was in force and could be used to prosecute Simbikangwa.<sup>81</sup>

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statute of limitations in relation to crimes against humanity and genocide see C. Fournet, *Genocide and Crimes against Humanity: Misconceptions and Confusion in French Law and Practice*, (Bloomsbury Publishing, 2013), at Chapter 5. This is also governed by Art. 213-5, *Code pénal*, created by Law No. 92-684, 22 July 1992: 'L'action publique relative aux crimes prévus par le présent sous-titre, ainsi que les peines prononcées, sont imprescriptibles'. This provision specifies that criminal liability for the crimes governed by the Article, that is, genocide and so-called 'other crimes against humanity', as well as the sentences imposed on genocide and other crimes against humanity, are not subject to statutory limitations.

<sup>78</sup> Since the introduction of Law No. 92-683, which came into effect on 1 March 1994, as amended by Law No. 2004-800, 6 August 2004, Art. 211-1 *Code pénal* reads: 'Constitue un génocide le fait, en exécution d'un plan concerté tendant à la destruction totale ou partielle d'un groupe national, ethnique, racial ou religieux, ou d'un groupe déterminé à partir de tout autre critère arbitraire, de commettre ou de faire commettre, à l'encontre de membres de ce groupe, l'un des actes suivants: atteinte volontaire à la vie; atteinte grave à l'intégrité physique ou psychique; soumission à des conditions d'existence de nature à entraîner la destruction totale ou partielle du groupe; mesures visant à entraver les naissances; transfert forcé d'enfants. Le génocide est puni de la réclusion criminelle à perpétuité.' Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group: wilful attack on life; serious attack on psychological or physical integrity; subjection to living conditions likely to entail the partial or total destruction of that group; measures aimed at preventing births; and enforced child transfers. Genocide is punished by criminal imprisonment for life. (official translation) *Legifrance*, available online at <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (visited 22 October 2015).

<sup>79</sup> FIDH and LDH, *The Pascal Simbikangwa Case*, *supra* note 13, at 8.

<sup>80</sup> *Ibid.*, at 9.

<sup>81</sup> Hubrecht, *supra* note 14, at 1.

Under Article 689-1 of the *Code de procédure pénale*, any individual having committed, outside French territory, the crimes listed in paragraphs 2–13 of Article 689 may be tried in French courts, where this is provided for by specific international treaties, which are listed the Code, on condition that the accused is present in France. The presence of the suspect within national territory when proceedings are initiated is a requirement and proceedings cannot be initiated in the absence of the suspect.<sup>82</sup> The crimes listed include, amongst others, torture as defined by Article 1 of the Convention against Torture, as specified in Article 689-2,<sup>83</sup> and crimes which fall under the jurisdiction of the ICC, as laid down by Article 689-11,<sup>84</sup> effectively extending jurisdiction to cover genocide, war crimes and crimes against humanity as stipulated by the ICC Statute. The list is expanded regularly, with enforced disappearances being added by a new law passed in 2013.<sup>85</sup> However, neither Article 689-2, nor Article 689-11, were used to prosecute Simbikangwa. As mentioned above, torture, as well as most other crimes, is subject to a ten-year statute of limitations in French law,<sup>86</sup> and this time period had long since passed when Simbikangwa was arrested. With regard to crimes falling under the jurisdiction of the ICC, these could only be prosecuted if committed after the date Article 689-11 entered into force, namely, on 11 August 2010.

In order to ensure the effective prosecution of these and future crimes, a special *pôle génocide et crimes contre l'humanité* was created in 2012 at the *Tribunal de grande instance* in Paris to deal with crimes against humanity and war crimes in general.<sup>87</sup> There are now three examining magistrates working full-time, two prosecutors and four specialized legal assistants in post, but their case load is not limited to Rwandan genocide suspects, also stretching to accusations of torture in Chad, chemical attacks in Baghdad and the victims who went missing from a Brazzaville beach in May 1999.<sup>88</sup>

82 Art. 689-1 Code de procédure pénale reads: 'En application des conventions internationales visées aux articles suivants, peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumérées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable.' In application of the international conventions which are the subject of the following articles, any person guilty of having committed, outside of French territory, any of the offences listed in these articles may be prosecuted and tried by the French courts, if he or she is found to be in France. The provisions of this article are applicable to attempt to commit the offence whenever this is subject to punishment (author's own translation).

83 Art. 689-2 Code de procédure pénale. This provision was created by Art. 30 Law No. 99-515, 23 June 1999.

84 Art. 689-11 Code de procédure pénale, created by Art. 8 Law No. 2010-930, 9 August 2010.

85 Art. 689-13, Code de procédure pénale, created by Art. 16 Law No. 2013-711, 5 August 2013.

86 Art. 7, Code de procédure pénale.

87 Art. 22 Law No. 2011-1862, 13 December 2011, establishes a '*pôle judiciaire spécialisé*', to deal with crimes against humanity and war crimes, by inserting Arts 628-634 *Code de procédure pénale*. See Ministère de la Justice, 'Crimes contre l'humanité: La France mobilisée', 5 March 2013, available online at <http://www.justice.gouv.fr/organisation-de-la-justice-10031/crimes-contre-lhumanite-la-france-mobilisee-25168.html> (visited 24 July 2015).

88 S. Maupas, 'Un premier dossier pour le pôle crimes de guerre français', *Le Monde*, 3 February 2014.

On 14 March 2014, after a trial in Paris lasting six weeks, Simbikangwa was found guilty of genocide, as opposed to complicity in genocide, the offence with which he was originally charged, and complicity in crimes against humanity for crimes committed in Kigali, notably for having supplied arms to the *Interahamwe* manning the barriers in Kigali and having encouraged them to kill the Tutsis —<sup>89</sup> but he was acquitted of participation in crimes at the barriers in Gisenyi on grounds of inadequate evidence. Simbikangwa was sentenced to 25 years in prison. Simbikangwa has appealed the verdict and his appeal is due to be heard before the French courts in 2016.<sup>90</sup>

#### 4. French Courts: The Best Forum for *génocidaires*?

Are we witnessing the commencement of large-scale prosecutions of genocide suspects currently residing in France? At first sight, this could appear to be the case. At present, there are 27 Rwandan genocide suspects under investigation by the *pôle génocide et crimes contre l'humanité*, and certainly, there has been a flurry of activity since the Simbikangwa verdict in order to progress these cases. In addition, non-governmental organizations, including FIDH and the *Collectif des parties civiles pour le Rwanda*, play a strong role in bringing civil actions in France. This applies to not only the energy and determination such organizations have devoted to demanding that perpetrators are prosecuted, but also research they have conducted and shared with the *pôle*. While some suspects are still the subject of extradition spats between Rwanda and France, some appear to have inched closer to trial in France.

Claude Muhayimana, driver for a guesthouse, accused of having conveyed soldiers to execute Tutsis in Rwanda, was arrested in April 2014, indicted for genocide and is awaiting trial in France. Charles Twagira, a doctor based in a Rouen hospital and formerly regional health director in Kibuye, was placed under investigation by the French authorities for genocide and crimes against humanity immediately after the conclusion of Simbikangwa's trial. Octavien Ngenzi, mayor of the Kabarondo district in the east of the country, and local leader of the former political party, the *Mouvement républicain national pour la démocratie et le développement* (MRND) and Tito Barahira, chairman of MRND were indicted in France, on 30 May 2014, for genocide and crimes against humanity in Rwanda, the indictment confirmed on appeal on 28 January 2015. Innocent Musabyimana has not yet been indicted, but the prosecution strongly advocated his extradition to Rwanda before the *Cour de cassation* denied their request,<sup>91</sup> so it is likely that the French authorities will investigate his case.

<sup>89</sup> Cour d'assises, Judgment No. 13/0033.

<sup>90</sup> Association française pour la promotion de la compétence universelle, *Appel Pascal Simikangwa*, 21 May 2015, available online at <https://afpcu.wordpress.com/tag/appel-pascal-simbikangwa/> (visited 20 July 2015).

<sup>91</sup> Heard with Muhayimana. See Cour de Cassation, Chambre criminelle, Judgment No. 810, *M. X*, 26 February 2014.

Father Wenceslas Munyeshyaka, former head of the Sainte-Famille parish in Kigali, and parish priest in France since 2001, was expected to be the subject of the next French trial, and fittingly so, as he was the first genocide suspect against whom charges were brought in France, as early as 1995. Before the examining magistrate investigating Munyeshyaka declared that there was no case to answer,<sup>92</sup> the trial had been expected to commence in 2015 or 2016.<sup>93</sup> It remains to be seen what will result from this decision.

Although this may appear to represent considerable progress in the fight against impunity and ensuring that the numerous genocide suspects who fled to France do not continue to reside there alongside their Tutsi victims who have also claimed refuge in France, nonetheless, issues that have been raised remain regarding the application of universal jurisdiction in this type of case, which cause considerable unease in some quarters. Simbikangwa was tried before the *Cour d'assises* in Paris, the verdict reached by a jury of six 'ordinary' citizens, selected at random from the electoral roll. The first two weeks of the trial were spent setting the context for the three judges and the jurors of a genocide that occurred 20 years previously, 7,000 kilometres away, in a country in which, in all probability, none of them had ever set foot. Aside from the vast differences of everyday life in an east African country, where appreciations of time and distance and relationships do not correspond to European norms, judges and jurors had to grapple with the historical and political events preceding the genocide, which are immensely complex, and the role played by France, which still remains somewhat ambiguous and partisan. It could be argued that the challenge faced by jurors to understand the events and the role played by the accused cannot be surmounted — and is too traumatic to be reasonably imposed on the average person — and this could jeopardize the provision of a fair trial. This could be offset by an advantage, in theory at least, of a greater likelihood of finding neutral, unbiased jurors in France than in Rwanda, where each citizen must be drawn in one direction or the other, due to the nature of the crimes committed. It is also to be noted that, had Simbikangwa appeared before an international court, there would have been no jury, as judges reach decisions at these forums. Presiding Judge, Olivier Leurent, considers that trials, such as the *Simbikangwa* case, should be heard by judges without a jury, as is already the case for terrorism offences in France, with the *cour d'assises spécialement composées*. Judge Leurent justifies his views not only by the complexity of these cases, and by suggesting that hearing such cases systematically before judges specially trained to deal with these type of matters would bring about real savings of time and money, but also by recalling that the justification of the popular jury is to associate the people in the judging of crimes committed in their neighbourhood. This

92 'Génocide rwandais: non-lieu pour Wenceslas Munyeshyaka', *Le Monde*, 6 October 2015.

93 A. Gauthier, 'Affaire Wenceslas Munyeshyaka: clôture de l'instruction', *Collectif Parties Civiles Rwanda*, 9 April 2015.

argument can hardly be advanced to support the hearing of trials of Rwandan genocide suspects before a people's jury in France.<sup>94</sup>

In addition to this knowledge gap, arguably costly to fill in terms of court time, but also, as Xavier Philippe maintains, in terms of guaranteeing a fair determination of guilt,<sup>95</sup> other costs are necessary to ensure a fair trial: transporting witnesses from Rwanda to testify; extracting convicted Rwandan criminals from prison to attend court in France; providing appropriate interpretation between French and Kinyarwanda;<sup>96</sup> exploratory visits by the Judges to Rwanda; establishing the *pôle* in Paris. These suggest that the appropriate forum for the trial of a Rwandan genocide suspect is by Rwandan court, or at least one with in-depth local knowledge and not a French court.

Leila Sadat further emphasizes the delicate situation of France exercising jurisdiction over genocide suspects, when it itself potentially has 'unclean hands',<sup>97</sup> and suggests that trying Simbikangwa before a neutral international court in preference to a national one could have helped diffuse the antagonism between France and Rwanda arising from the extradition request. Although it may be argued that the need to bring Simbikangwa — and others — to justice obliged the French courts to find a way to achieve this, in theory opening the gates to future trials, this was not without major problems, which could potentially have led to creating insurmountable diplomatic incidents, which would have been better avoided.

Sadat also highlights the Princeton Principles, devised by a working group of jurists and academics to study the challenges raised by universal jurisdiction and to produce principles to help clarify the concept of universal jurisdiction. The Principles promote greater justice for victims of serious crimes under international law, close the gaps that have often led to impunity for the most serious of crimes and to ascertain the best forum for the trial.<sup>98</sup> Sadat refers specifically to the eighth principle, which suggests various factors to be considered when ascertaining the appropriateness of a particular forum where universal jurisdiction is an issue. These factors include: first, the place of commission of the crime; second, the nationality of the perpetrator; third, the nationality of the victim; fourth, any other connection between the requesting state and the alleged perpetrator, the crime or the victim; fifth, the likelihood,

94 S. Delval, 'Regards croisés sur les procès de Germain Katanga et de Pascal Simbikangwa: entretien avec les juges Bruno Cotte et Olivier Leurent', Institut des Hautes Etudes sur la Justice, October 2014.

95 Specialist in constitutional law and formerly legal advisor for Eastern Europe, 2004–2005 for the International Committee of the Red Cross. X. Philippe, 'Rwanda: juger un génocidaire? Pas si simple!', *Le Monde*, 7 February 2014.

96 On this subject, see N.A. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010); H. Trouille, 'How Far has The International Criminal Tribunal for Rwanda Really Come Since *Akayesu* in the Prosecution and Investigation of Sexual Offences Committed against Women? An Analysis of Ndindiliyimana et al.', 13 *International Criminal Law Review* (2013) 747.

97 Sadat, *supra* note 29, at 545.

98 The Princeton Principles on Universal Jurisdiction, Programme in Law and Public Affairs, available online at <https://lapa.princeton.edu/hosteddocs/univejur.pdf> (visited 25 July 2015).

good faith and effectiveness of a prosecution in the requesting state; sixth, the fairness and impartiality of the proceedings in the requesting state; seventh, convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and finally, the interests of justice. Whereas none of these elements are absolute requirements and do not fall in any particular order, a quick glance through the list indicates that a third party state will not normally be anticipated as the forum of choice for crimes of this nature, the sticking point being the interpretation of 'the interests of justice' in any given case. Many factors tend towards the position that cases should be tried where the crimes occurred. Certainly, the policy of the ICC — enshrined in its Statute — is essentially to step in if domestic courts do not do so. The vast costs of investigating and holding international trials have limited the number of cases which the ICC has been able to hear, and it is usually financially preferable, if at all possible, to send suspects to be dealt with by the domestic courts where the conflict took place.<sup>99</sup>

Indeed, since the transfer of Uwinkindi to Rwanda by the ICTR in 2011, many states are handing genocide suspects back to Rwandan courts.<sup>100</sup> There is no doubt that the choice of forum will rarely be straightforward and will likely involve much legal argument — in the United Kingdom, for example, the decision of the Supreme Court is pending regarding the extradition of Vincent Bajinya (also known as Vincent Brown), Celestin Ugirashebuja, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Mutabaruka, arrested in 2013 on charges of murder and genocide after living in Britain for more than a decade. The High Court refused their extradition to Rwanda in 2009 because of the risk they would face a 'flagrant denial of justice' in Rwanda, but this has been reopened following the introduction of measures in Rwanda that may counter the High Court's objections.<sup>101</sup> If their challenge is successful, the five accused will be granted permission to remain and stand trial in the United Kingdom. If they are unsuccessful, they may raise the argument, once again, that extradition to Rwanda constitutes a denial of the right to a fair trial, using the 1998 Human Rights Act.<sup>102</sup>

## 5. Conclusion

Any discussion of jurisdiction where multiple fora are possible will unveil numerous complex issues which cannot be resolved quickly and easily, but such discussions are crucial to enable us to find an appropriate forum to

99 J. McManus, 'Domestic Implementation of the Rome Statute', Speech, Summer School on the International Criminal Court, Irish Centre for Human Rights, National University of Ireland, 19 June 2015.

100 Human Rights Watch, *Rwanda*, 28 March 2014, at 10-11.

101 C. Milmo and P. Akumu, 'Men Facing Extradition over Rwandan Genocide Face "most serious charges"', *The Independent*, 5 June 2013.

102 R. Pells, 'Supreme Court to rule on Rwandan Genocide Extradition this Week', *The Independent*, 2 November 2014.



prosecute the perpetrators of crimes, such as genocide. It is critical that criminals do not remain unpunished because existing mechanisms to prosecute them are reaching the end of their life cycle, are not trusted to provide a fair trial or are incapable of investigating and prosecuting within a reasonable delay. As states continue to seek the best way to deal with the genocide suspects living in impunity on their territory, it may be appropriate for the international community to reflect upon William Schabas' suggestion that the 'multitude of tribunals' which bring 'varying perspectives and, occasionally, different results' may actually strengthen international law, rather than fragmenting it.<sup>103</sup>

103 W.A. Schabas, 'International Criminal Law and the European Convention on Human Rights: Synergy or Fragmentation?' 9 *JICJ* (2011) 609, at 632.