

**The ICTR a dilemma: to tell the policy or the law?**

The Hague, Netherlands

November 14-15/2009

**Gaspard Musabyimana**

Writer

Investigator of ICTR Defence

## The ICTR a dilemma: to tell the policy or the law?

Through the creation of International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the UN has engaged in a complex and courageous fight against the reign of impunity in a series of serious and massive violations of human rights.

In doing so, even though the UN has set a fashion of new tools for safeguarding world peace, the experience in former Yugoslavia has been conclusive. It has demonstrated the positive role played by the UN jurisdiction in the consolidation of regional peace. This has unfortunately not been the case for Rwanda, where war and massacres were reported in the former Zaire, with human damage to millions of victims.

On the whole, the International Criminal Tribunal for Rwanda has not met the expectations of all who believed in international justice. And as such: it is under constant pressure by the authorities who installed to power the current leaders of Rwanda. They act on some judges who do not always have the courage to put aside politics to do what is right. At the crossroads of law and diplomacy, international justice is nevertheless a powerful instrument<sup>1</sup>.

### 1. A victor's justice

Many observers of international organizations have followed closely the work of the tribunal in Arusha and the evolution of its organization and its methods. Among them, Thierry Cruvellier<sup>2</sup>, has tracked down the hard daily functioning of the ICTR for about five years. He tried to learn some lessons from those mistakes "of what could only be the victors' justice", one that renounces to involve one of the actors of 1994, the RPF.

How to explain the power of intimidation of the RPF regime in Kigali in respect of the international community embodied by the UN? Th. Cruvellier stresses that the Arusha tribunal has been established and operates under the responsibility of those who have "at least morally failed" in 1994 namely the international community, the UN Security Council and its most powerful members. Hence the "unique" situation in this ad hoc court unable to aspire to impartiality, because its judges and prosecutors remain "the result not of a brand of power, but an act of contrition [...]. Nothing explains this hesitation better than the remorse consciousness and the paralyzing fear that capture the judges<sup>3</sup>. " This explains the abandonment of investigations on the air attack and the lack of carrying out charges in cases involving the RPF army.

This analysis is based on the image of an "international community covered with shame because of its refusal to intervene in order to stop the extermination of the Tutsi" and the experience of those who tried to have an open discussion with a Rwandese leader in Kigali on what happened in 1994. They were then forced to "answer this question: who stopped the genocide? The answer is unique - it is the RPF - it comes with an implacable glance, which forces you to lower yours and that means the end of the discussion<sup>4</sup>.

Why should the UN and its local mediators, who have expanded their efforts in favor of returning to the cease-fire and public order, apologize to Rwandese leaders, those who have constantly used the slightest excuse to prevent the conclusion of ongoing mediation and to discourage any plans for more active UN peacekeepers, thus paralyzing negotiations, with the

<sup>1</sup> Stéphanie Maupas. *Juges, bourreaux, victimes. Voyage dans les prétoires de la justice internationale*, Paris, Editions « Autrement Frontières », 2008, p.6.

<sup>2</sup> Thierry Cruvellier, *Le tribunal des vaincus – Un Nuremberg pour le Rwanda ?*, Paris, Editions Calmann-Levy 2006, particularly chapter XVI « la justice des vaincus », p.245 et ss.

<sup>3</sup> idem

<sup>4</sup> Thierry Cruvellier, op.cit ., pp. 247-248.

only goal to continue their plan of military conquest of the whole country and thus gaining full power?

It must be remembered that in Nuremberg in 1945-1946, the first responsibility of the senior tried Nazi leaders, before being accused of war crimes and a crime against humanity, was of having committed crimes against peace, which resulted in a plot to conduct a war of aggression.

Considered a child of Nuremberg, the International Convention on the Punishment of Genocide will only be adopted unanimously by the UN General Assembly on December 9, 1948.

At the ICTR, genocide is the priority, but it is somehow disengaged from the war of aggression from which it was born and which has matured during four years. The law has given way to politics. The ICTR sidesteps the substantive issues, uses shortcuts and judges disavow themselves, which undermines its independence and ultimately its effectiveness.

## **2. The guilty plea shortcut instead of a public trial**

Using a shortcut instead of holding a public hearing in order to bring light on the truth has shed doubt on the guilty plea of Jean Kambanda, the first to see this procedure being applied. The weekly "Jeune Afrique"<sup>5</sup> observed here that this Arusha logic is strange because politics seem to outweigh the judicial and the result of long secret negotiations held between an inmate and an attorney shall serve in lieu of a charge and discharge.

The guilty plea by Jean Kambanda presented in court on May 1, 1998 is the result of eight months of secret negotiations with the prosecutor's office instead of a normal hearing to charge and discharge. The ICTR can finally announce to the world the recognized existence of a genocide "planned and organized at the highest political and military levels of the State of Rwanda." A victory for the prosecution which obtains, on September 4, 1998, the conviction of the head of the interim government the maximum sentence: life imprisonment.

This Arusha victory will prove itself to be a "dupes' game », because even if by agreement between the accused and the prosecutor, a trial has been spared, "the court has fueled judiciary fiction. By not using more search of the truth, he left the research interests of the institution take over"<sup>6</sup>.

On appeal, the trial was limited to a purely formal review of the consent procedure followed at inferior court and concludes with the full guilt of Jean Kambanda, simply because he had not complied with the appropriate procedures (but fluctuating) of the new court and did not timely assert his rights to a competent and independent defense at inferior court.

In examining the case of conviction of Jean Kambanda, it does appear that the Court did not merely quote that Jean Kambanda had waived his right to invalidate his guilty plea because he had not exercised it in good time; when he had left the isolated circumstances of Dodoma, to reach the UN detention center in The Hague-Scheveningen. The Court proceeded in effect, to a systematic review of the various grounds for appeal, including the "hard" core which consisted of:

- failure to respect the right to be defended by a counsel of his choice;
- long isolation in an "illegal" detention place, outside the detention center in Arusha, and therefore favourable to all pressures and manipulations;

<sup>5</sup> Jeune Afrique n° 2018 of 14 to 20 September 1999, pp. 33-34.

<sup>6</sup> Thierry Cruvellier, op.cit., p.67.

- Inadequate control of the validity of the plea by the inferior court, asked to check if the following mandatory conditions were satisfied:

- a) the voluntariness of the confession, that is to say that it is pronounced in a normal mental state and free from any pressure or promise other than the prospect of mitigating circumstances because of cooperation with the prosecutor;
- b) the exact and complete understanding of the nature of the charges and consequences of the guilty plea, which means the effective assistance of a competent counsel;
- c) the unequivocal nature of the confession, illustrated by the fact that repentance does not invoke any explanation or justification for his actions, equivalent to a starting defense that should therefore be experienced during a normal trial.

Based on the record as presented to judges and on the minutes of the hearings, the Court said in its ruling of 19.10.2000 that it had seen no attempt by the repentant tending to explain his actions to raise or lower the average defense. A sufficient factual basis to justify the confession means that the counsel's defense should be based on the facts of the crime and on the participation of the accused to his commission, considering independent evidence of absence of any disagreement between the parties. This implies that the court is well assured that the plea is based on facts or at least on some evidence for judges to determine the admissibility of the plea.

As a result, the Court rejected the counsel's argument on the non-voluntary confession, given the unofficial place of detention (Dodoma) and the "oppressive" isolation because neither Jean Kambanda, nor his lawyer, raised this objection during the proceedings at inferior court.

The irregularities of a Registry, which has not always been content to be an effective secretariat and transparent service to all stakeholders of the ICTR, including defense, have previously contributed to the "seizure" of the normal functioning of the court. In this context, the clerk Okali has not hesitated to leave his duty of confidentiality by publishing a triumphalist item in the international press: "The example of the Rwanda Tribunal", before the ICTR verdict of the Akayesu and Kambanda cases<sup>7</sup>. The clerk pointed out excellent principles such as the first implementation of the 1948 Convention on Genocide, but he also says that historic "unprecedented" event, namely the public confession of former Prime Minister Jean Kambanda, implies the recognition of "having, in concert with others, deliberately committed against their countrymen the atrocities they are accused of."

Finally, he celebrated the improvement of cooperation with the Rwandese government, demonstrated by his meeting with General Paul Kagame, one of the key players in the drama of 1994, who was able to confirm the satisfaction of Rwandese people facing the "outstanding job" done by the ICTR "in difficult conditions", etc.

It took over a year to clarify the confidential position of the Registry binding Jean Kambanda to waive counsel of his choice, The Hon. Scheers hit by "disciplinary backgrounds"<sup>8</sup>.

Finally, to impose the choice of counsel to non-indigent client in a matter of international criminal law does not enhance the credibility of the court, where the Anglo-Saxon procedure is applied with support for the defense to bear its share of instruction and to face costs incomparable to those of a trial into domestic law.

A final crucial issue for the future: the danger of politicization of the ICTR? Prosecutor Del Ponte has frankly raised this issue at her conference in Freiburg on April 14, 2000, by

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<sup>7</sup> Le Monde of 2 September 1998.

<sup>8</sup> Letter dated 15 October 1998 from Jean-Pelé Fomete, Legal Counsel of ITPR, to Jean Kambanda.

reassuring her audience that although the two International Tribunals have needed the cooperation and support of States to accomplish their mission, this support did not violate the apolitical and independent nature of the prosecutor.

In Rwanda, the policy pursued by the prosecutor and his office in Kigali pursuing cooperation with the Government of Rwanda presented as an "amicus curiae" hardly seems to have reversed the trend of a military-dominated regime, unknown to a State of judicial rights; judging by the numerous defections of Ministers of Justice or Home Affairs and judges who, after trying to react against the criminal practices of the army or against "the constant interference in the independence the judiciary and obstructions in the course of justice by some authorities"<sup>9</sup>, they were forced into resignation and exile, when they were not murdered, their sin is to have denounced the serious abuses of the system!

Early in 2001, Carla Del Ponte announced that her office had prepared charges against RPF soldiers suspected of committing atrocities in 1994 and that after having talked in private with General Kagame, full cooperation in Kigali was assured. One could then hope that the chain of command would be reached within the army of the RPF, which has made these atrocities possible, and that investigations of sponsors and executors of the air attack of 6 April and recovery of total war would be reactivated. This remains wishful thinking until now! This impudence has even meant her removal from Rwanda matters. Because the enlargement of the prosecution strategy might have highlighted the international dimension of a criminal war, hitherto ignored by the ICTR. The strategy of the prosecution and the cooperation received from Kigali framed today in a judicial operation is more cosmetic than real.

The eight month isolation of Jean Kambanda in Dodoma and the late and rushed appointment of an unchosen lawyer does not seem to have contributed to the conduct of a fair trial, as defined during the conference of April 14, 2000 in Freiburg by Carla Del Ponte, namely a trial that offers a balance between ensuring maximum rights of the accused and the need for effective justice. These shortcomings of the Court could be understood in a running-in phase, but were extended and have thus undermined the credibility of the international jurisdiction.

As regards the principles of fair trial and contradictory inquiry, does the case of Jean Kambanda not hide a glaring imbalance between a charge of receiving eight months on parole and a defense involved in the end, just over a fortnight before the initial appearance on 1 May 1998?

Jean Kambanda was subject to the procedures of Anglo-Saxon admission of guilt, a practice unknown to him, but unknown in Rwandese and European law. His appearance on 1 May 1998 in Arusha and full recognition of the genocide and his responsibility for all charges including "conspiracy to commit genocide" were hailed by the Western press from the outset as an unexpected success for international justice and especially for the prosecution, who can then rely on the testimony of a repentant key to prove the guilt of his accomplices.

Subsequently, warned jurist Michel Aurillac<sup>10</sup>, lawyer and former French minister, delivered a more critical analysis of the application of this American procedure to guilty pleas in African societies, where family solidarity prevails over the sense of justice. He pointed out, at the heart of this admission, the bargain made between an accused wishing above all to "protect his family and with the help of the UN, to shelter a vengeance" and a prosecution concerned to dispose of important witnesses in the pursuit of subsequent prosecutions. Mr. Aurillac made a parallelism of this procedure with what was happening in Stalinist trials in Moscow

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<sup>9</sup> Amnesty International, Rwanda : *le cours perturbé de la Justice*, April 2000, index AFR 47/10/00, p.25 and footnote 18.

<sup>10</sup> Michel Aurillac, « Rwanda : un procès douteux », Le Figaro of 14 May 1998.

where the accused admitted all the conspiracy and pleaded guilty in the hope of saving themselves or to save their loved ones. For him, the Rwandese Prime Minister Jean Kambanda, named after the attack against the plane of President Habyarimana, "may be a great criminal, but the ICTR and the UN would be honored to prove otherwise than by confessions obtained without proof through a bargain that looks like blackmail."

### **3. Pressure by the Rwandese regime on the ICTR**

The case of Jean Bosco Barayagwiza is very illustrative of the influence of the ICTR in Kigali. Arrested in Cameroon in April 1996, Jean Bosco Barayagwiza was transferred to the ICTR in Arusha in November 1997. Following the gross violations of fundamental rights of the accused, including the fact that his detention period was characterized by serious procedural irregularities, the Appeals Chamber of the ICTR decided his release November 3, 1999. But immediately after the release decision was made public, the Rwandese government protested and suspended its cooperation with the Court ordering him to recant. Carla Del Ponte was denied a visa to enter Rwanda.

In this standoff, Rwanda was supported by the sponsors of the Tribunal who exerted enormous pressures on this institution for it to withdraw. Among other support, the Rwandan government benefited from the highest UN body. Indeed, in the process, Fred Eckhard, spokesman for Secretary General of the United Nations addressed a Canadian newspaper by asking about the victims' rights ("What about the human rights of his victims?")<sup>11</sup>. As far as the ICTR and its dependent judges of the United Nations were concerned, it was clear that this was a concealed way to give them an order to review their decision in the Barayagwiza case.

That was done without delay and Carla Del Ponte, who had taken the direction of the Prosecutor in The Hague, filed an application for review of the decision. She won her case and the Appeals Chamber decided to postpone the execution of the arrest of November 3, 1999. Jean Bosco Barayagwiza was kept in prison. The complacency of the judges encouraged thereafter the collusion between the Prosecutor and the Rwandese Government in many cases. Carla Del Ponte would thus support Rwanda in its claim of being "Amicus Curiae" in this matter which had been hit by an irregular revision.

By succumbing to political pressure from the UN, from its sponsors and from Rwanda, the independence and integrity of the ICTR has suffered somewhat. In reversing its decision, the Appeals Chamber did not decide in the interest of justice, but in that of politics.

Another consideration and not the least is the withdrawal of the Appeals Chamber. It shows that the ICTR acts as a Winner's tribunal, namely the RPF is in power in Rwanda and with strong support from its sponsors is judge and party to the conflict and uses this policy instrument as a safe and effective service to perpetuate its ethnist, dictatorial and criminal power.

### **4. The expertise and the privileged testimony at the ICTR**

Fortunately both the prosecution and the defense have the desire to submit to the ICTR a plurality of expertise or testimony. These opinions of expert witnesses are not only marked by a rough analysis of the facts directly related to the commission of acts of genocide, war crimes or crimes against humanity, but they refer to a lead which is intended to make such a crime comprehensible and which rest on a certain politico-historical conception of Rwanda, a heritage of rich historiographical myths and fertile, all on a minefield of old conflicts that do not want to enter an ultimate past.

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<sup>11</sup> National Post, Saturday 6 November 1999.

To correct the historical relativity and the dangers inherent in each subjectivity in these complex matters, it may be beneficial to confront a personal perspective to other approaches and experiences and contradiction, from which enrichment always emanates.

This confrontation should have been realised first with the observations and analysis of the Rwandese themselves, because they are the primary stakeholders and, ultimately, the best experts from the realities of their country, particularly those dangerous and criminal realities which even today are frightening.

It is in this difficult context that we ought to locate Alison Des Forges's expert testimonies. They confirm the general approach of many indictments, if not at the base thereof.

A. Des Forges has considered all the critical issues that challenge the government side and the R.A.F (Rwandese Armed Forces); but she makes this review as if the events were held in a static way and as if only one belligerent led the operations, by following a main lead that matches the version certified by the other belligerent as of the very beginning, namely the defense of an ethnic republic bearing in its womb the seeds of genocide. The expert even recognizes the differences between the responsible military and civilians facing the ever looking genocidal massacres and the emphasis placed by them during certain times of pacification, but she only sees the partisan opportunism and tactical changes which do not detract from their ultimate goal: the continuation of genocide.

Alison Des Forges forgets that the Rwandese tragedy was the culmination of a complexed multi-actors and dynamic process of which the most effective actors do not necessarily occupy the forefront of the scene, namely those who have committed a series of terrorist operations, guerrilla warfare, population displacement and a very sophisticated war for nearly four years.

Yet, many reports evoke the existence of clandestine cells of the RPF since the beginning of the war, with training courses for young people across the country; cells that are estimated from 1993 to several hundreds, and up to 600 cells in 1994, of which 147 are in Kigali. She recognizes that the RPF could count on a significant number of supporters of illegal conducts evaluated between 3600 and 7200, while rightly stating that all the pro-RPF Tutsis could be considered a priori as infiltrators.

However, nothing is said in the review of the critical period which marks the resumption of the total and final war for the RPF, the action of these clandestine cells and selective killings made by young infiltrated fighters. Alison Des Forges noted however that the RPF did not hesitate to recruit elements within the Interahamwe<sup>12</sup>.

Bearing in mind a unilateral perspective, the expert-witness, like the public indictment, ignores certain UN principles.

Thus the proposed analysis, in its various surveys, is treated in ethnist terms including that of March 2002, and shows that the extremism is at the base of the social and political exclusion that led to the sabotage and then to the unilateral breach of the peace agreement as of April 6, 1994, and finally to the genocide.

In her analysis of developments in the country after the attack by the RPF from Uganda, Alison Des Forges does not seem to recognize the sovereignty of the republic and its independent right to organize the defense of its territory and ensure the Homeland Security, and this through a series of measures such as self-defense and the civil establishment of patrols and checkpoints. Which is what the expert compares to a program of repression and elimination of the Tutsi minority.

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<sup>12</sup> The analysis is based namely on Alison Des Forges's report of March 2002 presented at the « Bagosora » trial.

Long before the outbreak of the drama, the normal practice of any sovereign country threatened or at war is to hold military intelligence and identify hazards, including the recruitment of young rebels, was classified in the preparations for the genocide.

This national sovereignty, though useful in times of creeping recolonization and of many experienced foreign interferences in the Rwanda crisis, is nevertheless not an absolute exercise and without limitation: the UN and its Security Council retain preeminence in the field of safeguarding of the peace and for defending international humanitarian law. The gravest abuses found in the guise of resistance justify the creation of the ICTR investigations and investigators and researchers like Alison Des Forges.

However, it remains unusual that independent international tribunal of States could accept such a disparity of treatment in the fight against terrorism: on the one hand some states (and this is the case of Rwanda today) assume the right to conduct war operations beyond simple police operations and beyond the national territory, on behalf of the fight against terrorism and internal insecurity, without providing any outcome in the sense of internal political dialogue.

On the other hand, other states less well supported (and what happened in Rwanda of the Second Republic, which has yet avoided to extend its operations in sanctuaries in Uganda and Burundi) are denied the right to take industrial action effective in identifying the source of terrorists, their methods, their support and their objectives, and that given the socio-political history of the country and its openness to democracy and the rule of law.

The ongoing efforts of UN representatives to urge the government side and the RPF to resume dialogue, to negotiate a cease-fire as soon as possible and thus put an end to the killings and to insecurity in general, are ignored in the analysis of Alison Des Forges, while the latter does not hesitate to criticize those officials and UN diplomats weakness or their blindness facing the implementation of the genocide, as if stopping the war was not ipso facto to stop this genocide.

In the introduction of the book published under her supervision<sup>13</sup>, A. Des Forges reverses the process of crisis handled by UN by saying that foreign decision makers have dealt with the genocide as a consequence of the war while it was an evil that had to be taken separately and be directly attacked. She even considers that the same spirit of dialogue and neutrality at the base of UNAMIR was no more appropriate. Alison Des Forges implicitly joins the RPF thesis.

In its strategy to fight against impunity after the tragedy of Rwanda, the Prosecutor of the ICTR and its experts cannot focus solely on the effects of war and invasion and on the crime wave which eventually ended up within the population, without carefully considering the hypothetical planning of the genocide and war crimes by the belligerent anti-democratic party, which has always retained the initiative and the secret operations and has finally determined the chronology of violent and murderous development since October 1990.

Asking the fundamental question about the strategy of the Prosecutor is nothing to deny the existence of a cons-growing crime in the Rwandese society.

The expertise of A. Des Forges that inspires the prosecution policy of the prosecutor attempts to identify the core scheduler of genocide outside the war of aggression RPF.

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<sup>13</sup> Human Right Watch and FIDH, *aucun témoin ne doit survivre*, Paris, Karthala Edition 1999, p.29.

## 5. The ICTR under the control of Anglo-Saxon powers

As she was preparing to prosecute military officials of the RPF, Carla Del Ponte was taken off the Arusha files thus putting an end to her dual role as prosecutor of both the ICTY and ICTR.

Forced removal of Prosecutor Carla Del Ponte of this file is a good illustration that the ICTR serves a policy dictated by the U.S. and the UK. The genesis of this case reveals that these two States, using their combined power in the Security Council, has proved to make the ICTR an instrument to be used for their politics in the Great Lakes Region and that the RPF regime is a residual which they use in their offensive to control Africa, and especially Francophone Africa<sup>14</sup>.

Everything starts when, upon setting up the ICTR, the Tribunal made obstruction as regards the attack against the plane of President Habyarimana, which is the trigger for the Rwandan genocide. The Chief Prosecutor of the ICTR, the South African Richard Goldstone (1994-1996) was acquired. He quit leaving the work to investigators. Among these, the Australian lawyer Michael Hourigan. The latter had evidence as to the RPF being the author of this terrorist act and other widespread massacres of civilians. But the successor of Richard Goldstone, the Canadian Louise Arbour, pushed aside the report, saying that it did not fall within the Tribunal's mandate for investigations involving General Kagame and his men. The Hourigan report was embargoed. Louise Arbour will be replaced by the Swiss Carla Del Ponte, who was slapped on the wrist when she tried to reopen the case. In August 2003, she was quickly taken off the Rwanda case by the Security Council of the UN, to deal only with the ex-Yugoslavia. Her spokeswoman, Florence Hartmann<sup>15</sup> explains how, under pressure by the United States, the special investigations targeting suspects Army Rwandese Patriotic Front (RPF) have been buried forever tarnishing the results of this international court that is ICTR<sup>16</sup>. The UK will adopt the same attitude because the head of British diplomacy is going to give Kofi Annan a letter late June 2003, in which he asks to split the post of attorney and appoint an attorney to deal only with Arusha cases<sup>17</sup>.

Carla Del Ponte will be replaced by the Gambian Hassan Jallow. Pierre Richard Prosper, U.S. prosecutor at the ICTR until 1998 who in 2001 became U.S. ambassador for war crimes, reassured President Kagame of his impunity because the new ICTR prosecutor, Hassan Jallow, had endorsed the promise made by the United States to the Rwandese authorities to drop charges against the soldiers of the RPF.

The promise of the United States to bury the crimes of Paul Kagame and his soldiers will soon materialize. The public found this arrangement a scandal; in June 2008, four officers of the RPA in Rwanda were arrested for the murder of 13 leaders of the Rwandese Catholic Church including three bishops on June 5, 1994 in Gitarama (central Rwanda). The surveys were conducted jointly by the Prosecutor of Rwanda and the ICTR Prosecutor. But the latter rushed to divest the business case onto the Rwandese military justice. This decision was criticized by many observers who felt that the RPF could not be both judge and party. Indeed, in this case, only the sidekicks were charged after a sham trial.

<sup>14</sup> Jean Baptiste Mberabahizi, *Kagame est un instrument au service des intérêts étrangers*, 03/04/2008 (see : <http://www.musabyimana.be/lire/article/kagame-est-un-instrument-au-service-des-interets-etrangers/index.html>).

<sup>15</sup> Florence Hartmann, Paix et châtement, *Les guerres de la politique et de la justice internationales*, Paris, Flammarion, 2007.

<sup>16</sup> Report of Hironnelle Agency of 7/9/2007.

<sup>17</sup> Read Florence Hartmann's book, op.cit., pages 262 to 275.

## 6. Lack of fairness and transparency

By trying to hide the facts implicated by the men in power in Kigali, the ICTR is obstructing the truth and is an impediment to proper justice. That is what drives the refusal to conduct an independent investigation into the circumstances surrounding the death of President Habyarimana, which is considered by many experts and international organizations including the UN and the OAU, as detonator of the Rwandese genocide.

This survey provides yet a legal interest because those who have shot down the plane carrying President Habyarimana knew very well what the consequences of this attack would be and which would therefore bear legal responsibility in the genocide<sup>18</sup>.

Another thorn in the Tribunal is its stubborn refusal to prosecute one party only to the Rwandese conflict, thus ensuring impunity to RPF members when serious charges of genocide and crimes against humanity are against them as still demonstrated by investigations lead by the French judge Jean Louis Bruguiere and Spanish judge Fernando Mereles. This attitude of the Prosecutor to refuse prosecution reflects a deliberate effort to apply a discriminatory justice which can only lead to unfair trials, and thereby complicate the reconciliation of Rwandese people.

The existence of the Tribunal Office in Kigali and in which the Prosecutor is present, is problematic. It has indeed provided the RPF government to influence the conduct of investigations and to give them a partisan orientation. In addition, it is a fact that the ICTR has initiated programs to assist victims, in Rwanda, via the services of the Registry. But it is among those that the Prosecutor has its witnesses. According to analysis, it is neither more nor less but a disguised way of subordination of witnesses.

The ultimate goal of the ICTR and proclaimed in many academic discourse is to promote national reconciliation in Rwanda and Rwandese population to help find solid benchmarks for rebuilding a battered country and torn society. This requires reaching through a judicial process transparent and fair, the truth, however complex may be.

It is undoubtedly unfortunate that the ICTR is contained in the logic of the Anglo-Saxon criminal law known as "common law", where judges are becoming a kind of arbiter to decide between a prosecutor (the prosecutor) and defense counsel (counsel), each theoretically set on equal footing.

This is why the office of the Attorney has settled to merely conduct a charge inquiry, leaving the defense with the task of making its counter-inquiry. Often this inquiry takes place blindly because it does not receive all items collected by investigators from the prosecutor, although the latter must make available to counsel, a month before trial, the only pieces he wants to produce, which excludes items collected at discharge or demonstrate the ambiguity of the given evidence.

As rightly observed by Professor Andre Guichaoua<sup>19</sup>, the prosecutor's office practices a collection of evidence is often limited to the identification of witnesses, and whose effectiveness is measured not by collecting solid evidence but rather by an accumulation of denunciation of evidence. Let us add the permanent interference of Kigali with the status of "amicus curiae" and which also controls the selection of witnesses and the granting of passports.

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<sup>18</sup> Filip Reyntjens in the Rutaganda case : see audience transcript of 24 November 1997, pp. 114-115.

<sup>19</sup> Le Monde of 3.09.2002.

The deliberate fostering of the Prosecutor to favour impunity and injustice manifests itself in the concealment of information or reports involving RPF. We shall remember the Gersony report involving the RPF on the systematic massacres of ethnic Hutus and embargoed by the UN or the results of investigation of Michael Hourigan bringing to light the responsibility of the RPF in the attack against the plane of President Habyarimana<sup>20</sup>.

The bad faith of the prosecutor in this area is recurrent. In September 2008, the ICTR Prosecutor, Hassan Jallow, was reprimanded by the judges. They criticized him for not rising to the level of integrity required in the performance of his duties as court officer and his apparent lack of diligence in the disclosure of matters which may exculpate the accused. They reminded him of his duty as an officer of justice, to help the court to discover the truth about the allegations in the indictment that he has produced and give justice to all concerned including victims and defendants. They clearly recalled that he must finally rise above the fray, always applying the highest standards of integrity in the discharge of his functions<sup>21</sup>.

The hidden information by the Prosecutor of the ICTR are among other evidence collected by investigators on the RPF's crimes against the civilian population of Rwanda.

## **Conclusion**

The ICTR suffers from its illness of childhood. It is a tribunal established in violation of the Charter of the United Nations by the Security Council, which replaced the member States of this organization. It controls all the mechanisms including the election of judges of that court. They have difficulty in getting rid of this guardianship and are constantly undergoing constant pressure from member countries that make up this UN body.

However, some of these States are the biggest sponsors of the Tribunal and unconditional allies of the RPF regime for geostrategic reasons. Hence Kigali too can afford to affect the smooth running of the court, not to mention that it has the freedom to manipulate witnesses of the prosecution in its own way. It has also been able to protect itself against further members of this court.

The consequences of this situation are numerous including the fact that trials are tainted with political overtones.

By refusing to indict one party to the conflict, namely military RPF, whose crimes are nevertheless well documented even by the prosecutor through his "Special Investigations", the ICTR has failed on equity principle and failed to perform a mission for which it was created: to promote reconciliation among Rwandese people.

*Gaspard Musabyimana*  
*November 2009*

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<sup>20</sup> Main parts of that report were published in the Canadian newspaper National Post by Steven Edwards of the 1 and 2 March 2000 edition.

<sup>21</sup> Hirondele Agency of 25 September 2008.