

## **INFORMATION MISSION TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR) 14-19 FEBRUARY 2010**

I ensured on behalf of the IADL an information mission concerning the International Criminal Tribunal for Rwanda in Arusha (Tanzania) from 15 to 19 February 2010. The main object of the present report was to list the problems related to the activity of this Tribunal with respect to the applicable fundamental principles of law recognized and proclaimed internationally.

### ***Preliminary observations***

Since it was an information mission before a Tribunal

- 1) Such mission could not include the discussion of the matter as to whether the massacres did constitute a genocide in the legal sense or not but includes only information about the right of the accused to discuss such matter according to the right recognized to any accused to discuss all the legal elements of the criminal qualification of the facts he is prosecuted for.
- 2) The sole object of the mission was to know to what extent the guarantees of a due process were provided regarding both the independence and impartiality of the Tribunal and the Defence rights, having in mind that the role of a court is to render justice but on condition that the justice rendered is just and fair.

Therefore, I reminded all my interlocutors that the IADL was conceived in the corridors of the Nuremberg Tribunal, and has, since its creation fought impunity for international crimes, but always in strict compliance with fundamental principles relating to judicial guarantees according to the Universal Declaration of Human Rights and the Covenants of 1966.

### **I - Prior to carrying out the information mission in Arusha**

It was important to assemble the essential legal elements governing the Tribunal's functioning; this leads in particular to the following points:

1. The Tribunal was established by the Security Council Resolution n° 955 (1994). Even though the Council's competence is only limited under Chapter VII of the UN Charter to the maintenance or restoration of peace, the resolution n° 955 (1994) linked the establishment of the Tribunal to the said competence precisising the following:

***"Convinced that in the particular circumstances of Rwanda, the prosecution of persons presumed responsible for acts of genocide or other serious violations of humanitarian law (...) may contribute to the process of national reconciliation as well as the maintenance and restoration of peace"***

Therefore the question arising is to know whether the result of the Tribunal's sixteen years of activity has actually contributed to national reconciliation or has failed in this respect and if it did not even on the contrary contribute eventually to maintaining and arousing antagonism.

In addition it should be **n**oted that precisely in the process **of** seeking reconciliation, the resolution is careful enough not to unilateralise the purpose of the Tribunal and does not mention "persons responsible for the genocide of Tutsis", but "persons responsible for acts of genocide" regardless of their camp, and in order to avoid any possible prior difference in legal qualification as genocidal or not of any respective massacres committed, the resolution adds: "and other serious violations ..."

This emphasizes more strongly that the goal of national reconciliation prohibits unilateral prosecution of members of one of the two camps exclusively.

Finally, it is significant that the Council's resolution mentions responsible for "acts of genocide" and not "of genocide" because this requires the identification of personal acts that constitute guilt.

At the opposite we cannot but regret the unfortunate wording of the resolution when it mentions, "*persons presumed responsible*", wording that can only be in breach of the cardinal principle that a defendant is presumed innocent. However, the Superior value of this general principle of law prevailing over the resolution wording entails that the Tribunal remains under an obligation of strict compliance with its requirements.

**2.** The organisation and functioning of the Tribunal are governed by two documents: the "statute" adopted by the Security Council resolution of March 8, 1994 and "Rules of Procedure and Evidence" prepared by the Tribunal and frequently amended by Plenary, sessions and supplemented by further various rules and directives.

From the point-of-view we are concerned with, these documents have revealed already a number of concerns:

**2.1.** The two essential elements of the right to a fair and impartial trial are the independence of judges and guarantees of full and free exercise of defence rights. One can only note that neither are fully guaranteed.

**2.1.1.** Regarding the independence of judges, it may seem satisfactory that the list is established by the General Assembly, but the choice of the latter is limited to a pre-selected list established by the Security Council.

Furthermore, the Tribunal is composed not only of permanent judges but also of judges *ad litem*.

**2.1.2.** As for the rights of the accused, it is significant and regrettable that the statute and the rules are almost exclusively destined to the structures of the Registry, judges and the prosecutor, without symmetrical detailed provisions structuring the counter power of the defendant. There is indeed a brief passage on the rights of the accused, including the right to be assisted by counsel. The said statute and rules even added special rules on providing free legal assistance by counsel for the accused (practically all accused) who will not have the means to fund their defence by counsel, but nothing is expressly provided concerning the freedom of counsel to defend suspects and the immunity that the said freedom should entail.

At the opposite, concerning sanctions against counsel it is provided expressly twice for possibilities of such sanctions when the "conduct is abusive" "obstructs the proceedings" or "contrary to the interests of justice".

All these provisions, allowing to leave the assessment of a matter arbitrarily "to the sole opinion" of the judge and to be applied mainly without the control of a court of appeal, are absolutely incompatible with the absolute right of the defence to use all arguments related to questions of facts and law when such arguments are not contrary to probity.

They imply the obligation of the judge to apply them only within limits, which does not constitute a means of waving the absolute right of the defendant to freely plead and oppose any objection related to questions of facts and law. This right of the defendant constitutes a cardinal principle prevailing over any provision providing to the contrary.

During my visit to President Byron, he kindly agreed that an organic imbalance existed in the Statute and Rules to the detriment of the defence, but that it was regrettable that the counsels themselves did not create a form of bar association ensuring their protection before the Tribunal.

Neither the Statute nor the Rules provide for such an option. The question is posed about the powers that could have been granted to such Bar association. Any way we can at least consider that this lack of provisions should necessarily command the utmost caution of the Tribunal in dealing with this matter.

### **2.1.3. Regarding proceeding rules,**

I will be led in my conclusions to this report to highlight the perverse role of the fact that trials are conducted under the common law procedure.

I must say that when, at the meeting in which I communicated my conclusions to defendants' counsels present in Arusha and the counsels present were mostly of Anglo Saxon legal culture, they have raised no objections to my opinion but they appeared to me as if they were discovering the matter even though the court is an international court. Being an international court there would be no obligation to privilege a sole system of proceeding. This can justify that a court has its own code of procedure.

The above-mentioned Rules of Procedure contain no express provision specifying the applicable system of procedure, but all their provisions are drafted under the logic of cross-examination like if «it should go without saying».

### **2.1.4 The concept of "judicial notice":**

In a decision on June 16, 2006, the Appeals Chamber has introduced a prohibition to contest the legal qualification of facts considered as a «genocide of Tutsis». The Chamber considers the matter as a previous judicial ascertainment by which the Tribunal considered a fact as certain and sure not only in its materiality (facts) but also in its legal nature, and that therefore the prosecutor no longer has to prove that fact and defendants are not allowed to contest it.

There is here an obvious infringement of the rights of Defendants and the principle of judicial independence. Both concepts involve necessarily that judges cannot take for sure and certain evidence based on common knowledge and that nothing can be considered only in terms of what has been freely discussed in open court, either the facts or their legal qualification. It is therefore an express limitation of the rights of the defendant that the Tribunal officially established.

It is also remarkable, as a factor strengthening the unilateral defect of this Tribunal that "judicial notice" relates only to the killings attributed to the Hutus on Tutsis and not the reverse.

It is true that the decision is based on Article 94 of the Rules of the Tribunal, which permit it to base "judicial notice" on what constitutes "common knowledge."

But (1) the Rules have been prepared by the Tribunal itself and could not exempt the tribunal from responsibility for breach of cardinal principles of law. (2) To prevent the breach of these principles, the scope of the Rules should have at least been limited to the materiality of facts and not include accountability or legal qualification matters related to them.

## **II - In Arusha**

I must say that everything was done to facilitate my mission. Hosted by the Deputy Registrar in charge of relations with the defence, I should have had a badge allowing me to move freely in the courtroom, but the machine making these badges being out of order, the registrar assistants were available to accompany me and open doors at my request.

Having announced my visit, a visit program had been prepared for me and was amended according to my requests.

As the Prosecutor was absent in Arusha, I met with one of his deputies and was received by the President of the Tribunal and the Chief Registrar. I was also able to have an impromptu interview with the deputy prosecutor in charge of one of the pending cases, for which I was able to attend several hearings

I also had two interviews with the defenders (counsels, co-counsels, assistants and defence investigators) present in Arusha, first on my arrival to collect their testimonies and their grievances and then before my departure in order to get an update.

### **1. At the initial meeting with the defenders, the following questions arose:**

**1.1** *The unilateral balance of the tribunal*, before which only Hutus accused of massacres of Tutsis have been prosecuted, but none of the perpetrators of massacres committed by the RPF, it was rightly pointed out that this (1) undermines the credibility of the Tribunal and its image of impartiality, (2) is inconsistent with its mission as noted above, including in general and without restrictions "acts of genocide and other serious violations (...)", (3) it functioned

contrary to the objective of national reconciliation by which the Security Council justified its jurisdiction for the establishment of the Tribunal.

**1.2. *The very serious inequality of the parties*** related to the investigation of cases and producing of evidence due to several reasons:

**1.2.1** At the opposite to the appearance of equality between the prosecutor and defence attributed to the common law procedure, the choice of common law here induced substantial inequality and that from the commencement of the Proceedings. In fact, it is the prosecutor who decides to initiate proceedings when at the hearing he deems that all his arguments are complete and that is why the accused must wait for several months, sometimes more, under the status of detainees without trial.

The evidence to be assessed by the Tribunal depends entirely on the ability of the respective parties to supply it. But the fact that Rwanda is, since the early stages of the functioning of the Tribunal, under the government authority of one of the parties whose headquarters is close to the seat of the Tribunal greatly facilitates the supply of witnesses in favour of this party to the Prosecutor, while the defence is forced to travel the world to find them in the Diaspora.

The geographic inequality is effective for the purpose of not only identification and obtaining testimonies but also for the purpose of ensuring material means necessary for their collection, since the common law procedure requires each party to collect testimony before producing it to the Tribunal.

It could be objected that the Tribunal's rules provide for the accused to benefit from a form of financial judicial aid, but this system submits the aid for expenses of defenders to the prior approval of their program by the Registry. It is therefore clear that even at the principle levels, the parties do not have the same rights and liberties before the Tribunal. In addition when common law procedure is applicable things become more serious for defendants because according to the said procedure the Tribunal has little power to order or direct collection of evidence and is dependent on the evidence presented by the parties.

**1.2.2. Inequality in the period of time to gather and present evidence:**

Since the beginning of the work of the Tribunal, the Prosecutor, in some cases, disposed of a period of 8 years to gather his evidence and present it, while the completion strategy obliges the defence to present his reply in less than 3 years.

**1.2.3.** In addition to this the institutional control of Rwanda by one of the two parties creates a permanent massive situation of a structural nature favouring *subornation* of *witnesses serving* the interest of the prosecution and obstructs the ability of the defence to present his own witnesses.

Indeed, the political prisoners prosecuted and convicted in Rwanda under domestic law (for which I was told that the situation in detention warrants the intervention of the Red Cross and the Observatory of Prisons) constitutes a great source of convenience witnesses recruited on the promise of remission of sentence or better conditions of detention. Many have had the courage to speak out retracting their testimonies during their appearance before the Tribunal.

**Worse:** A Rwandan law imposed a form of "plead guilty" which is admissible only if it is complete, sincere, motivated, and if it denounces a third party!

On the contrary, the Tribunal seems in recent judgments to contest globally the credibility of Rwandan witnesses in exile.

I still have to add concerning witnesses' testimonies which were indicated to me by the counsels, that the principle of indivisibility of the testimony is not applied, and that if a witness is believed to lie on ten points in one testimony, the testimony can still be considered valid on one point were the lie could not be demonstrated.

#### **1.2.4. Worse still: financial subornation**

I was told that prosecution witnesses have benefited from high remunerations for their testimony and I received an anonymous confidential document, showing a breakdown of expenses for a witness amounting to more than \$ 200,000.

Anxious to know how this could be found in the accounts of the Tribunal, I was told that this was not supported by the Tribunal but directly by the United Nations, information that was corrected, from sources absolutely sure that it is the United States that had allocated directly to the Attorney a budget of 2 million dollars for this purpose.

This deserves the establishment of a joint commission of inquiry.

## **2. Interviews with the President and Deputy Prosecutors**

Understandably, for discretion in relation to interlocutors who have spoken out freely, I do not personalize the responses.

### **2.1 Unilateralism,**

This has at no time been challenged.

I was first told that it was not possible to continue investigating the RPF and that there had been no denunciation of individuals, which is not true. Besides this, Mrs. Di Ponte had kept records, but she was subsequently disqualified.

I was then told that the United Nations wishing for the Tribunal to fix a term of completion, from 2004 onwards, it no longer had the possibility to initiate new procedures.

However, defence lawyers told me that there had at least been one procedure, which was immediately transferred to the Rwandan justice system, which acquitted them.

We also find an example of this one-sided bias in a hearing report herein below.

### **2.2. Inequality of the parties**

My interlocutors contested this but did not give any concrete solution to the questions raised by this inequality.

There has only been an objection about inequality over the duration to gather and present evidence, which was inaccurate. The objection considered that the defendants were aware from the beginning of what they were prosecuted for. I had to point out that this did not exclude the fact that the accused were not able to start searching for witnesses in order to contest charges until after the prosecution witnesses were heard before the Tribunal. In addition, I was told that modifications repeatedly made in indictments during procedure prevent defendants from being informed without undue delay of the facts alleged against them.

### **2.3 Philosophy of the Tribunal**

One of my interlocutors told me that the problem of the rights of the accused was not the most important, because the important thing was the compensation to the victims by giving all necessary publicity to what the genocide was. I had to point out that if the rights of the accused should be dependent on it, they would become hostages, and sacrificial victims **that is** victims to be protected.

## **3. The Hearings**

### **3.1. The lack of publicity**

As an anecdote, luck would have it that **the** first hearing I wanted to attend was held in-camera. The out of the court ceased for the time of the suspension of the hearing but was reinstated immediately after the hearing resumed and remained for all the afternoon. The motive given was the protection of the witness; I was told that there was extensive practice of in-camera hearings before this Tribunal.

More generally, the fact that this Tribunal **is** relegated to a location not very frequented and difficult to access deprives it of any real publicity. My interlocutor who considers that the Tribunal has a redemptive mission complained. However, this **is** also and above all damaging to the defence.

Almost all of the time I spent attending hearings was focused on the 3 days hearing of the representative of the Secretary General of the United Nations who was the head of UNAMIR during the time of the events.

Before any court, this visit would have constituted a scoop involving swarms of press journalists. For 3 days, the public gallery saw only about a dozen curious and 2 journalists, one of which was the Tribunal's news agency the other that of a Tanzanian newspaper.

### **3.2. The perverse effects of cross-examination**

One had to attend the hearings to realise its importance.

#### ***The tennis match***

The Tribunal can give the witness the right to address the parties who interrogate him, the same is given to the said parties and can be censored by the judge if needed but the witness

can in no way intervene in matters related to questions of law. The defendants are reduced to the same condition as that of a dumb witness, comparable to a tennis ball in a tennis match, receiving shots from lawyers and prosecutors.

The questions addressed may have no legal importance but can be aimed at destabilizing a witness or discrediting him for lying or making errors. It allows all tricky methods to be used.

This is more damaging as the Tribunal has no power to direct investigation other than by the said cross-examination by the parties, documentation and "objective" (material) evidence can only be taken into consideration through hearing witnesses, regardless of the subjective colour that this entails.

Moreover, the procedure is organized in such a way so it does not examine evidence and counter-evidence fact by fact but first organises a hearing of a global accusatorial act by the prosecutor, followed by a global response by the defence. The result is that quarrels of intent, moods and impressions, prevail easily over objective materiality. This leads to a situation where the absence of producing sufficient evidence is not enough to cause the dismissal of the proceeding or the accused who still has to take the whole cursus of demonstrating his innocence and the lack of legal grounds for his indictment, regardless of the cardinal principle that every one is presumed innocent until the contrary has been proven.

Finally the interplay of questions makes the hearings last interminably and their succession lasting for several months, makes it impossible to keep a coherent follow-up

This stretch of procedures has on the other hand an the effect of extending a particularly abnormal period of remand in custody (as there is no example of bail in the history of the Tribunal), custody that can be delayed up to as much as 18 months after the close of the Procedural hearings for purposes of deliberation before the Tribunal comes to a verdict.

### ***Some significant moments***

#### ***A call to order***

While the United Nations' representative who was present in Rwanda at time of the events, was giving his testimony before the court. At one point, he recalled the events that followed the attack against the President, and actually said "The RPF was engaged in massacres"

He was then interrupted by the President: *"Mr. Witness, I remind you that you are testifying by virtue of authorization of the Secretary General of the United Nations, and you must stay within the limits of this authorization »*

The President finished this reminder by inviting him to *"think about the limits of the authorization received"*

However, on verification, this authorization contained no such limitation. This is just an example of unilateralism. The next day when I made mention to this in my interview with the President, he gave the impression that he had heard nothing.

## **What should be shown?**

The next day, the same witness was again examined about the same sequence of events. He qualified as illegal the interim government, which was formed after the attack. After this, the following dialogue took place:

**The prosecutor:** *"The Prime Minister and the Belgian soldiers were therefore killed by this criminal government?"*

**Witness:** *"No I did not say that, I spoke about an illegal government (NB because the President having died the government could not have been formed by him) but I made no mention a criminal government »*

**The prosecutor** *"yet you did say that these people had been murdered by a criminal government? »*

**Witness:** *"No, the government was only established two days later, I spoke of a criminal gang"*

**The prosecutor:** *"Well then you spoke about a criminal government"*

## **Luck**

One witness explained that he was discharged of one of the charges he was prosecuted for because the only person witnessing against him presented himself as his employee at time of the events, and was unmasked as having actually been a military of the other camp. Luckily, he was able to prove it, but how many have been sentenced after having failed to prove the deception and subornation.

## **And for the future?**

### ***The acquitted***

This problem is particularly irritating. Having been acquitted they are not anymore "presumed" innocent but "deemed" innocent

Yet there is no authority of res judicata for the authorities of Rwanda, which prevents the acquitted abroad to return from a host country. But few people were able to find a host country and while awaiting to find one they remain hosted by the Tribunal under conditions similar to house confinement, with a supply of food typically prison like without possibility of work, without resources and separated from their families ... .. And no one knows what will become of them when the Tribunal closes.

Incidentally, after having undergone several years of wrongful imprisonment, they did not receive any compensation.

This is an △ intolerable situation for which the international institutions are responsible △ and they should strive to remediate it.

Even though it was confirmed to me that even the Tribunal had concerns about this and that everything that could be done in that respect would be welcome.

This situation has been ongoing for years for some of the acquitted.

### *The defence counsels*

These, and particularly those of Rwandan origin, drew my attention to the fact that the Rwandan authorities consider that defending an accused before the Tribunal constitutes a criminal denial of genocide.

They are seeking international guarantees of immunity for the duty of defence for citizens or refugees of Rwanda as for others who are at the mercy of an international warrant of arrest.

The archives

The archives of the Tribunal are large, and protection due to witnesses and lawyers and the conservation of accusatory elements provided by the parties and collected by the court both require a guarantee that they will not be made available to the actual governing party and that they will be kept necessarily in conditions ensuring neutrality. I was told that steps were being taking to that effect, but we should all remain vigilant about this.

### *The Convicted*

During their sentence: the Tribunal will have disappeared before the sentences have been served, so there is the question of the place of transfer and under which authority.

After having served the sentence: a problem of re-indictment similar to acquitted persons will arise sooner or later.

### *Review proceedings*

What has been said hereinabove concerning conditions under which the convictions involved suggests that revisions of procedures may arise?

It has already been indicated to me that  $\wedge$  applications for review have been filed and heard before the Tribunal itself, which seems to consider that such prosecutions as for the prosecution against the RPF are subject to the principle of universal jurisdiction.

## **CONCLUSION**

The function of a court is not to give a guarantee to historical debates or to take a position on political analysis, but render justice, and under criminal law to convict the perpetrators of crimes, but under the guarantees of justice which ensure that sentences are fair and do not apply to the innocent, and that are not made of wrongful convictions.

It results from the findings of this report that the defendants did not receive and do not enjoy the guarantees of fair justice. This is due both to the conditions of the establishment of the Tribunal that led to the creation of a special Tribunal and the location of its site that kept it away from the control of public opinion, that the choice of the cross-examination as a mode of procedure did not only burden the administration of cases filed of an unusual length of time but also made collecting evidence at the dependence of one of the parties.

**This leads :**

- 1) to draw lessons for the establishment of a permanent court mandatory for all, "equipped" with a procedure code truly international,
- 2) to reserve all possibilities for the review of convictions and sentences pronounced under conditions of impaired objectivity.
- 3) to ensure by appropriate means, either within the framework of a permanent universal court to be established or by applying the universality principle, that criminal proceedings remedy the unilateralism weighing over the global activity of the Tribunal
- 4) to take all steps to ensure that (a) the acquitted defendants should be held harmless from the prosecutions initiated against them, b) that defending counsels be free from retaliation for fulfilling their duty of defence, c) that those sentenced should be protected for any damages beyond, once they have served their sentences, and d) that records are protected from being altered and from all misuse.