



The ICTR, Law and International Politics: A Defence Perspective

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**Conference on the ICTR legacy
from the defence perspective
14-16 Nov. 2009
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Introduction

The United Nations International criminal Tribunal for Rwanda (ICTR) has a few years to go but discussions about its legacy for the International Criminal Law have started. While some perceive that Tribunal as a major advancement, others, including defence lawyers who have been defending genocide suspects for the last fourteen years, think that the ICTR and other ad hoc courts, have created a regrettable precedent. For Kenyan defence attorney Kennedy Ogetto 'the ICTR has been a big mistake'. For his colleague Charles Taku, from Cameroon, the ICTR is a huge cover-up, and is guilty of complicity in the current 'legal genocide against the Hutu'. Majority of speakers blamed the ICTR for guaranteeing impunity to the former rebels now in control of power in Rwanda. These views, and many others, were expressed during the 14-16 November 2009 self-sponsored conference organised in The Hague, the Netherlands, by defence attorneys. The more or less 120 people, Rwandans, but also foreigners coming from all over the world listened to presentations by the lawyers, scholars and experts. This short essay attempts to bring together the main issues that were discussed, namely the illegality of the ICTR, the externally-engineered distortion of truth, the conspiracy theory that serves as the cornerstone of the prosecution's strategy, witness-related issues, the fate of the ICTR archives, and post-judgement issues.

ICTR legality challenged



Roland Weyl, lawyer
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“All the tribunals set up by the Security Council are marked by a fundamental international illegality”

Is the ICTR legal? This question might appear superfluous and useless to pose. Some would argue that since the initiator of that Tribunal -the United Nations - represents the international community and acts in the interest of humanity, whatever it does for that end, is *ipso facto* legal and legitimate. Lawyers are known for their sense of the detail, the one that confuses the opponent. They distinguish between the UN as a whole, its legislative branch known as the General Assembly, and its executive, that is the Security Council, and the smallest details about their respective tasks: ‘All the tribunals set up by the Security Council are marked by a fundamental international illegality’, veteran French Lawyer Roland Weyl said during the conference. Weyl has been practicing Law since 1939 and is the first Vice President of the Association Internationale des Juristes Démocratiques. He explained that the sole task of the Security Council is to keep and restore peace: ‘The setting up of criminal tribunals is ... a prerogative of the General Assembly in its full sovereignty’, he concluded.

Looking at ICTR legality from the philosophical point of view, Austrian Philosophy professor Hans Koechler argued that since the Security Council’s decisions follow the will of the five super powers with a permanent seat and a veto right, any justice emanating from the courts created by that organ would be politically biased: ‘No *ad hoc* criminal court should be created by the UN Security Council’, because, then, justice would be administered by the five super powers. Another veteran lawyer, former United States’ Attorney General Ramsey Clark, also maintained that even though the ICTR illegality and partiality were obvious, most seemed agree about it, preferring to ignore the devastating damages it causes, and the Rwandan people’s self-confidence it destroys through its selective policies.

Fabricating historical truth



Chief Charles Taku, defence lawyer
(c) O. Nyirubugara, 2009

“The ICTR is a huge cover-up”



John Philpot, defence lawyer
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“They have not succeeded in their major plans”

A question rises: why is this so-easily demonstrated illegality accepted? Taku puts the ICTR in the heart of a ‘huge cover-up’ mechanism that has been put in place to ensure that certain criminals are not prosecuted: ‘why did the Security Council immediately decide that it was an internal conflict?’, Taku wonders, referring to Resolution 955 that created the ICTR in late 1994. He answered: ‘the reason is clear...they wanted to ensure that the RPF¹ is not pursued or prosecuted for the crimes committed from the day of the attack from Uganda’. If it were prosecuted, then the complicity of Uganda, the United States, the United Kingdom would come to light. That is even why they limited the jurisdiction of the Tribunal to 1 January and 31 December 1994, ‘because they wanted that only the Hutus should be prosecuted’. Indeed, only the Hutus have been prosecuted in over 15 years of prosecution: ‘The prosecutor’s policy has been a knockout victory for the RPF: 80-0’, said Canadian lawyer John Philpot. Philpot questions the credibility of the Court, criticizing especially its accusatory policy that has so far been ‘flagrantly discriminatory’.

Like Taku, French journalist Pierre Péan, whose investigation about the RPF ramifications and connections in France was published in his 2005 *Blancs menteurs, noires fureurs*, understands that discriminatory policy as emanating from the US, the UK and their satellites. For him, ‘the guardians of the temple’, that is the prosecution, ‘have deployed incredible energy to prevent that truth on the 6 April 1994 attack [against president Habyarimana’s jet] comes out.’¹ To do so, they simply decided to ‘demonize the sole Hutus’ on the one hand, and to ‘reduce that tragic history to a mere a face-to-face conflict between the bad guys [Hutu] and the good guys [Tutsi]’.

1. Rwandese Patriotic Front, a former rebel group dominated by the Tutsi minority, on power since 1994.

2. Pierre Péan, *Le TPIR comme instrument de légitimation des actions de grandes puissances dans l’Afrique des Grands Lacs* (2009)



Gaspard Musabyimana, author
(c) O. Nyirubugara, 2009

“ICTR: Law or politics?”



Peter Erlinder, Law professor and defence lawyer
(c) O. Nyirubugara, 2009

In other words, as Rwandan author Gaspard Musabyimana explained, the ICTR has decided to do politics instead of rendering justice, by for instance privileging negotiated confession ‘shortcuts’ rather than fair trials.³

Placing the ICTR and its work in a historical perspective, French history professor Bernard Lugan considers the methods being used ‘unacceptable’. Among other reasons, the ICTR has stagnated on its initial assumptions and theories, most of which are now obsolete, and ignored to incorporate new findings that surfaced in the last fourteen years. For instance, new evidence has surfaced regarding the downing of president Juvenal Habyarimana’s plane; the same goes for the assassination of Hutu leaders between 1991 and 1993; the crucial involvement of the RPF in the Interahamwe militia leadership has been evidenced. Professor Lugan, who did not attend the conference but sent a paper, regrets that ‘at no single occasion the ICTR prosecution took into account these new and essential elements’.⁴ The single occasion when the new elements were about to be taken into account, the audacious prosecutor who dared violate the founding principle of the ICTR paid for it. Law Professor and defence attorney Peter Erlinder dedicated his presentation on the recently published books by former ICTR prosecutor Carla Del Ponte,⁵ and by her former communications aid Florence Hartmann.⁶ Both explain how Del Ponte resisted instructions coming from US envoys and persisted in willing to start prosecuting RPF suspects. She was immediately ejected from the ICTR. Professor Erlinder placed these revelations in a chain of many others from former senior UN officials, which all push to conclude that the ICTR is manipulated by the United States and the United Kingdom to the benefit of the current Rwandan government.

3. Gaspard Musabyimana, *Le TPIR devant un dilemme : dire la politique ou le droit ?* (2009)

4. Bernard Lugan, *Le TPIR face au jugement de l’histoire* (2009)

5. Carla Del Ponte with Chuck Sudetic, *Madame Procureur: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (2009)

6. Florence Hartmann, *Paix et châtimement: les guerres de la politique* (2007)

Witnesses



Joseph Matata, Human Rights activist
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Witnesses have become professional testifiers, 'real artists'

7. Alexander Zahar, *The problem of false testimony at the International Criminal Tribunal for Rwanda* (2009)

8. Allison Turner, *ICTR witness protection?* (2009)

The above has suggested that the ICTR is creating a Genocide narrative which most speakers qualified as a voluntarily distorted version of the past, marked by a strong willingness to prevent any revisiting of the established narrative. That exercise only gets a semblance of credibility when scores of people show up to corroborate the prosecutor's story. This is where the witnesses come in and raise unprecedented legal issues in the history of International Criminal Law. Human rights activist Joseph Matata, investigated the false-witness issue and came to the conclusion that the RPF regime has put in place a system that recruits, trains, and pays witnesses, who then go around both in Rwandan and foreign courts bearing false witness: 'you, ICTR defence lawyers, have certainly seen many professional witnesses who show up many times in many trials', Matata said, calling that phenomenon, the 'Genocide industry', as it allows those involved to generate income. In his paper, Alexander Zahar of the Griffith Law School in Australia discussed the 'The problem of false testimony' at the ICTR.⁷ In the trial he was involved in, and which ended with an acquittal, the judges managed to detect the incoherence of those Matata called 'professional witnesses'. They observed that the key witnesses' testimonies were hearsay-accounts, giving 'irreconcilable versions of the facts', and 'shifting over the years'.

Canadian Allison Turner considered the witness issue from a different perspective, namely the 'ICTR witness protection'.⁸ She is convinced that there are some lessons to learn from the so-called special protection for witnesses, especially defence witnesses. According to the agreement between the ICTR and the government



*Allison Turner, Defence lawyer
(c) O. Nyirubugara, 2009*

“Lessons can be drawn from the ICTR’s failed legacy of witness protection...”

of Rwanda, where most witnesses live, Rwandan judicial and immigration officials are the ones who determine the availability of witnesses, and who ensure that they receive travel documents. For that, all personal details are communicated to Rwandan authorities. The result is that the Rwandan Prosecutor’s Office contacts the defence witnesses before they leave for Arusha. For Lugan, ‘the ICTR witnesses mostly come from Rwanda, where they are either in jail or “free”, but always accountable for their statements once back home’, and, for that reason, ‘their sincerity is questionable’.

The conspiracy theory



John Laughland, Law professor
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***“The JCE
undermines
the rule of
law”***

9- Helmut Strizek, *The Influence of the International Background on the Creation of the International Criminal Tribunal for Rwanda (ICTR): An Historian's View* (2009)

Presenting ‘An Historian’s view’ of the situation that culminated in the creation of the ICTR, German Historian Helmut Strizek sees a plan put in place long before the 1994 genocide. According to him, the conspiracy started materialising in January 1993, when a Human right investigation team reported that a genocide against the Tutsi was in preparation. The RPF, who had commissioned this report via their western connections, used this occasion to ‘create a situation where desperate Hutu would in fact perpetrate mass murder against the Tutsi’. Strizek goes further to compare the Rwandan situation to the one in his home country back in the late 30s-early 40s: ‘Contrary to what took place in Germany where the State clearly persecuted the Jews, what happened in Rwanda is a *sui-generis* genocide’. Moreover, the Jews were not at war against Germany while the RPF was. The latter even sacrificed the Tutsi inside the country already suspected on collaboration with the RPF. For Strizek, the vacuum created by the death of president Habyarimana in April 1994 led to what he called a ‘spontaneous genocide’. However, this conspiracy is not the one that worries the most the ICTR defence attorneys. Their concerns are about the Joint Criminal Enterprise, the doctrine consisting in grounding all the accusations on the existence of a joint plan. The logic then becomes that since the plan was a joint enterprise, suspects should be tried in groups of conspirators.

British International Criminal Law scholar and Sorbonne professor John Laughland holds that prosecuting and trying suspects in groups in criminal courts undermines the rule of law. The ICTR Office of the Prosecutor has been using the Joint Criminal Enterprise doctrine to put former government leaders, and former military commanders in



Beth S. Lyons, Defence lawyer
(c) O. Nyirubugara, 2009

“What happens at the ICTR...is that there is a presumption of guilt”

10. Beth S. Lyons, *Tortured Law/Tortured “Justice” – Joint Criminal Enterprise in the Case of Aloys Simba* (2009)

groups. According to Laughland and other lawyers, the aim is to prove that a conspiracy took place, without proving the personal responsibility of each of the accused. ‘The notion of a plan is far from contributing to reconciliation’, said Laughland, suggesting that it would rather fuel conflict and violence as different groups would hasten to have their own plans. He added one frequently ignored remark, that, in times of armed conflicts, like in Rwanda between 1990 and 1994, ‘crimes might have been dictated by the violence of the other side’.

Beth Lyons, another defence lawyer from the US, reminded of the metaphors that refer to the Joint Criminal Enterprise as the prosecutor’s ‘the nuclear bomb’ or ‘magic bullet’.¹⁰ In her words, that doctrine ‘tortures’ Law and Justice, because, contrary to the basic notion of presumption of innocence, it constrains defence counsels to prove the innocence of the accused: ‘We have no obligation to prove the innocence of our clients’, she said, reminding that ‘a person is presumed innocent’ until the prosecution has proven beyond any reasonable doubt that he or she is guilty. ‘What happens at the ICTR’, she went on, ‘is that there is a presumption of guilt...and this is wrong.’ Despite this collective and systematic presumption of guilt, Philipot noted that the ICTR did not manage to prove the existence of a plan to commit the genocide. Referring to the 18 December 2008 judgement in the Military 1 trial, grouping among others ‘the great conspirator, the great killer, the mastermind of the genocide’ Colonel Theoneste Bagosora, he triumphantly said: ‘NO finding on conspiracy! That was a tremendous victory’. Two days after saying this, Philipot celebrated tremendous victory: his client, Protais Zigiranyirazo was acquitted by the Court of Appeal. Mr. Z is the brother-in-law of late president Habyarimana and has been held by the prosecution as the initiator and mentor of the Akazu, the small circle around Habyarimana that allegedly planned the genocide. ‘They have not succeeded in their major plans’, Philipot said, during the conference.

What archives mean for lawyers



Gershom Otachi Bw'omanwa, Defence lawyer
(c) O. Nyirubugara, 2009

Should ICC archives on Darfur go to Darfur?

The ongoing discussions about the future of the ICTR archives, especially who will be their guardian when the Court closes its doors, have raised a number of issues and given rise to new theories about the relationship between the archives and collective memory. The government of Rwanda, dominated by former RPF rebels, wants to have the guardianship of the archives, at all costs. At first sight that would not be a problem. Any way, that is where the crimes took place. A new theory is making its way into trauma and memory theories that archives relating to mass murder should be the closest possible to the theatre of conflict. Kenyan lawyer Gershom Otachi Bw'omanwa demonstrated the weakness of that argument using the following example: the International Criminal Court (ICC) is conducting trials on the DR Congo, the CAR, and could start others on the Darfur and Kenya. Should its archives go to each of those theatres of conflict or should they be preserved at The Hague ICC headquarters? He wonders. He then explored the possibility of having those archives entrusted to the East African Community (EAC), of which Rwanda is member. The risk, he says, is that Rwanda would 'bully' other member states to have the archives. Others would ask what is wrong in having the archives in Rwanda. Canadian lawyer and law professor André Tremblay's confession is revealing in this respect. Those archives contain crucial pieces that might change the course of Rwandan history:

I want to confess something: I know now that there are in the ICTR's archives the reports of what is known as the Special Investigation Unit. The prosecutor never admitted the existence of that special unit,



André Tremblay, Defence lawyer
(c) O. Nyirubugara, 2009

while in the Prosecutor's safe there are exculpatory documents that were never, ever disclosed to defence counsels. The worst scenario would be sending those archives containing the investigation reports on RPF's crimes to Kigali. It is a possibility. I warn you. This should not happen.

From this point of view, having the ICTR archives in Rwanda would mean losing any hope of having the RPF criminals brought to justice, however late that would be. However, it will be up to the UN Security Council, the creator of the Court in the conditions mentioned and criticized above, to decide. If one considers the cover-up mechanism of which the ICTR is part, one comes to the conclusion that there are big chances that the last traces residing in the archives will be sent to Rwanda or simply be destroyed, because keeping them would be exposing the super-powers involved in the Rwandan tragedy.

Acquitted but...



*Seydou Doumbia, Defence lawyer
(c) O. Nyirubugara, 2009*

***The situation
after acquittal
is even
worse than
ordinary
detention.***

So far, the ICTR has acquitted a few suspects. However, according to the lawyers, acquittal does not mean more than leaving the ICTR detention facility. The post-prison life seems to be another prison, a psychological prison, to summarize Malian lawyer Seydou Doumbia's presentation. Doumbia discussed the deplorable and pitiful situation of the ICTR acquitted who are still to be reinserted back into normal life. While some have managed to find countries accepting to grant them asylum, many others are still in so-called 'safe houses' in Arusha, Tanzania. Yet others found their families dislocated and, on top of that, could not find jobs as no one wants to employ a genocidaire. 'Yet these are people who committed no crimes', said Doumbia. His colleagues Sadikou Alao from Benin and Philpot, presented about the convicts in Benin jails and the inmates in the ICTR detention facility, respectively. Their situation is mostly marked by uncertainty and worries, especially as to their fate after the ICTR closure now scheduled in 2012.

While those detained in Mali and Benin seem to be worried much more about health care, legal assistance, right to parole, food and other every day basic needs, those in Arusha fear their transfer to Rwanda, which has already signed a detention agreement with the ICTR. Should that happen, said Philpot, that would mean that the losers would be thrown in the claws of the winners and would spend the rest of their lives in isolation, a punishment that the Rwandan authorities replaced the death penalty with.

Conclusion



Kennedy Ogetto, Defence lawyer
(c) O. Nyirubugara, 2009

“The ICTR has been a big mistake”

Two remarks even push to more pessimism. In the first place professor Tremblay’s reflection on the residual mechanism being discussed by the UN Security Council leaves little room for hope: ‘I can assure you that the system we knew in Arusha will be maintained, and perhaps it will be worse’. Secondly, professor Lugan’s observation: would all the violations of basic principles at the ICTR have been possible if the suspects had been White and if the trials had not taken place in the heart of Africa, far from news media? His conclusion is that the ICTR, on its turn, will be judged by History, and the judgement will be ‘very severe’. All in all, the major conclusion of the 14-16 November Conference is that the solutions to the Hutu-Tutsi conflict in Rwanda is not to be found at the ICTR. All the speakers almost unanimously suggested that that court is rendering reconciliation even more complicated, by integrating lied and manipulated testimonies into its narratives. Most speakers rather see the solution in Rwanda itself, especially in the democratization of its political system, which would signal the end of ethnic, collective criminilization.

One interesting question kept popping up from the audience: ‘is there any thing positive to be noted with regard to the ICTR?’. The different answers put together could be summarised as follows: the ICTR has shown that the Rwandan tragedy was not just a Hutu-Tutsi face-to-face, that there were bigger stakes in play than just the small Rwandan territory. The selective prosecution strategy has been explained as offering impunity not just to the RPF but mainly to its sponsors. Allowing the RPF to stand trial would be exposing themselves. In a sense thus, the ICTR will have enabled every one to see how politics hides itself behind the International Criminal Law, especially ad hoc criminal courts. One other positive point of the ICTR from the answers provided and presentations in general, is that the ICTR has triggered debates that might enrich the International Criminal Law literature, on issues like the Joint Criminal Enterprise and witness-related issues. However, it is another story whether these debates will serve for the future, since the decisions seem to come from the five super-powers seating in the UN Security Council, whose political interests are much bigger and more important that the rights of people in Rwanda or elsewhere.

Presented & sent papers

1. ARGR – INTABAZA , Association des réfugiés Rwandais rescapés du génocide Rwandais, François Rwabukwandi, 'Marginalisation par le TPIR de toute tentative de réconciliation et impunité des criminels du FPR'
2. Alao, Sadikou, 'les decisions du TPIR peuvent-elles permettre la reconciliation des rwandais ?'
3. Amann, Gabriel, 'The Disclosure Regime Before The ICC: The Right To A Fair Trial'
4. Beule, Christiaan de 'Le TPIR a-t-il une responsabilité morale dans la recrudescence des violences dans la Région des Grands Lacs Africains?'
5. Bw'Omanwa, Gershom Otachi, 'Tribunal Archives'
6. Clark, Ramsay, 'International Criminal Courts for the 21st century: Equal Justice Under International Law, or War by Other Means?'
7. Dimitri, Mylène, 'Les Frontières de la Divulgation de la Preuve (The Borders of Disclosure and Cooperation)'
8. Erlinder, Peter, 'UN Security Counsel - created "Victor's Impunity" at ICTR and Prospects for the ICC'
9. Gatebuke, Justin [spokeperson of the Rwandan Community in Tennessee], 'Justice Denied to Rwandans. What to do with the ICTR detainees?'
10. Hinds, Lennox, 'The Presumption of Guilt at the ICTR'
11. Hoikkala, Ville, 'Legal Issues: Trial of François Bazaramba in Finland'
12. Hourigan, Michael, 'ICTR-OTP Suppression of RPF Crimes and Distortion of History'
13. Koechler, Hans, 'Depoliticizing ICJ: Global Justice or Global Revenge'
14. Laughland, John, 'Undermining the Rule of Law: Joint Criminal Enterprise and Command Responsibility in International Criminal Justice'
15. Loverdos, Jordi Palou, 'Impunity, international courts and universal jurisdiction: last law changes in Spain and debate at UN'
16. Loverdos Jordi Palou, "Spanish Universal Jurisdiction and Rwanda/DR Congo Case: Impact on UN and ICTR"
17. Lussiaà-Berdou, Cainnech, 'Witness Protection Orders'
18. Lyons, Beth, 'Tortured Law/Tortured "Justice" – Joint Criminal Enterprise in the Case of Aloys Simba'
19. Matata, Joseph, 'Le système de délation institutionnalise'

20. Meilhac, Philippe, 'La France : le traitement des personnes accusées du génocide : actualités et perspectives'
21. Moran, Tom and Cynthia Kline, 'Some Thoughts on Issues at the ICTR, Power point presentation'
22. Musabyimana, Gaspard, 'Le dilemme du TPIR: le droit ou la politique'
23. Ndagijimana, Jean-Marie Vianney, 'Apartheid mémoriel et judiciaire: le cas des Gacaca et du TPIR'
24. Ndereyehe, Charles [pour Victoire U Ingabire, candidate à la Présidence du Rwanda, Forces démocratiques unifiées, inkigi (United Democratic Forces)], 'Les Raisons Objectives de la faillite du TPIR dans la réconciliation des Rwandais'
25. Nderitu, Wilfred, 'The Issue of Perjury/Evidence Gathering at the ICTR and Its Impact on the Administration of Justice'
26. Njiru, Boniface, 'Why the ICTR has had a Zero Deterrent Effect in Africa, particularly in the Great Lakes Region'
27. Nyetera, Antoine, 'L'éducation au mensonge et les calomnies chez les Rwandais'
28. Ogetto, Kennedy, 'The challenges of defending international crime suspects – the application of JCE and superior responsibility by the ICTR and SCSL'
29. Péan, Pierre, 'Le TPIR comme instrument de légitimation des actions des grandes puissances (USA, Grande-Bretagne et Israël) dans l'Afrique des Grands Lacs après la chute du Mur de Berlin'
30. Philpot, John, 'Impunity at the ICTR'
31. Philpot, John, 'Post Conviction Issues: an Overview'
32. Strizek, Helmut, 'The Influence of the International Background to the Creation of the ICTR: A Historian's View'
33. Taku, Charles, 'ICTR: Eternalizing the 'Judicial Genocide' of the Hutu'
34. Tremblay, André and Sandrine Gaillot, « Les conditions de liberté et de sécurité des détenus, après la fermeture du TPIR »
35. Turner, Allison, "'Disciplinary Issues" and "Witness Protection Orders'
36. Zahar, Alexander, 'Rwamakuba case and problem of False Testimony'
37. Weyl, Roland, 'Commentaire sur la légalité du Tribunal'