

## **IMPUNITY AT THE ICTR**

### **JOHN PHILPOT**

On October 8, 2009, Judge Dennis Byron, President of the ICTR, stated at the United Nations General Assembly that “The answer must be a continuous and comprehensive fight against impunity for those who committed genocide, war crimes and crimes against humanity in Rwanda in 1994”

The term impunity has been very popular in ICTR circles since 1994. Is the ICTR the end of impunity in Central Africa or is it a guarantee of impunity for war makers and war criminals who invaded Rwanda in 1990 and took power in July 1994?

What punishment exists for :

- the wholesale massacres carried out by the RPF from 1990 onwards, for crimes committed in 1994,
- killing the two Hutu Presidents in April 6, 1994,
- the willful massacre of civilians during the road to power,
- the well documented massacres after taking power,
- the killings at the Kibeho refugee camp in Rwanda in April 1995?
- the war on the Congo and the tracking and persecution of hundreds of thousands of Hutu refugees beginning in November 1996?
- The list of RPF crimes is interminable and continues to the present.

In 1995, I wrote a paper entitled THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA - JUSTICE BETRAYED<sup>1</sup>.

In this paper, I asserted :

- In its form and structure, the Tribunal does not respect basic legal requirements of independence, impartiality, and broad international acceptance required of a tribunal

set up in international law. Furthermore, its mandate - limited in time, limited in who can be indicted, and narrowly limited in jurisdiction to violations of international humanitarian law - will prevent any light from being shed on the real issue raised by the Rwandan conflict, namely that of armed military intervention in Rwanda from Uganda, the root cause of the conflict.

- The likely result of its hearings and judgments will be the reinforcement of a distorted one-sided view of the crisis in Rwanda, and a justification for further genocide against the Hutu populations of the region by the Tutsi minority now in power. It will legitimate further interventionist policies in Africa and elsewhere to the detriment of established principles of international law and institutionalize the *de facto* impunity for the members and supporters of the present government of Rwanda who undoubtedly committed many serious crimes between October 1, 1990 and the present.<sup>2</sup> It will likely prevent the international community from learning about the causes of the terrible events which took place in Rwanda from 1990 to the present.
- The Tribunal will not envisage indictment of leaders of the Rwandese Patriotic Front for the planning the April 6 murder of Rwandan President Juvénal Habyarimana and President Cyprien Ntaryamira of Burundi nor for the elimination of ethnic Hutus during the four year war nor for the continuing arbitrary murder of Hutus in Rwanda. Nor will it or can it examine potential indictment of Belgian, American or Ugandan Government officials for the April 6, 1994 murder of these two Hutu Presidents in spite of ample evidence that such crimes deserve serious investigation.

### **War of aggression and the law of Nuremberg versus the Law of the ICTR**

The International Criminal Tribunal for Rwanda deals with crimes committed in the context of war but there is no provision dealing with a war of aggression. The ICTR (and the ICTY) were radical departures from existing international law. International law and the law of

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<sup>1</sup> It was published in French in *Le Tribunal international pour le Rwanda, La justice trahie*, in *Études internationales*, vol. XXVII, No. 4 décembre 1996. Copies of this paper in English and French will be sent by email with the papers given in this conference.

<sup>2</sup> *Rwanda, Les Violations des droits de l'homme par le FPR/APR. Plaidoyer pour une enquête approfondie*, S Desouter, F Reyntjen, Université d'Anvers, Institut de Politique de Gestion du Développement, Centre d'Etude de la Région des Grands Lacs d'Afrique Centrale, Working Paper, Anvers, June 1995

Nuremberg were based in different principles. The violation of national sovereignty, the planning and waging of a war of aggression were among the greatest crimes which exist and are established concepts universally recognized in international law.

Article 6. (a) of the Charter of the International Military Tribunal(Nuremberg) describes CRIMES AGAINST PEACE, namely:

"planning, preparation, initiation or waging of a war of aggression, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

Other subsections of the Charter describe crimes committed in the pursuit of the war.

The Court judgment under the pen of Mr Justice Birkett states:

"The charges in the Indictment that the defendants planned and waged aggressive wars are the charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from the other war crimes in that it contains within itself the accumulated evil of the whole."

The modern Rwandan conflict began with the invasion of Rwanda from Uganda in the north by the foreign RPF/NRA(Ugandan) army on October 1, 1990. This well planned and well organized invasion was followed by the four year war which ended with the military victory of the RPF in July 1994. Questions raised by this war include: the violation of Rwandan sovereignty and the planning and waging of the war by President Museveni of Uganda and by the leaders of the RPF, and the conduct of the war by the Rwandese Patriotic Army (RPA) and by the defenders of Rwanda.

Experience in defense has confirmed the perception of Rwandans that the country was invaded on October 1, 1990.

The principle of sovereignty is enshrined in international law: a country must not intervene in the internal affairs of another country. An army cannot therefore invade a neighboring

country. African law and African human rights law have created additional important duties concerning refugees and invasions from neighbor countries based on the particularities of modern African history.

The law is clear on this question. And is it not also clear that the most serious crime is the planning and implementation of aggressive war in violation of established principles in international law? Is it not all the more serious when such a war - the invasion of Rwanda from Uganda by joint Ugandan - RPF forces - is specifically forbidden by the major African legal instruments?

The International Criminal Tribunal for Rwanda refused to address the issue of the invasion as a war crime even as an international event. The war on Rwanda is considered the war as an internal war. Trial Chambers and the Appeals Chamber have held that the Rwandan war was a non-international armed conflict.<sup>3</sup> The Court went so far to decide that the “fact” that armed conflict in Rwanda was internal in character was not subject to reasonable dispute and should be judicially noticed.<sup>4</sup> This author does not share this view.

The ICTR has unwisely set aside definitively the reality of the international nature of the war.

### **Other Crimes**

The RPF also committed crimes during its war of invasion. The crimes commenced on 1 October 1990 and continued after taking power. Most concerned the indiscriminate intentional slaughter of civilians and acts of terrorism such as indiscriminate bombing of bus stations and other targets, mining of farming land, torture of Hutu peasants.<sup>5</sup> On April 6, 1994, it also

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<sup>3</sup> *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 74; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 621

<sup>4</sup> *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 198; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 29; *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, *Decision on Judicial Notice of Facts of Common Knowledge* (22 February 2008)

<sup>5</sup> *Rwanda, Les Violations des droits de l’homme par le FPR/APR. Plaidoyer pour une enquête approfondie*, S Desouter, F Reyntjen, Université d’Anvers, Institut de Politique de Gestion du Développement, Centre d’Etude de

assassinated President Habyarimana and his entourage, President Ntaryamira of Burundi and his entourage and French citizens manning the airplane.<sup>6</sup>

The United Nations in the “Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)»<sup>7</sup>, dated February 1995 stressed the importance of charging both sides in the war and the need for complete impartiality objectivity in laying charges.

It is common knowledge that the Prosecutor of the ICTR has indicted approximately eighty Hutu and no member of the RPF or no Tutsi. It is also common knowledge that all the information on the RPF is available in the Prosecutor’s office. The Prosecutor’s policy has been a knockout victory for the RPF : 80-0.

One would think that such a clearly discriminatory accusatory policy would be ground for invalidating an indictment or quashing charges. There are serious credibility problems with a Court when the accusatory policy is flagrantly discriminatory. It is particularly egregious when there is outstanding evidence of the guilt of the other side.

### **Jurisprudence on the discriminatory policy**

The Chambers have held that a discriminatory policy of only indicting one side cannot permit the quashing of an indictment. The defence has the high burden of rebutting the presumption of prosecutorial discretion, by (i) establishing an unlawful or improper (including discriminatory) motive for the prosecution; and (ii) establishing that other similarly situated

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la Région des Grands Lacs d'Afrique Centrale, Working Paper, Anvers, June 1995, Ruzibiza, Abdul Joshua. 2005. RWANDA: L'HISTOIRE SECRETE. Paris: Editions du Panama. 494 pp, TEMOIGNAGE d’Aloys RUYENZI, <http://www.inshuti.org/ruyenzif.htm>, Gersony report, see Wikipedia

<sup>6</sup> There a debate as to whether the murder of President Habyarimana is a war crime within the jurisdiction of the Tribunal. For the sake of this presentation, I will not take this attack into account.

<sup>7</sup> Pièce 35 : « Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994) » de février 1995.

persons were not prosecuted.<sup>8</sup> The remedy of dismissal of the indictment is not available even for a proven case of selective prosecution.<sup>9</sup> Unfortunately, the Court itself seems to have tacitly approved the Prosecutor's policy. At the minimum, it has not had the courage to stand up to Prosecutorial policy. The issue has not been fully litigated yet for the ICTR and should be.

### **Has the Tribunal even proven what it set out to prove?**

Strikingly, many of the allegations which were made publicly in 1994 and 1995 have been remained unproven fifteen years after the events. Mr Bagosora, allegedly the brains behind the genocide, was acquitted on 18 December 2008 of all conspiracy charges<sup>10</sup>. We see little public outcry or public apology to this man whose guilt determined by the court was limited to being negligent in directing the defence of his country during the war with the RPF. Similarly Mr Protais Zigiranyirazo, allegedly the head of the Akazu and mastermind of the genocide, was acquitted of all conspiracy charges.<sup>11</sup> The evidence was just not there and all the publicity against the family of the late President and Mrs Agathe Kanziga was wrong. The Prosecutor has not been able to prove the major allegations which have been the heart of the propaganda for the past fifteen years.

In 2003, Carla del Ponte, Chief Prosecutor was removed from her position since she was apparently moving towards indicting RPF members.<sup>12</sup>

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<sup>8</sup> *Prosecutor v Nindliyimana et al*, No. ICTR-200-56-T, *Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council* (26 March 2004) at para. 25

<sup>9</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (21 November 2008) at paras. 4-5, *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 96, *Prosecutor v Delalic et al*, No. ICTY IT-96-21-A, *Judgement*, A. C. (20 February 2001, at para 168

<sup>10</sup> Bagosora judgment

<sup>11</sup> The guilty finding was related to two specific events. The conviction is before the Appeals Chamber.

<sup>12</sup> See, *Paix et châtimeant. Les guerres secrètes de la politique et de la justice internationals.*, Florence Hartman , Flammarion,: 10/9/2007, *International Justice against Impunity*, Yves Beigbeder, Martinud Nijgoff, Publishers, 2005

## Consequences

The Prosecutorial policy at the ICTR, condoned by the judiciary has created a situation whereby the Rwanda Patriotic Front knows that it is above the law for any of its actions since 1990. It will not be punished.

The results of this policy are monumental. A short list will include:

- Maintaining the myth of the moral high road for the RPF criminals and guaranteeing their political supremacy.
- Allowing the warlords from Kigali to continue their war on the Congo with slave labour in the mines by Rwandan prisoners.
- Maintaining Tutsi supremacy and disenfranchising the Hutu in Rwanda, preventing the necessary reconciliation of Rwandan
- Allowing the Gacaca dictatorship of the arbitrary to continue.
- Allowing for the maintenance of life imprisonment in full isolation in Rwanda considered as not meeting reasonable international standards by the ICTR Appeals Chamber.<sup>13</sup> The risk of transfer of Accused or convicted person is real.
- Urging prosecution of Rwandan in foreign jurisdictions such as Canada, Belgium, Finland.
- Impunity for the murder of the white fathers such as Canadians Père Claude Simard (1995) and Père Guy Pinard (1997)

The unfortunate result is that the impunity discourse which was one of the justifications for the creation of the ICTR has been turned upside down and guaranteed the maintenance of a sanguinary Pinochet style dictatorship parading around the world on the moral high roads.

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<sup>13</sup> THE PROSECUTOR v. Yussuf MUNYAKAZI, *Case No. ICTR-97-36-R11bi, DECISION ON THE PROSECUTION'S APPEAL AGAINST DECISION ON REFERRAL UNDER RULE 11bis*, Para. 19, 20

ICTR Defence counsel have given their hearts and minds to defend their clients in difficult conditions. We will continue to do so. We have had the support of many fair minded employees of the ICTR. But, it is as if the whole world is against us. We are labouring in an environment where the Prosecutor has been systematically protecting the war makers who set Rwanda on fire on 1 October 1990. Our clients are virtually presumed guilty : “after all 800,000 people died”. Someone must be held responsible.

We have seen at first hand this inequitable Prosecutorial policy. Given the one sidedness, and in the interests of full reconciliation in Rwanda, the only fair solution is the release of the ICTR prisoners.

It is also essential in the short run to prevent the transfer of Rwandan prisoners from the ICTR to Rwanda.

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