

MEMORANDUM BEARING ICTR DETAINEES' CONTRIBUTION TO THE CONFERENCE OF DEFENCE LAWYERS TO BE HELD IN THE HAGUE IN NOVEMBER 2009.

UNDF Detainees in Arusha would like to congratulate the ad hoc Committee for their initiative to organise this independent conference on the legacy of the ICTR from the Defence perspective. We very warmly salute the speakers and all other stakeholders at all levels. Although we are not in a position to directly participate into this conference's debates which concern us and to which we can relate, we have decided to summarise our comments and suggestions in this memorandum addressed to the organisers who will upraise whether it should be distributed to the participants and, eventually, be a working documents for debates.

Our contribution is largely drawn from the very rich and informative debates held during the International Symposium on the ICTR, held in Geneva on 9, 10 and 11 July 2009. This symposium was jointly organized by French and Swiss University institutions (ADH, IHEID and IEDES) under the sponsorship of the Swiss Foreign Affairs Department and the ICTR. It brought together the highest authorities of the ICTR, namely: President Byron, Prosecutor Hassan Jallow and Registrar Adama Dieng, with a selection of key figures representing the Judiciary and academic circles such as former ICTR chief prosecutors, University professors and a number of defence and prosecution lawyers, ICTR executive staff, experts and witnesses who in the past have testified before the ICTR Trial Chambers. There were some journalists too.

Among the issues discussed during that Geneva Symposium, we would like to highlight and list the following themes because of their particular character of capital interest¹

- (1) The Geneva Symposium was intended to draw a balance sheet of the activities/achievements of the ICTR. But that objective did hide another one: to influence the future reports of the ICTR activities. This is what Professor Guichaoua declared on behalf of the organising committee during the opening session of the Symposium, in these terms: *what do we expect from this meeting? The answer is simple: there is no particular strategy other than that we, ourselves, make the first balance sheet, an overall view of what has been done. First of all because all who are present here, are in the best position to do it and secondly because it is better we do it before others undertake to do it. The goal is not to stop others from drawing their own balance sheets – others will certainly do it - but it is good to take stock of the situation, have the analysis ready and make sure it can be made available.*²

¹ Fundamental questions which were debated during the Symposium have been tabled in a synoptic analysis annexed to the present memorandum as Annex 1

² Session 1 p.19

- (2) During the Symposium, many participants noted the incoherence and lack of continuity in the Prosecutor's policy and in its implementation. More than that, the Symposium noted that in the determination of the prosecution policy, the Prosecutor has largely been influenced by the Human Rights NGOs. These NGOs did suggest an erroneous context of events according to which Genocide was planned and organised by the defeated government and that there was a national conspiracy³. Numerous participants noted that the said context has been disavowed by the Judgment of 18 December 2008 in the « Military I » case which established that what happened took place in a war context between the Rwandan government and the RPF. Many stakeholders of the Symposium saluted that evolution and stated that the truth on the history of the « *Rwandan genocide* » has started to unravel. They have recommended the continuation of investigations by researchers and academics in order to establish the truth on the tragic Rwandan events even after closure of the ICTR.
- (3) Many participants noted that politics has overrun justice with sad consequences: first, the scandalous impunity granted to the RPF and, second, national reconciliation forever jeopardised by the « victor's justice » which is administered by the ICTR under constant pressure from the Kigali government and its powerful sponsors.
- (4) With regard to the attack against President Habyarimana's aircraft, many participants including Carla Del Ponte, rejected the position defended by Prosecutor Jallow according to which that crime falls outside the ICTR mandate.
- (5) The Symposium noted the severe loopholes in the evidence at the ICTR with a particular emphasis on false testimony. Judge Arrey admitted the general practice of false testimony in these terms: « *In Court, lies come in all sizes and shapes. If we have to follow each person who gives false testimony in court, then we'll hardly have any witnesses come at one stage some of them will stop coming* »⁴.
- (6) The Prosecutor was compelled to admit the failure of his strategy to bring accused persons including the former Prime Minister Jean Kambanda to plead guilty and to cooperate with his office in accusing the other accused. The Symposium acknowledged the difficulties for ICTR Judges to conciliate Common Law and Civil Law systems and the failure of the Prosecutor to stick to their commitments/promises to the accused persons who have pleaded guilty.

³ It is now generally admitted that those NGOs were manipulated by the RPF and its sponsors even if the Symposium did not want to mention it. That manipulation started long before the establishment of the ICTR and has intensively continued thereafter. It started with the Final Investigation Report on genocide established in Kigali on 12/04/1995 by the « *Special Investigations Unit (SIU)* » of the UN High Commission for Human Rights

⁴ Session 3 p. 65

- (7) Many participants to the Geneva Symposium concluded that the ICTR has done less well than the ICTY without any apparent reason. The excessively long pre-trial detention and the categorical and unjustified denial of provisional or bail release are for a good number of the participants « *a shameful and indelible act* » of which the ICTR will never wash itself off⁵.
- (8) Almost all the participants to the Geneva Symposium admitted that neither the acquittal, nor the bail release, nor the final release after complete service of sentence, none of those situations has been provided for in the Statute and the RPE of the ICTR when it was in the phase of creation. The Symposium has admitted that it would be of urgent necessity to have those matters clarified with regard to acquitted persons, to persons released in the course of their prison sentence or after full service of their sentences. Nothing has been said concerning the complex situation of the convicts who have been transferred to serve their sentences in third countries far away from their families and relatives.
- (9) The situation of the acquitted persons is dramatic: not only the country of reinstatement is not provided; they remain in detention⁶ as if they still had cases to answer before the Tribunal. The ICTR does not recognise the right to financial compensation for the prejudice and arbitrary arrest, long imprisonment and there is no provision for financial compensation after so many years of unjustified deprivation of liberty, prejudice to the family and human degradation. The Geneva Symposium did not tackle this issue and yet it is a question of “Rule of Law” to use Adama Dieng’s words.
- (10) As to the residual mechanism to handle the ICTR functions after the closure of the Tribunal, the Registrar reported that the Report of the General Secretary (of the UN) is currently on the desk of the Security Council for a final decision.⁷

We note that all the criticism made by the participants to the Geneva Symposium, probably surprised the organisers and the least that could be said is that they came against their expectations. They had been the subject matter of our various correspondences addressed to the ICTR authorities and to the UN who unfortunately have responded by dead silence. We note and we share with many of the participants to the Geneva Symposium that the ICTR has appallingly failed in its mandate of establishing the truth about the Rwandan tragedy, of eradicating impunity, of contributing to the national reconciliation of the Rwandan people and of promoting peace in Rwanda and in the African Great Lakes Region. The Hague Conference coming after the Geneva Symposium, will, without any doubt, take into account all those shortcomings, admissions and observations and will denounce with vigour the drifts that have characterised the ICTR. It will plead in favour of a fair and impartial justice.

⁵ Session 4 p.36

⁶ Adama Dieng Session 4 p. 25 “*il y a un problème de rule of law. Mais un problème de droit de l’homme se pose aussi lorsque des personnes acquittées, qui ont été jugées non coupables sont maintenues dans ce que je nomme une « quasi détention*”

⁷ Session 4 p.62-63

We recommend that the Conference dwells at length on the past judgments that the ICTR delivered on the basis of « *false evidence* », many trials conducted with the sole intent of convicting the members of the defeated side in a war between the government of Rwanda and the RPF. It should be noted that it is appalling to ignore the historic context of the war of aggression engaged by the RPF with massive support of the Uganda government and other powerful sponsors. The Conference should clearly make a pressing and urgent appeal for the review process to be authorised without any delay.⁸

With regard to our contribution to this The Hague Conference, as by the wishes of the Ad hoc Committee, we shall limit our intervention to the situation of the accused and convicts of the ICTR. Referring to point n° 8 here above, we would like to remind the reader of some of the proposals made in the Memorandum of 17 February 2003 transmitted to the authority of the ICTR and the UN by the detainees and the convicts of the ICTR⁹. Besides the reference made to the situation of the accused, which is today no longer an issue, the major themes of the Memorandum remain alive as it can be demonstrated in the following excerpt:

That Memorandum is aimed at figuring out the loopholes to be cured by the Statute of the accused / the convicted person by the ICTR and denounces the multiple violations of fundamental rights of the persons detained or convicted by the ICTR. Those loopholes should be cured once for all by the same Statute. At the same occasion, we touch on the highly sensible but imperative and inescapable question of the reintegration of the released person and the service of sentences in Rwanda. As a matter of fact, one of the aims of the ICTR is to contribute to national reconciliation. For that to be done, the judgments and the sentences imposed on convicts and their servicing should be conceived within the framework of reintegrating the convict in his immediate environment and in the long term, to be integrated into his original society. This is conditioned to a radical political evolution of the policies of the regime in Rwanda.

Through that Memorandum, the detainees mean to draw the attention of the decision makers at the level of the United Nations and the ICTR to taking into account all these considerations and to integrating them into their agenda when negotiating with third parties to receive convicts to serve sentences in those countries or to receive persons released by the ICTR. These considerations should guide the decision makers while planning the completion strategies of the ICTR. A list of countries willing to receive released persons should be made available as much as the one of countries prepared to receive the convicts.

Concerning the situation of the ICTR convicted persons; the analysis made in that Memorandum of 17 February 2003 remains valid except additional details to be collected from our colleagues

⁸ Until this day, not a single appeal for review has been authorised by the Appeal's Chamber. All demands formulated by the convicts have been systematically rejected.

⁹ That Memorandum of 17 February 2003 is appended as Annex 2

who have been transferred to Mali and Benin to serve their sentences¹⁰. The most important issues are summarized in the following excerpt:

2.1. The Statute of the ICTR convicts must fix in details the questions related to the location and the conditions of the sentence servicing. Article 23.1 of the Statute and articles 101, 102 of the RPE of the ICTR deal with prison sentences. Article 26 of the Statute and article 103 of the RPE deal with the location where imprisonment sentence will be served. It is stipulated that sentences are served in Rwanda or in other countries which have expressed their willingness to receive convicts. The list of those countries is held by the Security Council. Sentences are served according to the laws in application in those countries. Article 104 of the RPE stipulates that the “service of the prison sentence is under the control of the Tribunal or of an organ designated by it (ICTR)”

The United Nations should determine, in a written document, basic minimal conditions which should be respected by those States that undertake to host the convicts of the ICTR. That document should mention that the convicts will not be forced to serve their sentences in States where they fear for their security or where minimal conditions of detention as defined by the United Nations are not respected. That is the reason why the Defence should be consulted while determining the countries of imprisonment. It is therefore clear that there is urgent need to have the list of countries that subscribe to receiving the convicts of the ICTR.

On the other hand, that list of countries should not be limited to the arbitrary appreciation of the Registrar of the Tribunal utilizing such criteria as conditions of culture, race and nationality. However, the health condition of the convict and an environment enabling reintegration of the convict should be taken into account. Physicians in charge of the convict should be consulted and their opinion should be considered before a decision on transfer is taken.

An organ entrusted with monitoring the detention conditions in pursuance of article 104 of the RPE should be determined without any further delay because there is already a group of convicts who have been transferred to a third party (Mali and Benin). The detainees wish to be well informed on the detention conditions in those countries. The Tribunal should have within the relevant Department a desk in charge of ensuring a follow up of the transferred convicts.

¹⁰ We suggest that Counsels Sadikou Ayo Alao and Doumbia collect information from the colleagues who are respectively in Mali and Benin and analyse with them the loopholes to be filled in the future agreements between the UN and the countries to receive future transfers. The same should be applied to the Directives to be issued by the President of the ICTR, President Byron on the designation and the modalities of transfer of convicts. The synoptic table in Annex 3 shows the situation of the accused and convicted persons as of 31 August 2009.

2.2. *The Statute must look into the conditions of exercising the right to review of the judgements rendered by the ICTR:*

- *Appeal for Review*
- *Plea for pardon*
- *Plea for commutation of sentence*
- *Plea for release on parole*

Article 27 of the Statute provides for the pardon and commutation of sentence according to the law of the country of imprisonment. Chapter IX of the RPE of the ICTR gives some precisions on the conditions of granting pardon and commutation of sentence by the State where the convict is imprisoned. It is the President of the Tribunal in consultation with the judges who appreciate the opportunity to do so.

The ICTR is supposed to cease to exist at the end of 2008, it has been extended to 2013? At any rate it will close before many convicts will have served the totality of their sentences. The United Nations should state which organ will deal with those residual questions in the absence of the President and judges of the ICTR. That function could be entrusted to the ICC.

Likewise, the document defining the status of the convict, should provide the judicial assistance mechanism for all the procedure which might come up after the final conviction by the Appeal's Chamber: review, plea for pardon, plea for commutation of sentence and other proceedings which may require the assistance of a counsel.

In that document, the United Nations must determine their overall role and define their responsibility with regard to the convicts of the ICTR. The measures to be taken in case the State of imprisonment fails in its duties and obligations must be defined to avoid that the ICTR convicts remain floating between nobody's responsibilities. The United Nations should make provisions for the repatriation of convicts who would estimate that conditions in Rwanda have become viable or better than in the host country and would be willing to voluntarily return home under the guarantee of the United Nations.

2.3. *The Statute must provide for applicable measures in case of serious illness or for convicts who reach advanced age. It could be assimilated to the situation described on 1.3 here above.*

2.4. *There is no provision for the situation of an ICTR prisoner dying in the course of servicing his sentence whether a life imprisonment or a limited time imprisonment. That situation should "mutatis mutandis" be clarified, in the same manner as for the detained person awaiting trial as referred to on para 1.4 above.*

With regard to the ICTR archives, the government of Rwanda has led a vigorous offensive in its campaign to be the heir of the ICTR archives at the closure of the Tribunal. We are convinced that that campaign is part of the Rwandan Patriotic Front (RPF) global strategy to put its hands on all possible evidence which could lead to reviving the question of the buried RPF prosecution for crimes committed before, during and after 1994. Handing the ICTR archives to Paul Kagame and his government would be the best way of sealing off his criminal responsibility and to insure impunity forever to him and other known criminals among his colleagues, members of the RPF. The fact that the government in Kigali has of recent days engaged into a vigorous campaign of manipulation of witnesses who have testified before the ICTR Trial Chambers against Kagame and his RPF in the attempt to change the nature of the evidence against them particularly the material related to the 6 April 94 air attack against President Habyarimana' plane¹¹, is a sign which should leave no one indifferent. The Conference in The Hague should insist on the vital necessity of discarding all attempts to transfer ICTR archives to Rwanda.

Concerning the released person, the 17 February 2003 Memorandum dwells on the scandalous situation of an acquitted person and of pre-trial detainees who seek bail release and who do not find host countries. The Registrar has confessed to the Geneva Symposium his inability to find a satisfactory solution for the relocation of André Ntagerura and Gratien Kabiligi. Regarding the situation of convicts who finish their sentences or those who could be granted pardon or clemency, our Memorandum remains valid.

Our proposals could be summarised in the following excerpt:

3.4. The Statute and the RPE of the Tribunal should make provision for convicts to be granted early release on parole under well defined conditions. This should not be left to the discretionary will of the Host States in order to avoid inequalities and discriminations among UN prisoners depending on host countries.

3.5. The release at the completion of the sentence could give rise to the same difficulties of finding a host country for a former ICTR convict as discussed on par 3.3 above. The same situation could rise in case of a release after pardon. The availability of the list of countries that have accepted to receive former prisoners could be the best solution, it would help the candidate to know his choice of destination.

In the 17 February 2003 Memorandum, the detainees of the ICTR had suggested the elements to be investigated in view of promoting a reintegration policy for the convicts. Today, our position has not changed, it is summarised in the following excerpt:

¹¹ Read for reference le Journal le Monde 22/08/09 and the AFP 26/08/09

The status of the UN prisoners thus defined must be in conformity with prison policy aimed at reintegrating the released persons into society. To that end, there should be ongoing training, teaching of useful professional jobs, communication with the outside world and the information of prisoners about the up-to-date situation in the host countries.

Every released person should be granted assistance for his social reintegration;

Family relationships enjoy a privileged status in the reinsertion program of former prisoners. The UN should make those relationships possible and facilitate them including the intimate relations within the family.

The reintegration policy (in their country of origin) of former prisoners is inconceivable without a general pacification of the country, a precondition to true national reconciliation. To accelerate that process, the United Nations and the International Community are invited to promote the advent in Rwanda of a political regime at the service of all Rwandans without discrimination of any kind.

Since such a political regime does not exist in Rwanda, the policy in practice today in the ICTR regarding the sentence servicing should continue.

The Security Council of the UN has been seized of the Secretary General's Report on the residual mechanism dealing with all pending questions before the closure of the ICTR.

Finally, our contribution is hereby constituted by this memorandum completed by the three annexes:

Annex 1. Synthesis of the Geneva Symposium on the ICTR

Annex 2. Memorandum of 17 February 2003

Annex 3. Situation of the accused and convicts of the ICTR as of 31 August 2009

Done in Arusha 26 September 2009

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