Prosecutorial Policies in the ICTR: Ensuring Impunity for the Victors

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UNSC Resolution 955 (1994) of 8 November 1994 establishing the ICTR states in its preamble that "the prosecution of persons responsible for serious violations of international humanitarian law would enable (the aim of ending impunity) to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace". Although it was clear that the RPF had committed crimes that fell squarely within the mandate of the ICTR[1], the risk of impunity for the victors was apparent from the early days of the tribunal's operation. During a conversation with the first Prosecutor, Richard Goldstone, in July 1996, I asked him whether he intended to prosecute RPF suspects. Irritated, he replied he saw no reason for doing so. When I told him that there was compelling *prima facie* evidence of these crimes, he got even more irritated and stated emphatically that there was no such *prima facie* evidence. That was the end of our brief conversation. Clearly, the OTP was not starting its operation with an open mind, and this mindset has handicapped it ever since.

In April 2003, towards the end of Carla Del Ponte's term as Prosecutor, I was in Arusha together with Alison Des Forges to run a seminar for OTP staff. We were brought in contact with the so-called "special investigations" team, put in place to work on the "second mandate", the one related to crimes committed by the RPF. The team wanted to discuss evidence and strategy. We were quite impressed by their work: they had assembled extensive data on between 15 and 20 massacres by the RPF. As it was unlikely that all these could be prosecuted, we exchanged on selecting files that could as a priority be formulated as indictments; and we agreed on four cases: Butare (in particular the killings at the agro-veterinary school and in the arboretum) upon the arrival of the RPF in July; the regional stadium of Byumba in April; Giti, an atypical municipality as no Tutsi were killed there, also in April; and Gakurazo, where the RPF killed bishops, other clergy and civilians in June. For all these cases, there is a great deal of evidence and the suspects are known. At the end of our meetings, we felt confident that indictments could soon be issued. More than six years later, nothing has happened.

What we did not realise then was that the US, under the stewardship of Pierre-Richard Prosper, the former member of the OTP turned American Ambassador-at-Large for War Crimes Issues, were busy burying the special investigations. The deal was that RPF suspects were not to be tried by the ICTR, but that Rwanda would take care of them. This never materialised. During the same period, Carla Del Ponte was replaced by the current Prosecutor in circumstances that I do not need to recall.

When I returned to Arusha in September 2004 to testify in the Bagosora case, I had the opportunity to talk to Prosecutor Jallow. I referred to the work done by the special investigations team, and asked him whether he intended to prosecute RPF suspects. A year after his appointment, he told me textually: "I am reviewing the evidence, and I'll make a determination when the time has come". He was to sing this refrain in the years to come, up to the present day, including when asked this question by the press. For instance, a year after our

[1] This was already unequivocally stated in the May 1994 report of special rapporteur René Degni-Segui.

meeting, he stated to the Hirondelle News Agency that he was still reviewing the evidence before proceeding any further[2]. In February 2007, Jallow stated that he "will decide by the middle of the year whether or not charges will be brought against members of the RPF"[3]. In the middle of 2007, nothing was however heard of him, except a new delaying exercise before the Security Council, where he stated: "Investigations of the allegations against members of the RPF, which we had hoped to conclude by now, need to be continued…". That was almost three years after my conversation with him, and during his presentation to the Security Council on 4 June this year, he seemed finally to admit that he had given up: "[M]y office does not have an indictment that is ready in respect of these allegations (against the RPF) at this particular stage"[4]. I shall return later to the "strategy of rotting" practised by the Prosecutor since he assumed office.

As I was worried about the perspective that nothing would happen, and having in mind the Tribunal's completion strategy[5], I contacted Jallow again in December 2004 to inquire about his intentions, but I again received an evasive answer. On 11 January 2005, I sent him a letter announcing that I suspended my co-operation with his office "unless and until the first RPF suspect is indicted". I told him that "[u]nder these circumstances, the ICTR risks becoming part of the problem rather than of the solution. While I remain committed to the cause which is at the heart of the mandate of the ICTR, on ethical grounds I cannot any longer be involved in this process". During the following years, my concern was obviously reinforced by the Prosecutor's delaying tactics.

He embarked on the same strategy again from mid-2008. Pushed by allegations that the ICTR was practising victors' justice, and at the same time refusing to prosecute RPF suspects himself, Jallow announced that "[i]t has been established that in June 1994, RPF soldiers had killed 13 clergymen and two other civilians", and that the Rwandan Prosecutor General "had said that he would shortly indict the implicated soldiers"[6]. While he pointed out that the suspects would be prosecuted for war crimes (that fall within the ICTR mandate), they were tried for murder and complicity to murder only. Although this was to be expected, as the Rwandan regime systematically denies that its soldiers have committed violations of international humanitarian law[7], this in itself would have justified recalling this case. Jallow did not do such thing, despite his pledge to reporters that "[i]f the trial is badly conducted, we have the competence to take the case to the Tribunal"[8].

Hardly two weeks after Jallow's initial announcement, four men faced trial before a military court in Kigali. Two captains pleaded guilty to murder, a major and a brigadier general pleaded not guilty to complicity to murder. The two captains were sentenced to 8 years in prison, a sentence reduced to 5 years on appeal, while the senior officers were acquitted, a decision confirmed on appeal. Clearly the captains were sacrificial lambs and the trial was a sham; in a letter to Jallow dated 26 May 2009, the Executive Director of Human Rights

[2] "Le TPIR a bouclé ses enquêtes pour le génocide des Tutsis", Arusha, Fondation Hirondelle, 30 September 2005.
[3] "RPF alleged crimes: Prosecutor to decide mid 2007", Arusha, Hirondelle News Agency, 8 February 2007.
[4] United Nations, Security Council, 6134th meeting, S/PV.6134, 4 June 2009, p. 33.
[5] The ICTR was to conclude first instance trials by the end of 2008, hardly four years after I met with Jallow.
[6] "UN Prosecutor admits of RPF atrocities during 1994 genocide", Arusha, Hirondelle News Agency, 6 June 2008.
[7] Not a single of the 32 RPA elements prosecuted in Rwanda for acts committed in 1994 have been charged with war crimes or crimes against humanity (See Human Rights Watch, *Law and Reality. Progress in Judicial Reform in Rwanda*, 25 July 2008, Annex 2).
[8] "ICTR can retract a trial, says top prosecutor", Arusha, Hirondelle News Agency, 12 June 2008.

Watch wrote that it was "a political whitewash and a miscarriage of justice, betraying the rights of victims' families to obtain justice for their loved ones". On 1 June 2009, an open letter by dozens of academics stated much the same thing, arguing that "[t]his domestic trial was a completely inappropriate substitute for ICTR prosecution". However, despite the Prosecutor's pledge to assess the Rwandan proceedings and to recall the case to the ICTR if the trial did not meet international standards, he remained silent over the issue, thus resuming his "strategy of rotting". There was no response to my repeated demands to the Prosecutor and to William Egbe, the member of the OTP in charge of the file, and the last email I received from Egbe on 14 April 2009 read: "I have forwarded your request to Prosecutor Jallow for his further information and attention". I haven't heard from the OTP since. In the meantime, despite all evidence to the contrary, Jallow seems content with the Rwandan procedure. On 4 June 2009, he indeed told the Security Council that the trial "was an open and public trial (…). The report of my monitors indicates that the standards of fair trial were observed"[9].

Of course, the Prosecutor has a very large degree of discretion in deciding to prosecute or not to prosecute. The way in which the current Prosecutor has analysed this discretion in a journal article[10] defines prosecutorial discretion as almost tantamount to prosecutorial arbitrariness. He is right in the sense that there is no legal redress in case a Prosecutor makes an abusive use of this discretion. But his argument and his prosecutorial practice also places the responsibility for the emergence of victors' justice squarely in his office. With the exception of Carla Del Ponte, who paid a high price for it, none of the successive Prosecutors have had the courage to fully assume their mandate, and –as Jallow rightly pointed out in his article– no one else could do it in their place or force them to do it.

The grave consequences of this failure appear when measured against the aims the ICTR was supposed to achieve, which I have recalled at the beginning of this presentation. First, ending impunity. It is precisely because the regime in Kigali was given a sense of impunity that, during the years following 1994, it has committed massive internationally recognised crimes in both Rwanda and the DRC, where the RPA massacred tens and possibly hundreds of thousands of civilians. Next, contributing the national reconciliation. When, in a deeply divided society like Rwanda, the suffering of the victims on one side is recognised, but not that of the victims on the other side, and when perpetrators on one side are tried, but not those on the other side, then the side whose perpetrators are tried and whose victims are not recognised accumulates frustration, resentment and even hatred, all the more so since the domestic judicial system shows a similar bias. These feelings are exactly the opposite of what national reconciliation needs. Finally, the restoration and maintenance of peace. The feelings just described among many Hutu result in major structural violence that will eventually lead to renewed acute violence. In addition, the sense of impunity has led the Rwandan army to twice invade Zaire/Congo, and to engage in widespread human rights abuse and looting of resources. So the way in which justice has been miscarried in the ICTR has not contributed to peace in Rwanda and in the region. Maybe it is not too late. The Prosecutor can still seek indictments for these serious crimes. In the words of the Executive Director of Human Rights

[9] United Nations, Security Council, 6134th meeting, 4 June 2009, S/PV.6134, p. 33. According to the 26 May letter of Human Rights Watch to the Prosecutor, he "sent an observer for only two preliminary detention hearings, one trial day, closing arguments, and the verdict. That cursory presence did not constitute diligent monitoring".

[10] H.B. Jallow, "Prosecutorial Discretion and International Criminal Justice", *Journal of International Criminal Justice*, 2005, pp. 145-161.

Watch in his letter of 26 May 2009: “Failure to do so will undoubtedly taint perceptions of the Tribunal’s impartiality and undermine its legitimacy in the eyes of future generations”.