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Analysis

International Criminal Tribunal for Rwanda

By Thierry Cruvellier*

A brainless genocide

Time has the same effect on trial judgements rendered by the International Criminal Tribunal for Rwanda (ICTR) as acid on limestone. On December 14, 2011, the Appeals Chamber of the ICTR reduced Colonel Bagosora's factual responsibility in the genocide to a minimum, and his life sentence to 35 years. After seventeen years of investigations and trials, the ICTR ends up with no mastermind behind the genocide.

It took 14 years after its creation for the ICTR to render the judgement that had been from the start the most eagerly awaited and the most central to its work on the genocide of the Tutsis in Rwanda, between April and July 1994. On December 18, 2008, it found Colonel Théoneste Bagosora guilty of genocide, crimes against humanity and war crimes and sentenced him to life imprisonment. Since 1994, Bagosora had been the 'number one suspect by default' of the genocide. However, when it was issued, the judgement by the Trial Chamber appeared iconoclastic. After hearing 242 witnesses, admitting some 1,600 exhibits, producing 30,000 pages of transcripts and receiving 4,500 pages of closing arguments by the parties, the trial judges wrote a decision that profoundly questioned the genocide in Rwanda as a carefully orchestrated crime. The 1992 reported warning by Bagosora that he was going to "prepare the apocalypse" came from two highly suspicious witnesses who contradicted themselves: Bagosora and others had played a role in the creation, arming and training of civil militias, but the judges could not conclude that "these efforts were directed at killing Tutsi civilians with the intention to commit genocide"; the organisation of civil defence was insufficient to claim conspiracy; the

preparation of lists targeting Tutsis and members of the political opposition did "not show that the purpose of the lists was to identify Tutsis, as such, and to eliminate them"; there was "considerable evidence" of death-squad activity in Rwanda before April 1994 and several sources say that Bagosora was a member of them, yet the evidence was indirect, second-hand, proved nothing in legal terms, and did "not mean that [they were] preparing a genocide."

Bagosora: guilty by inference

After the presidential plane was shot down on April 6, 1994, a wave of political assassinations marked the beginning of the massacres. There was no credible and reliable proof of Bagosora's direct participation, the trial judges wrote. But he was found guilty by inference. Considered to be the person having authority over the army at the time, the order to attack could only have come from him, said the judges. "The Prosecution has not presented any direct evidence that Bagosora..." repeated the judges tirelessly, but the accused knew that the soldiers under his authority were killing and, therefore, he was responsible.

"The post of directeur de cabinet was the most senior one after that of the Minister in the Rwandan Ministry of Defence," said the judges. "He would replace the Minister in his absence. This occurred in April 1994 when Augustin Bizimana, the Minister of Defence, was on official mission in Cameroon." During the three days in which the minister was away, from 6-9 April, Bagosora exercised his authority. After 9 April, the minister of defence returned to the country and all the crimes allegedly committed by Bagosora after April 9 fell away, without exception. But the colonel had nevertheless been found guilty.

In its judgement, the trial chamber recalled that "when confronted with circumstantial evidence, it may only convict where it is the only reasonable inference." Three years later, the Appeals Chamber turned this very argument against the trial judges. In 300 pages, it slashed the trial judgement so deeply that, seventeen years after it was created it would seem almost impossible to understand what's the narrative of the genocide that has come out of the most important trial at the ICTR.

Because the Appeals judges found that Bagosora's order or authorisation was not "the only reasonable inference" in the killings of April 7-9, the direct responsibility of Bagosora in the murders was annulled. What's left? "The Appeals Chamber finds that Bagosora had sufficient knowledge of his subordinates' criminal conduct in Kigali on 7, 8, and 9 April 1994 to trigger his duty as a superior to prevent their crimes." Bagosora remains guilty as a superior who failed to prevent those killings as well as a number of massacres in different parts of Kigali, and the killings at roadblocks in the capital city.

Eighteen years after the genocide, the ICTR essentially concluded that "there is no finding or sufficient evidence that Bagosora ordered or authorised any of the killings for which he was found to bear superior responsibility." He is solely held responsible for failing to prevent crimes committed by his subordinates over a period of 65 hours during which he had effective control. That's why a majority of judges approved the reduction of his sentence. There was a genocide, yes, but it was brainless.

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(* A detailed analysis of the first instance judgement will soon be published in the DVD book of the film "Arusha from Arusha".

Nsengiyumva: a near acquittal with a 15-year sentence

By Thierry Cruvellier

The ICTR Appeals Chamber ordered the immediate release last week of Colonel Anatole Nsengiyumva, who was the commander of military operations in north-western Rwanda. Arrested in 1996, he has already served more time than his 15-year sentence. In 2008, a Trial Chamber found Nsengiyumva responsible for crimes in Rwanda's Gisenyi and Kibuye regions and sentenced him to life. But the Appeals judgement dramatically overturned that decision. It slammed prosecutors: "In respect of the five crimes of which Nsengiyumva was found guilty, one was not charged and none of the other four was adequately pleaded in the indictment."

Then it reversed all convictions but one, saying the evidence "could not lead a reasonable trier of fact to conclude that the only reasonable inference was that Nsengiyumva, as the highest military authority in Gisenyi..., must have ordered the killings." His command responsibility was confirmed in Gisenyi only. Nsengiyumva was freed, but the confusion over how the genocide there took place remains.

ICTR: first transfer to Rwanda

After rejecting all similar demands in the past, the International Criminal Tribunal for Rwanda (ICTR) confirmed on Wednesday on appeal the transfer to Kigali of Rwandese pastor Jean Uwinkindi, for judgement. The appeals chamber believes that "improvements in Rwandan witness protection services 'may go some distance in guaranteeing that witness safety will be monitored directly by the Rwandan judiciary' and that this factor, coupled with Tribunal-appointed monitors, would address witness protection concerns". This decision could pave the way for other transfers requested by the ICTR prosecutor for three more suspects. Two remain at large. Some countries may also rely on this new jurisprudence to grant future or current extradition requests from Rwanda. "Despite many reforms in the Rwandese judicial system, we still think it is difficult to have fair trials for these persons in Rwanda", Human Rights Watch international justice advocacy director Geraldine Mattioli said on Monday on French radio RFI.

A tweeting judge in a twisted case

At 2:14 pm on December 6, Laurent Kasper-Ansermet issued a statement announcing that he had arrived in Phnom Penh to take up his duties as the international co-investigating judge at the Extraordinary Chambers in the Courts of Cambodia (ECCC).

At 4:08 pm, his Cambodian co-investigating judge, You Bunleng, issued a hostile counter-statement, informing the public that Kasper-Ansermet's work was "not legally valid" - because the Swiss judge had not yet been formally appointed by the government.

Kasper-Ansermet's arrival had been eagerly anticipated for nearly two months, since his predecessor's barely 11-month tenure collapsed in a frenzy of dysfunction and allegations of judicial misconduct in mid-October. That predecessor, Siegfried Blunk, inherited an unenviable burden when he took office last December: carrying out an investigation into two cases known as 003 and 004. These are virulently opposed by the Cambodian government and by the country's strongman prime minister, Hun Sen. Blunk and Bunleng closed their investigation into Case 003 without interviewing the suspects - the commanders of the Khmer Rouge air force and navy. And for most of the year, massive resignations at the Office of the Co-Investigative Judges and battles over political interference convulsed the court. A widely-circulated resignation e-mail written by the historian Stephen Heder, a consultant to the judges' office, accused Blunk of fostering a "toxic atmosphere" and closing the investigation into Case 003 "without effectively investigating it."

One of those discussing the e-mail was Kasper-Ansermet himself, the reserve investigating judge at the time. He immediately "retweeted" news articles on Twitter about the mass resignations in the office. On 9 October, Blunk abruptly resigned, saying that government interference had made it impossible to continue in his position.

Kasper-Ansermet was thrust into the spotlight and immediately nicknamed "the Tweeting Judge," while his 140-character posts were pored over by court observers. They reveal him to be a man with a penchant for

Eastern philosophy ("It is when we are surrounded by many dangers that we must not doubt ourselves"—Sun Tzu"). They also make it clear that he disagreed with the approach taken by Blunk and Bunleng to cases 003 and 004.

Although the UN and the Cambodian government have declined to publicly discuss the judge's Twitter account, both have found it discomfiting. Sources say the UN reprimanded the judge (he has not posted about the tribunal for over a month now), while the Cambodian government apparently sees it as a sign of an inconvenient independence. This new judge, it seems, will not be as acquiescent as Blunk to their desire to quietly bury the two cases. This may explain why, despite the fact that Kasper-Ansermet is reserve co-investigating judge—and by law the only possible successor to Blunk—the Cambodian government refuses to formally appoint him. Until now, the UN was nominating international judges and prosecutors, and the Cambodian Supreme Council of the Magistracy was duly meeting to rubber-stamp their appointment. But the body has simply declined to meet for the past two months, despite an explicit request from UN Secretary-General Ban Ki-moon to convene and appoint Kasper-Ansermet. Complicating the matter further is the fact that Bunleng himself actually sits on the Supreme Council and will be among those determining his would-be colleague's appointment.

"Paralysis"

At the very least, it does not bode well for the task at hand: completing an investigation of Case 004, involving three mid-level Khmer Rouge officials. "I have to say that I am very much concerned with the paralysis that affects the Office of Co-Investigative Judges," said Kasper-Ansermet. More ominously, it has become clear that the political firestorm of cases 003 and 004 will not abate anytime soon. Substantive hearings in the tribunal's showpiece case 002 began in late November, but the court's accomplishments in prosecuting the most serious international crimes are still overshadowed by the fact that it cannot escape government interference.

Mladic diaries of conspiracy

Bosnian Serb General Ratko Mladic had a habit of meticulously recording every meeting he attended during the former Yugoslavia's war from 1992-95. His notes may well turn out to be the single most important source of prosecution evidence in the war crimes trials of his Bosnian Serb and Serb allies before the International Criminal Tribunal for the former Yugoslavia (ICTY).

The man who authenticated Mladic's notes before the court was his former chief of staff, General Manojlo Milovanovic, who spent much of the Bosnian war at Mladic's "right-hand side". "In Crna Rijeka where the main staff was based, Mladic and I shared an office. We practically shared one desk, we had two chairs, we saw each other every day",

Milovanovic said in Jovica Stanisic's trial on December 8. Milovanovic has not been indicted himself, most probably because the Tribunal's prosecutors have focused on Srebrenica when indicting Mladic's staff officers and aides – including general Zdravko Tolimir, whose genocide trial is expected to end in 2012; or generals Radivoj Miletich and Milan Gvero, sentenced in 2010 to 19 and five years'

imprisonment for aiding and abetting crimes in Srebrenica.

Absence of Srebrenica notes

In summer of 1995, Milovanovic was fighting at the western side of Bosnia, far away from Srebrenica. Asked by prosecutors about the conspicuous absence of notes on Srebrenica in Mladic's diary, Milovanovic said: "I don't know why... It was some sort of secret around the main staff. He didn't discuss it, and whether he had kept notes there, I don't know." Since 2007, retired general Milovanovic has testified in four cases at the ICTY as a not-too-unwilling prosecution witness. He is also due to face his former supreme commander, Bosnian Serb leader Radovan Karadzic in court at the beginning of next year.

It happened almost by chance in April last year that Milovanovic was in The Hague – testifying in the Stanisic trial - when the Serbian government delivered Mladic's voluminous hand-written notes to the court. Asked by prosecutors, he confirmed Mladic's hand wrote them.

The Mladic diaries were seized during a search of his family's Belgrade apartment in February 2010. Serbian police confiscated 3,500 pages in 18 notebooks recording almost all meetings Mladic attended during war. In neat bullet-points, he wrote down the gist of what his numerous interlocutors said, usually in top-secret settings behind closed doors. The incriminating nature of this evidence became clear in April 2010, when prosecutors used it against Stanisic, who – as Serbia's State Security chief – had been Slobodan Milosevic's most powerful ally.

Although pieces of Mladic's diaries have been moved into evidence in different trials (Stanisic, Momcilo Perisic, Vojislav Seselj, Jadranko Prlic), their pages were put in proper context in the case against Karadzic. Mladic's notes speak for themselves, getting right to the heart of this alleged joint criminal enterprise between Bosnian Serb and Serb leaders.

Testifying recently in the Karadzic trial, prosecution military expert Ewan Brown relied on notes on a secret meeting with Karadzic and others at the beginning of May 1992. Mladic wrote

Gbagbo's investigation might end "by late March"

"At the moment we have no means," stated former Ivory Coast president Laurent Gbagbo's defence lawyer Emmanuel Altit at the ICC in a status conference on 14 December. Gbagbo's lawyer said he had not yet seen any evidence "allowing them to challenge the detention of President Gbagbo". "36 documents were already disclosed, 195 documents are coming", answered deputy prosecutor Eric MacDonald, adding that he "is not in a position to give an exact number of documents for one simple reason: that our investigations have not been concluded, as the prosecution cannot travel to Ivory Coast [due to the elections]. By late March we should be in a position to be much more specific." Confirmation of charges is scheduled in June 2012.

that the "ethnic separation" of Bosnian Muslims and Croats was defined by Karadzic at the meetings as the Serbs' primary and overall strategic war aim. Other goals included the "division of Sarajevo" and the "removal" of the border with Serbia on the Drina River. Those words soon proved not to be empty threats, after the Bosnian Serb assembly adopted "strategic" war aims in mid-May 1992, military expert Brown interpreted.

In his defence, Karadzic repeatedly claimed that the Bosnian Serbs' strategic goals were not only purely political, without relation to what happened militarily on the ground - but also adopted at the time by international peace mediators. Karadzic – who acts as his own lawyer – accepted Mladic's diaries as authentic

But he opposed their admittance into evidence "in their entirety". "I would be very worried if they were to be admitted in their entirety without additional corroborating documents. It's an aide-memoir, a reminder.

Not a diary in the true sense of the word", Karadzic said during Brown's testimony at the end of November. He also said large portions of Mladic's notes are in fact of an exculpatory nature. The trial chamber has decided to admit all Mladic's notebooks into evidence.

Mladic: a trial at last

The trial of Ratko Mladic, the former Bosnian Serb general is due to start on March 27 at the International Criminal Tribunal for the former Yugoslavia (ICTY).

By asking the prosecution early this month to reduce the number of crimes in the indictment to 106 from 196, the court is trying to speed up a trial expected to last years. It fears that Mladic's failing health could result in him evading justice as Slobodan Milosevic did in 2006. "For me, time is of no consequence", said Mladic, on 8 December. "Our team is absolutely not prepared to proceed with the trial, not even close to those deadlines", added Mladic's defence lawyer Branko Lukic, according to AP. Initially created with a four-year mandate in 1993, the ICTY is expected to close in 2014 - 21 years later.

Bensouda: an African heritage

Being the ICC's Chief Prosecutor is a delicate and politically sensitive job. For Luis Moreno Ocampo it has been "the best job in the world." Fatou Bensouda will be taking over his office in June. She inherits a huge caseload and has yet to secure the ICC's first conviction in her first case.

When 120 states agreed on 12 December that Bensouda shall succeed Ocampo, the Gambian was "definitely honoured." It was her second present before the close of the year. With the recent arrest of Laurent Gbagbo, Bensouda already reaped the benefits of the investigations she led in Ivory Coast. It may be the ICC's first 'presidential case', but she faces a huge task in preparing for the confirmation of charges hearings next June.

While Africa has been the main playground of international justice so far and the ICC its main theatre of justice, the Assembly of States Parties stated there was "pervasive sentiment that the next prosecutor should come from Africa". Bensouda was chosen from a list of 52 potential candidates. Almost half of them were from Africa.

Double standards

It seems to be a logical choice: African countries are over-represented in the ICC membership and all the ICC cases originate from Africa. African leaders, once the most passionate protagonists of the court, nowadays speak contemptuously of the "African Criminal Court". The African Union (AU) criticises the ICC for being discriminatory and conducting a selective dispensation of justice. Jean Ping, chairperson of the AU Commission, said earlier this year that the AU is "not against the ICC [...]" but against Ocampo who is rendering justice with double standards."

But the new prosecutor herself was very clear in stating that she will act - irrespective of her background. "Africa has taken the lead in international criminal justice and this has to be recognised," but she added "my origin, being African has nothing to do with my mandate as ICC prosecutor."

In contrast to her predecessor, it

seems to be a clear wish of the member states to have a reserved African lawyer who does her job without much fanfare. But the ICC states parties also chose Bensouda because she has been a constant factor at the court. She, like no other, knows the ins and outs of The Hague. "I have the good fortune to inherit a fully functioning office with about 300 staff," she said last week. Bensouda's 'internal promotion', is also a clear signal that the states are happy with the status quo at the prosecutor's office.

Fruit from the backyard

The question remains whether she will reap the fruits of her earlier work as deputy prosecutor. She has been in charge of preliminary investigations in Ivory Coast, Guinea and Nigeria. For the former Gambian Justice Minister, this was her backyard: not only does she know the files, but she knows the main players. It is a huge advantage given that for the chief prosecutor politics weigh heavier than justice.

After seven years as head of prosecution, Bensouda has only managed to wrap up one much-contested trial. Proceedings against Thomas Lubanga Dyilo took blood, sweat and tears to complete. Twice, the judges ordered Lubanga's release because of prosecution failures in disclosing evidence.

A situation never seen in the history of international justice. For the International Federation for Human Rights, "both episodes raise questions about the investigative capacity of the OTP. In particular its independence in conducting investigations." The rights organisation believes it would be highly desirable for Bensouda's office to reinforce its investigation teams, including recruiting more investigators. Bensouda said her office "has just completed an operational manual to standardise the work of the office." But it remains to be seen what that means in practice. Human Rights Watch warned of much "unfinished business" due to the limited prosecution policies that Ocampo and Bensouda have pursued up to now.

ICC: Mbarushimana released for insufficient evidence

The International Criminal Court (ICC) booked a plane ticket for Callixte Mbarushimana on Monday, "who deserved to spend Christmas in France with his family," according to his French lawyer, Philippe Meilhac. ICC judges refused to confirm the alleged charges against the Rwandan citizen. He was suspected of indirect command responsibility for war crimes and crimes against humanity committed in 2009 and 2010 in eastern Congo when he was the executive secretary of the FDLR Hutu rebel forces. The judges found "that the evidence submitted by the prosecution is not sufficient to establish [...] a significant contribution to the commission of crimes by the FDLR", says the December 16 decision. Arrested in October 2010 in Paris, Mbarushimana is also accused in France of other alleged crimes committed during the 1994 Rwandan genocide, when he was working for the PNUD in Kigali. An investigation into similar crimes by the International Criminal Tribunal for Rwanda ended in September 2002 with an order for dismissal signed by the then prosecutor Carla del Ponte for already insufficient evidence. But due to a UN travel ban, Mbarushimana on Wednesday was still behind bars. One of his lawyers said he has been "detained illegally" since Friday.

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