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# Pole Pole<sup>1</sup>: Hastening Justice at UNICTR

Eric Husketh \*

## I. INTRODUCTION

¶1

The United Nations International Criminal Tribunal for Rwanda (ICTR, or the Tribunal) was established in 1994 to deal with genocide, war crimes, and crimes against humanity committed during that year in Rwanda (or by Rwandan nationals elsewhere), primarily within a 100-day period from April to June. Even at its inception, the Tribunal was viewed by many, not least of all the Rwandans themselves, as an extremely late, patchwork means of dealing with Rwanda's crisis.<sup>2</sup> The International Criminal Tribunal for Yugoslavia had been established in 1993,<sup>3</sup> some two years after atrocities commenced in that country, and Rwanda's post-genocide Prime Minister called the Security Council to task for their failure to take advantage of that precedent and deal with Rwanda in a similar fashion, asking "[i]s it because we're Africans that a court has not been set up?"<sup>4</sup> Now, nearly ten years later, both Rwanda and the larger international community remain deeply frustrated by the exceptionally slow pace of adjudications in Arusha.<sup>5</sup> The Tribunal's present (third) mandate will expire in 2008, and although the Office of the Prosecutor (OTP) and the Tribunal as a whole have developed exit strategies aimed at completion by that time, there is great concern that ICTR will not be able to complete its work, even if the mandate were renewed once again. This possibility raises grave questions of social and political importance for Rwanda, but also practical issues such as how to deal with any detainees whose cases are not completed by that time.<sup>6</sup> This article

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\* Eric Moss Husketh, J.D. Candidate 2005, Northwestern University School of Law; M.A. in International Relations (2002), University of Chicago; B.A. in Psychology (1998), Duke University. I would like to express my gratitude and admiration to the staff of the United Nations International Criminal Tribunal for Rwanda, and my true hope for the people of Rwanda that in some minute way my work here will contribute to a brighter future. I am also thankful to my colleagues in the human rights community at Northwestern Law for their hard work and guidance. I welcome comments at e-husketh2005@law.northwestern.edu.

<sup>1</sup> A Swahili phrase used in Arusha, the seat of the Tribunal, meaning "slowly, slowly"—"be patient," or "don't try to go too fast."

<sup>2</sup> See, e.g., Nsongurua Ndombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT'L. L. REV. 1177, 1223-24. See generally Barbara Crossette, *Rwanda Asks Quick Start Of Tribunal*, N.Y. TIMES, October 9, 1994.

<sup>3</sup> UNSC Resolution 808 of 22 February 1993 called for the establishment of a Tribunal for the former Yugoslavia (ICTY) and instructed the Secretary General to prepare a report within 60 days regarding, *inter alia*, the legal basis for establishing such a court. See *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*. Most of the report's suggestions then became part of the ICTY statute, adopted by the Security Council as Resolution 827, (U.N. Doc S/RES/827) 25 May 1993 then became part of the ICTY statute, adopted by the Security Council as Resolution 827, (U.N. Doc S/RES/827 (1993)) 25 May 1993.

<sup>4</sup> 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* xv-xvi (1998), quoting Nelson Graves, *Premier Designate Compares Rwanda to Nazi Genocide*, Reuters World Service, 26 May 1994, available in LEXIS, News Library, Curnws File.

<sup>5</sup> The Tribunal was placed in Arusha, and its Statute promulgated, by U.N. SCOR, Res. 955, 3452rd mtg, U.N. Doc S/RES/955 (1994).

<sup>6</sup> One option would be the transference of cases to Rwanda's domestic courts, but an agreement would have

will not focus on whatever institutional, political, or other reasons may have explained the original inertia of the international community in dealing with Rwanda's genocide. These topics have been widely examined in multiple fora. Instead, I examine the final push towards improving the Tribunal's output and completing its mandate within the time allotted.

¶2 As a legal intern at ICTR during the summer of 2003, this author was intrigued by two major moves ostensibly aimed at expediting the tribunal's work and enhancing the quality of its output. The first of these was the addition of eighteen *ad litem* judges who could be temporarily teamed with permanent judges, effectively dividing each of the ICTR's three trial chambers into two functional subunits and enabling the tribunal to hear more cases. The second was the decision of the UN Security Council not to renew the mandate of Prosecutor Carla del Ponte for the Rwanda Tribunal. While del Ponte would continue as the Prosecutor for Yugoslavia, the mandate of her office was split and a new Prosecutor, Hassan Bubacar Jallow of the Gambia, appointed for Rwanda. A significant question in dealing with the decision to split the Prosecutor's mandate is the motivation for doing so. Appointing a Prosecutor to focus solely on Rwanda seems pragmatic in that it will most likely expedite the Tribunal's work, but inasmuch as it was a decision taken by the UN Security Council, this decision must have also had its political elements. One goal of this article is to examine the possibility that the decision to replace Carla del Ponte at the ICTR was at least partially motivated by the Rwandan government's animus against her as well as its desire to preempt her continued investigation into war crimes committed by the RPF/RPA during the Tribunal's temporal jurisdiction.

¶3 The article will proceed by describing the halting pace of adjudication at the ICTR and the problems caused by the delay, then by examining structural issues of the Tribunal that contributed to these delays. Where possible, this article examines some steps that have already been taken towards rectifying these problems and expediting the Tribunal's work. Next, the article examines the measures taken in mid-2003: how the changes came to pass and how they may alleviate the problem. The article concludes by discussing the potential of these measures to help expedite trials, and on a larger scale to advance peace and reconciliation in Rwanda. Whenever possible, the article will draw on the author's personal experience as a legal intern at the ICTR in the summer of 2003.

## II. DESCRIBING THE DELAYS

¶4 A cursory look at the judicial output of the ICTR provides a simplistic but useful indicator of the Tribunal's slowness. The current state of adjudications was described in a letter from the President of the Tribunal, Judge Erik Møse of Norway, to the Security Council dated 29 September 2003, describing the Tribunal's most recent "Completion Strategy." As of President Møse's 29 writing, the cases of twenty one accused had either been completed or were waiting for judgments to be delivered.<sup>7</sup> Using the more

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to be concluded to protect the accused from the application of Rwanda's death penalty, since the UN is institutionally opposed and since the ICTR can not impose such a penalty. *See id.*, Art. 23 para. 1.

<sup>7</sup> Letter dated 3 October 2003 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2003/946 (2003), 3 October 2003 [hereinafter Letter to Security Council]. The letter transmits to the Security Council a letter from President Møse, including the Completion Strategy to show that under the current rules allowing the use of four *ad litem* judges, the ICTR would not be able to complete all the cases it anticipated the Prosecutor would bring. Judge Møse was writing to ask the

conservative estimate of 800,000 deaths during the hundred-day genocide in 1994, this represents less than one case completed per 38,000 deaths, and an average of just over two cases per year of the tribunal's existence. While the former figure may appear sensationalistic, and is admittedly no indicator of legal efficiency, it is mentioned it here to emphasize that the legal work of the tribunal carries a massive burden of human suffering. The resulting emotional charge should not be overlooked because it can play a substantial role in relationship between the Tribunal and its namesake country—that is, the Tribunal can not and does not operate in a vacuum.

¶5 Between the commencement of trials in January 1997 and September 2003, the ICTR had handed down eleven judgments (for thirteen accused). One of these accused, Ignace Bagilishema was the Tribunal's only acquittal up to the time of President Møse's writing,<sup>8</sup> and three more were guilty pleas<sup>9</sup>. Of these completed cases, six of the convicted had begun their prison sentences in Mali. Three cases for four accused were on appeal.<sup>10</sup>

¶6 While the raw numbers of completed cases suggest a bleak outlook for the Tribunal, the rate of completion has nearly doubled in the Tribunal's second mandate (1999-2003) as compared to its first mandate (1994-1999). In September 2003, four cases were in progress with twelve accused, and the two "Government" group trials with eight accused were scheduled to begin on November 3, 2003. Thus in November 2003, the Tribunal would be trying nearly as many accused (twenty) as it had tried in the past nine years combined (twenty-one). In a conference with ICTR legal interns organized by this author in June, 2003, Judge Møse addressed the fact that the first years of the Tribunal's work had produced a very low number of final judgments, but defended these less efficient years as a necessary period of foundation-laying. The recent upswing in the Tribunal's activity may signal that certain initial problems have been solved, and that efficiency may continue to improve through the end of the Tribunal's third mandate. This is a possibility to be considered throughout this paper, as many of the problems described herein appear to have been "growing pains" of sorts.

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Security Council to approve the use of nine judges, as it had done with ICTY, in order to further expedite proceedings.

<sup>8</sup> Two more defendants have been acquitted since the initial writing of this article. These were Emmanuel Bagambiki and Andre Ntagerura in the "Cyangu" case, *THE PROSECUTOR v. EMMANUEL BAGAMBIKI and SAMUEL IMANISHIMWE and THE PROSECUTOR v. ANDRÉ NTAGERURA*, Case No. ICTR-99-46-T. See Hirondele News Agency, *ICTR/CALENDAR - 2004: A YEAR OF BOTH CONTROVERSIES AND PROGRESS FOR ICTR*, 1/04/2005 available at <http://www.hirondelle.org/arusha.nsf/LookupUrlEnglish/E16F1E358FC6B95443256F7F00234C04?OpenDocument> (last visited Apr. 4, 2005).

<sup>9</sup> *Letter to Security Council*, *supra* note 7. The accused who pled guilty were Ruggiu, Kambanda, and Serushago

<sup>10</sup> *Id.* It must be noted that immediately before this article was submitted for publication, two additional accused were acquitted and approved for provisional release while appeals were pending. See ICTR Press Release, Trial Chamber Convicts Imanishimwe but Acquits Ntagerura and Bagambiki, February 25, 2004, at <http://www.ictr.org/ENGLISH/PRESSREL/2004/376.htm> (last visited Apr. 4, 2005), and ICTR Press Release, Tribunal Grants Conditional Release of Ntagerura and Bagambiki, February 27, 2004, at <http://www.ictr.org/ENGLISH/PRESSREL/2004/377.htm> (last visited Apr. 4, 2005).

### III. THE PROSECUTOR V. BARAYAGWIZA: DELAY PAR EXCELLENCE

¶7 Perhaps the most dramatic illustration of the ICTR's inability to speedily complete trials has been the Barayagwiza case. Jean-Bosco Barayagwiza, a former official in the Ministry of Foreign Affairs, was accused of genocide, complicity in genocide, and crimes against humanity.<sup>11</sup> He had been a leader of the Coalition for the Defense of the Republic, an anti-Tutsi party that actively participated in the 1994 massacres, and a founder of Radio Television Libres des Mille Collines, the broadcast mouthpiece of Rwanda's Hutu Power factions.<sup>12</sup> Barayagwiza was arrested in Cameroon on March 27, 1996, and was not transferred to Arusha for nineteen months.<sup>13</sup>

¶8 Although Barayagwiza was first arrested at the request of Rwandan authorities, Cameroon's courts declined to extradite him to Rwanda. He was released in February, 1997 and then re-arrested at the request of the ICTR. He was transferred to the UN Detention Facility (UNDF) in Arusha on November 19, 1997. Almost a year later, on November 17, 1998, Trial Chamber II of the ICTR rejected Barayagwiza's claim that the continued delay had violated his right to a prompt and fair trial.<sup>14</sup> On appeal, however (but yet another year later), the Appeals Chamber based in The Hague found that Barayagwiza's rights had indeed been violated and ordered his release.<sup>15</sup> The newly-appointed Prosecutor, Carla del Ponte, immediately appealed the decision based on "new and additional facts"<sup>16</sup> (that were criticized as neither)<sup>17</sup>. Barayagwiza was held pending the outcome of the Prosecutor's appeal. According to Amnesty International, the governments of both Rwanda and Belgium may have planned in the interim to request Barayagwiza's re-arrest and extradition by Tanzanian authorities for trial in one of their national courts if he were eventually released.<sup>18</sup>

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<sup>11</sup> Barayagwiza's case, *The Prosecutor v. Jean-Bosco Barayagwiza* (ICTR Case No. ICTR-97-19) was merged into the "Media" group trial. For a summary of the merged "Media" trial, see *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze* (ICTR Case No. ICTR-99-52-T), Summary, December 3, 2003, at <http://www.ictr.org/ENGLISH/cases/Barayagwiza/judgement/Summary%20of%20judgment-Media.pdf> (last visited Apr. 4, 2005) (summarizing the court's decision in advance of producing authoritative texts) [hereinafter Media Summary].

<sup>12</sup> Press Release, Amnesty International, *International Criminal Tribunal for Rwanda: Jean-Bosco Barayagwiza Must Not Escape Justice*, 24 November 1999. Available at <http://www.amnestyusa.org/countries/rwanda/document.do?id=0F523D1C335BAFF18025690000692E68> (last visited Apr. 4, 2005). Note that Georges Ruggiu, the only non-Rwandan (a Belgian) to be tried by the ICTY, was a staff member of the radio station.

<sup>13</sup> Christopher Wren, *UN Tribunal Wrong to Free Top Suspect, Rwanda Says*, N.Y. TIMES, November 12, 1999.

<sup>14</sup> *The Prosecutor v. Jean-Bosco Barayagwiza*, ICTR Case No. ICTR-97-19, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect, 17 November 1998, at <http://www.ictr.org/ENGLISH/cases/Barayagwiza/decisions/RELEASE1198.htm> (last visited Apr. 4, 2005). See also Amnesty International, *supra* note 12.

<sup>15</sup> *Jean-Bosco Barayagwiza v. The Prosecutor*, [Appeals Chamber] Decision, 3 November 1999, at <http://www.ictr.org/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm> (last visited Apr. 4, 2005).

<sup>16</sup> Maury D. Shenk et al, *International Criminal Tribunals or the Former Yugoslavia and for Rwanda*, 34 INT'L LAW. 683, 689, (2000).

<sup>17</sup> Maury D. Shenk et al, *International Criminal Tribunals or the Former Yugoslavia and for Rwanda*, 35 INT'L LAW. 622, 630-31 (2001).

<sup>18</sup> *Id.* See also Amnesty International, *supra* note 12.

¶9

The decision of the Appeals Chamber represented an unabated disaster for the Office of the Prosecutor (OTP), and demonstrates the political ramifications of the ICTR's work. At the time of the decision, Carla del Ponte had just begun her tenure as the replacement for Louise Arbour, who had resigned her post as prosecutor in September to accept an appointment to Canada's high court.<sup>19</sup> The Appeals Chamber, cognizant of the gravity of the charges against Barayagwiza, issued a scathing condemnation of OTP's handling of the case: "it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence."<sup>20</sup> The appeals chamber chastened OTP from both sides of the issue, both for its apparent disregard for the rights of the accused, as well as for its failure to prosecute such serious crimes. Moreover,

[N]othing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing the human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights.<sup>21</sup>

¶10

Barayagwiza was to be released "so that no further injustice results."<sup>22</sup> At the time of the decision, several accused had been in custody for more than five years.<sup>23</sup> Within one month of the appellate decision, Theoneste Bagosora and three other accused had filed for release or indicated their intent to do so due to their own extensive imprisonment.<sup>24</sup>

¶11

The government of Rwanda was incensed at the decision to release Barayagwiza, who was viewed at home as the "number one criminal."<sup>25</sup> The government immediately blasted OTP's "prosecutorial incompetence"<sup>26</sup> and suspended cooperation with the Tribunal, making it virtually impossible for any other cases to move forward because witnesses could not be transported from Rwanda to Arusha to testify. This was especially damaging because several circumstances had already combined that year to keep the

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<sup>19</sup> Wren, *supra* note 13.

<sup>20</sup> *Jean-Bosco Barayagwiza v. Prosecutor II*, *supra* note 15, at Para. 106.

<sup>21</sup> *Id.* at Para. 112.

<sup>22</sup> *Id.*

<sup>23</sup> Thierry Cruvellier, *A Serious Crisis*, DIPLOMATIE JUDICIAIRE, TPIRUK 12 at 1, available at [http://www.justicetribune.com/article\\_uk.php?id=2080](http://www.justicetribune.com/article_uk.php?id=2080). The reader should note that Diplomatie Judiciaire was a web-based information service that placed journalists in Arusha and is heavily cited in this article. The service has ceased operations, but with few exceptions, Diplomatie Judiciaire articles have been archived in a new membership-based news service, International Justice Tribune (<http://www.justicetribune.com>). For certain articles cited herein, the members of International Justice Tribune have graciously provided links to the new archived locations of old Diplomatie Judiciaire articles. For others, the original Diplomatie Judiciaire web addresses are cited to assist the reader in locating the articles within the International Justice Tribune archives, if so desired.

<sup>24</sup> Shenk, *supra* note 16. Bagosora is a former military commander, currently part of the "Military 1" group trial, who is generally regarded as the mastermind of the genocide. His individual case was *The Prosecutor v. Theoneste Bagosora*, ICTR Case No. ICTR-96-7; joinder with Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva was granted by Decision on the Prosecutor's Motion for Joinder, 29 June, 2000, available at <http://www.ictor.org/ENGLISH/cases/Kabiligi/decisions/290600.html> (last visited Apr. 4, 2005).

<sup>25</sup> Wren, *supra* note 13.

<sup>26</sup> *Rwanda Bars U.N. Tribunal Prosecutor; Visa Refused after Court Freed Genocide Suspect*, WASH. POST, November 23 1999.

court from hearing a single case between July and October 1999.<sup>27</sup> Rwanda also targeted its wrath at Carla del Ponte personally; although the Tribunal sat in Arusha, del Ponte's own office and investigating staff remained in Kigali, and Rwanda refused to issue her a visa to enter the country.<sup>28</sup>

¶12 The Prosecutor won her appeal some five months later, with the appeals chamber finding that Barayagwiza's rights had indeed been violated but not to the point that he should be set free. Instead, if he were found guilty, his sentence should reflect proper consideration of these violations.<sup>29</sup> Shortly after the Appeals Chamber reinstated Barayagwiza's trial in March 2000, del Ponte was rewarded by Rwanda with a permanent visa.<sup>31</sup> The win was quite a coup for del Ponte in that she was able to kill two birds with one stone; she had retained the chance to prosecute serious crimes, but she had also allowed both her own OTP and the Rwandan government to save face.

¶13 The Barayagwiza appeal was crucial for del Ponte for several reasons. First, she needed to establish her own legitimacy in the eyes of the Rwandan government and virtually everyone else observing. Next, OTP had already poured its resources into building a case against Barayagwiza, and because OTP actually selects the suspects it will prosecute, letting Barayagwiza slip away would have been a waste of "sunk" resources and an embarrassment. Finally, in a larger sense, del Ponte needed to rescue the prosecution in order to preserve relations with Rwanda, who had made clear that it had the power to shut down the ICTR at its whim. With Barayagwiza, it became clear that politics and relations with the Rwandan government had already begun to taint the purity of legal work going on at ICTR; del Ponte even publicly stated that if Barayagwiza's trial were not reinstated, the Tribunal should "put the key under the mat."<sup>32</sup> Had del Ponte not eventually won her Barayagwiza appeal, the Tribunal process could have completely disintegrated.<sup>33</sup>

¶14 The Barayagwiza fiasco highlights the fact that the ICTR does not work in a vacuum. The entire Tribunal has the uneasy mandate of applying international law in a fair and disinterested fashion, yet it must depend upon and even participate in

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<sup>27</sup> See generally Note [Transmitting the 5<sup>th</sup> annual report of the International Criminal Tribunal for Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, Covering the Period 1 July 1999-30 June 2000 para. 58, U.N. Doc. A/55/435, October 2, 2000 [hereinafter *Fifth Annual Report*].

<sup>28</sup> *Rwanda Bars UN Tribunal Prosecutor*, *supra* note 26.

<sup>29</sup> If Barayagwiza were instead found innocent, he was to receive financial compensation. Jean-Bosco Barayagwiza v. The Prosecutor, ICTR Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), March 31, 2000, Para. 74, at <http://www.ictr.org/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm> (last visited Apr. 4, 2005). See also Shenk, *supra* note 17.

<sup>30</sup> Del Ponte made this statement in an interview in Kigali, December 7, 2001. International Crisis Group, International Criminal Tribunal for Rwanda: Delayed Justice 21 (2001) [hereinafter ICG Report].

<sup>31</sup> Rwanda: Arusha court prosecutor dismisses possibility of transferring detainees, BBC, May 14, 2000.

<sup>32</sup> Del Ponte made this statement in an interview in Kigali, December 7, 2001. International Crisis Group, *International Criminal Tribunal for Rwanda: Delayed Justice* 21 (2001), available at <http://www.icg.org/home/index.cfm?id=1649&l=1> (last visited Apr. 4, 2005) [hereinafter ICG Report].

<sup>33</sup> All three accused in the Media case were found guilty of various crimes, including genocide, on December 03, 2003. Barayagwiza's co-accused were Hassan Ngeze (founder of the anti-Tutsi newspaper *Kangura*), and Ferdinand Nahimana (Barayagwiza's co-founder of RTLM). Ngeze and Nahimana were sentenced to life in prison, but Barayagwiza's sentence was reduced to twenty-seven years in light of the prior violations of his rights. See Media Summary, *supra* note 11, and Sharon LaFraniere, *Court Convicts 3 in 1994 Genocide Across Rwanda*, N.Y. TIMES, December 4, 2003.

international politics to be able to accomplish that work. Perhaps reminded by Barayagwiza of its precarious position and the need for good relations with Rwanda, the ICTR made efforts throughout 2000 to reach out. For example, the Tribunal released to the Rwandan government a CD-ROM containing the entire confession of Jean Kambanda, the single highest-ranked government official at the time of the genocide.<sup>34</sup> The Tribunal also established an information and outreach center in Kigali, and some judges agreed to a “goodwill” visit to massacre sites within Rwanda for the first time.<sup>35</sup> After these palliative overtures, Rwanda’s representative to the ICTR stated that “many things have been put right as far as the workings of the Tribunal and its relationship with Rwanda.”<sup>36</sup> In November of 2000, Carla del Ponte went so far as to suggest that relations had improved enough to negotiate holding some ICTR trials in Rwanda in order to deepen the Tribunal’s connection to Rwanda.<sup>37</sup>

¶15 It is important to note, however, that relations with Rwanda are not the ICTR’s only political concern. The ICTR must maintain positive relationships with literally dozens of countries where suspects, witnesses, or evidence may be found, or where convicts may be sent to serve their prison terms, and most of all to secure funding at the UN itself.<sup>38</sup>

#### IV. STRUCTURAL PROBLEMS DELAYING JUSTICE

¶16 While the Barayagwiza fiasco was a distinct disaster on the part of OTP, the Tribunal as a whole has been plagued by a number of serious problems, all of which continue to combine to cause the most obvious of the ICTR’s failures: the simple inability to conclude trials quickly and efficiently. The web-based journal *Diplomatie Judiciaire/Judicial Diplomacy*, produced by journalists working close to the Tribunal in and around Arusha, succinctly listed the ICTR’s seemingly eternal handicaps in 2000: “a slow legal system, the lack of experience of a pioneering court, language difficulties, administrative unwieldiness, judges’ holidays, a strategic power struggle, procrastinatory manoeuvres, a lack of cooperation, power networks, etc.”<sup>39</sup> This “explosive cocktail”<sup>40</sup> of problems seems virtually inevitable given the nature of the court, and has proved

<sup>34</sup> The Prosecutor v. Jean Kambanda, ICTR Case No. ICTR-97-23. Kambanda was the Prime Minister in the Interim Government which presided over the genocide. See also *ICG Report*, *supra* note 32, at 21

<sup>35</sup> Shenk *supra* note 17 at 627-28..

<sup>36</sup> *Id.* at FN 76, citing Coalition for International Justice, *ICTR Judges to Visit Crime Scenes* (August 16, 2000) at <http://www.cij.org/content.html>. Three judges had visited Rwanda for three days in November 1999 to view massacre sites at the request of defense counsel for Ignace Bagilishema—notably, as mentioned earlier, the ICTR’s only acquittal until early 2004. See *Prosecutor v. Ignace Bagilishema*, Judgement, ICTR Case No. ICTR-95-1A-T, Para. 10, available at <http://www.ictor.org/ENGLISH/cases/Bagilishema/judgement/2.htm> (last visited Apr. 4, 2005).

<sup>37</sup> *Id.* at Footnote 77, Citing *Prosecutor Seeks to Move ICTR Hearings on Genocide to Rwanda*, Xinhua, November 21, 2000 In May of the same year, del Ponte said the opposite, namely that Rwanda’s continuing use of the death penalty made such transfers impossible.. See *Rwanda: Arusha court Prosecutor dismisses possibility of transferring detainees*, *supra* note 31.

<sup>38</sup> An expert report in 1999 examined the dependent nature of the ICTR’s political relationships at length. See *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, U.N. Doc. A/54/634, 22 November 1999, para. 25 [hereinafter *Expert Group Report*].

<sup>39</sup> *Softly does it.*, DIPLOMATIE JUDICIAIRE 7 (2000), available at <http://www.diplomatiejudiciaire.com/UK/Tpiruk/TPIRUK4.htm> See *supra* note 23.

<sup>40</sup> *Id.*



difficult, but not impossible, to overcome. This section examines some of the major issues that continue to slow the process of adjudications in Arusha, and where possible, progress in reducing these impediments.

### A. Financial Issues

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It can hardly be argued that the ICTR suffers from a lack of financial support. Annual budgets for the Tribunal hover just above \$100 million,<sup>41</sup> only some \$20 million less than the ICTY. It would be facile, however, to assume that such a large budget should automatically translate into speedy trials or that the two *ad hoc* Tribunals can easily be compared against each other. Rather, it could be argued that the budget must necessarily be so large precisely because running the Tribunal is so difficult in Arusha, and that the circumstances surrounding the work of the ICTR are so different from those of ICTY that a dollar-for-dollar comparison is of little use. I outline here some costs of the ICTR to underscore that, while limited resources may indeed contribute to delay, throwing money at Arusha may not automatically produce an increase in the ICTR's output or efficiency.

¶18

Several unique circumstances draining off the ICTR's admittedly huge budget are immediately noticeable to anyone working at the Tribunal. Firstly, technical services and goods are substantially more difficult to come by than in the Hague, and most of the resources now available to ICTR have been assembled from scratch.<sup>42</sup> For example, the ICTR's website was assembled at a pay-per-use Internet Café in Arusha.<sup>43</sup> Before the Arusha International Conference Center became the home of ICTR, it was just that—a conference center. Preparations for the special needs of the Tribunal required massive investments of time and money, such as installing generators to cope with inadequate electricity supplies and converting conference rooms into acceptable trial chambers.<sup>44</sup> As the Tribunal continues to expand its various capacities, construction work must be carried out (to UN standards) at the Arusha International Conference Center at prices inflated by Arusha's relative inaccessibility. Such infrastructure issues are vastly decreased at the Hague by the ICTY's ability to rely on existing resources (costs of European labor notwithstanding).<sup>45</sup> An Expert Group to review the ICTR's performance emphasized the dilatory effect of starting from scratch in a 1999 report, noting among other problems that while the first indictment was issued in 1995, the first courtroom was not completed until

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41 See generally Budget for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 for the biennium 2004-2005, 58th Session, Aug. 12, 2003, U.N. Doc.A/58/269.

42 See generally *Judging Genocide*, THE ECONOMIST, June 16, 2001 (US Edition).

43 *Id.*

44 *Id.*

45 A Guide to the Mobility and Hardship Scheme, International Civil Service Commission, May 1997.

Available at [http://www.un.org/Depts/OHRM/salaries\\_allowances/allowances/mobility/mobility.doc](http://www.un.org/Depts/OHRM/salaries_allowances/allowances/mobility/mobility.doc).

46 Guide for ICTR Staff in Arusha, May 2002. Available at <http://www.ictor.org/default.htm>

47 Conditions of service of the professional and higher categories: linkage between the mobility and hardship allowance and base/floor salary scale. Note by the secretariat of the International Civil Service Commission, U.N. Doc. ICSC/57/R.5. Available at <http://icsc.un.org/other/SES/57r5.doc>.

48 *Id.*

1996.<sup>49</sup> The third courtroom was not completed until 1999. One high-ranking OTP official in a confidential email opined that the lag time created by Arusha's initial lack of infrastructure was the single largest cause of delay.<sup>50</sup>

¶19

Another particular concern that delays work in Arusha has been the Tribunal's information technology capacity, in terms of intra- and internet access and the availability of up-to-date and functional computing, which had been a handicap from the beginning.<sup>51</sup> Other day-to-day tasks such as printing services may be available only at drastically increased prices or at substantially reduced quality—this author became well acquainted with prosecution staff planning their home leave around securing necessary goods for their teams, such as maps of massacre sites large enough to be seen by both judges and witnesses without moving around.<sup>52</sup>

¶20

Another major delay in Arusha has been the procurement of simultaneous translation into English, French, and Kinyarwanda. While simultaneous translation requires talented personnel to be present at all times, it also requires substantial technology that was not put in place in all three trial chambers until 2003.<sup>53</sup> At least three soundproof translation rooms are needed for each chamber, with requisite microphones, headphones, and other equipment. Until that time, it had been necessary to interpret witness testimony from Kinyarwanda into French, and then from French into English.<sup>54</sup> 2003 also saw significant improvement in the quality of transcription and recording services. Translation had been such a problem that in 2000 the judges authorized the use of outside translators<sup>55</sup>, after Hassan Ngeze, a defendant in the Media case, requested translation of all 71 issues of the *Kangura* newspaper he had edited. *Kangura* had been a major source of anti-Tutsi hate propaganda. The Chamber replied that the ICTR simply did not have the resources to provide such a substantial translation, and as a result Hassan Ngeze briefly boycotted his own trial<sup>56</sup>. Further, the lack of translation capabilities has also held up the release of judicial decisions.<sup>57</sup> Between the completion of simultaneous

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<sup>49</sup> *Expert Group Report*, *supra* note 38, para. 21.

<sup>50</sup> Email on file with author.

<sup>51</sup> Dire lack of computing resources in Kigali are noted in [Report of the Office of Internal Oversight Services on the Audit and Investigation of the International Criminal Tribunal for Rwanda], U.N. Doc. A/51/789, 6 February 1997 at para. 48 [hereinafter *Paschke Report*]. In this author's observation, the shortage appears to continue at present in Arusha. For example, eight interns working in one office in the summer of 2003 shared two computers with internet access. *See also Judging Genocide*, *supra* note 42.

<sup>52</sup> This was the case in the Military 1 trial during this author's internship; it was simply impossible for the trial team to produce a map of a massacre site large enough to be seen by the entire trial chamber.

<sup>53</sup> Note [Eighth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994] Covering the period 1 July 2002 to 30 June 2003 at 18, U.N. Doc. A/58/140, 11 July, 2003 [hereinafter *Eighth Annual Report*].

<sup>54</sup> Note [Transmitting the 6<sup>th</sup> annual report of the International Criminal Tribunal for Rwanda, Covering the period 1 July 2000-30 June 2001] para. 40, U.N. Doc. A/56/351, September 14, 2001 [hereinafter *Sixth Annual Report*].

<sup>55</sup> *Fifth Annual Report*, *supra* note 27.

<sup>56</sup> ICTR Press Release, *Media Trial Opens*, at <http://www.ictr.org/ENGLISH/PRESSREL/2000/245.htm> (last visited Apr. 4, 2005). *See also* Media Summary, *supra* note 11.

<sup>57</sup> *Sixth Annual Report*, *supra* note 54, para. 48

translation facilities and the improvements in court recording, Judge Møse has expressed optimism that translation could now move at least 25% faster than previously.<sup>58</sup>

¶21 Finally, security at the Tribunal and the detention facility must be expanded in Arusha to protect certain members of the staff as they travel to and from work. This means that ICTR's security staff sometimes functions as a de facto police force around Arusha as violent crime in the town continues to increase.<sup>59</sup> Arusha serves as a gateway for tourists headed to the Serengeti and Mt. Kilimanjaro, most often via Nairobi or Dar es Salaam. As the only major city in this region of Tanzania, Arusha also receives steady flows of the rural poor in search of work. Cheating or robbing tourists is easy as they are instantly recognizable; robbing ICTR staff is even easier as they are often the only foreigners dressing formally and are highly visible in traffic with their diplomatic license plates (and, of course, cars that virtually no one in Arusha can afford). Safety in Arusha thus presents one more practical problem for OTP and other ICTR staff: putting in late hours in the interest of efficiency at the ICTR can be a risky proposition because of the dangers of driving home or taking a taxi after dark. Door-to-door shuttle service is provided for staff who do not drive, but shuttles leave promptly after the end of the official work day.<sup>60</sup> Thus burning the midnight oil as is the norm in most legal cultures is simply not an easy option.

¶22 With regard to living and working in Arusha, it is also worth mentioning that internationally recruited staff members who are contracted for more than one year must also have their salaries adjusted upwards for the hardship posting.<sup>61</sup> Arusha and Kigali have been classified as a "C" hardship station on a scale of A to E.<sup>62</sup> For reference, Kabul, Afghanistan is an E, and Freetown, the seat of the Special Court for Sierra Leone, has recently been upgraded from E to D.<sup>63</sup> While this may not account for a substantial portion of the ICTR's expenditures, it nonetheless adds to the cost of running the Tribunal in Arusha. While it has not been verified, the fact that Arusha is a hardship post may also make it more difficult to hire and retain the talented personnel necessary for an efficient court.

### *B. Cost and the division of offices*

¶23 Another structural concern is the bifurcation of the ICTR's offices in Kigali and Arusha. Clearly the cost of maintaining two facilities, when combined with the cost of transporting personnel and materials between the two, presents a serious challenge for the

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<sup>58</sup> *Eighth Annual Report*, *supra* note 53.

<sup>59</sup> For a first-hand assessment of security in Arusha, see *Security Awareness*, ICTR Newsletter Vol. 1, No. 3, August 2003 available at <http://www.ictr.org/ENGLISH/newsletter/aug03/aug03.doc> (last visited Apr. 4, 2005). See also *Report of the Office of Internal Oversight Services on the follow-up to the 1997 audit and investigation of the International Criminal Tribunal for Rwanda*, U.N. Doc. A/52/784, 6 February 1998, at paras 63-68 [hereinafter *Follow-Up Report*].

<sup>60</sup> Author's personal observation during internship.

<sup>61</sup> *A Guide to the Mobility and Hardship Scheme*, International Civil Service Commission, May 1997, available at <http://icsc.un.org/resources/pdfs/ppd/mhardship/MOBILITYENG.pdf> (last visited Apr. 4, 2005).

<sup>62</sup> *Guide for ICTR Staff in Arusha*, May 2002, available at <http://www.ictr.org/ENGLISH/opportunities/guide/index.htm> (last visited Apr. 4, 2005).

<sup>63</sup> *Consolidated List of Entitlements, Effective 1 January 2005*, International Civil Service Commission, at [http://icsc.un.org/resources/html/ppd/hardship/hs/hs\\_frm.htm](http://icsc.un.org/resources/html/ppd/hardship/hs/hs_frm.htm) (last visited Apr. 4, 2005).

Tribunal.<sup>64</sup> However, the additional cost alone is not the only challenge presented by the separation of functions. Communication and coordination between the two offices, even with telephone and intranet links, is necessarily hampered by the lack of face-to-face interaction and the inability to simply have a group meeting between, for example, prosecutors and the investigators on whom they rely to produce evidence and reliable witnesses. In the early years when OTP was entirely based in Kigali and the Registry in Arusha, the distance appears to have hampered good relations between those offices as well.<sup>65</sup>

¶24

In addition, the need for OTP staff (now mostly stationed in Arusha) to be physically present in Rwanda from time to time should not be underestimated. Especially as witnesses' memories fade these ten years after the genocide, the ability of OTP staff to fully understand, for example, the physical layout of massacre sites or other localities can be crucial to developing a case. Thus the physical distance between the Tribunal and the area with which it deals must necessarily increase the amount of time, effort, and money needed to mount a prosecution. The ICTR maintains a single seven-passenger aircraft which usually makes two trips per week between Arusha and Kigali, and Tribunal staff must balance their need for travel with budget constraints as well as witness protection issues: if witnesses are being transported to or from Arusha on the aircraft, other staff may be barred from the flight to protect the witness' anonymity and/or to avoid "contaminating" the witness. The ICTR and ICTY are conceivably the only courts in the world with the unique logistical burden of having to regularly fly their staff and witnesses back and forth across national borders to accomplish their work, and it is probably even more rare that the country concerned occasionally is hostile to such exchanges.

¶25

While the dilatory effect of maintaining two offices is obvious to all concerned, this is seemingly an inevitable problem. At the time Security Council Resolution 955 was passed establishing the Tribunal, Kigali was essentially a disaster area. Questions of security and the availability of resources would have been even more serious had the ICTR been established in Kigali because it is even less accessible than Arusha. Furthermore, if a (hypothetical) ICTR in Kigali were to focus on "bigger fish" as it has had to do in Arusha, a situation similar to the present one would have arisen: while the ICTR focused its limited, but nevertheless substantial, resources on providing due process for high-level defendants who could only be sentenced to life imprisonment, the decimated Rwandan judicial system would have to apply its vastly reduced resources to the remaining massive numbers of individual criminals, who could be sentenced to death for crimes that are presumably lesser in magnitude<sup>67</sup>. The duality between the fairness of trials at the ICTR and those in Rwanda is already disturbing,<sup>68</sup> as is the fact that the

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<sup>64</sup> See generally *Paschke Report*, *supra* note 51, para 41.

<sup>65</sup> *Id.* Para. 42.

<sup>66</sup> See Julia Preston, *Tribunal set on war crimes, Kigali votes no on UN resolution*, Washington Post, Nov. 9 1994. Of course, the Security Council's refusal to apply the death penalty was one of the reasons Rwanda was the only "no" vote on Resolution 955, despite its professed support for the Tribunal.

<sup>67</sup> See Julia Preston, *Tribunal Set On Rwanda War Crimes; Kigali Votes No On U.N. Resolution*, WASH. POST, November 9, 1994. Of course, the Security Council's refusal to apply the death penalty was one of the reasons Rwanda was the only "no" vote on Resolution 955, despite its professed support for the Tribunal.

<sup>68</sup> See, e.g., Amnesty International, *Rwanda: the troubled course of justice*, April 25, 2000, available at <http://www.amnestyusa.org/countries/rwanda/document.do?id=00B458F4B18051F2802568BF004A5937> (last visited Apr. 4, 2005).

planners of the genocide are immune from the death penalty while those who carried out their plans are not. Placing the Tribunal in Kigali would have made this dichotomy even more apparent, and even more likely to hamper reconciliation and reconstruction.

¶26 As mentioned above, Carla del Ponte appears to have toyed with the idea of moving some elements of the trial process into Rwanda to help increase the relevance of the Tribunal's work to the Rwandan people. This would have seemed possible as Kigali settled down in the years after the conflict, but the idea does not seem to have gotten anywhere because the continuing death penalty and fair trial dichotomies have never been resolved.<sup>69</sup> Furthermore, it is well known that, having ruled out Kigali and being "uninvited" from Nairobi, the UN had virtually no other options for placing the ICTR near Rwanda except Arusha. Ten years later, after pouring so much money and time into developing the necessary infrastructure in Arusha, shifting back to Kigali would seem wasteful. While most of the activities formerly carried out in Kigali have been consolidated to Arusha, including the posting of a Deputy Prosecutor to manage OTP while the Prosecutor was in the Hague or elsewhere, it will be necessary to maintain some kind of presence in Kigali for two reasons. First, as long as prosecutions are ongoing, OTP in Arusha will require the capacity to simply call Kigali and ask for whatever evidence it may need. Further, it is politically necessary to maintain a physical presence in Kigali. This is not only necessary to connect the ICTR's work to the people of Rwanda, but also to avoid the possibility that the ICTR could be completely shut out of Rwanda if another fiasco like Barayagwiza were to again sour relations with the Rwandan government. That is, if no ICTR staff are present in Kigali, it would be far easier for a disgruntled Rwandan government to bar ICTR staff from entering altogether. Thus the dilatory effect of maintaining two offices must continue to be tolerated.

¶27 While this article has examined the cost (in terms of time, money, and general efficiency) of maintaining offices in Kigali and Arusha, the vastly increased distance between the Hague, where the Prosecutor and the Appeals Chamber for both tribunals are based, is perhaps the most salient handicap. This article will return to this issue by way of discussing the decision to dismiss Carla del Ponte from her post for Rwanda.

¶28 The foregoing are primarily practical issues that have hampered the efficiency of OTP and the ICTR at large. However, it must be noted that corruption and mismanagement have also cost the Tribunal money and slowed it down. Audits have revealed incompetence and misconduct within the Tribunal's administration, as well as lacunae in the pay procedures for defense counsel that had allowed defense lawyers to share the fees they received with the accused and their families. Problems with court management and with defense counsel have seriously affected both the speed and the cost of carrying out trials, and so I will discuss them in turn.

### *C. Management*

¶29 The incompetence and/or misconduct of ICTR staff, particularly those in administrative positions, was an early source of concern for the Tribunal. Procurement, hiring, management of defense counsel, and other administrative matters are within the mandate of the Registrar (at the time of writing, Adama Dieng of Senegal), as is the day-to-day coordination of transit, language and documentation services, scheduling, and

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<sup>69</sup> *Rwanda: Arusha court prosecutor dismisses possibility of transferring detainees*, *supra* note 31.

other services upon which the court's progress depends.<sup>70</sup> Given the practical challenges of working in Arusha as described above, the efficient integration of all these crucial services demands talented and dedicated personnel. The UN's auditing branch, the Office for Internal Oversight Services (OIOS), issued a report on the state of affairs at the ICTR in February of 1997.<sup>71</sup> The report, commonly known as the Paschke report for the head of OIOS, found "faulty accounting processes, hiring of unqualified applicants, widespread disregard of U.N. regulations... [and] neglect of the problems by U.N. officials in New York."<sup>72</sup> The Paschke report also cited "a finance director who had no degree in finance... and a procurement chief who had no experience in U.N. procurement procedures."<sup>73</sup> A wave of firings followed, including the Registrar himself, Andronico Adeye (Kenya) who "spent half of his time on duty traveling in the region on official business"<sup>74</sup> and Deputy Prosecutor Honore Rakotomanana (Madagascar) who had clashed notoriously with his superiors Richard Goldstone and Louise Arbour.<sup>75</sup>

¶30

Regardless of the quality of personnel, the ICTR was handicapped from the start by a statute, written as it was by UN bureaucrats, that placed budgeting and administration under the full command of the Registry, rather than subject to the needs of the court as seen by the judges.<sup>76</sup> The Rules of Procedure as adopted by the Chambers provided for some judicial oversight of administration, but this provision was explicitly rejected by Registrar Andronico Adeye who insisted that the Rules were subordinate to the Statute and therefore powerless over him. Adeye thus felt that he was entitled to override administrative actions taken by other ICTR bodies. This controversy remained even after Adeye's dismissal, most famously causing serious tensions between President Navi Pillay (South Africa) and Adeye's replacement, Agwu Okali (Nigeria).<sup>77</sup> Okali in turn was dismissed by the Secretary General in 2001.<sup>78</sup> Tensions between the Registry and the Chambers have also been illustrated (and worsened) by statements from Judges Aspegren and Ostrovksy publicly denouncing the Registry's incompetence<sup>79</sup>. While wrangling over administrative decision-making clearly damaged the court's efficiency, it must also be noted that the ongoing problem absolved the Chambers and the OTP of their

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<sup>70</sup> For a basic outline of the duties of the Registrar, see *Statute of the International Criminal Tribunal for Rwanda*, Art. 16, available at <http://www.icttr.org/ENGLISH/basicdocs/statute.html> (last visited Apr. 4, 2005) and *Statute and Rules of Procedure and Evidence*, Part 3 §5, available at <http://www.icttr.org/ENGLISH/basicdocs/statute.html> (last visited Apr. 4, 2005).

<sup>71</sup> *Paschke Report*, *supra* note 51.

<sup>72</sup> Craig Turner, *Rwanda War Crimes Tribunal Mismanaged, Report Says; Africa: The Problems Have Slowed Efforts to Prosecute Killers in Genocide*, U.N. Says, L.A. TIMES, February 13 1997.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *UN dismisses Rwanda tribunal's prosecutor, administrator*, Deutsche Presse-Agentur, February 26, 1997.

<sup>76</sup> For a discussion of the resulting controversy over certain management issues, see *Expert Group Report*, *supra* note 38 at paras. 237-247.

<sup>77</sup> See ICG report, *supra* note 32 at 12.

<sup>78</sup> *UN dismisses Rwanda tribunal's prosecutor, administrator*, *supra* note 75.

<sup>79</sup> See *Campaigning Judges*, DIPLOMATIE JUDICIAIRE, available at [http://www.justicetribune.com/article\\_uk.php?id=2097](http://www.justicetribune.com/article_uk.php?id=2097). Judge Aspegren blasted the Registrar and the incompetence of Registry staff in announcing his decision not to seek another term. See also Thierry Cruvellier, *Judge Ostrovsky Speaks Out*, DIPLOMATIE JUDICIAIRE, April 23, 2002, available at [http://www.justicetribune.com/article\\_uk.php?id=2089](http://www.justicetribune.com/article_uk.php?id=2089). See *supra* note 23.

own responsibility to keep things running smoothly, as whatever problems arose could all too easily be blamed on the Registry.<sup>80</sup>

#### *D. Issues with Defense Counsel*

¶31

Early in the Tribunal's existence, large numbers of motions were necessary to flesh out the law being applied because the participating lawyers came from diverse legal systems, and because the ICTR is a sort of synthetic and novel civil-common law hybrid with little precedent on which to rely for guidance. Thus as with practical infrastructure matters, it should be expected that the number of motions and their dilatory effect on the ICTR should taper off as the bulk of novel questions are answered. However, defense counsel are continuously accused of slowing down the court by continued excessive use of motions. By no means should this submission be taken to broadly insinuate misconduct or abuse of the court by defense counsel, but it seems clear that the excessive use of motions by defense is a problem. Part of the problem arises from the way defense is provided—thus far, every accused has been deemed indigent and provided counsel free of charge.<sup>81</sup> In 1999, the ICTR spent \$4.5 million on defending accused, with that figure expected to rise.<sup>82</sup> At that time, the most experienced lawyers earned \$110 per hour for a potential salary of \$230,000 per year, and the registry had no way of verifying the veracity of the number of hours billed.<sup>83</sup> Thus a defense attorney has substantial incentive to stretch out trials for his or her own financial gain (and perhaps the prestige of the position), but because of the relative ease with which an accused can dismiss his or her defense<sup>84</sup>, it also becomes necessary to make a show of “earning one's keep.” That is, defense counsel must make it obvious that he or she is actively pursuing the accused's case in court by, among other tactics, making numerous motions of potentially dubious merit to impress the accused.<sup>85</sup> Delay of this kind is not solely the fault of defense counsel, however, as it is also the responsibility of judges to manage their courtrooms and keep the proceedings moving. Judge Ostrovsky, for example, is one of several judges criticized for failing to reign in defense counsel in the interest of efficiency.<sup>86</sup> In order to more effectively manage defense counsel, the judges decided in 2002 to begin ordering the Registry to withhold payment for services rendered in the filing of frivolous defense motions. They also decided to allow single judges to decide motions rather than the entire

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<sup>80</sup> See generally *ICG Report*, *supra* note 32 at 12.

<sup>81</sup> U.N.S.C. Res. 955, *supra* note 5, Art.20 §4(d).

<sup>82</sup> *ICG report*, *supra* note 32.

<sup>83</sup> *Id.* While this may not be a stellar salary in American legal culture, it should be remembered that few of these lawyers come from such highly paid backgrounds. For a discussion of the ramifications of a single pay rate for differently situated lawyers, see *Expert Group Report*, *supra* note 38 paras. 206-208.

<sup>84</sup> For a general discussion of the rights of the accused, including the right to choose defense counsel, see *U.N.S.C. Res. 955*, *supra* note 5, Art. 20. Problems at ICTR regarding interpretation of the right of the accused to change counsel are addressed in the *Expert Group Report*, *supra* note 38, at paras. 225-234.

<sup>85</sup> See generally *Investigation by the Office of Internal Oversight Services into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*, U.N. Doc. A/55/759, paras 54-61, 1 February 2001 [hereinafter *Fee-Splitting Report*].

<sup>86</sup> Cruvellier, *supra* note 79. “[H]is role as presiding judge in this [Semanza] case has been the most confusing...and, in many respects, the poorest example of getting the tribunal's work done in the time allotted...[U]nder the authority of the Russian judge, the parties have had unrivalled control of the proceedings, akin to a political negotiation where the mediator is only permitted to intervene as a discreet arbitrator. This is clearly not the behaviour of a judge under pressure from an over-loaded court schedule.”

chambers,<sup>87</sup> to take more motions in writing (eliminating the extra time needed for courtroom proceedings), and to render more instantaneous oral decisions when motions were made during proceedings to avoid extended interruptions.<sup>88</sup>

¶32 While none of these administrative difficulties is particular to the *ad hoc* tribunals, the problem of fee splitting might be. In February 2001, OIOS looked into rumors of fee-splitting in both the ICTR and ICTY. No direct, cash-based fee-splitting was initially uncovered, but other indirect kinds of fee-sharing were found.<sup>89</sup> These included hiring of relatives or friends of the accused as defense personnel (thus funneling some of the funds paid to the defense by the UN back into the family of the accused),<sup>90</sup> gifts to the accused,<sup>91</sup> and gifts to the families of the accused.<sup>92</sup>

¶33 A second report the following year uncovered more substantial misconduct. In one case, the defense lawyer agreed in 2000 to pay the accused \$2500 a month from his salary. The lawyer never made any such payments, but also failed to inform the Registry of these improprieties until 2001.<sup>93</sup> The same lawyer was caught instructing a legal assistant to “make necessary ‘alterations’ to ‘maximize payment’” for his services for Nov. 2001.<sup>94</sup> Another lawyer was asked to pay \$5000 monthly to the accused. The lawyer only reported this illegal request after the accused sought to have the lawyer removed from the case.<sup>95</sup> Clearly this kind of corruption diverted ICTR’s money away from more pressing needs, took time and effort to investigate and rectify, and may have also provided yet another incentive for dilatory tactics in the courtroom: if defense counsel were going to have to share, they were simply going to have to make more money.

¶34 The fact that these corrupt practices existed at all suggests that the Registry was at best sleeping on the watch. The OIOS report describing these three situations noted the Registry’s failure to deal with the first two situations quickly and appropriately.<sup>96</sup> Worse yet, at least one member of the Registry’s administrative staff was actively involved in fiscal misconduct with defense counsel. This staff member, when confronted, admitted that he had requested and received bribes, often in excess of \$1000 each, to expedite payment and/or to approve spurious bills for defense services.<sup>97</sup>

¶35 Attempts to deal with fee sharing and similar billing issues have included strictly enforced limits on gifts from lawyers to the families of the accused, and the dismissal of at least one defense lawyer for submitting inflated billing information.<sup>98</sup> Article 5 *bis* of

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<sup>87</sup> This tactic was used in *Barayagwiza*. See Note [Transmitting the 7<sup>th</sup> annual report of the International Criminal Tribunal for Rwanda, Covering the period 1 July 2001-30 June 2002] paras. 15, 23, U.N. Doc. A/57/163, July 2, 2002 [hereinafter *Seventh Annual Report*].

<sup>88</sup> *Id.* at Para. 15.

<sup>89</sup> *Fee-Splitting Report*, *supra* note 85, at para. 72.

<sup>90</sup> *Id.* at Para. 40.

<sup>91</sup> *Id.* at Paras. 35-36.

<sup>92</sup> *Id.* at Para. 35.

<sup>93</sup> *Follow-up investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*, U.N. Doc. A/56/836, 26 February 2002, para. 15.

<sup>94</sup> *Id.* para. 20.

<sup>95</sup> *Id.* para. 23.

<sup>96</sup> *Id.* paras. 17, 21, 22.

<sup>97</sup> *Id.* paras. 24, 25.

<sup>98</sup> *Seventh Annual Report*, *supra* note 87, para. 102. See also ICTR Press Release, *Defence Lawyer Removed for Financial Dishonesty*, 6 February 2002, available at



the Code of Conduct for Defense Counsel was also altered to require defense attorneys to refuse any overtures to fee splitting and to report them to the Registrar for investigation.<sup>99</sup> Needless to say these corrupt practices, the time and money spent dealing with them, and the perverse incentives they created for defense lawyers to stretch out proceedings have been a serious drain on the ICTR's resources that would have been better spent on moving trials forward.

### *E. Rules and Plea Bargaining*

¶36 As the Expert Group noted in 1999, the law to be applied at ICTR was necessarily unclear, partly due to the lack of precedent.<sup>100</sup> As the ICTR has gained experience, the judges have altered some rules of procedure to remedy certain problems. Some of these rule changes have significant potential to speed up cases.

¶37 Several rule changes at the Tribunal's 12<sup>th</sup> plenary session (2002) may speed the work along. Rule 11*bis* was added to allow the ICTR to transfer cases to national courts under certain circumstances, which will allow the ICTR to focus only on the cases it deems most important without sacrificing other cases.<sup>101</sup> Until 2002, the Tribunal was handicapped by an all-or-nothing approach, illustrated by the *Ntuyahaga*<sup>102</sup> case, where the trial chamber allowed OTP to drop the charges against the accused, but did not allow the transfer of the case to, e.g., Tanzania or Belgium, essentially allowing the accused to escape with no trial.<sup>103</sup> Rule 11 *bis* may satisfy many interested parties by increasing the number of accused who can be tried for crimes in Rwanda, while allowing ICTR to continue its emphasis on "big fish."

¶38 Rule 92 *bis* also improves the availability of evidence by allowing in non-oral (i.e., written) form evidence that "seeks to prove a matter other than the acts and conduct of the accused as charged in the indictment."<sup>104</sup> The "other matter" restriction protects the right of the accused to face the person testifying against him or her, but the admission of written statements promises to make more information available by decreasing the ICTR's dependence on the willingness or ability of witnesses to physically come to Arusha (e.g., expert witnesses from Belgium, or survivors living in Rwanda), and to significantly decrease the time it would take in court to adduce the same evidence orally.

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<http://www.ictr.org/ENGLISH/PRESSREL/2002/299e.htm> (last visited Apr. 4, 2005) and ICTR Press Release, *Statement by the Registrar, Mr. Adama Dieng, on Allegations of Fee Splitting between a Detainee of the ICTR and his Defence Counsel*, 29 October 2001, available at

<http://www.ictr.org/ENGLISH/PRESSREL/2001/9-3-06.htm> (last visited Apr. 4, 2005). The lawyer removed was Andrew McCartan of Scotland, counsel for Joseph Nzirorera, of the Government 1 group of accused. For the chamber's legal findings on the scandal, see *The Prosecutor v. Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Nzirorera's Motion for Withdrawal of Counsel, 3 October 2001 available at <http://www.ictr.org/ENGLISH/cases/Nzirorera/decisions/031001.htm> (last visited Apr. 4, 2005).

<sup>99</sup> *Press Briefing by the Spokesman of the ICTR*, 8 July 2002, available at

<http://www.ictr.org/ENGLISH/pressbrief/2002/brief9-13-22.htm> (last visited Apr. 4, 2005)

<sup>99</sup> *Id.*

<sup>100</sup> See generally *Expert Group Report*, *supra* note 38, paras. 61-83.

<sup>101</sup> *Press Briefing by the Spokesman of the ICTR*, *supra* note 99.

<sup>102</sup> *The Prosecutor vs. Bernard Ntuyahaga*, ICTR Case No. ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 Mar. 1999, available at

<http://www.ictr.org/ENGLISH/cases/Ntuyuhaga/decisions/withdraw.htm> (last visited Apr. 4, 2005).

<sup>103</sup> *Press Briefing by the Spokesman of the ICTR*, *supra* note 99.

<sup>104</sup> *Id.*

¶39 One final development of extreme importance has been the addition to the rules of a provision for plea bargaining.<sup>105</sup> One senior OTP official, speaking on condition of anonymity, noted: “The second largest cause of delay in my humble opinion is the failure to facilitate guilty pleas, which now results in trials [sic] of every accused as well as the loss of potential ‘insider’ witnesses who could otherwise strengthen the cases and therefore speed them up.”<sup>106</sup> As noted earlier, only 3 accused thus far have pled guilty.<sup>107</sup> The first of the three, Jean Kambanda, was the Prime Minister of Rwanda during the genocide. Apparently hoping for leniency in sentencing, Kambanda provided substantial information in his confession that could have helped other prosecutions and agreed to cooperate with the ICTR in future cases. His confession was taken as a mitigating factor for sentencing, but its mitigating effect was overridden by the aggravating factors of the crimes he had actually committed.<sup>108</sup> Moreover, as the Prime Minister of the country and a primary architect of the atrocities, it was felt that to give Kambanda anything less than the maximum sentence of life imprisonment, regardless of the value of his information, would be a travesty. When the life sentence was delivered, Kambanda immediately ceased all cooperation with the tribunal and attempted to retract his guilty plea.<sup>109</sup>

¶40 The other two defendants who have pled guilty, Omar Serushago and Georges Ruggiu, also pledged to assist the ICTR in future cases. In all three cases, the accused was given no promise of reduced sentence, but because the testimony of the accused put all of their families in danger, the ICTR did offer all three some form of protection for their families.<sup>110</sup> However, unlike Kambanda, Serushago and Ruggiu used their confessions as opportunities to express remorse for their deeds. Both were given relatively lighter sentences than the Prosecution had suggested—Serushago was the first accused to receive less than a life sentence (fifteen years), and Ruggiu, who was sentenced to twelve years, was the first ICTR defendant who did not appeal his sentence.<sup>111</sup> Both have testified in subsequent trials.

¶41 .Because of the Tribunal’s record of convictions, the ever-increasing accrual of evidence, and the increasing efficiency of investigations and prosecutions, it might be reasoned that more defendants who are indeed guilty of the offences charged will be willing to admit as much (rather than put the Prosecution to its proof) than in the Tribunal’s early years. Of course the accused are innocent until proven guilty, but it must be remembered that OTP selects whom it will prosecute, partly based on the strength of the evidence against an individual. Thus, if OTP has gone so far as to bring a person to court, it can be assumed that evidence against that person is already fairly strong, or else OTP would not risk wasting its limited time and resources.<sup>112</sup> In the urgent atmosphere of

<sup>105</sup> *Eighth Annual Report*, *supra* note 53, para. 47

<sup>106</sup> Private correspondence via email, on file with author.

<sup>107</sup> *Supra* note 9.

<sup>108</sup> *The Prosecutor v. Jean Kambanda*, Judgement and Sentence, ICTR Case No. ICTR 97-23-S, Part C, 4 September 1998, available at <http://www.ictr.org/ENGLISH/cases/Kambanda/judgement/kambanda.html> (last visited Apr. 4, 2005).

<sup>109</sup> For a general discussion of Kambanda’s guilty plea, see Nancy Armoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L.REV. 1, 128-133. Combs also points out that in the early days, the contours of the law were less clear, which may have made going to trial a more promising prospect.

<sup>110</sup> *Id.* at 138.

<sup>111</sup> *See generally id.* at 128-138

<sup>112</sup> *Id.* at 63.

the Tribunal's final years, plea bargaining holds especially important potential for speeding the court along and saving countless sums in defense and administrative costs. While negotiating a plea deal may take some time, it has been estimated that the court can verify and accept a guilty plea in about a day's time.<sup>114</sup>

¶42 The issue of plea bargaining takes on special moral significance in these latter days of the ICTR. Earlier in the history of the *ad hoc* tribunals, it was generally felt that the crimes committed by the accused were too heinous to allow them to bargain for a conviction that did not accurately reflect their deeds. During his presidency of the ICTY, Antonio Cassese stated this position thus:

The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhuman acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.<sup>115</sup>

¶43 While this ethical consideration is no less true now than it was earlier, in the final days of the Tribunal it may be reasoned that "something is better than nothing." This is true for the practical reason that ICTR trials are "exceedingly lengthy, costly, and complex," and plea bargaining offers an opportunity to streamline at least some of these cases.<sup>116</sup> If the goal of the recent changes at ICTR has been to expedite the resolution of cases and to complete as much work as possible before the Tribunal's mandate expires, then the time for plea bargaining has come.

¶44 In addition to practical reasons of expediency, plea bargaining has additional benefits as well. As a corollary to Judge Cassese's opinion above, the heinous crimes of which ICTR defendants are accused would not seem appropriate candidates for plea bargaining except that the ICTR's mandate is broader than the simple prosecution of criminals. The ICTR also exists to establish a historical record of the atrocities and to promote reconciliation. The use of plea bargaining, inasmuch as it can convince the accused to "spill the beans," can result in a much fuller record of fact. Equally as important, the facts gained through a guilty plea are facts admitted openly by an accused, which may contribute more to the process of conciliation than those facts which are found and reported by judicial decisions.<sup>117</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Combs, *supra* note 109, at 139.

<sup>116</sup> *Id.* at 107.

<sup>117</sup> *Id.* at 149-150.

### *F. Judges*

¶45 One third factor impacting (for better or worse) the speed of the ICTR's work has been the judges themselves. Several recent developments regarding judges have indeed been controversial, but nonetheless offer the promise of accelerating the work to be done.

¶46 The usual selection process for judges is defined by Article 12 of the ICTR's statute: the UN General Assembly elects judges to four year terms from a shortlist prepared by the Security Council.<sup>120</sup> Judges may be re-elected. Six judges for the ICTR were elected in mid-1995,<sup>121</sup> and upon the request of ICTR President Kama in 1997, three more were elected in 1998 to compose a third trial chamber.<sup>122</sup>

¶47 Pursuant to Article 14 of the Statute,<sup>123</sup> the judges of the Tribunal make the Rules of Procedure. Many of the rules they have promulgated are aimed at maintaining smooth and efficient judicial functions. Fairly early in their tenure, the judges wisely included in the rules of procedure provisions to deal with changes in the composition of Chambers. Rule 14 *bis* allows judges to "continue to discharge their duties until their places have been filled."<sup>124</sup> Rule 15 was also written and later modified to deal with the possibility of judges' extended absence for such reasons as sickness. Rule 15 (E) deals with brief absences by authorizing the presiding judge of that particular chamber to simply adjourn. In longer absences, however, the President of the Tribunal is to assign another judge and proceed with the case (as long as the accused consents). Rule 15 (F) was added in June 1998, allowing the President to authorize a Chamber to carry on with "routine matters, such as the delivery of decisions" even in the extended absence of one of the judges.<sup>125</sup> Further amendments were made in 2000 to allow single judges to handle initial appearances, to allow the judge who confirmed an indictment to also hear the merits of the resulting case, and to allow the President to make administrative Practice Directions (notably solidifying the subordination of the Registry to the Chambers).<sup>126</sup> However, even with these provisions the judges soon found that there were simply too few of them to deal with the number of cases efficiently. Moreover, although one judge could

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<sup>118</sup> NEED CITE

<sup>119</sup> Seventh Annual Report, *supra* note 57, para. 102. *See also* Press Release, ICTR, Defence Lawyer Removed for Financial Dishonesty, (Feb. 6, 2002), available at <http://www.ictor.org/ENGLISH/PRESSREL/2002/299e.htm>. The lawyer removed was Andrew McCartan of Scotland, counsel for Joseph Nzirorera, of the Government 1 group of accused.

<sup>120</sup> U.N.S.C. Res. 955, *supra* note 5, Art. 12.

<sup>121</sup> 1 MORRIS, *supra* note 4, at 368-369. The judges elected at the time were Pillay (South Africa), Kama (Senegal), Khan (Bangladesh), Ostrovsky (Russian Federation), Sekule (Tanzania), and Aspegren (Sweden).

<sup>122</sup> *Id.* at 363. *See also* JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 505-06 (2<sup>nd</sup> Ed. 2000). In the second mandate, Judges Khan and Aspegren were replaced. Their replacements, and three new judges for the new chamber, were Dolenc (Slovenia), Güney (Turkey), Møse (Norway), Williams (Jamaica/St. Kitts and Nevis), and Kondylis (Greece), the latter resigning on March 24, 1999 without ever taking office.

<sup>123</sup> U.N.S.C. Res 955, *supra* note 5, Art. 14.

<sup>124</sup> *See* JONES, *supra* note 122, at 551-52; MORRIS, *supra* note 4, 356-57. The rule was most likely inspired by the difficulties in the *Celebici* case at ICTY, where three judges were not reelected, but authorized by Security Council Resolution 1126 of August 27, 1999 to remain on the case until it was completed. The Security Council's decision in turn suggests that the ICTR judges were indeed within their administrative powers to create this rule.

<sup>125</sup> JONES, *supra* note 122, at 552-53.

<sup>126</sup> Fifth Annual Report, *supra* note 27, para. 58.

temporarily fill in for another, the substitution process would necessarily create a drain on the Chamber from which that judge was “borrowed.” As early as 1996, judges in both *ad hoc* tribunals submitted a joint request to the Security Council to have a larger pool of judges.<sup>127</sup> The Security Council rejected the Tribunals’ suggestion that the judges should be temporarily interchangeable between the Hague and Arusha to expedite cases, responding that this would destroy “the distinction between the two tribunals which are separate entities, and the separation of the Appeals Chamber from the Trial Chambers.”<sup>128</sup> The Security Council’s decision necessitated the ICTR’s request to simply add a third chamber, to which the Security Council acquiesced.<sup>129</sup>

¶48

Because the Rules allow for a judge to continue sitting even after s/he has been replaced, it is theoretically possible to have more than the allotted number of judges working at the same time. Since this would necessarily increase the funding required by the Tribunal, the Security Council retains the right to define the conditions of the outgoing judge’s stay. The terms of eleven judges expired on May 23, 2003. Four of them were not reelected: Pillay (South Africa), who will become a judge of the ICC, Maqutu (Lesotho), Ostrovsky (Russia), and Dolenc (Slovenia). The Security Council authorized all of them to continue hearing cases, with one unique qualification.<sup>130</sup> Judge Pillay’s tenure in Chamber 1 was extended to finish the Media case<sup>131</sup> by December 2003, and Judges Ostrovsky and Dolenc were authorized to remain on the Cyangugu case<sup>132</sup> until February 2004. Judge Maqutu’s tenure was extended until December 2003 to finish the Kajelijeli<sup>133</sup> and Kamuhanda<sup>134</sup> cases. All of the above cases were relatively near to completion. However, Judge Maqutu was also sitting on the Butare case regarding six accused in Butare prefecture.<sup>135</sup> The Butare case includes Pauline Nyiramasuhuko, the first woman ever accused of rape as crime against humanity.<sup>136</sup> As Judge Maqutu’s term was not extended for the Butare case, a series of negotiations became necessary. Under rule 15 *bis* (D), the accused must consent for the case to continue with a different judge.

<sup>127</sup> 1 MORRIS, *supra* note 4, at 362.

<sup>128</sup> *Letter Dated 27 June 1996 from the President of the Security Council Addressed to the Presidents of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, U.N. Doc. S/1996/476 (1996), at 1.

<sup>129</sup> 1 MORRIS, *supra* note 4, at 363.

<sup>130</sup> U.N.S.C. Res. 1482, U.N. Doc S/RES/1482 (2003), 19 May 2003.

<sup>131</sup> *Supra* note 11.

<sup>132</sup> The Cyangugu case was named for the prefecture of Rwanda where the pertinent events took place. See *The Prosecutor v. Andre Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Judgement and Sentence, ICTR Case No. ICTR-99-46-T, February 25, 2004, available at <http://www.ictr.org/ENGLISH/cases/Imanishimwe/judgement/judgment-en.pdf> (last visited Apr. 4, 2005).

<sup>133</sup> *The Prosecutor v. Juvenal Kajelijeli*, ICTR Case No. ICTR-98-44-A

<sup>134</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, ICTR Case No. ICTR-99-54

<sup>135</sup> *The Prosecutor v. Pauline Nyiramasuhuko & Arsène Shalom Ntahobali, Sylvain Nsabimana & Alphonse Ntezirayayo, Joseph Kanyabashi, Elie Ndayambaje*, ICTR Case No. ICTR-98-42-A15*bis*.

<sup>136</sup> See *The Prosecutor v. Pauline Nyiramasuhuko [and] Shalom Ntahobali*, Indictment, ICTR Case No. ICTR-97-21-I, Count 7, page 42, available at <http://www.ictr.org/ENGLISH/cases/Nyira/indictment/index.pdf> (last visited Apr. 4, 2005). In a tragic irony, Nyiramasuhuko was the Minister of Family and Women’s Development in the Interim Government. Ntahobali, her son, was a leader of a group of *Interahamwe*, the MRND party’s youth wing. *Id.* Part 4. See also Hirondele News Agency, 01/31/2005, ICTR/BUTARE - THE ONLY WOMAN ON GENOCIDE TRIAL AT ICTR TO START HER DEFENCE ON MONDAY, available at <http://www.hirondele.org/arusha.nsf/LookupUrlEnglish/19ABF28E1DB11A9343256F9A0021271C?OpenDocument> (last visited Apr. 4, 2005).

Negotiating this consent, however, turned out to be quite a challenge because there were six defendants. Only one of the accused, Sylvain Nsabimana, eventually consented to continue.<sup>137</sup> The defense was given until July 4, 2003 to submit their arguments as to how to proceed. The remaining judges, Sekule (Tanzania) and Ramaroson (Madagascar) ruled that the trial should continue with another judge “in the interests of justice,” and defense appealed.<sup>138</sup> The appeals chamber held that the decision was within the discretion of the trial judges, and that they had indeed ruled in the interest of justice.<sup>139</sup>

¶49

While the highly unusual Butare situation clearly presented a significant obstacle for the Tribunal, it nonetheless helped resolve how to efficiently deal with the reelection process. With that issue clarified, the most important event of the summer for the Chambers was the approval by the Security Council of eighteen *ad litem* judges. The possibility of using temporary judges had been advanced in 1999 by an Expert Group assembled to review the functioning of the ICTR and ICTY.<sup>140</sup> The Expert Group contemplated the use of former judges of either tribunal, but President Pillay in her late 2001 request for a pool of *ad litem* judges did not specify such a qualification.<sup>141</sup> President Pillay reiterated her request in her annual report of July 2, 2002, noting in delicate language that the two *ad hoc* tribunals must be treated equally, and in notably stronger language that the addition of additional judges was the only way ICTR would ever finish its work.<sup>142</sup> Her point was unstated but nonetheless clear: the ICTY already had the nine *ad litem* judges it had requested, and the ICTR was taking backseat. The Security Council finally acquiesced with Resolution 1321 on August 14, 2002, providing for a pool of eighteen *ad litem* judges. However, whereas the ICTR had requested for nine *ad litem* judges to be allowed to sit at any given time, the Security Council only approved four.<sup>143</sup> The judges were elected on June 25, 2003, and as of September 1, 2003, the first of these began sitting on the Ndindabahizi trial,<sup>144</sup> and another would soon take the place of Judge Maqutu in the Butare case.<sup>145</sup> Simple arithmetic shows the poor logic of this decision; if one *ad litem* judge must sit with two permanent judges, then only four trial chamber sections could be created. The (then) new President of the Tribunal, Erik Møse, wrote on September 29, 2003<sup>146</sup> to ask the Security Council to authorize five more *ad litem* judges, showing that with the resulting six sections the court could most

<sup>137</sup> *Trial to continue where it left off, says appeals chamber*, Hirondele News Service, October 1, 2003, available at <http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/f98d9cd12db192c4c12565b3005fab02?OpenDocument> (last visited Apr. 4, 2005).

<sup>138</sup> *Id.*

<sup>139</sup> *The Prosecutor v. Pauline Nyiramasuhuko et.al.*, Decision in the Matter of Proceedings Under R 15bis (d), §IV, ICTR Case No. ICTR-98-42-A15bis, available at <http://www.ictr.org/ENGLISH/cases/Nyira/decisions/240903.htm> (last visited Apr. 4, 2005). *But see also* Dissenting Opinion of Judge David Hunt, ICTR Case No. ICTR-98-42-A15bis, available at <http://www.ictr.org/ENGLISH/cases/Nyira/decisions/240903hunt.htm> (last visited Apr. 4, 2005) (holding that the trial chamber had subordinated the accused's right to a fair trial to interests of expediency, cost, and the rights of victims and witnesses).

<sup>140</sup> *Expert Group Report supra* note 38, para. 48.

<sup>141</sup> *Letter dated 9 July 2001 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General*, U.N. Doc. S/2001/764 (Annex and Appendix), September 19, 2001.

<sup>142</sup> *Seventh Annual Report, supra* note 87, paras. 18-23.

<sup>143</sup> *Letter to Security Council, supra* note 7, at 3.

<sup>144</sup> *The Prosecutor vs. Emmanuel Ndindabahizi*, ICTR Case No. ICTR-2001-71-I.

<sup>145</sup> *Supra* note 135.

<sup>146</sup> *See generally Letter to Security Council, supra* note 7.

likely complete its anticipated case load by 2008 as the Security Council had instructed in Resolution 1503 (2003).<sup>147</sup> The Security Council granted his request on October 27, 2003 with Resolution 1512 (2003), which amended Articles 11 and 12 of the Tribunal Statute to allow nine *ad litem* judges.<sup>148</sup> President Møse's letter also described the system of twin-tracking courtroom shifts to be used: each section will hear one "large" case and one "small" case simultaneously, and courtrooms will be used by two different cases in the mornings and afternoons. In order for the shift system to work, there would have to be enough sections so that no judge would be on a case from morning until night. While twin-tracking and shifting would mean that a larger number of cases will be heard, each individual case will have to take longer due to switching off with another case, and the Tribunal's resources (such as translation services) will have to be at full speed to accommodate the increased workload.<sup>149</sup>

## V. RELATIONS BETWEEN RWANDA AND "ITS" TRIBUNAL

¶50 This article has addressed several issues at the ICTR that have negatively affected the Tribunal's output and some attempts to rectify them. At first glance, the decision to replace Carla del Ponte might be thought to have been another such attempt at moving things along. However, other factors have been examined at such length because the major event of this summer, and the focus of this submission, may seem somewhat out of place considering that so many other problems appear to have been resolved, clearing the way for a strong finish at ICTR.

¶51 The relationship of the ICTR at large with Rwanda is so closely connected to the practices and person of the Prosecutor herself that it can be difficult to separate one relationship from the other. Moreover, delays at the Tribunal and acrimonious relationships with Rwanda seem to be part of one cycle which further compounds the identity of the ICTR as a whole with the individual Prosecutor—Rwanda responds to delays at the ICTR (in general) by ceasing to cooperate with its primary representative *in* Rwanda, the OTP, with the individual Prosecutor as its head., which in turn causes more delays. As will be fleshed out in the following section, "Rwanda" means not only the government but also survivors' groups such as IBUKA and AVEGA and post-genocide Rwandan society at large.

¶52 It is a well-known irony that, despite having requested the Tribunal, Rwanda was the only country to vote against Resolution 955 establishing it. By a twist of fate, Rwanda had a seat on the Security Council at the time, and its representative expressed the new government's concern that the masterminds of the genocide would only be punished by imprisonment. Nonetheless, Rwanda pledged its cooperation. Further, because the ICTR and ICTY had been established for the sake of legitimacy and expediency under the Security Council's Chapter VII powers rather than by optional assent to a treaty, all state members of the United Nations (including Rwanda) were obliged to cooperate with the Tribunals regardless of their disposition.<sup>150</sup> As violence continued around Rwanda's

<sup>147</sup> U.N.S.C. Res. 1503, U.N. Doc S/RES/1503(2003), August 28, 2003 The projected number of cases still to be brought were based on the Prosecutor's completion strategy.

<sup>148</sup> U.N.S.C. Res. 1512, U.N. Doc. S/RES/1512 (2003), October 27, 2003.

<sup>149</sup> *Letter to Security Council*, *supra* note 7, at 4, 7.

<sup>150</sup> The Security Council found under Article 39 of the U.N. Charter that the situations in Yugoslavia and later Rwanda were threats to international peace and security. Article 41 establishes that, upon identifying

borders in 1995 (especially in connection with refugee camps inhabited by Hutus fleeing the victorious RPF), the Security Council also issued Resolution 978<sup>151</sup> reminding all states of this duty. Thus it is abundantly clear that any failure by the Rwandan government to cooperate with the ICTR is a breach of its international obligations—but what if the Tribunal, ostensibly created for Rwanda’s sake, displeases Rwanda? What, one might ask, is a sovereign nation to do?

¶53

It is almost unnecessary to examine the degree to which the ICTR’s slowness has irritated Rwanda. However, as it is the Prosecutor whose staff operates in Kigali, and the Prosecutor’s subordinates upon whom Rwanda most directly depends for its vindication (through convictions and through the establishment of historical fact), the office and person of the Prosecutor is both an extremely precarious position and a particularly easy target for Rwanda’s frustration. It is also true that as one individual subject to reappointment every four years, the Prosecutor’s job is perhaps the single position within the two Tribunals that is most vulnerable to politics. All the delays described above, while symptomatic to the Tribunal at large, when combined with several problems within OTP which are described below, have the effect of making it appear as though the Prosecutor him- or herself has failed Rwanda. As this paper focuses on the decision to dismiss Carla del Ponte personally as well as to split the statutory mandate of her office, this analysis is restricted as much as possible to events within her own tenure.

¶54

Richard Goldstone may be viewed as the Prosecutor who got the ball rolling in Arusha.<sup>152</sup> Next, Louise Arbour<sup>153</sup> oversaw the substantial development of the ICTR’s various capacities, and, as much as possible, attempted to rectify the serious problems of incompetence within her staff.<sup>154</sup> Arbour’s tenure also saw the exceptionally crafty capture of a number of suspects by the use of secret indictments and investigations.<sup>155</sup> However, Carla del Ponte inherited Arbour’s persistently underskilled staff as well as a failed “national indictment,” which attempted to place twenty-nine Rwandan accused on one indictment under a Nuremberg-style theory of criminal conspiracy.<sup>156</sup> The practice of joining indictments had been used previously as one means of consolidating trials to conserve resources and save time where the same witnesses and same patterns of fact could be used against multiple accused,<sup>157</sup> but the inclusion of twenty-nine individuals, mostly government figures, was simply too broad. One of del Ponte’s first tasks upon arrival in 1999 was to completely reorganize the prosecution strategy by breaking up the one “super-indictment” into internally consistent, manageable, smaller groups. The work required to assemble Arbour’s twenty-nine-person national indictment strategy had

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such threats, the Security Council may then call on members of the UN to cooperate with its chosen plan of action to deal with such threats.

<sup>151</sup> U.N.S.C. Res. 978, U.N. Doc. S/RES/978 (1995), February 27, 1995.

<sup>152</sup> U.N.S.C. Res. 936, U.N. Doc. S/RES/936 (1994), July 8, 1994. Goldstone was already the Prosecutor for Yugoslavia when he was installed for Rwanda.

<sup>153</sup> Arbour replaced Goldstone in 1996. See U.N.S.C. Res. 1047, U.N. Doc S/RES/1047 (1996), February 29, 1996. For more information on the selection of Goldstone and Arbour, see also 1 MORRIS, *supra* note 4, at 384-387.

<sup>154</sup> Thierry Cruvellier, *Arbour, the Maplewood Eagle*, *DIPLOMATIE JUDICIAIRE*, 2001. Available at <http://www.diplomatiejudiciaire.com/UK/Book1.htm> See *supra*, note 23.

<sup>155</sup> *Id.*

<sup>156</sup> *Court Quashes Appeals*, *DIPLOMATIE JUDICIAIRE*. (Author and date not given in original). Available at <http://www.diplomatiejudiciaire.com/UK/Tpiruk/TPIRUK4.htm> See *supra* note 23.

<sup>157</sup> Combs, *supra* note 109, at 138-139



drawn OTP's resources away from other cases in progress, so del Ponte had the additional disadvantage of inheriting an office well behind schedule already.<sup>158</sup> And, as noted before, she took up her post in the aftermath of the Appeals Chamber order to release Barayagwiza. She also walked into a firestorm of controversy over what was referred to in this author's experience as "the famous laughing case," where, during testimony by a victim about sexual assault, judges and defense counsel engaged in "jovial banter" and a judge may even have laughed aloud.<sup>159</sup>

¶55

The immediate about-face in Rwanda's approach to OTP once del Ponte reclaimed the Barayagwiza trial showed quite clearly that Rwanda was willing to use its power to manipulate the Tribunal and that it would openly direct its ire at the Prosecutor personally. Of course, the appeals chamber had suggested that OTP had been derelict in its duties<sup>160</sup>—but the outcome of Barayagwiza's appeal had virtually nothing to do with del Ponte's own competence or her personal agenda, as she had only recently taken office. Rwanda already appeared to be grasping for straws to exert its influence.

¶56

Several other crises during del Ponte's tenure have poisoned relations with Rwanda and the Tribunal. One of these was the acquittal of Ignace Bagilishema, which del Ponte attributed to the incompetence of her subordinate who was promptly fired. She also fired the deputy prosecutor, who at the time was based in Kigali.<sup>161</sup> Del Ponte was confident that she could take back Bagilishema on appeal, but was mistaken.<sup>162</sup> Another episode was the discovery that persons wanted for genocide by the Rwandan government had actually been employed by the Tribunal as investigators.<sup>163</sup> And finally, 2002 saw survivors' groups and the Rwandan government accuse the Tribunal of failing to sufficiently protect witnesses.

¶57

The concerns about wanted *genocidaires* working at the Tribunal were closely linked to other concerns related to witness protection—it was ethically wrong for such suspects to be on the staff, and it represented a glaring administrative mistake, but it also threatened to destroy the critical anonymity of the witnesses themselves. Upon the Rwandan government's criticism of the Tribunal's witness protection, the Registrar (Adama Dieng) invited the government in March, 2002 to compose a joint panel to investigate. However, Dieng withdrew this invitation shortly thereafter, as he quickly realized that Rwanda's demands for such an inquiry were far too expansive, at least with reference to his own statutory powers. Dieng also expressed regret that Rwanda's demands displayed a lack of respect for the judicial independence of the Tribunal.<sup>165</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> Helena Kennedy, *The Grand Inquisitor*, THE GUARDIAN, March 6, 2002.

<sup>160</sup> Jean-Bosco Barayagwiza v. Prosecutor II, Decision, *supra* note 17.

<sup>161</sup> In a spate of firings, certain among the dismissed alleged that the decision had been racist; del Ponte flatly replied that the people fired were simply incompetent.

<sup>162</sup> See generally *The Prosecutor v. Ignace Bagilishema* (Appeals Chamber) Judgment, ICTR Case No. ICTR-95-1A-A, December 13, 2002, available at <http://www.ictor.org/ENGLISH/cases/Bagilishema/judgement/acjudge/131202.htm> (last visited Apr. 4, 2005).

<sup>163</sup> Victor Peskin, *Rwandan Ghosts: Eight Years After the Genocide, an International Tribunal is Failing to Sort the Criminals from the Victims*, LEGAL AFFAIRS, 2002-OCTOBER Legal Aff. 21.

<sup>164</sup>

<sup>165</sup> ICTR Press release, *The Registrar Decides to Withdraw His Proposal to Establish a Joint Commission to Investigate Allegations of Mistreatment of Witnesses from Rwanda*, April 17, 2002, available at <http://www.ictor.org/ENGLISH/PRESSREL/2002/9-3-10.htm>; ICTR Press release, *Statement by the Registrar on the Response of the Government of Rwanda to the Proposal to Establish a Joint Commission*

¶58 There appears to be some substance to Rwanda's ongoing concerns about the safety of witnesses. In December 1996, a witness was killed with his daughter, brother, nephew and seven others. The witness had asked investigators for protection, and was advised to call the investigators in case of trouble. The nearest telephone was more than 20 miles from his home. The next month, January of 1997, another witness and her entire family of eight were killed after returning from testifying in Arusha.<sup>166</sup> However, information as to precisely why these people were killed does not appear to be readily available, i.e., it is not certain whether they were killed in connection with their testimony or for other, unrelated reasons. It should be noted with regard to these concerns that, like virtually every other section of the ICTR, the Victim and Witness Protection Unit started from scratch and has developed its protection capabilities substantially.<sup>167</sup>

¶59 Relations with the Rwandan government deteriorated yet again later in 2002. President Pillay had invited Rwanda's Minister of Justice and Prosecutor General to visit the Tribunal, and they cancelled their trip on December 10, 2002. President Pillay had written to the Security Council twice that year, requesting that the Security Council "use such measures as it deemed appropriate to ensure that the Tribunal could meet its mandate."<sup>168</sup> This was a thinly veiled request for help in dealing with an increasingly intransigent Rwanda; two trial chambers had been brought to a standstill by Rwanda's refusal to issue travel documents for witnesses to travel to Arusha.<sup>169</sup> After Pillay's second request for help, the Security Council responded by issuing Resolution 1431 on August 14, recalling their previous Resolution 955 on 1994 to much the same effect, and reminding "all states" that they are bound to comply with the Tribunal due to its status as an organ of the Security Council pursuant to Chapter VII of the UN Charter.<sup>170</sup>

¶60 In July, 2002, Judge Claude Jorda (President of the ICTY) and Carla del Ponte discussed the Tribunals in a closed session of the Security Council.<sup>171</sup> While the text of del Ponte's comments is not publicly available, the Permanent Representative of Rwanda to the UN addressed a seething response only three days later.<sup>172</sup> This document contains a litany of complaints about the Tribunal, and as such is the most useful source for examining the "beginning of the end" of Rwanda's relationship with the Prosecutor. Its major points are summarized and discussed below.

- (1) While the government agreed that certain survivors' groups had boycotted the ICTR, the government has not influenced this decision. The boycotts continued because of the ICTR's failure to engage in constructive dialogue

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to Investigate the Allegations of Mistreatment Coming from Rwanda, March 28, 2002, available at <http://www.ictt.org/ENGLISH/PRESSREL/2002/9-3-09.htm>.

<sup>166</sup> Nasser Ega-Musa, *Another Failure of Justice in Africa*, WASH. POST, March 06, 1997.

<sup>167</sup> The nascent character of witness programs was noted in the Paschke Report, *supra* note 51, at para. 54. The follow-up report one year later lamented a continuing lack of experienced staff and an inability to integrate witness management with witness protection. See *Follow-Up Report*, *supra* note 59, at 57-62. For more recent developments, see generally *Eighth Annual Report*, *supra* note 53, at paras. 70-72.

<sup>168</sup> U.N. Doc. S/2002/847, July 26, 2002; U.N. Doc S/2002/923, August 8 2002.

<sup>169</sup> These were the *Niyitigeka* case in Chamber 1 and the *Butare* case in Chamber 2. *Butare* lost the equivalent of five trial weeks waiting for witnesses. See *Eighth Annual Report*, *supra* note 53 at 9.

<sup>170</sup> U.N.S.C. Res. 1431, U.N. Doc S/RES/1431(2002), August 14, 2002.

<sup>171</sup> *Official communiqué of the 4581st (closed) meeting of the Security Council*, U.N. Doc S/PV.4581, July 23, 2002.

<sup>172</sup> *Letter dated 26 July 2002 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2002/842, July 26, 2002.

with the groups and with the government. (The report also condemns Adama Dieng for “unilaterally withdr[awing] the offer” to discuss witness protection, as discussed above.<sup>173</sup>)

- (2) The accusation that Rwanda had not responded to requests to transfer witnesses in custody was false. Rwanda cites one case in which the requested witnesses were wanted in Rwanda’s *gacaca* proceedings, and authorities notified ICTR to that effect.<sup>174</sup>
- (3) A “campaign of misinformation”<sup>175</sup> has alleged that Rwanda had changed its requirements for issuing travel documents to witnesses. Rwanda said there had been no such change except that, whereas it formerly only required a letter of sponsorship from ICTR, it now required the same submissions from witnesses as from all other applicants for travel documents. These included, e.g., a photograph and a certificate that the applicant was not facing any criminal charges. In justifying this policy, Rwanda took advantage of the opportunity to take a swing at the ICTR: “the government has had frequent reports of deaths of witnesses in unexplained circumstances after their testimony at the ICTR...the Government cannot ensure the protection of witnesses...without complete information on their identity.”<sup>176</sup>
- (4) Although the Government admitted it had not supplied requested documents to the ICTR, this was because the request was made on short notice, and the state of Rwanda’s public records requires time to produce them. Del Ponte’s allegation that Rwanda might intentionally be withholding information was dismissed as “most absurd.”<sup>177</sup>

¶61

The fifth “defensive” section of the Rwandan government’s response addresses Rwanda’s “alleged failure to cooperate in investigations of human rights violations by the RPA in 1994,”<sup>178</sup> which will be discussed at length later. The response then goes further by cataloguing the failures of the ICTR, which include:

- (1) the low number of adjudications and length of trials, which threatens to necessitate the release of some suspects, and attendant high costs<sup>179</sup>
- (2) the failure of the ICTR to rein in rampant corruption in multiple areas<sup>180</sup>
- (3) the failure of the ICTR to “reach out” from its erroneous location in Arusha to the people of Rwanda<sup>181</sup>

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<sup>173</sup> *Id.* at 3.

<sup>174</sup> *Id.* at 3-4.

<sup>175</sup> *Id.* at 4.

<sup>176</sup> *Id.* at 4. While it may be assumed that this allegation includes the witness deaths described above, Rwanda’s statement does not corroborate or explain this charge at all.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 5. The RPA is the Rwandan Patriotic Army, the forces of the RPF or Rwandan Patriotic Front.

<sup>179</sup> *Id.* at 6-7.

<sup>180</sup> *Id.* at 9-10.

<sup>181</sup> *Id.* at 10-11.

- (4) the failure of the Tribunal to hold some trials in Rwanda as had been promised at its inception<sup>182</sup>
- (5) the “clandestine” transfer,<sup>183</sup> by the Prosecutor, of her offices to Arusha, maintaining only a “skeletal presence”<sup>184</sup> in Kigali in contravention of the Statute
- (6) the fact that OTP’s appellate attorneys were based in the Hague. This could not “meet any reasonable objective other than misuse of resources especially because appeals hearings are normally conducted in Arusha.”<sup>185</sup>
- (7) that the detention facility in Arusha was mismanaged, allowing one detainee (unnamed) to send threatening emails and one to maintain a website from within

¶62 In effect, this list of problems seems more like an “affirmative defense” by Rwanda—a way of saying, as in criminal law, “yes judge, I did it, but here’s why you should forgive me.” That is, if the aim of Rwanda’s response was to respond to allegations of non-cooperation, why was it also necessary to describe (in unusually undiplomatic terms) the failures of the Tribunal? The final section of Rwanda’s response clearly foreshadows the endgame to come in the summer of 2003—most significantly, demanding that a Prosecutor be appointed for only Rwanda and that the Rwandan government and genocide survivors be consulted as to how to resolve the Tribunal’s problems. According to Rwanda’s statement, all the problems mentioned must be rectified for the sake of rescuing the ICTR’s credibility *in Rwanda*.<sup>186</sup> This brings us to an extremely important but uncomfortable point: the Tribunal for Rwanda, as a court of law, is not, in fact, a Tribunal for Rwanda. It is a court aimed at deciding, in terms of the most advanced jurisprudence available, whether or not *individuals* are guilty of specifically defined crimes. Clearly, these decisions can not be made in a vacuum. But neither should they be influenced by any other factor than the truth—not even by Rwanda itself.

¶63 Whatever the outcome of the above exchange at the UN, relations with survivor groups IBUKA and AVEGA remained acrimonious throughout most of 2003.<sup>187</sup> Yet substantial strides were also made in preparing for the final push to finish the Tribunal’s work. The Eighth Annual Report of the President of the Tribunal to the Security Council covers July 1, 2002—just before the controversy above—through June 30, 2003, immediately before the ultimate decisions regarding the Prosecutor. OTP’s strides during that time (January 2003), included finally hiring a Deputy Prosecutor to replace Bernard Muna, whom Carla del Ponte had fired. This was Bongani Majola, a South African lawyer, and unlike Muna, he was indeed stationed at Arusha as the Rwandan government had lamented. Although this position was absolutely critical for managing prosecutions while del Ponte remained in the Hague, it had gone unfilled for more than fourteen months. Melanie Werrett (UK/Zimbabwe) was also hired as Chief of Prosecutions and

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<sup>182</sup> *Id.* at 11.

<sup>183</sup> *Id.* at 12.

<sup>184</sup> *Id.* at 11.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 12.

<sup>187</sup> *Tribunal’s Groundbreaking Achievements Continue*, ICTR Newsletter Vol. 1, No. 1, June, 2003, available at <http://www.ictor.org/ENGLISH/newsletter/june03/june03.doc> (last visited Apr. 4, 2005).

stationed in Arusha as well.<sup>188</sup> OTP further refined its completion strategy by whittling down to 26 the number of suspects left to pursue,<sup>189</sup> identifying some 40 suspects to be “deferred” to various national courts,<sup>190</sup> launching its more complex cases, streamlining the number of witnesses to be called, and stepping up its level of activity in general in order to prepare for the increased caseload that would result as the newly approved *ad litem* judges arrived.

¶64

Within the registry, numerous adjustments were made and an “External Relations and Strategic Planning Section” created to facilitate cooperation with Rwanda, civil society groups, etc.<sup>191</sup> The African Union, with its rhetorical emphasis on human rights,<sup>192</sup> launched in Durban on July 9, 2002. Registrar Adama Dieng attended the summit to promote the ICTR and push for the formation of a trust fund for victims, but was unable to secure a resolution pledging greater support from the new organization due to time constraints.<sup>193</sup> However, he was notably able to visit Kigali in March, 2003 on a sort of goodwill tour. Dieng met with high-ranking officials of several Rwandan government agencies to promote cooperation, and visited “solidarity camps” and memorial sites.<sup>194</sup>

¶65

Just before the decision was made to replace Carla del Ponte, relations with Rwanda seemed to be on an upswing. The spokesman of the Tribunal and the chief of the newly formed External Relations and Strategic Planning Section, Roland Amoussaga, visited Rwanda for five days in July, 2003. Amoussaga met with representatives of the survivors groups, politicians, human rights figures, and the Prosecutor General of the Rwandan Supreme Court, Gerald Gahima. The “ice-breaking” talks were “candid and cordial” and were intended to “revive, pursue, and develop a better and harmonious working relationship” with the Rwandan parties.<sup>197</sup> Nonetheless, this and other positive developments of 2003 do not appear to have repaired the years of struggle already discussed in this article.

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<sup>188</sup> ICTR Press release, *Deputy Prosecutor Takes Office*, January 29, 2003, available at <http://www.ictr.org/ENGLISH/PRESSREL/2003/331.htm> (last visited Apr. 4, 2005).

<sup>189</sup> *Eighth Annual Report*, *supra* note 53, at 4. Of course, it could turn out that some of these 26 are already dead or could never be located, so fewer than 26 may eventually be tried in Arusha.

<sup>190</sup> *Id.* Notably, 15 of these could be sent to countries whose courts apply universal jurisdiction, and the 25 others, who were relatively low-level suspects, could be deferred to Rwanda as long as the death penalty would not be imposed.

<sup>191</sup> *Id.* para. 14.

<sup>192</sup> See, e.g., *The Constitutive Act of the African Union*, Art. 3, available at [http://www.africa-union.org/About\\_AU/AbConstitutive\\_Act.htm](http://www.africa-union.org/About_AU/AbConstitutive_Act.htm) (last visited Apr. 4, 2005).

<sup>193</sup> *Eighth Annual Report*, *supra* note 53, at para. 66

<sup>194</sup> ICTR Press Release, *Strengthening Co-operation Links Between the Tribunal and Rwanda*, March 7, 2003, available at <http://www.ictr.org/ENGLISH/PRESSREL/2003/338.htm> (last visited Apr. 4, 2005).

<sup>195</sup> *Eighth Annual Report*, *supra* note 36 at 4. Of course, it could turn out that some of these 26 are already dead or could never be located, so fewer than 26 may eventually be tried in Arusha.

<sup>196</sup> *Id.* Notably, 15 of these could be sent to countries whose courts apply universal jurisdiction, and the 25 others, who were relatively low-level suspects, could be deferred to Rwanda as long as the death penalty would not be imposed.

<sup>197</sup> ICTR Press Release, ICTR, *ICTR Initiates Major Moves to Strengthen Relationship with Rwandan Genocide Survivor Groups*, July 28, 2003, available at <http://www.ictr.org/ENGLISH/PRESSREL/2003/352.htm> (last visited Apr. 4, 2005).

### A. *The Decision is Made*

¶66 As mentioned above, one way to effect a significant change at the ICTR is by changing the Prosecutor. And if this is going to be done, it can be accomplished most simply at the end of the Prosecutor's mandate. Thus, regardless of the roller-coaster relationships which I have been describing between the ICTR, Rwanda, and Carla del Ponte personally, August was the last available opportunity to take advantage of that one possibility. Indeed, Kofi Annan made a statement in late July that struck many at the ICTR as strange: he announced, before the decision was made to dismiss del Ponte, that the time had come to split the Prosecutor's mandate.<sup>198</sup> In Arusha's OTP hallways, it was taken as a foregone conclusion that the decision to dismiss "the boss" had already been made, or Annan would have refrained from making such a statement prematurely. In Annan's opinion, it was important that whoever was at the helm of prosecutions during the final stages of the two Tribunals be able to devote him or herself entirely to a single cause. His statement appears diplomatically worded to avoid the insinuation that Rwanda was the squeaky wheel needing the grease. Indeed, neither the statement nor the resolutions establishing the resulting two mandates made any insinuation that the ICTR had "underperformed."

¶67 Annan's logic is difficult to dispute. Aside from the inevitable lag time it will take to orient del Ponte's successor, Hassan Jallow of the Gambia, and to complete whatever reorganizations are necessary, it stands to reason that having a leader on site will be more efficient than having one who must shuttle back and forth to Holland and run another, equally complex tribunal for Yugoslavia at the same time. Moreover, the office of the Prosecutor is perhaps the most influential factor in deciding who gets arrested, prosecuted, and convicted or acquitted, because the Prosecutor makes the ultimate call on whom OTP prosecutes and then directs the cases against them. Thus it is exceptionally important to have a devoted and competent person in that office, and the turnover which has now occurred was essentially the last chance to make any change before the ICTR's time expires. Whoever emerged from the debate as the last Prosecutor would be the person who sealed the ICTR's place in history as either a success or a failure. Mr. Jallow comes to ICTR from a position as a judge on the Special Court for Sierra Leone, a hybrid UN/domestic body that is widely lauded as a more efficient model for tribunals and one that appears to have learned many lessons from the ICTR.<sup>199</sup> At least one critic has indeed attributed the relative success of the SCSL to the efficiency of its Prosecutor, David Crane of the US, which suggests that Mr. Jallow may have had the opportunity to learn some lessons from the SCSL as well.<sup>200</sup> It may also turn out to be significant that

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<sup>198</sup> Letter dated 28 July 2003 from the Secretary-General addressed to the President of the Security Council, U.N. Doc S/2003/766, July 29, 2003.

<sup>199</sup> For a general introduction to the SCSL and the circumstances surrounding its creation, see Human Rights Watch, *The Jury Is Still Out: A Human Rights Watch Briefing Paper on Sierra Leone*, July 11, 2002 available at <http://hrw.org/backgrounder/africa/sfbck0711.htm>. See also Nsongurua J. Udombana, Globalization of Justice and the Special Court for Sierra Leone's War Crimes, 17 EMORY INT'L L. REV. 55 (Spring 2003).

<sup>200</sup> For a general discussion of the relative advantages and disadvantages of hybrid courts and "lessons learned," see Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 A.J.I.L. 295 April 2003. The SCSL model and Crane's practical approach are praised in Major Jeffery L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96, 160-164 (June 2003).

Mr. Jallow is African, providing a sort of cultural understanding that will facilitate the sensitive work of inter-African cooperation on such matters as investigations, arrests, and extraditions.

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Perhaps most importantly, Mr. Jallow is well acquainted with the ICTR's various handicaps because he was a member of the "Expert Group" [to Review the Effective Operation and Functioning of the ICTR and ICTY] which thoroughly investigated both the ICTR and ICTY in 1999. Notably, the Expert Group announced in January 2000 that "midway in the life of both *ad hoc* tribunals...there was no compelling reason to recommend an amendment of the Statute to provide a separate Prosecutor for the ICTR."<sup>201</sup> The Expert Group found that, were the ICTR and ICTY being created anew, it would be logical to consider having two separate Prosecutors.<sup>202</sup> However, at the time of the report, the tribunals were working with "a solid body of five years of experience,"<sup>203</sup> which was performing reasonably well, consistent with the report's general suggestion that many of the delays in both tribunals had been inevitable given their novel and unique character.<sup>204</sup>

### *B. The Idea of A Separate Prosecutor*

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As evidenced by the Expert Group Report, the idea of a separate Prosecutor for ICTR has been around for some time. Rwanda had requested a separate Prosecutor at the very outset,<sup>205</sup> and it seems obvious that it may have been wise at the very outset to provide one, but using Justice Goldstone for both had several advantages. First, it avoided the delay of finding someone equally as qualified as Goldstone to handle Rwanda—and as noted earlier, in the first days of ICTR, any additional delay would have been politically unseemly. Next, a single Prosecutor held the promise of a unified strategy and a unified understanding of the work to be done for both Tribunals. The next possible juncture to split the mandate would have been when Goldstone was replaced by Louise Arbour in 1994, but it might be reasoned that ICTR had barely gotten off the ground, and to put in a new person may have damaged the ICTR in the bud. It may also have simply been too early to assess whether the one-person strategy was working properly. Alternatively, of course, this may have been the very best time to make the move, so that the crucial years of the ICTR's development would have been guided by a single, focused leader. The next opportunity to assign a Prosecutor for Rwanda came when Louise Arbour departed in 1999 and was replaced by Carla del Ponte. If a Prosecutor for Rwanda was seriously being considered at that point, the Expert Report was poorly timed, as it came about a month after del Ponte had already been installed. Nonetheless, the Report's relatively rosy assessment of the issue must have comforted the Security Council that all was going to plan.

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At least one member of the Security Council had recognized by 1999 that a dedicated Prosecutor for Rwanda was a superior idea. According to the United Kingdom

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<sup>201</sup> ICTR Press Briefing, January 31 2000, available at <http://www.icttr.org/ENGLISH/pressbrief/2000/brief20000131.htm> (last visited Apr. 4, 2005). *See also Expert Group Report*, *supra* note 38.

<sup>202</sup> *Expert Group Report*, *supra* note 38, para. 254.

<sup>203</sup> *Id.* para 255

<sup>204</sup> *See, e.g., id.*, para 264.

<sup>205</sup> Speech to U.N. Security Council by Rwandan Ambassador Bakuramutsa, U.N. Doc. S/PV.3453, at 15.

mission to the UN, the UK had been a proponent of a separate Prosecutor at least this early for several reasons.<sup>206</sup> The UK's support for the idea had nothing to do with the person of the Prosecutor, but rather several pragmatic factors: first, that the work load simply demanded a person who could be physically present. Next, there was a need to combat a public perception that Rwanda was continuing to get less attention from the UN. This was of particular importance considering the predominant perception that many of the atrocities in Rwanda had occurred as a result of the UN's earlier inattention.

¶71

The opportunity to select a dedicated Prosecutor for Rwanda has only presented itself four times. Considering the continued low output of the ICTR between the most recent times the issue has presented itself, the entire Security Council seems to have come around to the UK's way of thinking (this is not to suggest, of course, that the UK was more responsible for the decision than any other state). A diplomatic source in the Russian Federation mission to the UN confirmed that his country simply felt that a separate Prosecutor would be more effective, as did a legal officer in the Chinese mission.<sup>207</sup>

### C. *Ulterior Motives?*

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All these affirmative reasons to install a dedicated Prosecutor for Rwanda notwithstanding, it simply seems all too expedient for the predominately Tutsi Rwandan government, naturally comprised of many former RPA figures,<sup>208</sup> to have secured the dismissal of a Prosecutor actively engaged in investigating war crimes the RPA may have committed in taking Rwanda and toppling the genocidal Interim Government. It must be noted, of course, that there is nothing to suggest acts of genocide by the RPA (i.e., against Hutus), but it was established even before the Tribunal was created that the RPA broke certain rules of war.<sup>209</sup> In negotiating the Tribunal's statute, the Rwandan government had strongly opposed a broad mandate, arguing that the focus should be on "the crime of crimes," genocide—which, although it may have committed other crimes, the RPF had not committed.<sup>210</sup> A cynical observer might reason that the new government could easily foresee the prosecution of RPA war crimes and argued for a narrow mandate to obviate exactly that possibility. Rwanda's efforts notwithstanding, the Tribunal's mandate does not in any way limit the Prosecution from pursuing possible crimes of the RPF as it does not name any specific perpetrators. Indeed, if the Tribunal is to deal with the *entire* Rwandan tragedy, it may be of historical and equitable value to prosecute Tutsi war criminals as well as those committed by Hutus.

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Investigating crimes by the RPF has been a theme of del Ponte's entire mandate, beginning shortly after her arrival at ICTR. Louise Arbour had publicly stated that she

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<sup>206</sup> Telephone conversation by author with Catherine MacKenzie, 1<sup>st</sup> Secretary, Political Section, UK Mission to the UN, on December 8, 2003.

<sup>207</sup> Telephone conversations by author with officers at Russian Federation and Chinese missions, both of whom wished to remain anonymous, on December 8, 2003.

<sup>208</sup> Who, notably, were at the time of the decision simultaneously cementing their power in Rwanda by taking, in a landslide, the country's first post-genocide presidential election. See Marc Lacey, *Rwanda to Elect President For 1st Time Since Killings*, N.Y. TIMES, August 24, 2003.

<sup>209</sup> *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935* (1994), §III(c), U.N. Doc. S/1994/1405 (Annex), December 9, 1994.

<sup>210</sup> Speech to U.N. Security Council by Rwandan Ambassador Bakuramutsa, *supra* note 205.



felt such investigations were necessary,<sup>211</sup> but according to *Diplomatie Judiciare*, opinion at ICTR was that the task was “officially impossible” because of the risk that Rwanda would have used its power to shut the entire Tribunal down in retaliation.<sup>212</sup> However, in the aftermath of the Barayagwiza fiasco, it was claimed that del Ponte had so finessed relations with Rwanda that investigating the RPF had become a possibility.<sup>213</sup> She broached the topic (without naming any suspects) with Rwandan President Paul Kagame, who had been the leader of the RPF/RPA before taking office, again focusing on the “bigger fish” (such as the RPA military leadership, some of whom would have been rewarded for their service to the RPA with positions in Kagame’s government) rather than the “smaller fry.” *Diplomatie Judiciare* and other commentators credited del Ponte’s initiative as a symbol of a new power dynamic between the ICTR and Rwanda, an assertion of the Tribunal’s, and her own, independence.<sup>214</sup> Other commentators applauded the move, noting that the prosecution of only Hutus, when Tutsis had also committed crimes, including attacking refugees from Rwanda living in Zaire, made the ICTR look like victor’s justice.<sup>215</sup>

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Thus investigations began, and caused tensions between the ICTR and Rwanda throughout del Ponte’s mandate. These tensions came to a head in December 2002, after del Ponte met in the Hague with members of exiled Rwandan opposition groups considered by Rwanda to be implicated in the genocide, ostensibly to gather information about possible RPF crimes.<sup>216</sup> A statement by Rwandan authorities alleged that by meeting these parties she had “lost the moral authority to handle cases related to the Rwandan genocide.”<sup>217</sup> Del Ponte fired back in a speech to members of Britain’s parliament, saying that Rwanda was being uncooperative because “we have real reason to believe that powerful elements in Rwanda are vehemently opposed to the investigations [of alleged RPA crimes].”<sup>218</sup> In interviews with *Diplomatie Judiciare*, del Ponte also reiterated that Rwanda had no influence whatsoever over whom she may or may not meet, and that Rwanda was only objecting to that particular meeting because it had become politically expedient to call for her resignation.

¶75

At the time of this crisis, there had been a two-and-a-half month break in investigations of the RPF. Del Ponte made clear that, although the Rwandan government, particularly the military, had refused to cooperate with the investigations, the break was purely for practical reasons such as the departure of staff, and should not be seen as any kind of capitulation by OTP.<sup>219</sup> Investigations had already resumed in November 2002, and del Ponte already had drafts of indictments that she planned to release when OTP had

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<sup>211</sup> Ian Fisher, *Crisis Points Up Tough Choices for Tribunal on Rwanda*, N.Y. TIMES, December 19, 1999.

<sup>212</sup> Stéphanie Maupas, *The ICTR is Not a Winner’s Court*, DIPLOMATIE JUDICIAIRE, December 15, 2000. Available at <http://www.diplomatiejudiciare.com/UK/tpiruk/Prosecutor6.htm>. See *supra* note 23. Note that this article has not been retained in the new International Justice Tribune archives.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* See also Shenk, *supra* note 17.

<sup>215</sup> See *Missing*, THE ECONOMIST, December 23, 2000; *Prosecutor Accused*, THE ECONOMIST, August 23, 2003.

<sup>216</sup> Arnaud Grellier and Frédéric Legrand, *There Has Been A Two And A Half Week Break in Investigations into the RPA*, DIPLOMATIE JUDICIAIRE, December 4, 2002, available at [http://www.justicetribune.com/article\\_uk.php?id=2092](http://www.justicetribune.com/article_uk.php?id=2092). See *supra* note 23.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

gathered enough evidence. While she had expressed a goal of issuing RPF indictments by the end of 2002, this was not to be.<sup>220</sup>

¶76 Del Ponte was scheduled to meet with various officials in Arusha a few days after her address in London, but the Rwandan authorities cancelled and insisted that Pierre Richard Prosper, the US Ambassador for War Crimes Issues, be present at any negotiations scheduled for the future. Rwanda's withdrawal prompted President Pillay's letter to the Security Council asking for help mentioned earlier. Commenting on del Ponte's recent actions, Rwanda's Justice Minister, Jean de Dieu Mucyo, raised several concerns in a single statement:

She wants to play the game of balance, doubtless because of political pressure. But how can she compare Bagosora<sup>221</sup> to a [RPA] soldier who killed a neighbor whom he suspected of having killed his family? These are clearly crimes, but can they really be compared to genocide? What's more, our legal system is dealing with the case [sic] and people have already been tried and convicted.<sup>222</sup>

¶77 Mucyo also stated that del Ponte was "inexplicably...mixing politics and justice"<sup>223</sup> and that Rwanda had "difficulties with individuals and not with the institution,"<sup>224</sup> hinting at Rwanda's personal animus towards the person of the Prosecutor.

¶78 On the same day as Mucyo's statements, del Ponte criticized Kigali for trying to inject its own political agenda into her work and stated that the Rwandan government had actually intimated to her in private that the real reason for Kigali's outrage over her meeting the exile groups had indeed been indignation over her RPF investigations.<sup>225</sup> As if responding to Mucyo, she stated that she was indeed working on limited resources, and that as a result genocide trials had to remain top priority, with RPF investigations coming second and at a different pace.<sup>226</sup> Nonetheless, she intended to bring all of her indictments by 2004 (apparently assuming that she would still be at her post).<sup>227</sup>

¶79 Rwanda finally got its meeting between del Ponte, Justice Minister Gahima, and Pierre Richard Prosper in June, prompting speculation that del Ponte had bowed to Rwanda's pressure and cancelled RPF investigations. Her staff refuted the idea as "absolutely false," noting that no such deal could be struck through negotiation, and that even though Rwanda had the right to carry out RPF investigations itself, the ICTR has primacy over any such domestic jurisdiction. OTP was in fact still conducting investigations.<sup>228</sup>

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<sup>220</sup> *Id.*

<sup>221</sup> Mucyo is referring to Gen. Theoneste Bagosora, defendant in the Military 1 case. *See supra* note 24.

<sup>222</sup> Ladislav Niyongira and Ephrem Rugiririza, *Settling Scores*, DIPLOMATIE JUDICIAIRE, December 19, 2002, available at [http://www.justicetribune.com/article\\_uk.php?id=1728](http://www.justicetribune.com/article_uk.php?id=1728). *See supra* note 23.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Africa News, *Rwanda; Prosecutor Says Tribunal Can Complete Work in 2004*, pg. 2, December 19, 2002.

<sup>226</sup> *Id.* at 3.

<sup>227</sup> *Id.*

<sup>228</sup> Hirondelle News Agency, *Prosecutor Spokesperson Denies Tribunal Has Dropped Plans to Pursue RPF Soldiers*, July 2, 2003, available at <http://www.hirondelle.org/arusha.nsf/0/78A4759CCEC638B9C1256D63007DA9FD?OpenDocument> (last

### D. Endgame

¶80 Del Ponte had stated in December, 2002 that she would seek a second term to continue her work at ICTR and ICTY because she was busy in both, apparently not contemplating that she might find herself working on one and not the other. Not surprisingly given all the controversies I have described in this paper, Rwanda had already begun to suggest that she should not get that second mandate. Speculation abounds that Rwanda supported the dismissal of Carla del Ponte from the ICTR as an attempt to avoid further investigation into the possible crimes of the RPF/RPA and as an *ad hominem* attack on the personification of poor relations with the Tribunal.<sup>229</sup> This appears to have been the suspicion of human rights groups such as Human Rights Watch, who wrote to the Security Council on August 7, 2003, acknowledging legitimate concerns regarding management and/or efficiency, but urging the members to “ensure that changes do not undermine the independence and impartiality of the ICTR, including in prosecuting...members of the Rwandan Patriotic Army.”<sup>230</sup>

¶81 After Kofi Annan’s July 28, 2003 announcement recommending del Ponte’s replacement, Rwanda registered its support for the idea. A statement from Rwanda’s Ministry of Foreign Affairs was submitted to the Security Council just one day before del Ponte was to appear to discuss Annan’s proposal. The statement expressed Rwanda’s concerns over inefficiency and the lack of attention paid to ICTR and Rwanda, as well as the “usual suspects:” incompetence, corruption, fee-splitting, nepotism, etc. Del Ponte, in the closed session the next day, mentioned in her own defense the possibility that replacing her would derail the RPA investigations.<sup>231</sup> The Security Council was unconvinced.

### VI. CONCLUSION

¶82 It seems clear that by dedication and physical presence, a new Prosecutor for Rwanda may be able to alleviate some of the problems discussed in this paper. Furthermore, one might even speculate that the cost of hiring another individual altogether might not be much more than the cost of shuttling one Prosecutor back and forth across the globe. So, considering that efficiency is and should be a primary concern motivating the Security Council, it is difficult to dispute that the decision taken this August was the correct one. This said, however, it also appears that Carla del Ponte may have been an unfortunate scapegoat. As described in this article, many of the ICTR’s problems which irritated Rwanda and the international community had very little to do with the Prosecutor herself. Del Ponte, with arguably the Tribunal’s “dirtiest work,” and one of few top officials who interacted with Rwanda (as well as the UN Security Council) directly, served as a lightning rod for these frustrations which were not of her

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visited Apr. 4, 2005).

<sup>229</sup> See, e.g., *Prosecutor Accused*, *supra* note 200; Jonathan Birchall, *Del Ponte in Plea to UN on Rwandan War Crimes Role*, FINANCIAL TIMES, August 9, 2003.

<sup>230</sup> Press Release, Human Rights Watch, *Leading Rights Groups Urge Security Council to Ensure Management Reforms Do Not Undermine Rwanda Tribunal*, August 7, 2003, available at <http://www.hrw.org/press/2003/08/rwanda080703.htm> (last visited Apr. 4, 2005).

<sup>231</sup> Letter dated 5 August 2003 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/794. See also Birchall, *supra* note 229.

own making. Several other problems, such as issues with infrastructure like translation equipment, were just nearing resolution when del Ponte lost half her job. This may not have any bearing on the validity of the decision to replace del Ponte, but as a person who has worked at the Tribunal, this author would sympathize with a saddened del Ponte who might have felt she was just about to hit her stride.

¶83 The new Prosecutor, Hassan Bubacar Jallow, has been hailed as an excellent choice for his job.<sup>232</sup> It is also a credit to the Security Council that a replacement for del Ponte was found with a speed almost unknown in the UN, thus preempting what could have been a disaster if the position had gone unfilled for any length of time. However, Mr. Jallow has come to the Tribunal at the busiest period in its history, and will be under more pressure to perform than any of his predecessors. As noted at various points in this article, so much of the work the ICTR must accomplish before 2008 depends on circumstances largely beyond Mr. Jallow's control. His legacy will depend on the smooth and integrated functioning of disparate elements of the Tribunal, many of which have only recently achieved full speed, such as court scheduling, the availability of witnesses, and language services. It must also be noted that heightened output in Arusha will put a corresponding strain on the appeals chamber in the Hague, and the Security Council must be willing to provide for those needs as well if the ICTR's cases are to continue moving along swiftly.

¶84 At this writing, the issue of prosecuting RPA war crimes remains unresolved. An article by International Crisis Group suggests that during a May, 2003 meeting in Washington, Carla del Ponte agreed in principle to step aside and allow Rwanda to handle such prosecutions domestically, intervening only if Rwanda failed to do so satisfactorily.<sup>233</sup> However, no further evidence of this agreement has been found, and at any rate del Ponte's dismissal would likely make such an informal agreement void. A diplomatic source at the UK mission to the UN was adamant that Mr. Jallow, as well as the Security Council, was fully aware that the investigation of the RPF has not been removed from the ICTR's agenda with the removal of its chief proponent.<sup>234</sup> With Mr. Jallow permanently present in Arusha, and, perhaps even more importantly, with crucial subordinate positions filled shortly before his arrival, OTP may indeed be substantially more capable of carrying out this important task expediently.

¶85 Whatever the outcome of this long and arduous task, one must hope that the legacy of the ICTR will be a sense of justice, however slight-- that at least some of the perpetrators of such unfathomable cruelty will be meted out at least some of the retribution they deserve. Yet regardless of the ICTR's inefficiency or lack thereof, and regardless of the personality of its Prosecutor, adjudications in Arusha can offer little consolation to Rwanda's victims, both living and dead. This article has addressed some of the myriad difficulties of dealing with a genocide after it is over. The author hopes that the true lesson of the ICTR, however, will be to stop the next one before it begins.

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<sup>232</sup> See Araminta Wordsworth, *New Genocide Prosecutor Pacifies Rwanda*, NATIONAL POST (Canada), November 28, 2003.

<sup>233</sup> International Crisis Group, *The International Criminal Tribunal for Rwanda: Time for Pragmatism*, Africa Report No. 69, September 26, 2003, at <http://www.crisisweb.org/home/index.cfm?id=2303&l=1>.

<sup>234</sup> Telephone conversation by author with an official (who wished to remain anonymous) at the UK mission to the UN, December 8, 2003.