

**The International Criminal Tribunal for Rwanda:
International Justice or *Juridically-Constructed* “Victor’s Impunity”? ©**

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The United Nations International Criminal Tribunal for Rwanda was established at the end of 1994 with the mandate to prosecuting *all* international crimes committed in Rwanda during the previous year. Unlike the Nuremberg and Tokyo Tribunals, organized by the “victors” of WW-II, the ICTR and the Tribunal for the former Yugoslavia were created by the UN Security Council (albeit under controversial circumstances²). As a European tribunal, the ICTY has been closely studied and criticized and I will not attempt to offer my own critique in this setting. My purpose is to raise awareness of the apparent political manipulations that have turned the Rwanda Tribunal into a great-power foreign policy tool, rather than an example from which international justice might flow.

During the thirteen years of its existence, the ICTR Office of the Prosecutor (OTP) has come under great criticism for moving so slowly in bringing its cases to trial, which can be explained either as a lack of competence or a particularly difficult investigative or evidentiary situation.³ However, it is without doubt that, unlike the ICTY which has brought at least some charges against each of the protagonists (with the notable exception of NATO forces), at the ICTR *only* members of the former Rwandan government and military have been among the Accused at the ICTR. Now the ICTR is scheduled to end its trials in 2008 and appeals in 2010, and the question of transferring detainees to the Rwandan government is in the offing.⁴

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² Whether the Security Council has a proper mandate to establish tribunals under Chapter 7 “peace-enforcement” powers are issues raised at both the ICTY and ICTR and remain the source of some controversy.

³ Recent revelations indicate that the task of the ICTR Prosecutor has been complicated by the necessity to re-cast the Rwanda war, and the resulting prosecutions, in a manner that is actually inconsistent with the evidence showing that the Rwanda narrative upon which the ICTR prosecutions have been grounded has been complicated by the political necessity of creating impunity for the victors in the Rwanda war. See Del Ponte and Hartmann references, *Infra*.

⁴ The ICTR has recently approved Rwanda as a possible transfer site, despite the recent indictments of leading figures in the Rwanda government for crimes committed during 1994. See indictments of Judge Bruguiere (France, November 2006) and Judge Andreu (Spain, February 2008). See *also* commentary by author, “The Great Rwanda Genocide Coverup” February 18, 2008, “Different Justice at the Rwanda War Crimes Court,” March 10, 2008, JURIST website, (U of Pittsburgh, U.S.)

Given the mandate of the ICTR to prosecute all crimes committed in Rwanda, this is quite an extra-ordinary set of circumstances. Either the “Rwanda war” is the *only* war in history in which only one of the contestants committed crimes during the war (a proposition about which I hope to raise some doubt in this paper)...or the United Nations Tribunal for Rwanda has been manipulated for political reasons to create impunity for a favored contestant and has actually become a “victor’s” tribunal, like those that were established after WW-II.⁵

Because of access to original UN and government documents that the ICTR defense has put into the record, another narrative is developing that confirms the observations of former Chief ICTR Prosecutor Carla Del Ponte with respect to the outcome of the ICTR, as an institution of international justice:

It is unfair that politics undermines our work. I find it wounding to see that we have managed to ridicule the principles of international justice because Kagame has signed a bi-lateral agreement [with the United States].⁶

ICTR Defense Evidence: The *Real* Narrative of the Rwanda War

There was no doubt that extreme violence had swept Rwanda during the last 3 months of the 4-year war in Rwanda⁷ between the French/Kinyarwanda-speaking Rwandan Government (supported by France and other African governments) and an invading force made up largely of English/Swahili speaking former members of the Ugandan National Resistance Army (now called the Rwandan Patriotic Army) whose parents had left Rwanda more than 20 years earlier.⁸ Evidence at the ICTR shows between 1900 and 1994 the RPA military

⁵ Of course, the Nuremburg and Tokyo Tribunals failed to consider fire-bombing of Dresden or Tokyo, much less atomic weapons used on civilians in Hiroshima and Nagasaki. Delineating the nature of these acts as “crimes” is beyond the scope of this paper, but the commission of “crimes” by all participants in WW-II is beyond dispute, the asserted justifications for their commission are another matter.

⁶ Hartmann, *Paix et chatiment les guerres de la politique* (Flamarion, Paris September 27, 2007), p. 271-72.

⁷ For purposes of this paper, this brief historical review has been drawn from a much more detailed account in the author’s forthcoming book on the ICTR and the Rwanda War. For a description of the war from the perspective of a former officer in the RPF/A, see Military-I exhibit DNT 218, Ruzibiza, *The Secret History of Rwanda*, (Paris, 2005)

⁸ The NRA of Uganda, under Yoweri Museveni, had deposed a socialist-oriented Milton Obote in 1986, after a war for power in which at least 300,000 civilians were killed between 1981-1985. See, Mamdani, *When Victims Become Killers*, (Kampala, Fountain 2001) and Waugh, *Paul Kagame and Rwanda*, (McFarland, USA 2004). In 1996 and again in 1998, the combined armies of Uganda and Rwanda invaded the Eastern Congo and established de facto control over the economic and material resources of that region with Kigali and Kampala becoming major trading

actions in Rwanda were supported by a steady stream of materiel and weapons, delivered from the territory of Uganda.⁹ By February 1993, the RPA demonstrated its military superiority¹⁰ in an assault that nearly captured Kigali. The presence of French and Belgian military advisors deterred the final assault. A ceasefire, negotiations and a peace agreement ensued,¹¹ which lasted a little over 9 months.

On April 6, 1994, just the “transitional government” agreement had been approved by all surrounding countries, the U.S., France and Belgium which would have consigned political arm the invading forces (the RPF) to a minority role in the subsequent government,¹² President Habyarimana of Rwanda, the President of neighboring Burundi, much of the Rwandan military leadership and the French flight crew was killed by missiles that hit the President’s plane on the approach to the Kigali Airport. The four-year war resumed after the apparent assassination and hundreds of thousands of civilians lost their lives in the month that followed in what has come to be called the “Rwanda Genocide.”

This was a horrible event, but not completely unexpected if the war was to resume after the ceasefire that had been in place for nearly a year. Massive killings of civilians had followed the assassination of the *previous* Burundian President by his own army only six-months earlier (late October 1993) and even U.S. Ambassador to Rwanda Robert Flaten testified at the ICTR that he *personally* warned both sides in November 1993 that “Burundi-like” massacres would be the result if either side resumed the war.¹³ Even the U.S. State Department chief for Africa stated on the night of April 6, that mass killings were likely in both Rwanda and Burundi, as a reaction to the assassination of the two presidents, without any consideration of pre-planned ethnic violence.¹⁴ This

centers for gold, diamonds and precious minerals that are now being exported through Uganda and Rwanda, rather than westward down the Congo River as had previously been the case. See, 2003 *Experts Report on Congo and references, infra*.

⁹ Testimony at the ICTR from former RPA officers identified several ammunition/weapons caches of 200-300 tons in the area of Rwanda controlled by the RPA, much of which was delivered in 1993 after the RPA had established military dominance in February 1993. (*i.e.* Lt. Abdul Ruzibiza March, 9 and 10, 2006, and others)

¹⁰ ICTR Military-1 exhibit DB 71: The RPA military superiority was documents by Gen. Dallaire in the Sept 1993 *UNAMIR Reconnaissance Report* filed at the ICTR.

¹¹ The Arusha Accords were signed in August 1993.

¹² ICTR Military-1 exhibit DNT 121: April 1, 1994 Code Cable from U.S. Ambassador Rawson in Kigali to U.S. Embassy in Kampala Uganda

¹³ ICTR Military-I testimony of U.S. Ambassador Robert Flaten, July 2006.

¹⁴ ICTR Military-I exhibit DNT 315. April 7, 1994 cable of Amb. Prudence Bushnell: “If, as it appears, both Presidents have been killed, there is a strong likelihood that widespread violence could break out either or both countries, *particularly if it is confirmed that the plane was shot down.*”

mass violence had already happened several times in Burundi before October 1993,¹⁵ and was predicted as a political consequence of the Rwanda war (i.e. war crimes or crimes against humanity), *not* because of planned killing of civilians for ethnic reasons (i.e. genocide).

The invading army of the Rwandan Patriotic Front, called the Rwandan Patriotic Army, led by former Ugandan Military-Intelligence Chief, Paul Kagame seized the eastern 1/3 of Rwanda by April 20 in well-orchestrated “blitz-krieg” fashion and took control of the capital Kigali in mid-July. As early as May 17, 1994 UNHCR had detailed reports of massive killing of civilians by the RPA in the southeastern part of Rwanda that they controlled:¹⁶

The presence of the RPF at the border and across the border...raises critical security concerns...the following are excerpts a UNHCR-Ngara protection report...made on 14 and 15 May :

- At Rusomo commune, sector Kigarama, the RPF...called for a “peace meeting.” Those who did not participate voluntarily were forced to the meeting. At the school people were tied together, three by three by three – women and children – and stabbed. The bodies were put on trucks and thrown into the Kagera River....
- At...sectors Nyamugari, Gisenyi, Nyarubuje, the RPF comes at 05h00...the villagers are caught and taken away to the river by trucks. No one has returned. Refugees in the area have seen people being tied together and thrown into the river. It seems guns are only used if somebody tries to escape....
- At...sector Muzaza,...the RPF launched several attacks on the village and its population. On 13.05 40 RPF soldiers...surrounded the village. Villagers were gathered in houses, which were burned down. An eye witness saw 20 people burned this way. 8 villagers were thrown into a latrine and the latrine was filled with soil. Asked by UNCHR field officer refugees said that RPF did not care whether the victims were hutu or tutsi villagers...

¹⁵ Burundian massacres of several hundreds of thousands of mainly Hutu civilians after the assassination of President Ndadaye in October 1993, as well as in 1972 and 1988. See Lemarchand, “Managing Transition Anarchies, Rwanda, Burundi and South Africa,” *Journal of Modern African Studies*, Vol. 32, No. 4 (Dec. 1994) and numerous other sources.

¹⁶ ICTR Military-I exhibit DNT 259. May 17, 1994 UNCHR Report of RPF killings at Rusomo Bridge to Tanzania, over Kagera River, in southeastern Rwanda. This evidence was put into the ICTR record by the Ntabakuze Defence, NOT by the Prosecution.

- On 15.05...a group of Rwandan people were observed running away from 20-35 soldiers...some jumped into the river. One person drowned. The soldiers rounded up a group of civilians and marched them off...
- An IRC staff person wrote to their office: "Things are getting very bad at the border here...Each day there are more and more bodies in the river and most of them without their heads; the count is between 20 to 30 each 30 minutes..."
- We believe that only Tanzania...only border open to refugees – Zaire has been closed to them; ...Burundi are undesirable because of RPF presence and instability...RPF atrocities on the other side of the river will force people to flee...
- We will be overwhelmed here unless someone takes action to the bloodshed, the atrocities, the massacres, in Rwanda.

In August 1994, UNHCR received the only independent human rights report from *any* area controlled by the RPF/RPA before, during or after the war. The so-called "Gersony Report"¹⁷ of massive RPF killings, given to Kofi Annan

¹⁷ ICTR Exhibit DNT 260A:

New York Times, August 5, 1994: Bonner, Raymond, "Rwandans Say the Victors Kill Many Who Go Back"

KADUA, Rwanda, Aug. 4 -- ...Recently, hearing from the new Government in Kigali that it was safe to go home, some have tried. And now they are coming back to the wretched refugee camps with reports that some Hutus Rwandan Patriotic Front... In separate interviews, other Hutu men and women...gave similar accounts of men tied up and led away by Patriot Front soldiers and of men, women and children being killed with they returned to their villages....There have been persistent rumors of atrocities by the Patriotic Front but no confirmations until now. But, two reporters who spent several hours today in separate interviews with refugees found their accounts credible.

New York Times, September 28, 1994: Bonner, Raymond, "U.N. Stops Returning Rwandan Refugees,"

GENEVA, Sept. 27 -- "In a sharp reversal of policy, the United Nations has stopped encouraging Rwandan refugees and is refusing to even assist those who wish to go home because of a report that the new, Tutsi-dominated Government in Rwanda has killed thousands of members of the Hutu ethnic group...the report concluded that there was 'an unmistakable pattern of killings and persecutions' by soldiers of the Rwandan Patriotic Front, 'aimed at the Hutu populations'...the report was based on a five-week investigations that included interviews with 300 Rwandans in 41 of Rwanda's 145 communes and at nine refugee camps."

Le Monde, October 10, 1994

"Rwandan: Un rapport confidentiel fait état de la mort de 30,000 Hutus
controversie persiste sur les allégations du HCR (RAPPORT GERSONY)"
(See ICTR testimony of former Rwandan Foreign Minister Jean Marie Ndagiyimana, November 2006 and documents associated therewith)

and other UN figures, was confirmed by publicly available Human Rights Watch¹⁸ and Amnesty International¹⁹ reports from September/October 1994.

A memorandum from the Undersecretary of State for Africa George F. Moose to “the Secretary” (U.S. Secretary of State Warren Christopher under President William Clinton) reports a briefing on September 17, 1994:

A UNCHR investigative team that spent July and August in Rwanda (i.e. Gersony) has reported systematic human rights abuses by the GOR (RPF) forces – including systematic killings – in the south and southeast of the country. The team has concluded that the GOR is aware of these reprisals against Hutu civilians and may have sanctioned them....

¹⁸ ICTR Military-I defense Exhibit DNT 261:

Human Rights Watch, *Absence of Prosecution, Continued Killings*, Sept. 1994:

- Killings, Arrests and Disappearances of the Accused, p. 3
- *At Kimuvu parish...priests were evacuated when RPF soldiers arrived to make camp on the grounds. When the priests returned in July, they found a considerable number of bodies. Apparently, the victims, whose arms had been bound, had been assembled for interrogation by the soldiers and had been beaten to death. The priests organized the burial of the bodies in three large mass graves which were located and photographed by Human Rights Watch/Africa.*
- *On July 13, in the southern town of Butare, RPF soldiers gathered several hundred displaced persons...most or all of the men have not been heard from since. The men were detained in the veterinary school...Witnesses related that for a period of two days there were sounds of people being killed in the woods next to the school.*
- *(many other examples included in report)*
- The RPF Killing of Civilians During the War, p. 5

¹⁹ ICTR Military-I defense Exhibit DNT 258:

Amnesty International, *Rwanda: Reports of killings and abductions by the Rwandese Patriotic Army, April-August 1994*, October 20, 1994:

- 1. Introduction:
Amnesty International has known for years that the RPF closely monitored and controlled movements of foreigners in areas under its control. Journalists and representatives of humanitarian organizations rarely talked to Rwandan citizens under the control of the RPF without an RPF official being present. This ensured that before the new government came to power on 19 July 1994 very limited information about abuses by the RPA could be gathered and made public...However, Amnesty International has received numerous reports of human rights abuses committed by the RPA since the war in Rwanda began in October 1990. These have included hundreds of deliberate and arbitrary killings or possible extrajudicial executions and disappearances...reports of civilian supporters of the RPF being allowed to kill opponents...many prisoners held by the RPA have been subjected to a particularly painful form of tying...
- 2. Deliberate and arbitrary killings by the RPA, p. 3.
- 3. Abductions and “disappearances” by the RPA, p. 8.

On the basis of interviews with refugees/individuals, the UNHCR team concluded that a pattern of killing had emerged. The RPA convened meetings of displaced persons to discuss peace and security. Once the displaced persons were assembled, RPA soldiers moved in and killed them. In addition to these massacres, the RPA engaged in house to house sweeps and hunted down individuals hiding in camps. Victims were usually killed with hoes, axes, machetes and with fire. Although males 18-40 were at highest risk the young and elderly were not spared. *The team estimated that the RPA and Tutsi civilian surrogates had killed 10,000 of more Hutu civilians per month, with the RPA accounting for 95% of the killing.* (emphasis added)

The UNHCR team speculated that the purpose of the killing was a campaign of ethnic cleansing intended to clear areas in the south of Rwanda for Tutsi habitation. The killings also served to reduce the population of Hutu males and discouraged refugees from returning to claim their land.²⁰

The former Foreign Minister of Rwanda, Jean Marie Ndagiyimana, has testified that UN documents showing that he was approached at his office in Kigali in October 1994 by Kofi Annan and USAID chief for Africa, Brian Atwood, in an effort to cover-up the killings by the RPA were correct and that, as a member of the former government, who had only recently taken his post in the “unity-government,” resigned his post and went into exile in November 1994.²¹

Crimes of the RPA/F against civilian supporters of the former government were also fully documented by the United Nations in early 1995, and not seriously disputed, when the RPA was openly killing civilians by the thousands in the Kibeho Refugee camp.²² In 1996, the RPA and Ugandan armies invaded the eastern Congo triggering a war that continues today. More than 6 million deaths and the largest UN peace-keeping operation in history has been the result of these invasions and occupation using surrogate forces.²³

²⁰ ICTR Military-1 Evidence, DNT 264.

²¹ See, ICTR Military-I testimony of fmr. RPF Foreign Minister Jean-Marie Ndagiyimana, November 2006.

²² The temporal jurisdiction of the ICTR extends only to the year 1994 and crimes committed by the RPF/A *after* 1994 are at issue at the ICTR and are mentioned here only to establish the fact that later actions and policies of the RPF/A confirm that the use of military violence and civilian casualties are tactics which the Rwandan government has adopted.

²³ See, *UN Panel of Experts Report on the Illegal Exploitation of the Democratic Republic of the Congo*, October 20, 2003.

By early 1997, the chief investigator for the ICTR, Michael Hourigan QC, a professional prosecutor from Australia, along with a team consisting of former FBI Agent James Lyons and Maj. Amadou Deme (the former Chief Military Intelligence Officer for General Dallaire) had concluded that the two Presidents had been assassinated by an RPA execution team under the command of Paul Kagame. This was reported to Chief Prosecutor Louise Arbour but, according to the testimony of QC Hourigan he was ordered to destroy his notes. Hourigan and all his team also resigned from the ICTR in 1997.²⁴

The undeniable fact that *only* members of the former government and military have been prosecuted so far is not terribly surprising because it is completely consistent with the well-established narrative²⁵ that even I had come to accept, before I began an independent investigation, in my role as ICTR Defence Counsel in 2003. However, the hard evidence in the ICTR record (only some of which I have alluded to here) requires a serious reappraisal...in the interest of international justice, the integrity of the ICTR and the fate of the detainees that the ICTR Prosecutor has proposed be transferred to their former enemies in battle.

Recently issued European indictments have confirmed that the Kagame-RPF/A government committed massive, uncharged criminal acts during 1994 are indictments issued by Judge Bruguiere of France in November 2006. Judge Bruguiere is also reported to have met personally with then-UN Secretary General Kofi Annan to urge the ICTR prosecution of Rwandan President Kagame for the assassination of former President Habyarimana, since France grants immunity to sitting heads of state.²⁶

The Bruguiere indictment was followed in February 8, 2008 by Judge Andreu of Spain, who issued a 180-page indictment charging Kagame and forty members of his government, including the Military Attache at the Rwandan

²⁴ ICTR defence evidence in Military-I, Exhibit DNT 365. March 8.2007 Affidavit of QC Michael Hourigan (and supporting affidavit of Amadou Deme):

In late January or early February 1997 members of the National Team were approached by three (3) informants (either former or serving member of the RPF) claimed direct involvement in the 1994 fatal rocket attack on the President's aircraft. Their evidence specifically implicated the direct involvement of President Paul Kagame, members of his administration and military. The informants also advised that the Kagame administration was actively involved in covert operations aimed at murdering high profile expatriot Rwandans – one such murder was the death of Seth Sendashonga in Nairobi.

²⁵ *i.e.* that the current Rwandan government and military, led by Paul Kagame, were the “heros” who had stopped their genocidal predecessors by seizing power in mid-July 1994, after the former President had blocked efforts to democratize Rwanda and was killed, probably by his own military.

²⁶ See Bruguiere Indictment, November 2006, charging RPF leaders for the assassination of former President Habyarimana, and recommendation that Kagame be prosecuted at ICTR.

Embassy in Washington, DC.²⁷ These indictments suggest that the Rwandan government is actually responsible for many of the crimes that have been charged to the former government and military and that President Kagame and the RPF/A have benefited from judicially-created impunity at the ICTR for the past 13-years. This means that the UN-ICTR detainees are facing being transferred to the custody of indicted war criminals, and their war-time enemies the United Nations.²⁸ It is as though the United Nations is being used as “bounty hunter” for the current government of Rwanda....and its super-power patrons.²⁹

It seems plain that the ICTR has been used to create impunity for the “victors” in the Rwanda war....but it was not until September 2007 that it became clear *why* this creation of impunity has occurred.

My first hint that the “standard narrative” was not the *real* “Rwanda-genocide” story (or at least the full story) came in the summer of 2003 from the then-ICTR Prosecutor Carla Del Ponte, herself. The second hint came from U.S. Secretary of State Colin Powell and, later, the third came from UN Secretary General Kofi Annan. ICTR Prosecutor Carla Del Ponte’s removal from office in the fall of 2003, at the insistence of the Kagame government, the United States, the United Kingdom and, eventually by Secretary General Kofi Annan confirmed that closer scrutiny of the entire ICTR process was necessary.

Prosecutor Carla Del Ponte Acknowledges Crimes of RPF/A: Another Narrative Begins to Emerge in Mid-2003

In July 2003, I witnessed the Arusha Tanzania press conference of ICTR Chief Prosecutor and Swiss Judge Carla Del Ponte (who was also Chief Prosecutor for the ex-Yugoslavia Tribunal) at which she announced that her office had enough evidence to *prosecute* members of the Kagame Government that had taken power in Rwanda in July 1994!³⁰ This announcement was clearly at odds with the standard narrative, and if this was the Rwanda reality, why were all those in the dock *only* members of the former Rwandan Government?

This was the first time in nearly nine years that the ICTR Office of the Prosecutor (OTP) had publicly admitted that there was at least *shared* responsibility for the tragedy in Rwanda and was the first time I even considered

²⁷ See Andreu Indictment, February 8, 2008 charging 40 RPF leaders, including Paul Kagame, with crimes committed during 1994, including the assassination of former President Habyarimana and *genocide*.

²⁸ In September 2007, it became apparent that, “According to independent experts, some 30,000 Hutu had been killed in Rwandan territory, at the time the army of the FPR was advancing. The Arusha prosecution had catalogued fourteen sites of massacres and was making efforts to go up the chain of command.” Hartmann, *Paix et chatiment*, p. 66.

²⁹ See Hartmann and Del Ponte, *infra*.

³⁰ See, Hartmann, *Paix et chatiment*, pp. 261-72

such an idea. But, it gave hope that the UN Tribunal might be on the cusp of fulfilling its mandate by fairly assigning blame where it properly should be placed. And, not surprisingly, within a day of the Del Ponte press conference, the Rwandan Government in Kigali was called for the resignation of the ICTR Chief Prosecutor.

But the mystery deepened a few days later when U.S. Secretary of State Colin Powell took time out from the on-going search for “Weapons of Mass Destruction” in Iraq to echo Kagame’s call for Del Ponte to be removed from office. And, a few weeks later, UN Secretary General Kofi Annan also called for Del Ponte to be removed from her Rwanda post. For an interested observer, the question was, why on earth would the highest levels of the United States government, or the United Nations for that matter, object to the United Nations ICTR Prosecutor in Arusha, Tanzania announcing nothing more than her intention to carry out her mandate to prosecute all crimes committed in Rwanda some nine years earlier? History had become a current story.

Sham Elections in Rwanda: August 2003

Just weeks after Colin Powell’s press conference in late July 2003, the Rwandan Government held its first presidential election after nine years of rule under the RPF transitional government, during which Paul Kagame controlled the Rwandan military and was either Vice-President or President. Readily available stories in the popular press reported that Kagame had become President in 2000 when RPF party members in Rwanda’s un-elected “transitional” parliament voted 81-5 to replace former President Pasteur Bizimungu with Kagame. Bizimungu, who had been President since July 1994, had abruptly resigned and left the country after finding himself accused of misdeeds when he objected to other members of the government who were possible opponents of Kagame being unfairly attacked and driven into exile. The western press had reported that when Bizimungu returned Rwanda to contest the 2003 popular presidential election in 2002, he was imprisoned for establishing the opposition PDR party, which Kagame loyalists in the transitional appointed-Parliament deemed illegally “divisionist.”³¹

By August 2003, it was also a matter of public record that the only credible opponent to Kagame was former Prime Minister Faustin Twagiramungu who had also returned from exile to contest the election. He had been the main opposition figure to the previous government as the leader of the MDR party for the RPF seized power and was Kagame’s first RPF Prime Minister in the “Unity Government.” But, he had resigned and gone into exile in 1995, too, after refusing to be associated with the well-documented killing of thousands of unarmed civilian war-displaced Hutus at the Kebeho Refugee Camp by RPA troops in 1995, and other RPF crimes. Twagiramungu announced for the

³¹ See generally, Waugh, *Paul Kagame and Rwanda: Power, Genocide and the Rwandan Patriotic Front* (MacFarland USA 2004)

Presidency from abroad in early 2003 but, by April 2003, his MDR party had also been declared illegally “divisionist” (like Bizimungu’s PDR) and outlawed.

When Twagiramungu returned to Rwanda in June 2003 to run as an independent, the elections were moved up from November to August 2003 making organizing and campaigning even more difficult for the challenger. And, two days before the elections his 12 provincial campaign representatives were arrested for “planning to coordinate acts of violence in all the provinces” and his campaign managers resigned citing fear for their lives.³²

This was far from a speculative concern, a growing list of former members of the Kagame government had found it necessary to leave the country in addition to Twagiramungu and Bizimungu. Twagiramungu’s successor as Prime Minister, Celestine Rwigyema, had gone into exile in 2000, as had former Speaker of the National Assembly Joseph Sibarenzi. Other former members of the “Unity Government” had been assassinated, including former Interior Minister Seth Sendashonga (in Nairobi) and Assiel Kabrera an advisor to Sibarenzi and Bizimungu (in Kigali). The European Union Observer Mission, which had been in Rwanda for nearly a month before the August election, reported large-scale ballot fraud, vote buying and a “climate of intimidation” which characterized the entire process, owing in no small part to the absence of opposition parties and the arrest of supporters of Twagiramungu.³³

Kagame was elected with nearly 95% of the vote and under the new constitution, that was also approved in 2003, Kagame was elected to the first of two 7-year terms. By the fall of 2003, it was clear that Kagame had been virtually guaranteed remaining in power for a minimum of 23 years....a term longer by several years than assassinated former President Juvenal Habyarimana, whose term came to an end with his crash of his plane on April 6, 1994. This outcome was particularly ironic because one of the stated aims of the RPF as early as 1990 had been establishing a “multi-party” system, to bring an end to the “Habyarimana dictatorship.”³⁴

By the 10th Anniversary of the “Rwandan genocide” on April 7, 2004, *The Economist* reported that the Kagame government was the most repressive on the African Continent.³⁵

³² *The Economist*, Aug. 28, 2003

³³ Rptr. Colette Flesch, *Report of European Observer Mission, September 2003*; See also, Waugh, *Paul Kagame and Rwanda: Power, Genocide and the Rwandan Patriotic Front*, pp. 185-206 (Mcfarland USA 2004)

³⁴ ICTR Military-I Defence Exhibit: Joint Statement issued by RPF and opposition parties from Brussels, May 1992.

³⁵ *The Economist*, March 28, 2004.

**“The 1996-2003 Rwandan/Ugandan Rape of the Eastern Congo”:
UN Experts Report October 2003**

At nearly the same time Carla Del Ponte was appealing for her job at the UN Security Council in the fall of 2003, another UN body was issued a report that shed an entirely new light on what seemed to be an increasingly curious Rwanda story. The *UN Panel of Experts Report on the Illegal Exploitation of the Democratic Republic of the Congo* was issued on October 20, 2003,³⁶ after several years of study and preliminary reports, which detailed the invasion of the Congo by Ugandan and Rwandan troops in 1996, and again in 1998. The Report described in damning terms how these foreign armies had stripped the eastern Congo’s resources and permanently altered the economy by directing Congo’s wealth, including gold, diamonds and coltan (a mineral essential to cell phone manufacture), east to Kigali and Kampala. The capitals of Uganda and Rwanda became major trading centers for valuable mineral resources that did not exist in either country, but which existed in great abundance in the eastern Congo.³⁷

These invasions of the eastern Congo resulted in the deaths of millions of Congolese as a consequence of war and destruction of the fragile Congolese infrastructure. The Rwanda/Uganda initiated wars in the eastern Congo had drawn the militaries of surrounding nations in what has been called the first “World War” of Africa. By 2003, the Congo wars had been going on for 7 years and had killed more than 3 million Congolese, all as a consequence of the joint Rwandan/Ugandan invasions and resulting occupation by foreign troops, or their surrogate local forces.³⁸

All of these events occurred within the first few months after I accepted the appointment at the ICTR and only raised more questions that I could not answer at the time. But, once I began to pay closer attention to contemporaneous events in Central Africa as part of my new assignment, it was relatively easy to see that the Kagame/RPF government and its RPA army was not behaving in the way that they had been portrayed in the conventional Rwanda-genocide narrative. Far from being the “democratic liberators,” the role to which they had been assigned in describing events in Rwanda in 1994, since coming to power Kagame’s RPF/RPA had been seizing power and resources in Rwanda and the surrounding area at a terrible human cost.

³⁶ *UN Panel of Experts Report on the Illegal Exploitation of the Democratic Republic of the Congo*, October 20, 2003.

³⁷ *Id.*

³⁸ *United Nations Security Council Report of Experts* Oct. 2003, which are continuing as this is being written in spring 2008. The most recent estimates are that more people than 6 million have been killed and more civilians are being killed in the eastern Congo every 4 months than have been killed in Darfur in total!

**U.S./U.K. Pressure UN Security Counsel:
Del Ponte Removed “With Immediate Effect” in October 2003**

With all of this in the news and the public domain, I watched in stunned wonder in October 2003, only a few months after her Arusha press conference when Judge Del Ponte was removed from her position as ICTR Prosecutor by the UN Security Council, at the urging of the United States and the United Kingdom. She was replaced by an African, Abubacar Jallow, who publicly pledged *not* to follow-up on the prosecutorial initiative to prosecute both sides to the Rwanda War announced by his predecessor. Just as astounding, Del Ponte was permitted to retain her post at the ICTY, indicating her removal was not a question of competence, but the publicly asserted reasons were “efficiency” questions that, on their face, were murky at best. Despite her protestations, the duties of the Chief Prosecutor’s office were split and Abubacar Jallo was appointed to replace her at the ICTR. Jallo publicly pledged not to prosecute members of the Kagame Government and all settled back to “normal” at the ICTR.³⁹

But, what could Carla del Ponte possibly have been referring to when she announced that members of Kagame’s Government committed crimes too? And, if Carla del Ponte had the evidence to prosecute members of the Kagame Government in 2003 and the public record revealed manipulated one-party “elections” in Rwanda and massive civilian killings in the Congo by the Rwandan military, why had no RPF prosecutions been launched before 2003? Why did Colin Powell take time out from laying waste to Iraq to call for her removal from office, when her announcement only meant that she was carrying out the mandate of the Security Council to prosecute all crimes committed in Rwanda in 1994?⁴⁰

Was it possible that the highest levels of the United States government and its closest ally were not aware of the years of massacres and economic piracy being committed by Kagame’s RPA and surrogates in Congo, as reported by the UN experts and numerous journalists following events in the Congo? Was it possible that U.S. sources were unaware of the manipulation of the “elections” documented by the EU and the obvious elimination of all political opposition to Kagame within Rwanda, which had left him with military control and virtual dictatorial powers? Hadn’t US President George Bush been informed this had all

³⁹ Hartmann, *Paix et chatiment*.

⁴⁰ In September 2007, the 1994 reports of RPF crimes mentioned earlier were cited as the basis for ICTR prosecutions, “According to independent experts, some 30,000 Hutu had been killed in Rwandan territory, at the time the army of the FPR was advancing. The Arusha prosecution had catalogues fourteen sites of massacres and was making efforts to go up the chain of command.” Hartmann, *Paix et chatiment*, p. 66.

been going on before he met with Paul Kagame at his ranch in Texas during Kagame's state visit to the U.S. in March 2003?⁴¹

By the end of 2003, all recent information emerging at a public level pointed to either: highly unlikely ignorance on the part of the United States and the United Kingdom (Kagame's major patrons since both governments had been the first to immediately recognize the RPF government in July 1994) or publicly *unacknowledged* support and acceptance of the Kagame government by the United States and the United Kingdom, so well-established that it would be unaffected by hard evidence of massive crimes committed by that government both inside and outside Rwanda's borders *after* the RPF seized power in July 1994. However, hard evidence that this apparent *quid pro quo* existed, and that it has had a continuing impact on shaping the story of the "Rwanda genocide," and the ICTR, itself, was not confirmed until September 2007, first by Carla Del Ponte's long-time press aide Florence Hartmann and in February 2008 by Judge Del Ponte herself.

The 2007-08 Del Ponte/Hartmann Revelations: U.S.-U.K./Rwanda Political *Quid Pro Quo* Distorts ICTR Mandate

Some of these questions were answered on September 10 of 2007 when the former long serving press-aide to Ms. Del Ponte, Florence Hartmann, published *Paix et Chatiment*, that described Del Ponte's years at the Yugoslavia and Rwanda Tribunals.⁴² Hartmann had direct access to Judge Del Ponte both before and after 2003 and, after the publication of Hartmann's book, Del Ponte has published her own book in February 2008, *War Criminals and Me*,⁴³ that recounts some of the same incidents and supports Hartmann's account. Carla del Ponte as not disavowed any of the accounts of events described in the Hartmann book.⁴⁴ A small number of pages are devoted to the Rwanda Tribunal, and specifically the events of the summer of 2003, when Del Ponte made her public announcement about evidence sufficient to prosecute the Kagame Government for 1994 war crimes, and the events that followed which resulted in Del Ponte being removed from office.⁴⁵

⁴¹ BBC, March 02, 2003

⁴² Hartmann, *Paix et chatiment: les guerres del la politique*. (Flammarion, Paris, September 10, 2007)

⁴³ Del Ponte, *War Criminals and Me* (2008).

⁴⁴ In the main, the Hartmann book discusses the Yugoslavia Tribunal, from which Ms. del Ponte resigned at the end of 2007, and describes Del Ponte's frustration with the U.S. State Department's interference with the prosecution of Slobodan Milosevic because of his usefulness to the U.S. during and after the Dayton Accords. The book sets out in some detail the numerous ways that UN member-states manipulated, or tried to manipulate, the Yugoslavia Tribunal for their own purposes.

⁴⁵ Hartmann, *Paix et Chatiment*, pp.261-72.

The Hartmann book explains that, shortly after her announcement Prosecutor del Ponte was summoned to the U.S. State Department in Washington, D.C. to meet with Bush Administration “War-Crimes Ambassador,” Pierre Prosper, who was no stranger to the ICTR, or the Rwanda disaster. He had formerly been a member of her office at the ICTR, and had actually prosecuted one of the first cases that convicted a leader of the losing side.⁴⁶

According to the book, Prosper flatly *ordered* Del Ponte to drop *all* notions of prosecuting the Kagame Government. He explained that the United States had “strategic interests” in Central Africa that included a close working relationship with the Kagame Regime.⁴⁷ He specifically mentioned cooperation by Rwanda in excluding U.S. persons from the jurisdiction of the International Criminal Court, and military cooperation of long-standing that her prosecutions would disrupt. The book cites dates, places, names and details that only Ms. Del Ponte could have known, and which she has not disavowed in her own account.

The book also explains the behind-the-scenes machinations of the U.S. and U.K. delegations to the Security Council that eventually resulted in her removal from office in the fall of 2003. So, the Hartmann book solves at least one part of the “mystery.” Because of U.S./U.K. relations with the Kagame Government, according to Ms. del Ponte, ICTR prosecutors who even *consider* prosecuting the side that won the Rwanda War will not have long U.N. careers. Presumably this would also apply to other ICTR personnel, as well, and it is difficult to imagine that the ICTR Judges have not learned this lesson, too.

ICTR Military-I Trial Defence Evidence Confirms the ICTR “Cover-up”

Plainly stated, the Hartmann book and Carla Del Ponte books describe the entire ICTR enterprise as a “cover-up” of what really happened in Rwanda in 1994, but it does not explain how the “cover-up” began, or how long it has been going on? During 5-years of research at the ICTR, I managed to see *all* of the UN-Rwanda files that had been generated at UN headquarters by Kofi Annan’s Department of Peace Keeping Operations (DPKO) between 1993-1995, and those swept up from the UNAMIR (United Nations Mission in Rwanda) in Kigali when it closed down. Many of these documents are in the evidentiary record of the Military-I trial,⁴⁸ and the rest are on the web in a searchable database, so that other researchers can verify my conclusions.⁴⁹

⁴⁶ Presumably, Ambassador Prosper had access to much of the same information that had caused Prosecutor del Ponte to make her public announcement of RPF culpability since he was a lead prosecutor in *Prosecutor v. Akeyesu*, one of the first convictions following trial at the ICTR.

⁴⁷ Hartmann, *Paix et Chatiment*, pp. 261-72.

⁴⁸ See, ICTR Military-I and Military-II exhibits.

⁴⁹ www.rwandadocumentsproject.net

As any thorough lawyer would do, I also benefited from Freedom of Information Act requests for contemporaneous, unclassified reports about Rwanda, generated by the State Department, Pentagon and CIA. The “disclosure” rules of the ICTR made most of this possible, and are an unintended consequence of establishing Tribunals that purport to embody even a small level of due process. The Tribunal rules have permitted the accumulations of documents that “the vanquished” never get an opportunity to examine under “normal” circumstances....and may never become public otherwise. In addition to these contemporaneous documents, the Tribunal also made it possible to interview witnesses scattered all over the world, and to include their sworn testimony in the ICTR record. However, not all of the most important testimony is publicly known because of the “closed session” procedures which have the effect of shielding important testimony from public view.

Carla Del Ponte was not the first ICTR Prosecutor who had concluded that members of the Kagame Regime should be prosecuted. As briefly mentioned earlier, in 1997 QC Michael Hourigan recommended that Col. Bagosora and Col. Nsengiumva of the losing side be brought to book, but he also recommended that President Kagame, himself, be arrested for the assassination of the Rwandan and Burundian that triggered the 90-days of violence. According to the sworn affidavit of QC Hourigan, shortly after he presented his report recommending the prosecution of Kagame, Chief Prosecutor Arbour ordered him to drop the Kagame investigation, to forget it had ever happened, and ordered him to destroy his notes.⁵⁰

Instead he resigned in 1997, as did the other members of the team shortly thereafter, and his affidavit and copies of his notes are now in the evidentiary record in the Ntabakuze Defence case at the ICTR as is Major Deme’s affidavit, describing the evidence he had turned up in 1994-95 pointing to Kagame having ordered the assassinations.⁵¹

The Del Ponte book and the sworn statements of QC Hourigan raise serious questions about the real “mission” of the ICTR. Former ICTY/ICTR Prosecutor Ms. Arbour has never said publicly whether Canada’s allies (the same super-powers that threatened and removed Ms. del Ponte) had anything to do with her orders to “bury” the prosecution of Kagame. But, *every* ICTR prosecutor, and Judge, *must* have gotten the message that keeping all of the blame for the Rwanda tragedy firmly focused on the losing side is the only way to keep one’s job!⁵² The unfortunate fact seems to be that the ICTR is in the

⁵⁰ ICTR Military-I Defence Exhibit DNT 365. Affidavit of Michael Hourigan QC.

⁵¹ ICTR Military-I Defence Exhibit proposed DNT 366.

⁵² The Hartmann book also describes how a U.S. prosecutor, Michael Johnson, undermined Del Ponte’s investigations of the Kagame government in 2003.

business of creating impunity for war crimes, not exposing and prosecuting the *real* perpetrators.

The testimony of witnesses in the Military-I case, including former members of the Kagame army like Lt Joshua Ruzibiza, who was accompanied by a bodyguard provided by the European government that has granted him asylum when he came to testify at the ICTR.⁵³ His 2006 book describes in great detail how he, and a select assassination team, launched the missiles that brought down the Presidents' plane on the night of April 6, 1994 on orders from then-Gen. Kagame.⁵⁴ Other witnesses, also former officers in the Kagame army testified how they secretly transported the missiles from Uganda to Kagame's own house in Mulindi for safe-storage, and then to Kigali for the launch.

Several former RPF/A officer testified to the detailed planning and accumulation of weapons and ammunition from Uganda that took place between August 1993 and April 1994. They also testified that the order for the final assault to seize power was given by Kagame on the night of April 6, shortly after he confirmed that former President Habyarimana had died in the crash. All of the commanders of the military units had been called into headquarters by Kagame a few days before, and were given their orders to begin the war during the Africa Cup soccer match on the night of April 6.⁵⁵

For more than 10-years every effort to raise the assassination of former President Habyarimana as the "triggering" event of the civilian massacres in Rwanda, was declared "irrelevant" by ICTR judges. Whether they were influenced directly or indirectly by the same pressures that were brought to bear of Carla del Ponte, QC Michael Hourigan, and possibly Louise Arbour is impossible to know, but it is undeniable that before the Ntabakuze Defence in the Military-I case accomplished it, the assassination of the President was never discussed at the ICTR. And, even today, the Chief Prosecutor who replaced Ms. Del Ponte is on record as publicly stating that the assassination is "not within the jurisdiction of the United Nations International Criminal Tribunal for Rwanda."

But, despite the obstacles, not only was evidence of the Habyarimana assassination put into the Military-I trial record, but more than a thousand United Nations and U.S. Government documents that had been only in the prosecutors files have been put before the ICTR judges.⁵⁶

One of these is a May 17, 1994 UNHCR report describing huge massacres of civilians taking place in southeastern Rwanda, an area long-

⁵³ ICTR Military-I testimony of Lt. Abdul Ruzibiza, Mar. 9-10, 2006.

⁵⁴ ICTR Military-I exhibit DNT 218: Ruzibiza, *The Secret History of Rwanda*, (Paris, 2005)

⁵⁵ ICTR Military-I testimony (closed session)

⁵⁶ See ICTR Military-I documentary evidence *et seq.*

controlled by the invading Kagame army.⁵⁷ And, numerous references to the “Gersony Report” that had been prepared for the United National High Commissioner for Refugees (UNHCR) based on the *only* “independent” human rights investigation in Rwanda, since the Kagame Government seized power in mid-July 1994 which detailed assassination-style killings of “at least 30,000 civilians in southeastern Rwanda by the Kagame RPF army and the UN documents reveal the fire-storm that erupted in its wake.⁵⁸ But the U.N. documents, now in the record at the ICTR reveal more.

The “Rwanda-Genocide”: Cover-up of RPF Crimes

In the fall of 1994, both Kofi Annan and a representative of USAID (a U.S. State Department agency) Brian Atwood, traveled to Kigali shortly after Gersony’s findings became known. The U.N documents report a meeting with the new Foreign Minister of the Kagame Government, Jean Marie Ndagijimana, who had been elevated to his position only months before from the Ambassadorship to France in the previous government. He was one of the French-speaking “hutu’s” brought into the new government in a show of unity. Foreign Minister also testified at the ICTR and confirmed all of the details reported in the UN documents.⁵⁹

According to the U.N. documents, the Foreign Minister was told that disclosure of Gersony’s findings “would be embarrassing to the Rwandan Government and to the U.N.” Why the crimes of the RPF should be embarrassing to the United Nations and United States is subject to speculation, but both the UN documents and the former Foreign Minister confirm that the attempt to cover-up the RPF/A crimes by the United Nations and United States goes back to at least August 1994.⁶⁰

Now, the “cover-up” is almost complete. Within a few months the ICTR will shut down, and current ICTR Prosecutor Abubacar Jallow, who replaced Carla del Ponte, will be conveniently *unable* to carry out the Security Council mandate to prosecute the crimes described in ICTR evidence and the international warrants issued by France and Spain.

The Rwandan Government, with U.S. and U.K. support, is actively campaigning to have ALL of the ICTR cases transferred to Rwanda. No one at the ICTY is suggesting transferring Croats to Serbia when the ICTY shuts down. The Kagame Regime also wants at ICTR records to be transferred to Kigali and

⁵⁷ See, related notes, *supra*

⁵⁸ Similar reports were published by Human Rights Watch and Amnesty International in the fall of 1994. See related notes *supra*.

⁵⁹ See testimony of fmr Rwandan Foreign Minister Jean Marie Ndagiyimana, November 2006.

⁶⁰ *Id.* and related notes, *infra*.

has issued 40,000 warrants for “genocidaires” in the Rwandan diaspora, *both* Hutu’s and Tutsi’s, who are making common cause to bring down a regime that the *Economist* called the “most repressive in Africa” in April 2004.

The Security Council has announced that new trials will be over in 2008 and the appeals in 2010....soon the ICTR will be no more. IF all goes as planned, the ICTR will soon pass into history as the *only* International Tribunal that was not designed as a tool of “victor’s justice”...but became one, in practice.

***Rejecting Juridically-Constructed Impunity:
The Only Chance for Reconciliation in Rwanda.***

I have been declared a “criminal” by President Kagame, himself, for putting these facts before the ICTR and the court of public opinion. Under the laws of Rwanda, I have violated the ban against “negationism” by questioning the Kagame version of events. My former Rwandan investigator has been threatened with arrest and is seeking asylum. A Rwandan ICTR lawyer as been arrested when he attended the court,⁶¹ and a defense investigator is being prosecuted for manipulation of evidence by the same ICTR Prosecutor who has refused to follow Ms. del Ponte’s lead, the recommendations of Judge Bruguiere or the indictments and warrants issued by Spanish Judge Andreu.⁶²

One has hope that, now that the manipulations of the ICTR by the U.S. and U.K. for their own political purposes is known at the ICTR and increasingly outside of Africa, the good judges in Military-I will carefully evaluate the evidence and require “proof beyond a reasonable doubt” before they permit my client, Major Ntabakuze to be convicted....but, it is hard to be optimistic. ICTR process *has* made it possible to document a narrative which contradicts the story told by the “victors,” which was not possible at Nuremburg or Tokyo, and which permits a more balanced and accurate historical appraisal of the Rwanda war....and genocide. Now that this evidence has been discovered, it can be evaluated by scholars and historians, even if it cannot change the pre-ordained outcome of the Tribunal.

And, perhaps *this* will eventually prove to be the *greatest* contribution that the ICTR has made to the development of “international justice.” And, if the more accurate historical record provides the basis for a *sharing* of responsibility for the undeniable tragedy of Rwanda, a South African-style “reconciliation” process might be possible for Rwanda. However, if the ICTR succeeds in fixing blame *only* on the losing side of the Rwanda war, through juridically-created impunity,

⁶¹ ADAD member Me. Gakwaya, a Rwandan ex-patriot living in Mozambique, was arrested by Tanzanian authorities based on a Rwandan warrant when he appeared at the ICTR. He has since been released, but is deceased.

⁶² An indictment in *Prosecutor v. Nshogoza*, and investigator charged in Rwanda and transferred to the ICTR was filed in mid-2008.

the likelihood of a stable peace in Rwanda will have been reduced to the vanishing point.....and *another* Rwanda tragedy is a predictable consequence.

A rejection of juridically-constructed impunity is not only a necessary for justice to be achieved in the short-run, it is also necessary to prevent a distortion of international legal institutions into political tools of the powerful...and the source of future conflict *created* by a *false* reconstruction of history...and imposed by force by the nations of the world that can project economic and military power. This is the unfortunate legacy of the ICTR.

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