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DEPAUL UNIVERSITY

COLLEGE OF LAW

Center for Public Interest Law

**THE UN SECURITY COUNCIL *AD HOC*
RWANDA TRIBUNAL:
INTERNATIONAL JUSTICE OR
JURIDICALLY-CONSTRUCTED
“VICTOR’S IMPUNITY”?**

PROF. PETER ERLINDER¹

“. . .if the Japanese had won the war, those of us who planned the fire-bombing of Tokyo would have been the war criminals. . .”²

Robert S. McNamara, U.S. Secretary of State

“. . .and so it goes. . .”³

Billy Pilgrim (*alter ego* of a German prisoner of war who survived the Allied firebombing of Dresden in the cellar of an *abattoir*, author Kurt Vonnegut Jr.)

¹ President ICTR-ADAD (*Association des Avocats de la Defence*), Arusha, Tanzania; ICTR Lead Defence Counsel, *Prosecutor v. Ntabakuze* (ICTR Military-I Trial); Past-Pres., National Lawyers Guild, New York, NY; Prof. of Law, William Mitchell College of Law, St. Paul, MN; Director, International Humanitarian Law Institute, St. Paul, MN.

² *THE FOG OF WAR: ELEVEN LESSONS FROM THE LIFE OF ROBERT S. MCNAMARA* (Sony Pictures Classics 2003). This 2004 Academy Award winning documentary film by director Errol Morris records McNamara’s voice-over to the opening scene of newsreels showing Tokyo ablaze from U.S. napalm bombs that incinerated some 250,000 civilians *before* atomic bombs were dropped on the civilian populations of Hiroshima and Nagasaki.

³ KURT VONNEGUT, JR., *SLAUGHTERHOUSE-FIVE* or *The Children’s Crusade: A Duty-Dance with Death* (1969). This phrase was used throughout the novel in the face of senseless death. Vonnegut was a prisoner of war in Dresden during the Allied napalm bombing in which more German civilians died than were killed at Hiroshima and Nagasaki.

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AUTHOR'S NOTE: On Friday morning May 28, 2010, as I was finishing a morning cappuccino and croissant before leaving for the airport, agents of Rwanda's secret police surrounded my table and politely suggested I accompany them . . . somewhere. Why? I had no idea. But, I was now in the hands of Rwanda's dictatorial President, Paul Kagame.⁴

I had arrived five days earlier to consult with would-be Presidential candidate Victoire Ingabire, who had been briefly jailed for "genocide denial." Her supposed "crime" was asking why genocide memorials did not mention Hutu victims even though both the U.N. and Rwandan government both acknowledged that both Hutus and Tutsis had died.

Paul Rusesabagina, the 2005 U.S. Medal of Freedom recipient from President George Bush and the main figure in the award winning film Hotel Rwanda, had told me as I left Belgium that Kagame had threatened him, and that he could not go home. But, I had immunity as a U.N. Tribunal defense lawyer and planned to do no more than meet with the U.S. Embassy and U.N. Office, Rwandan officials and consult with my prospective client.

Rwanda's President Paul Kagame, had an unsavory reputation for rumored assassinations and jailing opponents, but he had never arrested an American lawyer and, in late 2009, Bill Clinton had given Kagame a "human rights" award and declared "things have changed in Rwanda!" With the 2010 Rwandan elections approaching, Kagame's new image had been burnished by an honorary MIT degree, Tony Blair signing-on as a consultant, and Rwanda's 2009 admission to the British Commonwealth. But, as I was being taken away by Kagame's secret police, I realized I had put far too much faith in Clinton's public embrace of Kagame and an effective public relations campaign.

⁴ See Josh Kron & Jeffrey Gettleman, *American Lawyer for Opposition Figure is Arrested in Rwanda*, N. Y. TIMES, May 29, 2010, at A9. See also, *Prosecutor v. Ntabakuze*, Case No. ICTR-98-41-A, Decision on Motion for Injunction Prohibiting Prosecution of Defense Counsel Professor Peter Erlinder (Oct. 6, 2010).

After a week of sleeping on a concrete floor and trying to convince AK-47-armed 16-year old guards to allow me to live by buying food and water from street vendors, I finally learned that my “crime” had been earning the acquittal of my U.N. Tribunal client through original U.N. documents that showed the defeated army had not conspired to commit a “long-planned genocide,” as Kagame had claimed, and then writing articles about the meaning of the acquittal.

A worldwide, “Internet-peoples’ campaign” pressured the U.S. and Rwandan governments to release me in slightly less than a month, on humanitarian health grounds (together with the brave, skilled representation of my Kenyan lawyers Ken Ogetto and Gershom Otachi, with support from U.S. lawyer Kurt Kerns). On October 6, 2010, the U.N. Tribunal issued an injunction against the Rwandan government, ordering that the pending prosecution against me be dismissed as illegal under principles of UN-ICTR defense counsel immunity.⁵

However, Rwanda’s Chief Prosecutor has threatened to pursue a second prosecution that will avoid U.N. immunity protections.⁶ I remain at risk of arrest under Rwanda-issued INTERPOL

⁵ See Bagasora, Ntabakuze, Nsengiyumva v. Prosecutor, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion for Injunctions against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder (Oct. 6, 2010).

⁶ Edmund Kagire, *Rwanda: we will not drop Erlinder’s case*, Prosecutor, THE NEW TIMES (Oct. 28, 2010), <http://allafrica.com/stories/201010280192.html>.

According to Prosecutor General, Martin Ngoga, Erlinder [...] will be summoned back to the country to answer charges after he was released on bail on medical grounds in June.

“You may also recall that few days ago the ICTR ruled that he doesn’t have immunity when it comes to publications and statements that he does out of the scope of his duties in the defence council of his clients at the ICTR,” said Ngoga. “That his arrest here was not in breach of his functional immunity because he was not on ICTR business. That is the development that paved the way for us to pursue the case against him.” Ngoga dismissed recent allegations by Erlinder that he fears for his life. Erlinder earlier this week issued a statement that he

warrants and have learned from exiled former members of the government that, at a high-level meeting in Kigali in mid-October 2010, Kagame has complained that my release was “a mistake” and ordered that I be brought back to Rwanda “dead or alive.” This article summarizes how my U.N. work made me an “enemy of the Rwandan state” and explains why original U.N. documents in evidence at the International Criminal Tribunal for Rwanda, as well as more recent development including the 600 page U.N. report of Rwanda’s genocidal crimes in the Congo 1993-2003 leaked to the world press by *LeMonde* and the *New York Times* in late August 2010,⁷ require a re-assessment of the “Rwanda-genocide” narrative.

INTRODUCTION

The precedent for the U.N. Security Council tribunals, established in the mid-1990’s to prosecute individuals allegedly complicit in international crimes,⁸ were the post-World War II Nuremberg and Tokyo War Crimes Tribunals created by the victorious Allies to prosecute the leadership of Japan and Germany.⁹ However, unlike the WWII Tribunals, the U.N. Security

fears he could be poisoned or he could disappear if he returned to Rwanda.”

⁷ Jason Stearns, *Bombshell UN Report Leaked: ‘Crimes of Genocide’ Against Hutus in Congo*, CHRISTIAN SCIENCE MONITOR (Aug. 26, 2010), <http://www.csmonitor.com/World/Africa/Africa-Monitor/2010/0826/Bombshell-UN-report-leaked-Crimes-of-genocide-against-Hutus-in-Congo>.

⁸ The elements of these crimes are defined in the Security Council “statutes” under which each tribunal has been established. *See, e.g.*, Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

⁹ The UN Charter does not mention the establishment of such tribunals, either as freestanding entities or within the powers of the Security Council, leading to jurisdictional challenges to many of the early ICTY and ICTR prosecutions. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I (Int’l Crim. Trib. For the Former Yugoslavia Aug. 10, 1995); Prosecutor v. Kanyabashi, Case No. ICTR-96-15 (Int’l Crim. Trib. For Rwanda June 3, 1999). However, the Security Council tribunals have justified their own existence by relying on

Council tribunals for the former Yugoslavia¹⁰ (ICTY) and Rwanda¹¹ (ICTR) were ostensibly untarnished by the taint of “victor’s justice” that could not be avoided by their WW-II precursors.¹² But, despite having been established by a presumably “neutral” U.N. body,¹³ rather than the victors in war, the ICTR has become the *only* international tribunal in history mandated with prosecuting *both* sides in a war that has failed to fulfill its mandate and has prosecuted *only* the vanquished.¹⁴

Human Rights Watch rightfully observes that the ICTR history of one-sided prosecution threatens the Tribunal’s historical legacy¹⁵ for a wide range of reasons. First, it falsifies history and creates a completely unreliable jurisprudence that has been manipulated to fit a pre-determined outcome.¹⁶ Moreover, the

UN Charter Chapter VII, which grants the Security Council “peace-making” authority. See ALEXANDER ZAHAR & GORAN SLUITER, *INTERNATIONAL CRIMINAL LAW* 329 (Oxford University Press, 2008) (discussing jurisdictional arguments).

¹⁰ See Resolution establishing an International Criminal Tribunal for the Former Yugoslavia, *supra* note 8.

¹¹ See United Nations Security County Resolution establishing an International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc S/Res/955 (Nov. 8, 1994).

¹² That the Nuremburg and Tokyo Tribunals failed to consider the fire-bombing of Dresden or Tokyo, much less the use of atomic weapons on civilians in Hiroshima and Nagasaki, or other possible war crimes committed by the victorious Allies, is beyond the scope of this paper. But the commission of “crimes” by *all* participants in WW-II is beyond dispute, irrespective of the asserted justification for their commission.

¹³ The legitimacy of the UN tribunals have been criticized because neither the UN Charter nor the General Assembly has specifically authorized the establishment of the *ad hoc* Tribunals or the appointment of a prosecutor by the Security Council to act on behalf of the UN proper. See *INTERNATIONAL CRIMINAL LAW*, *supra* note 9, at 25-40.

¹⁴ See *infra* notes 90-117 and accompanying text.

¹⁵ See HUMAN RIGHTS WATCH, *GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (January 15, 2010), available at <http://www.hrw.org/en/reports/2010/01/12/genocide-war-crimes-and-crimes-against-humanity>.

¹⁶ See *infra* notes 90-117 and accompanying text.

ICTR's one-sided prosecution threatens the *legitimacy* of the ICTR and calls into question *all* of its findings, because prosecuting *only* the vanquished military and government must mean either: (a) the war that raged in Rwanda between 1990-94 is the *only* war in history in which *only* the vanquished committed crimes, *or*, (b) the ICTR has *become* a victors' tribunal, like Nuremberg and Tokyo, without public acknowledgment that this is the case.

Fortunately, former ICTR Chief Prosecutor Carla Del Ponte¹⁷ and her deputy, Florence Hartmann,¹⁸ have provided the definitive and historically comforting answer: the Rwanda War is *not* historically anomalous and is *not* the only war in history in which only the vanquished committed crimes. The memoirs describes precisely how Del Ponte was fired from her UN-ICTR post by the U.S. State Department in 2003 because she refused U.S. orders to drop prosecutions against the victorious invaders from Uganda, the Rwandan Patriotic Front (RPF) and its leader Paul Kagame, for "Rwanda genocide" crimes.¹⁹ These memoirs also describes how, despite U.S. manipulation of the Tribunal, the Ntabakuze Defense Team in the Military-I Trial²⁰ gained ac-

¹⁷ See CARLA DEL PONTE & CHUCK SUDETIC, *MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY* (2009).

¹⁸ See FLORENCE HARTMANN, *PAIX ET CHÂTIMENT, LES GUERRES SECRÈTES DE LA POLITIQUE ET DE LA JUSTICE INTERNATIONALES* (2007).

¹⁹ See *generally* MADAME PROSECUTOR, *supra* note 17; HARTMANN, *supra* note 18.

²⁰ Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva, ICTR Case No. 98-41-T (Feb 9, 2009) [all documents referring to this trial will hereinafter be referred to as part of the *Military-I Trial*]. The author is Lead Counsel of the Defense Team for Major Aloys Ntabakuze, former commander of the Paracommando Battalion of the *Forces Armées des Rwandais* (FAR) an elite unit charged with defending the Kigali airport, the most militarily-strategic site in the land-locked country. The Team consists of Co-counsel Me. Andre Tremblay, Montreal, Me. Sandrine Gaillot, Paris and New York, and Joseph Holmes, Esq. London. Rwandan investigators for the Team were Juvenal Baragahoranye and Emilien Dusabe, whose courage and dedication made it possible to locate

cess to original U.N. documents that had been suppressed since 1994, to explain what *actually* happened during the “Rwandan genocide” rather than what the victors *say* happened, after the fact.²¹

As a result, the supposed “architects of the Rwandan genocide,” including my client former Major Aloys Ntabakuze, were acquitted of “planning or conspiracy to commit genocide” and the highest ranking officer, Brigadier General Gratién Kabiligi, Chief Rwandan Military Operations, was acquitted of *all* charges.²² Del Ponte’s memoir describes some of the evidence, which was more fully developed in the Military-I Trial record, that *compelled* the Court to conclude that the “long-planned conspiracy to commit genocide” was a “victor’s *myth*” unsupported by the evidence, despite the best efforts of the Rwandan government, the U.N. Security Council, and the U.S. State Department, with the assistance of the U.S. Justice Department personnel.²³

Understanding the extent of U.S. influence over *all* aspects of the ICTR, as well as developing a more accurate narrative of the “Rwandan genocide,” itself, is important to grasp the role that international tribunals play as vehicles for furthering U.S. foreign policy. The influence of U.S. policy over *every* international

witnesses and evidence in Rwanda that far exceeded any reasonable expectations. Both are now in exile (May 4, 2007).

²¹ See MADAME PROSECUTOR, *supra* note 17; HARTMANN, *supra* note 18.

²² See *Military-I Trial*, ICTR Case No. 98-41-T. Colonel Bagosora, the supposed main ringleader of the genocide conspiracy, was convicted of crimes committed by others in which he failed to intervene, occurring on April 6-8 only.

²³ Several ICTR prosecutors have been drawn from the ranks of the U.S. Justice Department, including Steven Rapp, former Deputy Chief Prosecutor under Chief Prosecutor Jallow and current War Crimes Ambassador for the Obama administration (former U.S. attorney for Northern Iowa), lead *Military-I* Prosecutor Barbara Mulvaney (former assistant U.S. attorney), and lead *Akayesu case* Prosecutor and War Crimes Ambassador for the Bush administration Pierre-Richard Prosper (former assistant U.S. attorney). See *infra* note 108 and accompanying text.

tribunal in which the Security Council retains an important role (including the International Criminal Court, of which the U.S. is not formally a member but exercises influence *through* the Security Council),²⁴ is probably better understood by nations vulnerable to tribunal justice, or vengeance, than this overarching U.S. influence is understood, or admitted, *within* the U.S.²⁵

For example, recently the heads of State of *all* African Union²⁶ nations unanimously refused to cooperate with the International Criminal Court²⁷ which, in the last analysis, is an expression of “no confidence” in U.S. foreign policy toward Africa.²⁸ As Uganda-born scholar Mahmood Mamdani of Columbia University explains:

²⁴ An example is the ICC indictment of President Omar al-Bashir of Sudan, who faces ICC prosecution despite Sudan not being a signatory to the ICC Treaty, on account of the UN Security Council retaining the power to refer cases to the ICC. As a result, leaders having positive relations with Permanent Security Council member states have not been referred to the ICC for prosecution (such as Paul Kagame of Rwanda), while non-state actors and heads of state without a protector on the Security Council face ICC criminal charges. *See supra* Author’s note.

²⁵ *See Targeting Africa: The Case for and Against the ICC*, NEW AFRICAN, May 2009, at 8.

²⁶ The African Union is an intergovernmental organization founded in 2002. The AU has 53 members, including Rwanda, and among its objectives is “to promote and defend common positions on issues of interest to the continent and its people.” *See generally*, Organization of African Unity, *Constitutive Act of the African Union* (July 11, 2000), available at <http://www.unhcr.org/refworld/docid/4937e0142.htm>.

²⁷ The International Criminal Court (ICC) is a permanent, treaty-based international criminal court seated at The Hague, Netherlands. The ICC was created by the Treaty of Rome, which was enacted in 1998 and ratified in 2002. A member of the UN Security Council may refer matters for prosecution, without limit to territoriality. Treaty signatories may refer matters within its territory to the ICC for prosecution. Neither the United States nor Rwanda is a signatory to the treaty. The United States is a Permanent Member of the U.N. Security Council. *See Rome Statute of the International Criminal Court*, U.N. Doc A/CONF.183/9 (1998).

²⁸ Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec. 270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV), Assembly of the African Union, July 25-27,

Its name notwithstanding, the [International Criminal Court] is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are U.S. adversaries and ignored actions the United States does not oppose, like those of Uganda and Rwanda, effectively conferring impunity on them [in the ICTR].²⁹

This article is intended as an object lesson that reveals the extent of U.S. “Sole Superpower” influence over seemingly “neutral” international juridical bodies by using the recent public exposures of the manipulation of the ICTR by the U.S. to conform with its own policy interests. The article also describes the devastating costs that the United States’ use of the ICTR to further U.S. policy interests has inflicted upon the people of Central Africa.

Part I of this article³⁰ describes how an American law professor and a UN-ICTR defense lawyer became a “genocide denier” and enemy of the RPF ruling party of Rwandan State, without really trying. Part II³¹ examines how the most powerful Permanent U.N. Security Council Members have re-created the ICTR as a “victor’s tribunal” to serve their own policy interests. Part III³² discusses the long-suppressed U.N. documents that the Ntabakuze Defense put into the ICTR public record, which resulted in the acquittal of the supposed “architects of the genocide;” Part IV³³ describes the consequences of international “tribunals” manipulated by the sole superpower, no matter how pure the *intentions*, and concludes they are an impediment to

2010 in Kampala, Uganda. See Decisions of the Assembly at <http://www.africa-union.org/root/au/conferences/2010/july/summit/15thsummit.html>.

²⁹ Mahmood Mamdani, *The New Humanitarian Order*, THE NATION, Sept. 29, 2008.

³⁰ See *infra* p. 7.

³¹ See *infra* p. 16.

³² See *infra* p. 23.

³³ See *infra*, p. 51.

reconciliation between African peoples and a recipe for disaster for the international justice, and for long-term U.S. interests in the developing world.

I. HOW A U.S. ACADEMIC, AND U.N. HUMAN RIGHTS LAWYER, BECAME AN “ENEMY OF THE RWANDAN STATE,” WITHOUT REALLY TRYING

The standard “Rwanda genocide” narrative, with which most of the world is familiar,³⁴ can be roughly summarized as follows: “Hutu hardliners” in the former government of Rwanda had long-planned the mass murder of Rwanda’s Tutsi population. After the mysterious shooting-down of the Rwandan president’s plane on April 6, 1994, which killed the Presidents of both Rwanda and Burundi, the long planned “genocide” was put into effect in 100-days long-planned mass killings. The victims were either “Tutsi” or “Tutsi and moderate Hutu” (depending on the version) and the estimated victims ranged from several hundred thousand, or over a million (also depending on the version).³⁵ The “heroes” of the tale were Gen. Paul Kagame and his RPF

³⁴ See generally, ALISON DES FORGES, HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA (1999), available at <http://www.grandslacs.net/doc/1317.pdf>; PHILLIP GOUREVITCH, WE REGRET TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES (1998); COLIN WAUGH, PAUL KAGAME AND RWANDA: POWER, GENOCIDE AND THE RWANDAN PATRIOTIC FRONT (2004).

³⁵ Would-be candidate for Rwanda’s presidency, Victoire Ingabire, was charged with “genocide denial” for questioning the absence of any mention of Hutu victims of the “genocide,” despite public acknowledgement that victims were both Tutsi and moderate-Hutus in both the U.N. and official Rwandan government description of the mass violence in 1994. See *Rwanda urged to ensure opposition leader receives fair trial*, AMNESTY INTERNATIONAL (April 27, 2010), <http://www.amnesty.org/en/news-and-updates/rwanda-urged-ensure-opposition-leader-receives-fair-trial-2010-04-28>. Recent research indicates that total deaths vary widely. See Filip Reyntjens, *Rwanda, Ten Years On: From Genocide to Dictatorship*, 103 AFR. AFFAIRS 177 (2004); Christian Davenport & Alan Stam, *What Really Happened in Rwanda*, MILLER-MCCUNE (October 6, 2009), <http://www.miller-mccune.com/politics/what-really-happened-in-rwanda-3432>.

troops, who took military control of the country after the 100-days of long-planned mass violence, and put an end to “the Genocide.”³⁶

Like most people who have only heard the victor’s description of the “Rwandan genocide” narrative, when I first began considering an appointment as defense counsel at the ICTR in the summer of 2003 I had no reason to question the “standard narrative.” But, soon after I arrived at the Rwanda tribunal in Arusha Tanzania, Chief ICTR Prosecutor Del Ponte publicly announced that she intended to prosecute the RPF victors and their leader Paul Kagame, for mass crimes committed in Rwanda in 1994.³⁷ This announcement shattered my former understanding of the “Rwanda genocide” and called into question the “standard narrative” upon which it had been based. If Del Ponte was right, Paul Kagame, the President of Rwanda and his RPF ruling party and army, the widely-trumpeted “heroes” of the “Rwandan genocide,” were war criminals, too.

ICTR Prosecutor in 2003: The “Heroes of the Genocide” are War Criminals, Too.

When I heard Del Ponte’s shocking announcement, I was at the UN-ICTR and to decide whether I should accept an appointment to defend one of the accused in the central case at the tribunal, upon which the entire “Rwanda genocide conspiracy” hinged. Commonly called Military-I, the top-four officers in the defeated army (including the alleged “mastermind of the geno-

³⁶ In early 2010, the Rwandan government published the *Mutsinzi Report*, which sets forth the “standard” narrative, despite the ICTR *Military-I* Judgment having found to the contrary. See generally, INDEPENDENT COMMITTEE OF EXPERTS, REPUBLIC OF RWANDA, REPORT OF THE INVESTIGATION INTO THE CAUSES AND CIRCUMSTANCES OF AND RESPONSIBILITY FOR THE ATTACK OF 06/04/1994 (2007), available at <http://mutsinzireport.com/wp-content/uploads/2010/01/Falcon-Report-english.pdf> (providing a more detailed discussion of the “standard narrative” and references).

³⁷ See generally MADAME PROSECUTOR, *supra* note 17. See *infra* notes 90-117 and accompanying text. See also, HARTMANN, *supra* note 18, at 261-272.

cide” former Colonel Theoneste Bagosora) were charged with having long-planned genocidal crimes against civilians that were carried out in 100-days of mass violence, after the plane carrying the Presidents of Rwanda and Burundi was shot down, probably by them, on the evening of April 6, 1994.³⁸

At the time, I knew very little about the UN Tribunal and even less about Rwanda. Carla Del Ponte’s announcement was the first time that I heard that the victors in the Rwanda war were even *suspected* of committing crimes. Like nearly everyone else, I naively thought the victors in the Rwanda in 1994 were the “good guys!” But, it was not terribly surprising when Paul Kagame, the RPF General and President of Rwanda who Del Ponte accused of war crimes, called for her resignation within a matter of hours.³⁹ The predictable took on the air of mystery a few days later when, during a TV press conference from Washington, D.C., U.S. Secretary of State Colin Powell took a time-out from discussing the so-far unsuccessful search for “weapons of mass destruction” in Iraq, to echo Kagame’s call for Del Ponte’s removal and⁴⁰ deepened further when the U.N.’s Kofi Annan soon followed suit.⁴¹

Why the U.S. Secretary of State and the U.N. Secretary General would favor removing the Chief Prosecutor from her position for the “mistake” of announcing that she intended to do her job? Powell and Annan had piqued my curiosity, so I agreed to accept the assignment as Lead Counsel for Major Aloys

³⁸ See MADAME PROSECUTOR, *supra* note 17, at 223 (reproducing Del Ponte’s opening statement in the *Military-I Trial*, delivered on April 2, 2002).

³⁹ My personal observations in Arusha were later confirmed by the international media in the days and weeks that followed. See MADAME PROSECUTOR, *supra* note 17; HARTMANN, *supra* note 18. See also, *infra* notes 90-117 and accompanying text.

⁴⁰ *Id.*

⁴¹ See Steven Edwards, *Del Ponte Said UN Caved to Rwandan Pressure*, NATIONAL POST, Sept. 17, 2003; John Hooper, *I Was Sacked as Rwanda Genocide Prosecutor for Challenging the President Says Del Ponte*, GUARDIAN, Sept. 13, 2003; Felicity Barringer, *Annan is Said to Want a New Prosecutor for Rwanda War Crimes*, N. Y. TIMES, July 29, 2003.

Ntabakuze, one of four accused military-officer “architects of the genocide” in the Military-I Trial in the summer of 2003. A few weeks later, the Security Council announced that Carla Del Ponte was being removed from her job,⁴² to be replaced by Abubacar Jallow. Jallow soon announced that, unlike Del Ponte, he would *not* be prosecuting Kagame or the RPF, a pledge he has honored to this day, despite the growing public exposure of RPF crimes that have long been known to ICTR Prosecutors.⁴³

Not until February 2009, when Ms. Del Ponte published the English edition of her memoirs,⁴⁴ did I and the rest of the English-speaking world, learn that the U.S. State Department War Crimes Ambassador, Pierre Prosper, actually removed Del Ponte from her job in 2003. Former Chief U.N. Prosecutor Del Ponte’s memoirs have made plain to the world that the U.S. determines who the U.N. Security Council tribunals (both the ICTR and the ICTY) will or will not prosecute, for policy reasons unrelated to the facts known to the ICTR or ICTY Prose-

⁴² See, S.C. Res 203, U.N. Doc S/RES/203/1503 (Aug. 28, 2003) (requesting nomination by the Security Council for a new ICTR prosecutor and nominating Del Ponte for reappointment as ICTY prosecutor).

⁴³ *ICTR/Mandate – The ICTR’s Mandate Covers the Habyarimana Assassination (Des Forges)*, HIRONDELLE NEWS AGENCY (Mar. 6, 2007), <http://www.hirondellenews.com/content/view/9316/99/>.

Alison Des Forges, expert witness before the International Criminal Tribunal for Rwanda (ICTR) and in charge of Africa for the organization Human Rights Watch, affirmed Tuesday before the ICTR that she could not understand why no investigation had been opened into the downing of Juvenal Habyarimana’s plane.

“I am of the same opinion of Judge Goldstone, the first prosecutor of the ICTR, that this is part of the tribunal’s mandate,” she said during her cross-examination in Tharcisse Renzaho’s trial. According to the prosecutor currently in place, Mr. Abubacar Jallow, the investigation into the assassination which sparked the genocide is not part of the ICTR’s mandate.”

⁴⁴ See MADAME PROSECUTOR, *supra* note 17.

cutor.⁴⁵ Those striving to establish a system of international justice, based on due process and equality before the law, owe her a debt of gratitude.

Apparent ICTR Impunity for Kagame and the RPF

Once I agreed to the ICTR appointment in the summer of 2003, everything about Rwanda, Central Africa and the ICTR took on new importance. While the rest of the world was focusing on Iraq, those of us at the ICTR were paying attention to the first Rwandan “elections” since the war. Kagame controlled the Rwandan military and had been made President in RPF Party ballots with a 81-5 majority in 2000 to replace former President Pasteur Bizimungu, a Hutu, after Kagame accused Bizimungu of crimes and forced him to step down, or suffer the consequences. The Speaker of the Parliament, Joseph Sebarenzi, a Tutsi, was driven into exile after being threatened by Kagame at about the same time.⁴⁶

Bizimungu was imprisoned when he contested the first popular election in 2003. Another possible candidate in 2003, the first RPF Prime Minister Twagiramungu, who had been in exile for several years and returned to Rwanda to contest the election, was forced into exile when his political party was outlawed as “divisionist.”⁴⁷ The European Union Observer Mission reported large-scale ballot fraud, vote buying and a “climate of intimidation, as Kagame went on to win 95% of the “popular” vote.⁴⁸ Even though the reports of election fraud were well-known,⁴⁹ no one at the ICTR seemed to notice that the Kagame regime was

⁴⁵ See generally, *Id.* See also, HARTMANN, *supra* note 18, at 261-272.

⁴⁶ See JOSEPH SEBARENZI, *GOD SLEEPS IN RWANDA* (2009).

⁴⁷ COLIN WAUGH, *supra* note 34, at 185-206 (citing COLETTE FLESCH, *REPORT OF EUROPEAN OBSERVER MISSION* (2003)).

⁴⁸ *Id.* See generally, U.S. DEPARTMENT OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003: RWANDA* (February 25, 2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27744.html>.

⁴⁹ See COLIN WAUGH, *supra* note 34; *COUNTRY REPORTS*, *supra* note 48.

becoming a dictatorship, although it was well-known even among former Kagame/RPF supporters, such as Prof. Filip Reyntjens, a former ICTR prosecution witness, who wrote in 2004:

Ten years after the 1994 genocide, Rwanda is experiencing not democracy and reconciliation, but dictatorship and exclusion. Although the government led by the Rwandan Patriotic Front has achieved rapid institutional reconstruction and relatively good bureaucratic governance, it has also concentrated power and wealth in the hands of a very small [RPF] minority, practiced ethnic discrimination, eliminated every form of dissent, destroyed civil society, conducted a fundamentally flawed 'democratization' process, and massively violated human rights at home and abroad. The Rwandan army twice invaded neighboring Zaire-Congo, where its initial security concerns gave way to a logic of plunder. It has caused protracted regional instability and derailed the transition process in the Democratic Republic of the Congo. The Rwandan government has succeeded in avoiding condemnation by astutely exploiting the 'genocide credit' and by skillful information management. The international community has been complicit in the rebuilding of a dictatorship under the guise of democracy. It assumes grave responsibility in allowing structural violence to develop once again, just as before 1994. In the years to come, this may well lead to renewed acute violence.⁵⁰

The Security Council "Del Ponte-replacement," Abubacar Jallow, continued to call witnesses provided by the RPF to con-

⁵⁰ Reyntjens, *supra* note 35.

demn those the RPF defeated, as if Carla Del Ponte had never had even mentioned that the ICTR prosecutor's office had sufficient evidence to prosecute the RPF and Paul Kagame for international crimes committed in 1994.

***U.N. Experts 2001, 2002, 2003 (2008 and August 2010):
Millions Die in Rwanda's Illegal Occupation and
Theft of Congo Resources***

About the same time that Carla Del Ponte was appealing for her job and Kagame was winning a sham election in 2003, the U.N. Security Council was receiving the third in a series of reports it had commissioned regarding the resource rape of the Congo by Rwanda.⁵¹ These reports detailed the invasion of the Congo by Rwandan and Ugandan troops in 1996 and 1998.⁵² The 2003 report followed similar reports in 2001 and 2002 which described how Rwanda and Uganda had occupied huge areas of the eastern Congo and directed Congo's wealth east to Kigali and Kampala.⁵³ Three million Congolese had died by 2003, and many more have died since.⁵⁴ Despite these reports, Mr. Jallow

⁵¹ *U.N. Security Council Panel of Experts Report on the Illegal Exploitation of the Democratic Republic of the Congo*, U.N. Doc. S/2003/1027 (Oct. 20, 2003) available at <http://www.un.org/Docs/sc/>.

⁵² *Id.* See also FILIP REYNTJENS, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (2009).

⁵³ See also 600 page UN High Commissioner for Human Rights Report leaked to the press on August 27, 2010 documenting genocide committed by the RPF against Hutu victims in the Congo between 1993-2003: *Democratic Republic of the Congo, 1993-2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003*, Office of the U.N. High Commissioner for Human Rights, June 2010, Draft available at <http://www.rwandadocumentsproject.net/>. See also *DRC: Mapping Human Rights Violations 1993-2003*, Oct. 1, 2010, <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx>.

⁵⁴ *U.N. Security Council Panel of Experts Report on the Illegal Exploitation of the Democratic Republic of the Congo*, U.N. Doc. S/2003/1027 (Oct. 20, 2003) available at <http://www.un.org/Docs/sc/>. The most recent estimates are

kept introducing RPF-supplied evidence that painted the RPF as the “good guys” in the Rwandan conflict, to condemn the members of the government and military the RPF had defeated, as if these reports of RPF occupation and crimes in the Congo didn’t exist.⁵⁵

Using ICTR Disclosure Principles to Prevent the Falsification of History: The Suppressed U.N. “Rwanda Genocide Papers” Unearthed by Ntabakuze Defense

Between the Fall of 2003 and the close of the Prosecution’s case at the end of 2005, Mr. Jallow’s staff used very few, if any, of the thousands of pages of contemporaneous documents produced by agencies and organizations that had staff in Rwanda between 1993-95, the years in which the genocide conspiracy was supposedly being planned and carried out, including: the U.N. itself; the United States; United Kingdom; France; Belgium; and a variety of Non-Governmental Organizations and religious organizations.⁵⁶ And, when it became apparent that Mr. Jallow did not intend to use these documents to prove up his

that more 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. See *U.N. Security Council Panel of Experts Final Report on the Democratic Republic of the Congo*, U.N. Doc. S/2008/773 (Dec. 12, 2008) available at <http://www.un.org/Docs/sc/>.

⁵⁵ It may become more difficult to pretend that Rwanda’s criminal exploitation of the Congo is not taking place in light of the United Nations Security Council Report of Experts of December 2008 and the U.N. High Commissioner for Human Rights Report leaked to the *Le Monde* and the *New York Times*, on August 27, 2010, documenting genocide committed by the RPF against Hutu victims in the Congo between 1993-2003.

⁵⁶ See generally *Military-I Trial*, ICTR Case No. 98-41-T (2008) (Prosecution Exhibits). Unclassified State Department documents between 1993 and 1995, also exhibits in *Military-I* and posted on the Rwanda Documents Project website, include many references to other governments and NGO’s that were present in Rwanda during this entire period. See ROMÉO DALLAIRE, BRENT BEARDSLEY, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* 90 (2004) for references to governments reporting on events in Rwanda.

case, the Ntabakuze defense began asking for disclosure of these documents under ICTR disclosure rules requiring the Prosecution to disclose potentially exculpatory evidence to the defense.⁵⁷ Since 2003, the Ntabakuze defense has managed to secure copies of nearly *all* of the U.N.-Rwanda files that had been generated at U.N. headquarters in New York by Kofi Annan's Department of Peace Keeping Operations (DPKO) between 1993-1995. It has also obtained copies of documents from the U.N. mission to Rwanda (UNAMIR) files in Kigali when that office closed down.⁵⁸

In early September 2010, the Ntabakuze team has also requested the ICTR Appeal Chamber to order the Prosecutor to disclose the files describing RPF crimes that Carla Del Ponte describes in her memoirs.⁵⁹ The ICTR Appeal Chamber will have to decide whether, in light of what Del Ponte has revealed about the criminal culpability of Paul Kagame and the victors in the Rwanda war, it will permit itself to continue to be complicit in the long-running cover-up of RPF crimes, committed before, during and after the "Rwandan genocide" that has prevented both the ICTR Defense and the ICTR Chambers from being able to properly assess the liability of both sides in the Rwanda War. Many of the documents from U.N. files that the Ntabakuze Defense has been successful in securing are in the evidentiary

⁵⁷ ICTR Rule 68 requires the prosecution to disclose potentially exculpatory evidence to the defense. The Ntabakuze requested disclosure of suppressed UN files, as well.

⁵⁸ See generally *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibits).

⁵⁹ See *Military-I Trial*, ICTR Case No. 98-41-T (Motion for Disclosure Pursuant to Rule 68 (Sept. 6, 2010)). The request includes evidence of Kagame's involvement in the assassination of President Habyarimana suppressed by former Chief Prosecutor Arbour as described in the affidavit of Queen's Prosecutor Michael Hourigan, copied later in this article, and the Prosecution file secret file numbers of RPF crimes leaked to the press in May 2010, as well as files referred to in Del Ponte's memoir.

record of the Military-I trial,⁶⁰ and others are catalogued on the author's Rwanda Documents Project website.⁶¹

***The Suppressed U.N. Document -based "Rwanda genocide"
Narrative: The Foundation for "Genocide
Denial" Allegations***

From these documents and testimony from U.S. government and U.N. witnesses at the ICTR, another narrative of the "Rwanda genocide" is beginning to emerge. This version differs significantly from the victor's description of the last 100-days of the RPF more than 3-year war of invasion to seize power in Rwanda. The February 9, 2009 Judgment in the Military-I case, acquitting the top-four military officers of conspiracy or planning to commit genocide, was the first concrete manifestation that this alternative narrative was better supported by the long-suppressed U.N. documentary evidence than the narrative concocted by the victors.⁶²

⁶⁰ See *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibits); *Prosecutor v. Ndindilyimana*, ICTR Case No. 00-56-T (Oct. 6, 2006).

⁶¹ See The Rwanda Documents Project website, <http://www.rwandadocumentsproject.net>, (under construction) by the author with the assistance of William Mitchell College of Law. The purpose of The Rwanda Documents Project is to put documents into the public record that make independent research possible. The Ntabakuze Defense has also benefited from the Freedom of Information Act (FOIA) by being able to access contemporaneous, unclassified reports generated by the State Department, Pentagon, and CIA, via the National Security Archive. These documents are also on the website. As time goes on, original, contemporaneous documents from the U.N., U.S., France, Belgium, Canada, U.K. and Rwanda, and contemporaneous media reports will be added to the database to provide an accurate evidentiary base for researchers to better understand the complete Rwanda genocide narrative, not only that told by the victors.

⁶² Another welcome confirmation is the report of the United Nations High Commission on Human Rights leaked to *Le Monde* on August 27, 2010, which confirms that massive crimes have been committed by the RPF in the Congo, including war crimes and crimes against humanity. Many of these crimes meet the definition of genocide. See *Bombshell UN report leaked*,

After 7 years of examining the best evidence that the RPF could muster, with the active assistance of the U.S. and U.N., the unanimous ICTR three-judge panel ruled that the victors' version of the Rwanda genocide (*i.e.* that the "Rwandan genocide" was a long-planned conspiracy to kill Tutsi civilians on the part of the vanquished army) was not supported by the evidence.⁶³

When viewed against the backdrop of targeted killings and massive slaughter perpetrated by civilian and assailants between April and July 1994 as well as earlier cycles of violence, it is understandable why for many this evidence. . . shows a prior conspiracy to commit genocide. . . *However, they are also consistent with preparations for a political or military power struggle. . . when confronted with circumstantial evidence [the Chamber] can only convict where it is the only reasonable inference. . . the Prosecution has not shown that the only reasonable inference based on credible evidence. . . was that [genocidal] intention was shared by the Accused. . . the Chamber is not satisfied that the Prosecution has proven beyond a reasonable doubt that the four Accused conspired among themselves, or with others to commit genocide before it unfolded on 7 April 1994.*⁶⁴ (emphasis added).

In finding that the Prosecutor failed to prove that the top four military officers "conspired among themselves or with others to commit genocide," the ICTR judges rejected the RPF victors' claims that the vanquished forces had long planned to kill hun-

supra note 7. See also Office of the U.N. High Commissioner for Human Rights, *supra* note 53.

⁶³ See generally *Military-I*, ICTR Case No. 98-41-T (Final Judgment).

⁶⁴ See *id.* at 539-40, ¶¶ 2110-2113.

dreds of thousands of civilians for ethnic reasons and that they had assassinated their own President and military leaders.⁶⁵

Ironically, the English language edition of Ms. Del Ponte's memoir was published nearly simultaneously with the written Military-I Judgment in February 2009. The Military-I Judgment completely rejects the major premise of her 2002 prosecution of the Military-I defendants, described in the memoir. But, her memoir does reveal that, during the summer of 2003 at about the same time that I had heard her announce that she possessed evidence to prosecute the RPF, she had been fired by the U.S. State Department for attempting to prosecute the RPF.⁶⁶ The memoir also describes in more detail the crimes for which the ICTR Prosecutor Del Ponte had evidence to hold Kagame and the RPF criminally culpable, as of 2003.

The February 2009 confirmation of the existence of this evidence by Del Ponte merely added to the evidence presented in the Ntabakuze Defense Trial Brief filed in May 2007⁶⁷ that actually went farther than Del Ponte's memoir in explaining how the documentary evidence from the U.N. and U.S. government files (as well as the direct testimony of both Prosecution and Defense witnesses) provided a coherent explanation of how the communal violence erupted in Rwanda after the assassination of two Presidents on April 6, 1994, that did not include a long-planned conspiracy to kill civilians by the vanquished army.⁶⁸ Del Ponte's memoir also confirmed that ICTR investigators had known since 1997 that the assassinations of the two Presidents was not a mystery at all, but was a war crime committed by Kagame's RPF⁶⁹ as part of their final military assault to seize power.

⁶⁵ See generally *Military-I Trial*, ICTR Case No. 98-41-T (Final Judgment).

⁶⁶ MADAME PROSECUTOR, *supra* note 17.

⁶⁷ See generally *Military-I Trial*, ICTR Case No. 98-41-T (Defence Brief).

⁶⁸ See *id.*

⁶⁹ *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DNT-365); *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza); *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of BRA).

The May 2007 Ntabakuze Trial Brief in the Military-I case summarizes, for the first time, the compilation of original U.N. documents which, like the *Pentagon Papers*⁷⁰ or *Wikileaks* files,⁷¹ expose a previously suppressed history of war. Not unlike the observation of Robert McNamara from the *Fog of War* quoted at the beginning of the article,⁷² it is becoming increasingly clear that the victors in the Rwanda war, Paul Kagame and the RPF, have been able to avoid their own responsibility for the mass violence of the victors which *they* have characterized as the “Rwandan genocide,” for which *they* have asserted the vanquished are exclusively responsible.⁷³ Having discovered and publicized the “Rwanda Genocide Papers,” that are already in the ICTR public record and posted on the Rwanda Documents Project website, as well as other evidence of crimes of Kagame’s RPF are mounting by the day, are the reason I was arrested by the Rwandan government and labeled a “genocide denier” not opinion pieces posted on the internet, as the Rwandan government has publicly claimed.⁷⁴

The following sections of the article summarize the contents of some of the “Rwandan Genocide Papers” to explain hap-

⁷⁰ See MADAME PROSECUTOR, *supra* note 17; *New York Times Co. v. United States*; *United States v. Washington Post*, 403 U.S. 713 (1971).

⁷¹ See MADAME PROSECUTOR, *supra* note 17; *Iraq war logs: media reaction around the world*, UK GUARDIAN, Oct. 28, 2010, <http://www.guardian.co.uk/world/2010/oct/28/iraq-war-logs-media-reaction>.

⁷² THE FOG OF WAR, *supra* note 2.

⁷³ See discussion of Del Ponte memoirs, Hartmann memoirs and evidence of unprosecuted RPF crimes, *infra and supra*.

⁷⁴ See *Military-I*, ICTR Case No. 98-41-A (Registrar Submission Pursuant to Rule 33). Unfortunately, I received chilling confirmation of this assessment from current and former members of the Kagame RPF government, who reported the subject of a meeting in Kigali in mid-October 2010 during which President Kagame informed military and government leaders that my release from Rwanda in June was a “mistake,” and that I should be returned to Rwanda “dead or alive.” (Confidential email on file with the author). The sources are credible enough that I cannot ignore the threat and have filed reports with local and federal law enforcement and the U.S. State Department.

pened in Rwanda in 1994, according to contemporaneous U.N. and U.S. government documents, and sworn testimony in the Military-I Trial evidence.

II. SECURITY COUNCIL MANIPULATION OF U.N. TRIBUNALS: AN UNAVOIDABLE CLASH OF LAW AND POLITICS?

*It is unfair that politics undermines our work [at the ICTR]. 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]. . .*⁷⁵

Chief U.N. Prosecutor Carla Del Ponte

Much scholarship and main-stream reportage of Security Council *ad hoc* tribunal proceedings has taken place in a kind of intellectual vacuum that is so divorced from the political reality that, with precious few exceptions,⁷⁶ the analysis appears to be the product of almost willful denial:

The question of politicization is not a straightforward one. The decision to establish the tribunal was political, and it was established for a political purpose, but its internal mandate is to the delivery of justice. Thus, while politics permeated every as-

⁷⁵ Ms. Hartmann reports the 2003 exchange between Ms. Del Ponte and Iqbal Riza, the first assistant to Kofi Annan in 1994 in the Department of Peacekeeping Operations: "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]." HARTMANN, *supra* note 18, at 271-72.

⁷⁶ See generally DR. HANS KOECHLER, *GLOBAL JUSTICE OR GLOBAL REVENGE? INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS* (2003); DR. HANS KOECHLER, *WORLD ORDER: VISION AND REALITY* (2009); JOHN LAUGHLAND, *Why this court is a criminal waste of time and money*, DAILY MAIL UK, July 26, 2008, <http://www.dailymail.co.uk/>; JOHN LAUGHLAND, *The ICC and Universal Jurisdiction*, http://www.iccwatch.org/article_Mar09.html; KINGSLEY MOGHALU, *RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE* 5 (2005).

pect of the tribunal's operation, including its establishment, proceedings had to be conducted *in a political vacuum*. On a conceptual level, while this form of justice is inherently political, the judicial process is not necessarily "politicized." On a practical level, the interaction of politics and law was central to the tribunal's ability to perform its judicial function, *it did so independently of politics, which was crucial for its success as a tool for the restoration of peace and security*. [emphasis supplied.⁷⁷]

With precious few exceptions, writers with impeccable U.N. tribunal credentials have noted that, because the Security Council is essentially a political body at the apex of an inherently political United Nations, it should be no surprise that "politics" and the interests of more-powerful nations would suffuse the functioning of any judicial body established by the Security Council. Kingsley Moghalu, former spokesperson for the ICTR;⁷⁸ Kofi Annan's Chief Aide Iqbal Riza;⁷⁹ U.N. Office of Legal Affairs Chief Counsel Ralph Zacklin;⁸⁰ and U.S. War Crimes Ambassador Pierre Prosper⁸¹ have all made this simple observation.

⁷⁷ See RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY* 2 (2004), for an example of the sort of wishful thinking that Ms. Del Ponte has put to rest.

⁷⁸ See MOGHALU, *supra* note 76, at 5.

⁷⁹ On the occasion of Del Ponte being removed from her ICTR post in 2003, Hartmann's account quotes Secretary General Annan's chief aide, Iqbal Riza as saying, "It's all politics. It should not have happened like this, but everything is politicized." HARTMANN, *supra* note 18, at 271-72.

⁸⁰ Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. OF INT'L CRIM. JUST. 541 (2004) (former Chief of UN Office of Legal Affairs.)

⁸¹ Prosper has noted that "war crimes 'justice' is political." See MOGHALU, *supra* note 76, at 5.

But not all ICTR participants are willing to be as straightforward. For example, former ICTR President Navanthem Pillay of South Africa⁸² is capable of asserting, without apparent irony:

Yes, justice can be selective, it can be political. But if you ask me if justice is being done here (at the ICTR), I can say, YES!⁸³

Of course, any concept of “justice” worthy of the name can be *neither* selective *nor* political, but Judge Pillay’s refreshingly straightforward statement demonstrates the distortion of fundamental concepts of equality before the law and the conflation of *legal* decision-making with political expediency – a conflation that has been accepted as “normal” by the current incarnation of international tribunals.⁸⁴ The description of Del Ponte’s appointment by the Security Council, and the political reality limiting her ability to perform normal prosecutorial duties and decision-making, in the Del Ponte and Hartmann’s memoirs provide concrete examples of how the policy interests of the U.S. distorts the actual functioning of international tribunals as institutions of international justice.⁸⁵

⁸² Judge Navanthem Pillay was President of the ICTR during the period Del Ponte was investigating the RPF and when she was removed from office in 2003, which makes it difficult to believe that Pillay was not aware of the “cover-up” of RPF crimes at that time. Five years later, the appointment of Navanthem Pillay as UN High Commissioner for Human Rights was approved by the General Assembly on July 28, 2008. She took up the post on September 1, 2008. <http://www.ohchr.org/EN/AboutUs/Pages/HighCommissioner.aspx>. Members of her UNHCHR staff leaked the report documenting RPF crimes in Congo to *Le Monde* in late August 2010.

⁸³ See Bob Braun, *Rwandans Face a Reckoning in UN Trials*, NEWHOUSE NEWS SERVICE, Sept. 17, 2002.

⁸⁴ See generally MADAME PROSECUTOR, *supra* note 17.

⁸⁵ *Id.*

a. How the Ad Hoc Security Council Tribunals Actually Work: Lessons from Del Ponte's Appointment as Chief U.N. Prosecutor

In mid-1999, just as the NATO-bombing of Serbia was coming to an end, the Swiss Secretary of State submitted Del Ponte's name as a candidate to replace the Security Council's top prosecutor for Yugoslavia and Rwanda Tribunals, Louise Arbour, who had been nominated to Canada's Supreme Court.⁸⁶ Del Ponte's nomination was approved primarily because Switzerland is *not* a member of the U.N., EU or NATO.⁸⁷ Security Council Permanent Members China and Russia objected that any candidate from a NATO country was unsuitable because NATO bombers had recently destroyed the Chinese embassy and devastated the civilian infrastructure of Russia's Yugoslav ally.⁸⁸

Similarly, the two NATO allies on the Security Council, the U.S. and U.K., would not accept a prosecutor from Russia, China, or non-allied countries that might be sympathetic to claims that the NATO-bombing of Yugoslavian cities and infrastructure constituted a war crime.⁸⁹ An experienced prosecutor from a neutral country, not implicated in the NATO bombing and not a member of the EU or the U.N., Del Ponte was the perfect compromise candidate.⁹⁰ Del Ponte's first person ac-

⁸⁶ After serving on the Canadian Supreme Court, Ms. Arbour was appointed UN High Commissioner for Human Rights, preceding the appointment of Navanethem Pillay. Since 2009, Ms. Arbour has been President of the International Crisis Group, a NATO-oriented international foreign policy non-governmental organization founded by former U.S. State Department personnel in 1995, headquartered in Brussels. See *International Crisis Group*, <http://www.crisisgroup.org/>.

⁸⁷ See MADAME PROSECUTOR, *supra* note 17, at 11-32 for a discussion of Del Ponte's appointment.

⁸⁸ See *id.*

⁸⁹ *Id.*

⁹⁰ *Id.* Del Ponte was only the third prosecutor to be appointed to the Security Council post when she replaced Canadian Louise Arbour, who had replaced the first ICTY-ICTR Prosecutor, South Africa's Sir Richard Goldstone, in 1996. Del Ponte succeeded Arbour in August 1999 and moved

count describes that, from the outset of her relationship with the tribunals, Security Council politics made her appointment possible and necessary.

b. Del Ponte at the ICTR: Lessons in the Realpolitik of the Ad Hoc Security Council Tribunals

As early as November 1999, only a month after taking office, Del Ponte learned that her long-time colleague, French examining magistrate Jean-Louis Bruguiere,⁹¹ had opened an investigation into the assassination of Presidents Habyarimana of Rwanda and Ntaryamira of Burundi, both of whom had died in a missile attack on Habyarimana's plane on the night of April 6, 1994. This dual assassination set off the 100-days of massive violence known as the "Rwandan genocide" between April 6 and mid-July 1994.⁹² The French judge had come to the conclusion that the RPF and Paul Kagame were probably responsible for the assassination.⁹³ Del Ponte's Chief Investigator Laurent Walpen developed evidence not only of the assassination of the two presidents, but also of other RPF crimes⁹⁴ with "[e]stimates

to the Prosecutor's Hague offices in September. From the outset, the politics of the Security Council made her appointment possible and, as she was to learn, imposed a *muro di gomma* (wall of rubber) on fulfilling her prosecutorial obligations far beyond any she could have imagined from her prosecutions of international gangsters, financiers, and politicians in Switzerland.

⁹¹ Judge Bruguière had become well-known for prosecuting major international criminals in France as Del Ponte had in Switzerland during the same period. Del Ponte knew Bruguière and trusted his judgment and his work on cases like Carlos the Jackal, and others. See MADAME PROSECUTOR, *supra* note 17, at 179-81. Spanish Judge Merelles Abreu came to the same conclusion in an indictment issued in 2008. See *infra* notes 233 *et seq.* and accompanying text.

⁹² *Military-1 Trial*, ICTR Case No. 98-41-T (April 6, 1994) (Defence Exhibit DNT 120).

⁹³ *Id.*

⁹⁴ The Arusha prosecution had catalogued fourteen sites of massacres and was making efforts to go up the chain of command." HARTMANN, *supra* note

of the dead. . .in the tens of thousands.”⁹⁵ But Del Ponte’s memoir explains that the investigations were blocked by the Rwandan government:

. . .because President Kagame and the other Tutsi leaders had staked so much of their claim to political legitimacy upon the RPF’s victory over the genocidaires in 1994. And they were marketing their takeover of the country as a righteous struggle to halt the genocide.⁹⁶

Moreover, U.S. intelligence agencies were *assisting* the Rwandans in compromising the security of the ICTR Prosecutor’s Office:

We knew the Rwandan Intelligence service had received monitoring devices from the United States and was using them to compromise our telephone, fax and Internet traffic.⁹⁷

By May 2002, Bruguiere recommended to Kofi Annan that the ICTR prosecute Kagame because France lacked jurisdiction over sitting heads of state.⁹⁸ In early June 2002, Kagame and the RPF were “. . .blackmailing the tribunal. . .in order to halt the Office of the Prosecutor’s Special Investigation of crimes allegedly committed by. . .the RPF in 1994.”⁹⁹ According to Del Ponte:

18, at 66. Del Ponte confirms Laurent Walpen on her staff developed evidence of these sites. *See* MADAME PROSECUTOR, *supra* note 17, at 184.

⁹⁵ *See infra* note 245 and accompanying text. This same evidence was apparently provided in January 1997 to Ms. Del Ponte’s predecessor, Louise Arbour, who suppressed the evidence, stopped the investigation and disbanded the investigative team that made the recommendation that Kagame be prosecuted for the assassination of Habyarimana, as described herein. Ms. Del Ponte does not reveal whether she was aware of Ms. Arbour’s suppression of the earlier investigation of Kagame.

⁹⁶ *See* MADAME PROSECUTOR, *supra* note 17, at 183.

⁹⁷ *Id.*

⁹⁸ *Id.* at 235.

⁹⁹ *Id.*

. . . halting the genocide trials was the Rwandan government's objective, so long as there was a possibility that the tribunal would indict Tutsi leaders and army officers. The motive, it seemed, was preserving the Tutsi regime's legitimacy and, by extension the rule of President Paul Kagame.¹⁰⁰

On July 23, 2002, Del Ponte publicly reported to the Security Council:

the Prosecutor is effectively unable. . . to achieve the investigation of crimes alleged to have been committed by the Rwandan Patriotic [Front] in 1994.¹⁰¹

By November 2002, Del Ponte publicly exposed the refusal of the Kagame government to cooperate with her investigations.¹⁰²

On March 3, 2003, the U.S. State Department announced a new area of cooperation between the U.S. and Rwanda in the form of a signed bilateral agreement, initiated by the Bush administration, to exempt each country's citizens from prosecution before the International Criminal Court. Del Ponte wrote:

I suspected that, in return for Rwanda's signature on the agreement, President Kagame had sought United States support in the campaign to prevent the Rwanda tribunal from completing its Special Investigation and bringing indictments against se-

¹⁰⁰ *Id.* Kagame was effectively elected President for Life in the Fall of 2003, in an election that, as reported by European Union election observers, included the jailing of all political opponents, not unlike the election of Robert Mugabe in Zimbabwe five years later. See COLIN, *supra* note 34 at 197-203; Rptr. Colette Flesch, *Report of European Observer Mission*, Sept. 2003, cited in COLIN WAUGH, *supra* note 34, at 185-206; see also "Rwanda's Application for Membership of the Commonwealth: Report and Recommendations of the Commonwealth Human Rights Initiative," *Commonwealth Human Rights Initiative*, 2009, http://www.humanrightsinitiative.org/publications/hradvocacy/rwanda%27s_application_for_membership_of_the_commonwealth.pdf.

¹⁰¹ See MADAME PROSECUTOR, *supra* note 17, at 227.

¹⁰² See MADAME PROSECUTOR, *supra* note 17, at 223-41.

nior Rwandan military officers, and perhaps Kagame himself, in connection with massacres the Tutsis had allegedly committed in 1994.¹⁰³

Although Del Ponte only mentions the *quid pro quo* between the U.S. and Rwanda in May 2003, a “special relationship” had existed between the U.S. and the Kagame government for more than a decade.¹⁰⁴

Florence Hartmann observed that U.S. interest in the Bruguière investigation and Del Ponte’s investigation of Kagame, as early as 2001 made it clear that “the Americans wished to subject the court to an entirely political management of its exit strategy.”¹⁰⁵ And U.S. State Department memos discovered by the Ntabakuze Defense Team, including one to U.S. Secretary of State Warren Christopher from September 1994, make clear that a cover-up of RPF crimes actually began as early as August 1994,¹⁰⁶ even before the Security Council voted the Tribunal into existence in November.¹⁰⁷

On May 15, 2003, Pierre Prosper, the Bush administration Ambassador for War Crimes, called Del Ponte to the State Department in Washington, D.C.¹⁰⁸ Prosper asked her to turn over

¹⁰³ See MADAME PROSECUTOR, *supra* note 17, at 231.

¹⁰⁴ The U.S. and U.K. support for Kagame and the RPF forces is further documented in the 2009 Commonwealth Human Rights Initiative Report which urges rejection of application of Rwanda for admission to the Commonwealth. See generally COMMONWEALTH HUMAN RIGHTS INITIATIVE, RWANDA’S APPLICATION FOR MEMBERSHIP OF THE COMMONWEALTH: REPORT AND RECOMMENDATIONS OF THE COMMONWEALTH HUMAN RIGHTS INITIATIVE 33 (2009), available at http://www.humanrightsinitiative.org/publications/hradvocacy/rwanda%27s_application_for_membership_of_the_commonwealth.pdf.

¹⁰⁵ See HARTMANN, *supra* note 18, at 262-63.

¹⁰⁶ *Id.*

¹⁰⁷ See United Nations Security County Resolution establishing an International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc S/Res/955 (Nov. 8, 1994), *supra* note 11.

¹⁰⁸ Prosper was no stranger to the ICTR Office of the Prosecutor; he had been assigned by the Justice Department as lead prosecutor in the Akeyesu case, which concluded just before Del Ponte’s term began. See *Prosecutor v.*

her investigative files to the Rwandan government.¹⁰⁹ Del Ponte refused.¹¹⁰ Prosper informed her that she would not be re-appointed to the Rwanda tribunal.¹¹¹ On May 20, 2003 Del Ponte received a State Department fax stating that the Office of the Prosecutor should provide the Rwandan government with their investigative files and agree not to prosecute RPF crimes.¹¹² By the end of July, the *New York Times* cited unnamed Western diplomats as saying that the Rwandan government had won support from the United States and the United Kingdom for removing Del Ponte.¹¹³ The *Times* also reported that British diplomats said that the change in Prosecutors would include dropping of investigations of the RPF.¹¹⁴

Del Ponte was removed from office on August 28, 2003, when the Security Council passed Resolution 1503.¹¹⁵ She was replaced by Hassan Abubacar Jallow who continues to maintain that the assassination of the two presidents remains outside ICTR jurisdiction,¹¹⁶ a position with which the first ICTR Prosecutor, former South African Supreme Court Justice Richard Goldstone has publicly disagreed.¹¹⁷ Since Jallow replaced Del

Akeyesu, ICTR Case No. 94-4-T (Sept. 2, 1998). This was the first case at the ICTR to go to trial, and it resulted in history's first conviction for "genocide." Prosper must also have long been aware of the RPF crimes that were being investigated within the Office of the Prosecutor at the ICTR. See discussion of the Arbour and Bruguière incidents *infra* and *supra*.

¹⁰⁹ See MADAME PROSECUTOR, *supra* note 17, at 231-32.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² This account is essentially the same as that reported by Hartmann. See HARTMANN *supra* note 18, at 267-70.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See HARTMANN, *supra* note 18, at 267-72; see also MADAME PROSECUTOR, *supra* note 17 at 227.

¹¹⁷ Richard Goldstone's remarks were reported by the Danish newspaper BERLINGSKE TIDENDE. See ICTR/Attack—April 6th 1994 Attack Fits the ICTR's Mandate (Goldstone), HIRONDELLE NEWS AGENCY (Dec. 13, 2006), <http://www.hirondellenews.com/content/view/4100/26/>.

Ponte, despite the evidence of RPF crimes that Del Ponte has admitted none of the members of the victorious RPF army or the Kagame government have been indicted at the ICTR to date.¹¹⁸ As is now apparent from Del Ponte and Hartmann's memoirs and the acquittals in the Military-I case, the "victors' narrative" of the Rwanda War and the "Rwanda genocide" is at best incomplete.

III. WHAT *REALLY* HAPPENED IN RWANDA: THE MILITARY-I TRIAL EVIDENCE

A detailed description of the "victor's narrative" of the war and the genocide is beyond the scope of this article. However, other authors have treated this question in decontextualized detail.¹¹⁹ The essence of the narrative is that Hutu "hardliners" seized power in a coup after the Rwandan President's plane was shot down on April 6, 1994 and carried out massive pre-planned and long organized massacres of "Tutsi and moderate Hutus" during a 100-day "genocide" until the long-planned killings were stopped by the military victory of the RPF in mid-July 1994.¹²⁰ The narrative ignores the four years of war that preceded the

¹¹⁸ Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Hassan Jallow, ICTR Chief Prosecutor (Aug. 14, 2009), *available at*: <http://www.hrw.org/en/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime>.

We also urge you to prosecute other senior RPF commanders who led similar military operations in other parts of the country in 1994 and against whom the ICTR has evidence. The recent extension of the Tribunal's mandate until the end of 2010 affords an opportunity for such prosecutions to take place. Failure to do so will taint perceptions of the Tribunal's impartiality and undermine its legitimacy for years to come.

¹¹⁹ For a much more detailed description of the dominant narrative, see Barrie Munro Collins, *The Rwanda War 1990-1994: Interrogating the Dominant Narrative* (2009) (unpublished Ph.D. thesis, School of Oriental and African Studies, University of London) (also available at <http://www.rwandadocumentsproject.net>).

¹²⁰ *Id.*

100-days of extreme violence, the conditions in Rwanda caused by the war, and the most important event preceding the mass violence in Rwanda, the explosive mass violence in Rwanda's "sister-country," neighboring Burundi, following the assassination of the Burundian President only six months before the "Rwandan genocide." Taken out of historical and political context, the victors' narrative is compelling. The Military-I Trial evidence told a completely different story from many of the same facts, arising from the historical context provided by third parties and mainly from suppressed 1993-95 UN files.

a. The Failure of the ICTR Prosecutor's "Genocide Conspiracy" Narrative as Demonstrated by the Military-I Judgment, February 9, 2009

Del Ponte's April 2002 opening statement in the Military-I case summarizes the central theme of the dominant narrative, which relies on the assertion of a long-planned "genocide conspiracy" at the highest levels of the former government and military, to explain the extreme violence that engulfed Rwanda between April and July 1994. The opening statement is reproduced in Carla Del Ponte's memoir:

"These four men [*Col. Theoneste Bagosora, Col. Anatole Nsengiyumva, Gen. Gratién Kabiligi, and Maj. Aloys Ntabakuze*] are among the perpetrators of the genocide. . . Who is responsible for close to a million deaths in a few months? Who is responsible for all the other victims mutilated, tortured, raped, left for dead." The indictment alleged that *Bagosora and other commanders on trial were part of a group of senior Hutu officers who had, for several years, planned the systematic extermination of the Tutsi's and moderate Hutus in*

*order to secure the Hutu Extremist's political dominance of the country. . .*¹²¹

There is *no doubt* that widespread extreme communal violence swept Rwanda for 100-days beginning on April 6, 1994 when the plane of Rwandan President Juvenal Habyarimana was shot down. But the dominant narrative and Del Ponte's opening statement *both* fail to mention the context of the Rwandan violence, which was evidence in the Military-I trial and discussed in detail later in this article. In April 1994: (a) Rwanda had been embroiled in war for more than four years between the majority-Hutu government and an invading Ugandan-RPF army comprised of minority Tutsi members of the former Rwandan ruling aristocracy; (b) approximately one-sixth of its population had been internally displaced by the war by mid-1993; (c) mass violence killing hundreds of thousands of majority Hutu peasants had also swept neighboring Burundi six-months before April 1994, after Burundi's first elected President was assassinated by the Burundian Tutsi ruling class army; (d) more than a quarter-million Burundian refugees flooded Rwanda before April 1994; and, (e) the vast majority of Rwandans were terrified that nothing could protect them from being brutally subjugated by the former ruling class, whose army could not be stopped.

Ironically, the English edition of Del Ponte's memoir was published almost simultaneously with the Military Judgment¹²² of February 2009, in which the Court ruled on whether the ICTR Prosecutor could actually prove the long-planned "conspiracy to commit genocide" of which she accused my client and three other defendants.¹²³ After seven-years of receiving evidence of the "long-planned conspiracy to commit genocide" described in Ms. Del Ponte's opening statement, the three-judge ICTR panel unanimously held:

¹²¹ See MADAME PROSECUTOR, *supra* note 17, at 223.

¹²² Military-I Trial, ICTR Case No. 98-41-T 2009 (Judgment).

¹²³ *Id.* at 539-40.

When viewed against the backdrop of targeted killings and massive slaughter perpetrated by civilian and assailants between April and July 1994 as well as earlier cycles of violence, it is understandable why for many this evidence. . . shows a prior conspiracy to commit genocide. . . *However, they are also consistent with preparations for a political or military power struggle. . . when confronted with circumstantial evidence [the Chamber] can only convict where it is the only reasonable inference. . . the Prosecution has not shown that the only reasonable inference based on credible evidence. . . was that [genocidal] intention was shared by the Accused.*

. . . the Chamber is not satisfied that the Prosecution has proven beyond a reasonable doubt that the four Accused conspired among themselves, or with others to commit genocide before it unfolded on 7 April 1994.¹²⁴ (emphasis added)

The ICTR judges' conclusion that the assassination of the two Presidents was the impetus behind the extreme communal violence that broke out in Rwanda is not a conclusion held solely by the ICTR judges. Nor is it a new conclusion. Just minutes after the plane was shot down on the night of April 6, 1994 the Africa desk at the State Department sent a cable to the U.S. Embassy in Kigali that said:

If, as it appears, both Presidents have been killed, there is a strong likelihood that widespread violence could break out in either or both countries (*i.e* Rwanda and Burundi), *particularly if it is con-*

¹²⁴ *Id.*

firmed that the plane was shot down. (emphasis added).

*Prudence Bushnell, Washington, D.C. to
David Rawson, U.S. Embassy in Kigali Rwanda,
April 7, 1994*¹²⁵

This is but one of thousands of pages of contemporaneous U.N. documents that had been withheld from the defense at the ICTR for nearly 14 years that the Ntabakuze defense successfully put into ICTR evidence.

Even Ms. Del Ponte's memoir makes clear that in May 2002, when she argued that the Military-I defendants were engaged in "a long-planned conspiracy," she had known for at least 3-years that French Judge Bruguiere had evidence that Paul Kagame, not the defendants on trial, had assassinated the two Presidents.¹²⁶ And that less than a month *after* she delivered this opening statement, she *knew* that Judge Bruguiere recommended to Kofi Annan that the U.N. prosecute Kagame for the assassination of Habyarimana and other crimes.¹²⁷

And, with respect to the Military-I defendants "establishing dominance over the country" *after* the assassination of the President, U.N. documents put into evidence by the Ntabakuze Defense, made clear that there was *no* takeover of the country by the military after Habyarimana's assassination. For example, UNAMIR General Romeo Dallaire wrote in an April 13, 1994 cable to U.N. Headquarters that the military *could* have staged a coup after the assassination of the President, but didn't do so.¹²⁸ And, the U.N. Office of Legal Affairs went even farther in a May 25, 1994 Legal Opinion which acknowledged that the post-Habyarimana civilian government, established on April 8, 1994, *was* the lawful successor government properly constituted

¹²⁵ Military-I Trial, ICTR Case No. 98-41-T (Defence Exhibit DNT 120).

¹²⁶ MADAME PROSECUTOR, *supra* note 17, at 191.

¹²⁷ *Id.*

¹²⁸ Military-I Trial, ICTR Case No. 98-41-T (Defence Exhibit DNT 108).

under the 1992 Rwandan Constitution, rather than the product of a “coup”.¹²⁹

This means that the U.N. files, which were available to Ms. Del Ponte *well before* she made her opening statement in the spring of 2002, showed that allegations against the Military-I defendants, that they were:

. . . part of a group of senior Hutu officers who had, for several years, planned the systematic extermination of the Tutsi's and moderate Hutus *in order to secure the Hutu Extremist's political dominance of the country*,. . .¹³⁰

were not supported by the evidence in her own files. And, after hearing seven-years of evidence, the three-judge Military-I panel agreed and found that the Military-I defendants were not engaged in a conspiracy to kill civilians, or to seize “political dominance of the country” in the full Military-I Judgment in February 2009.

***b. De-Constructing the Victors' “Long-Planned Genocide”
Myth: Modern Origins of Mass Violence in the
1990-94 Rwandan War***

The conflict between “Tutsi” (herding, pastoralist, aristocracy/warrior caste) and “Hutu” (farmer, majority-peasant/client caste) has deep roots in the African Great Lakes region, not just Rwanda.¹³¹ Although the 100-days of communal violence were sparked by the 1994 assassinations of the two presidents, the tension between the two groups had been building in Rwanda

¹²⁹ Military-I Trial, ICTR Case No. 98-41-T (Defence Exhibit DNT 193).

¹³⁰ MADAME PROSECUTOR, *supra* note 17, at 223.

¹³¹ See Filip Reyntjens, *Constitution-making in situations of extreme crisis: the case of Rwanda and Burundi*, 40 JOURNAL OF AFRICAN LAW 236-39 (1996); see also René Lemarchand *Managing Transition Anarchies, Rwanda, Burundi and South Africa*, 32 JOURNAL OF MODERN AFRICAN STUDIES, No. 4, (1994) (reporting on the impact of repeated Burundian massacres on political conditions of Rwanda).

since long before. Similar conflicts can be found throughout sub-Saharan Africa where competing, but interconnected, systems must co-exist with limited land and resources.¹³² A discussion of the specific history of this conflict in Rwanda is beyond the scope of this article but it is possible to differentiate these distinctions as neither tribal nor cultural because Rwandan pastoralists and farmers share the same language, religion and traditions, but the historic caste-like divisions are real.¹³³

Perhaps it is enough for purposes of this discussion to liken Hutu/Tutsi distinctions to *caste*, or even *feudal class* differences arising from differing relationships with land use. But, because Hutu/Tutsi identity passes *patrilineally*, a very “tutsi-appearing” individual may actually self-identify as a Hutu, and a very “hutu-appearing” individual as a Tutsi, and would be so-considered by Rwandan society, depending on the identification of one’s father. In a stable village society, it would be easy enough to sort out by common, collective knowledge one’s parental lineage. However, the question becomes more complicated when individuals find themselves in areas where parentage and family lineage is not known, such as during the chaos of war, for example, when “caste” and identification with an invading army become conflated.¹³⁴

The Origins of Rwandan Mass Violence in April 1994: The October 1990 RFP Invasion from Uganda

With respect to the 1994 “Rwandan genocide” there is little dispute that the most immediate source of the communal violence known as “the Rwandan genocide” began on October 1, 1990, when an estimated 3,000-4,000 troops of the National Re-

¹³² *Id.* Reyntjens *supra* note 131.

¹³³ See Reyntjens and Lemarchand, *supra* note 131; see also discussion of fears of re-establishment of a Tutsi aristocracy by U.S. Ambassador Robert Flaten in 1992 report to State Department at note 146, *infra*.

¹³⁴ See generally MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS* (2001); see also WAUGH, *supra* note 34.

sistance Army (NRA) of Ugandan President Yoweri Museveni (later called the Rwandan Patriot Army or Rwandan Patriotic Front-hereinafter RPF) invaded Rwanda from Uganda.¹³⁵ These Ugandan army troops were largely composed of the offspring of members of the former Rwandan Tutsi-aristocracy and monarchy.¹³⁶ In the early 1960's, just prior to Rwandan independence from Belgium, the Hutu-peasantry that made up some 85% of the Rwandan population had deposed the Tutsi-aristocracy and monarchy in favor of a majority-Hutu republic.¹³⁷

These Ugandan army troops were largely the offspring of members of the former Rwandan Tutsi-aristocracy and monarchy,¹³⁸ which had been deposed by a rebellion of the Hutu-peasantry that made up some 85% of the Rwandan population in favor of a republic, just prior to Rwandan independence from Belgium in the early 1960's.¹³⁹ The former Rwandan Tutsi aristocracy faced discrimination as foreigners in Uganda, and many of the children of the displaced Rwandan-Tutsi aristocracy (including a teenage Paul Kagame) threw their lot in with the National Resistance Army (NRA) of Yoweri Museveni, who led armed rebellion against the elected government of President Milton Obote that took some 500,000 Ugandan lives between 1981 and 1986.¹⁴⁰

Museveni promised them full acceptance in Ugandan society but, after seizing power, Museveni was pressured by indigenous Ugandans to eliminate the influence of the large number of Rwandan "foreigners" in the NRA ranks. In 1988 he withdrew his support for the Rwandans remaining in and agreed to sup-

¹³⁵ *Id.* Mamdani, *supra* note 134. The original number of troops is estimated to be about 2,000 with 800 civilian supporters. *See also* STEPHEN KINZER, A THOUSAND HILLS: RWANDA'S REBIRTH AND THE MAN WHO DREAMED IT 65 (2008).

¹³⁶ *See* WAUGH, *supra* note 34.

¹³⁷ *Id.*; *see also* Mamdani, *supra* note 134.

¹³⁸ *See* WAUGH, *supra* note 34.

¹³⁹ *Id.*

¹⁴⁰ *See* Mamdani, *supra* note 134.

port their return to Rwanda by force of arms.¹⁴¹ On October 1, 1990 an estimated 3-4,000 mainly Rwandan troops of the Ugandan NRA,) invaded Rwanda across the northern border with Uganda.¹⁴²

Paul Kagame, previously Museveni's senior intelligence officer, returned from training with the U.S. Army at Ft. Leavenworth, Kansas in late 1990 to lead the invasion.¹⁴³ Although the Rwandan army (*Forces Armee Rwandais*- hereinafter, FAR) had not been engaged in combat for several decades, the 5,000 FAR conventional troops soundly defeated the invading RPF,¹⁴⁴ which withdrew to the rugged Virunga mountains, where famed primate researcher Dian Fossey had been murdered by "unknown parties" in 1985, during the violence of the NRA war for power in Uganda, and the film *Gorillas in the Mist* was set.¹⁴⁵

***RPF Military Superiority Established:
January 1991-February 1993***

Between early 1991 and February 1993, Kagame led the RPF in carrying out guerilla/terrorist raids from the Virunga Mountains, despite an August 1992 ceasefire and ongoing peace negotiations. According to the U.S. Ambassador to Rwanda Robert Flaten the building military threat of the RPF promised an explosion of reactive violence because of deep-seated fear that the Tutsi-aristocracy would reclaim power, should full-scale war resume with an RPF offensive:

. . . leaders from all sides have begun to realize the more terrifying implications of an RPF march to Kigali. No matter how many Hutus the RPF may

¹⁴¹ See Kinzer, *supra* note 135; see also Waugh, *supra* note 34.

¹⁴² *Id.* Kinzer, *supra* note 135; See also Mamdami, *supra* note 133.

¹⁴³ See Kinzer, *supra* note 135; See also Waugh, *supra* note 34.

¹⁴⁴ Military-I Trial, ICTR Case No. 98-41-T (2004) (Defence Exhibit DB 71.) See also, Kinzer, *supra* note 135 regarding defeat of the RPF.

¹⁴⁵ AMADOU DEME, RWANDA 1994 AND THE FAILURE OF THE UNITED NATIONS MISSIONS: THE WHOLE TRUTH 16-17 (2010).

have representing it, it is perceived in Rwanda as an essentially Tutsi organization. Should this group break through to Kigali, all the fears of the Hutu majority of again being subjected to slavery or feudal vassalage will be resurfaced. When threatened with the restoration of the feudal system, the Hutus on the collines (hills) will begin to eliminate their Tutsi neighbors. When this happened in 1990. . .Habyarimana sent an army unit in to stop it. When it happened in Bugasera in March 1992, the Gendarmes eventually arrived to encourage the restoration of calm. This was done with an administration and communications in place, neither of which would be the case should Kigali fall to the RPF.¹⁴⁶

In February 1993, the RPF broke the ceasefire with an assault on Kigali, Rwanda's capital. The assault nearly succeeded and gave substance to the fear of the restoration of aristocratic Tutsi domination described by Ambassador Flaten.

Even though the RPF then withdrew to an area near the Ugandan border so as to avoid combat with Belgian and French military advisors defending Kigali,¹⁴⁷ the fact of RPF military superiority had been established beyond dispute and would, necessarily, determine the course of all future events because ongoing attempts at settlement of the conflict were no longer between parties in a military-stalemate. By the time of the RPF's 1993 assault on Kigali the invading RPF had grown from the 3,000-4,000 Ugandan "deserters" in late 1990,¹⁴⁸ to a light

¹⁴⁶ Declassified memo from Robert Flaten, U.S. Ambassador in Rwanda, to Edmund DeJarnette, U.S. Ambassador in Tanzania (July 8, 1992), *available at* <http://www.rwandadocumentsproject.net>.

¹⁴⁷ BENJAMIN VALENTINO, *FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE 20TH CENTURY* 181 (2004).

¹⁴⁸ Museveni falsely claimed that Uganda had nothing to do with the invasion and that the Ugandan troops under Kagame's command were "deserters," which has been thoroughly de-bunked by numerous sources. For a

infantry fighting force of at least 20,000 troops with unquestioned military superiority.¹⁴⁹

By contrast, the defending FAR had the 6,000-7,000 “real” troops who had defeated the initial small RPF/Ugandan invasion in late 1990 augmented by some 25-30,000 recent recruits, which the U.N. commander of U.N. troops, U.N. General Dallaire, characterized as “rabble.”¹⁵⁰

The RPF victory in its last offensive (January 1993) has affected the morale of the RGF forces. . . The general standard of training in the RGF is low. A period of rapid expansion (from 5,000 to 34,000) during the war was conducted without an effective training base. Soldiers possess only basic military skills of varying standards. . . The capability of the RGF is assessed as medium to low. . . A large number of weapons were lost or stolen during the war.¹⁵¹

Not only did this military force imbalance pre-determine the military outcome of the 100-days of the “Rwanda genocide” following the assassination of the two Presidents in April 1994,¹⁵² but it also dictated the outcome of all “Arusha Accords” peace negotiations in 1993 and 1994.

discussion of the continuous military support provided to the RPF through Uganda between 1990 and 1994, *see generally* AMADOU DEME, RWANDA 1994 AND THE FAILURE OF THE UNITED NATIONS MISSIONS: THE WHOLE TRUTH (2010).

¹⁴⁹ Military-I Trial, ICTR Case No. 98-41-T (2004) (Defence Exhibit DB 71.) This estimate was only the number of troops that Dallaire estimated in September 1993. By April 1994, according to Dallaire’s military intelligence officer Capt. Amadou Deme, Ugandan army regulars added to the RPF troops observed by Dallaire, so the actual military power wielded by the RPF was probably much greater than reported by Dallaire in September 1993.

¹⁵⁰ ROMÉO DALLAIRE, BRENT BEARDSLEY, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA 70 (2004).

¹⁵¹ *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit No. DB-71: Report of the U.N. Reconnaissance Mission) at 7.

¹⁵² *See infra* notes 209 to 234 and accompany text.

The “Arusha peace process” was responsible for the 1992 ceasefire, which the RPF assault had broken in February 1993. In March 1993, the peace process resumed with a new balance of military power. The negotiations under the new conditions resulted in the August 1993 “Arusha Accords.” This power sharing agreement with the RPF provided for a transitional government that included existing political parties as the basis for multi-party elections in the near future.¹⁵³ Although the RPF represented no more than about 15% of the population that self-identified as Tutsi, under the Arusha Accords the RPF would control 50% of the military and an outsized, but still minority, position in parliament and government ministries.¹⁵⁴

Of course, this was a political victory for the RPF who had been guaranteed a seat at the table of the Rwandan government and a continuing important role in the combined military force contemplated in the Accords. However, entering into the Arusha Accords power-sharing agreement also meant that the militarily-dominant RPF would eventually have to choose between surrendering its military superiority in favor of permanent political minority status, and using the militarily dominant position it had already achieved to seize control of the Rwandan state, when it ultimately deemed that the time was right. The events in Rwanda between April and July 1994, reflected in the previously suppressed U.N. files, make clear that the RPF (quite sensibly from the standpoint of a superior military power) apparently decided not to trust the negotiated power-sharing to protect their interests.

¹⁵³ Arusha Peace Agreement, Rwanda - RPF, Aug. 4, 1993, *available at* <http://www.incore.ulst.ac.uk/cds/agreements/pdf/rwan1.pdf>.

¹⁵⁴ *Id.*

***February- December 1993: Refugees, Destabilization and The
1993 “Burundi massacres” as Precedent for the 1994
“Rwanda Genocide”***

According to the Reconnaissance Report, prepared by U.N. General Dallaire in September 1993¹⁵⁵ as a precursor to U.N. non-combat peace keepers to replace the French and Belgian troops that had blocked the RPF advance in February 1993,¹⁵⁶ Rwanda was already awash in grenades, guns, deserters and self-appointed “militias” as a consequence of the war and the success of the February 1993 RPF assault:

According to many sources in Kigali, the going price for a hand grenade in Kigali is as little as \$3 and a Kalashnikov is just about as easily obtainable. Years of conflict in Rwanda, the Uganda war, the turmoil in Burundi and Zaire have led to a plethora of military hardware being easily and cheaply available. . . . Numbers of gendarmes and soldiers have deserted and formed loosely knit groups of bandits. These bandits gravitated towards Kigali where they could more easily blend in among large of numbers of armed men in uniforms and have been responsible for much of the attacks on roads and on houses in and around Kigali. . . . Even with the best will in the word, the gendarmerie are totally inadequate to effectively combat crime in Rwanda and preserve law and order.¹⁵⁷

¹⁵⁵ *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit No. DB 71: Report of the U.N. Reconnaissance Mission), at 16.

¹⁵⁶ Intended or not, the replacement of the European troops with UN non-combatants had the effect of eliminating the only military impediment that had prevented the RPF takeover of Kigali in February 1993. See Valentino, *supra* note 147.

¹⁵⁷ *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit No. DB 71: Report of the U.N. Reconnaissance Mission) at 16-17.

Many of these same conditions were, as U.S. Ambassador Flaten predicted in 1992,¹⁵⁸ to become much worse after the war resumed in April 1994. They were not, however, unique events that occurred only *after* the President's plane was shot down evidencing mass violence following the assassination having been pre-planned.¹⁵⁹

By the time Dallaire wrote his report in September 1993, about one-sixth of the total population of eight million¹⁶⁰ (some 1.2 million Hutu *and* Tutsi refugees) had been displaced during the February 1993 assault and were living in squalid refugee camps outside Kigali and throughout the country.¹⁶¹ U.S. Ambassador to Rwanda, Robert Flaten, testified at the ICTR that he had seen the appalling conditions of the war-displaced civilians in these camps,¹⁶² which gave millions of Rwandans reason to believe stories about the brutality of the RPF. In October 1993, hundreds of thousands of Burundian refugees poured into Rwanda to escape military mass violence against civilians, following a presidential assassination in their own country¹⁶³ and was a precursor to predictable mass violence in Rwanda, should the war resume, according to U.S. Ambassador Flaten in late 1993.¹⁶⁴

¹⁵⁸ *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Former Ambassador to Rwanda, Robert Flaten, June 30-July 1, 2005).

¹⁵⁹ See 2010 *Mutsinzi Report*, *supra* note 36.

¹⁶⁰ Filip Ryentjens, *Estimation du nombre de personnes tuées au Rwanda en 1994*, in *L'AFRIQUE DES GRANDS LACS, ANNUAIRE 1996-1997*, 179-186 (Stefaan Marysse and F. Rentjens, Eds., L'Harmattan 1997).

¹⁶¹ *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Former Ambassador to Rwanda, Robert Flaten) (June 30-July 1, 2005).

¹⁶² *Id.*

¹⁶³ See generally memoir of former U.S. Ambassador to Burundi, ROBERT KRUEGER AND KATHLEEN TOBIN KRUEGER, *FROM BLOODSHED TO HOPE IN BURUNDI* (University of Texas Press) (2007) [hereinafter *KRUEGER Memoirs*].

¹⁶⁴ *Id.* See also *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Former Ambassador to Rwanda, Robert Flaten) (June 30-July 1, 2005).

The Military-I judges heard evidence from multiple sources that mass violence that swept Burundi in October 1993, and similar mass violence in Rwanda in April 1994, were closely linked because of the close interconnection between the two neighboring countries. The neighboring countries with interwoven histories from pre-colonial times which share similar languages, ethnicities, religion, and topographies. During the colonial period they were even considered a single entity.¹⁶⁵ But, the differences in the political conditions after independence in each country were significant.

While Rwanda had been a comparatively peaceful Hutu-majority republic since independence in the early 1960's, Burundi was ruled by a Tutsi-dominated military dictatorship¹⁶⁶ that carried out several mass killings of hundreds of thousands of Hutus in the 1970's and 1980's.¹⁶⁷ At about the same time that the Arusha Accords were being signed in August 1993, ostensibly to bring the Tutsi RPF into the Rwandan government and military, the first presidential election in Burundi was also taking place. In the summer of 1993, both countries hoped for peace and democracy ushered in by the Arusha peace agreement ending the three-year war in Rwanda, and an electoral process in Burundi that would end the long-standing military dictatorship.¹⁶⁸ The first elected Burundian president, a Hutu intellectual named Melchior Ndadaye, was elected by the 85% Hutu majority in August 1993, but within 90-days he was assassinated by the Tutsi-dominated Burundian military.

¹⁶⁵ See generally RENÉ LEMARCHAND, *RWANDA AND BURUNDI* (London: Pall Mall 1970).

¹⁶⁶ See DALLAIRE, *supra* note 150, at 87.

¹⁶⁷ *Id.* See generally, RENE LEMARCHAND, *BURUNDI: ETHNIC CONFLICT AND GENOCIDE* (Cambridge University Press 1994); RENÉ LEMARCHAND, *THE DYNAMICS OF VIOLENCE IN CENTRAL AFRICA* (University of Pennsylvania Press 2009).

¹⁶⁸ See *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Former Ambassador to Rwanda, Robert Flaten) (June 30, 2005).

Violence exploded in Burundi as Hutu peasants rose up with hand-weapons.¹⁶⁹ Ultimately, the Tutsi military massacred the Hutu peasantry in the tens of thousands, estimates range from 50,000 to over 100,000 victims.¹⁷⁰ Thus, by the end of 1993, Rwanda's 8 million people¹⁷¹ included the homeless, landless, unemployed refugees internally displaced in February 1993 by the RPF advance in Rwanda, and several hundred thousand refugees displaced by the massacres in Burundi in October, all of whom had stories of RPF/Tutsi military atrocities within their own villages and families.

Because the much-feared aristocratic-Tutsi RPF had established military superiority, in early Rwanda was actually much more volatile than Burundi had been in October 1993. In addition, the Burundian example, itself, demonstrated that the Tutsi-military violently rejected majority-rule elections and engaged in mass-killings of the Hutu majority, which must certainly have re-inforced the deep-seated fear of Tutsi domination, described by Ambassador Flaten. In addition, as General Dallaire reported in September 1993, in Rwanda (unlike Burundi before violence erupted in October 1993) weapons and armed bandits were everywhere even before the assassination of majority presidents;¹⁷² the economy was in a shambles; and, as described by Ambassador Flaten, the majority Hutu population was terrified that renewed domination by the Tutsi aristocracy was imminent.¹⁷³

Ambassador Flaten testified that, after witnessing the massacres in Burundi he met with then-General Paul Kagame in November 1993 and personally warned him about the potential for triggering mass violence in Rwanda, if the Arusha Accords

¹⁶⁹ See generally KRUEGER Memoirs, *supra* note 163.

¹⁷⁰ *Id.*

¹⁷¹ Filip Reyntjens, *Rwanda, Ten Years On: From Genocide to Dictatorship*, 103 AFRICAN AFFAIRS 178, 8 (2004).

¹⁷² *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit No. DB-71: Report of the U.N. Reconnaissance Mission).

¹⁷³ See Flaten 1992 memo, *supra* note 146.

ceasefire was violated. Flaten testified that he told Kagame and Habyarimana that if *either* broke the Arusha Accords ceasefire, Rwanda would explode in mass violence like Burundi and leader responsible for breaching the ceasefire would be responsible for the inevitable civilian massacres to follow.¹⁷⁴

Ambassador Flaten was not alone in understanding that the assassination of Ndadaye and the mass violence in Burundi established a dangerous precedent for the Rwandan people. General Dallaire writes in his own memoir that the assassination of Ndadaye probably made peace impossible in Rwanda, but that he didn't understand enough about the history or politics of the region to understand the significance of the assassination of Ndadaye at the time.¹⁷⁵ And, as mentioned earlier, the cable sent from the State Department Africa desk on the night of April 6, 1994 to the U.S. Ambassador anticipated that mass violence could break out in *both* Rwanda and Burundi.¹⁷⁶ According to Military-I Trial evidence, as well as pending criminal indictments in France¹⁷⁷ and Spain¹⁷⁸ charging Kagame and the RPF with the presidential assassinations, war crimes, crimes

¹⁷⁴ *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Former Ambassador to Rwanda, Robert Flaten, June 30-July 1, 2005).

¹⁷⁵ DALLAIRE, *supra* note 150, at 97-114.

¹⁷⁶ *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DNT-120: Memorandum of Prudence Bushnell); *Military-I Trial*, ICTR Case No. 98-41-T (Proposed Defence Exhibit DNT 366: Affidavit of UNAMIR Chief Military Intelligence Officer Major, Amadou Deme).

¹⁷⁷ In November 2006, French Judge Bruguiere issued an indictment for members of the RPF assassination team that shot down President Habyarimana's and triggered the civilian killings. See *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DK-125: Delivrance de mandats d'arret Internationaux, Jean-Louis Bruguiere).

¹⁷⁸ In February 2008, Spanish Judge Merelles Abreu issued another detailed 182-page indictment naming Kagame and his followers as responsible for more than 312,000 civilian deaths. See Memorandum from Roland Amousousa to Michelyne C. St-Laurent (June 10, 2008) [hereinafter French and Spanish Indictments], available at <http://www.rwandadocumentsproject.net/gsd/collect/comment/index/assoc/HASH4e91.dir/Espana-Audiencia%20nacional-English%20version.pdf>.

against humanity and genocide, Kagame resumed the war in the manner *most* likely to trigger mass violence in Rwanda, given the Burundi experience.¹⁷⁹

c. RPF “Planning and Conspiracy”: Planned Assassinations Trigger Predicted Mass Violence, and a “Blitzkrieg” Strategy to Seize Power

The evidence in the Military-I Trial runs to thousands of pages of testimony and documents which can't be completely replicated here, but a few key documents will be quoted or duplicated. However, the ICTR judges who wrote the Military-I Judgment were presented with a detailed analysis in the Ntabakuze Brief and the documents are available on the ICTR website and on the Rwanda Documents Project website.

Successful Long-Term RPF Planning for Offensive War 1990-1994

In light of historical events that are beyond dispute, the RPF achieved a rapid increase in the size of its forces from the 3-4,000 troops that had retreated to the Virunga Mountains in January 1991. By February 1993, the RPF demonstrated military superiority and by September 1993, it had armed and trained at least 20,000 light-infantry. The ultimate success of the RPF's military advance during April-July 1994 also conclusively demonstrates an advanced military combat capability and logistical infrastructure. In just 100 days the RPF moved from controlling

¹⁷⁹ As supported by *Military-I Trial*, ICTR Case No. 98-41-T (Defense Exhibit DNT-365: Affidavit of Michael Hourigan); *Military-I Trial*, ICTR Case No. 98-41-T (Proposed Defense Exhibit DNT-366: Affidavit of UNAMIR Chief Military Intelligence Officer Major, Amadou Deme); Sworn Statement of Retired FBI Special Agent James Lyons (April 6, 2001), available at <http://www.rud-urunana.org/index.asp?op=51&tb=11&id=208>; French and Spanish indictments, *supra* note 178. See also DEME, *supra* note 145.

only a small area near the northern border of Uganda to exercising military dominance over the entire country.¹⁸⁰

According to testimony of former RPF officers, between the spring of 1993 and the spring of 1994, the RPF established 3 weapons caches of 200-300 tons each inside Rwanda.¹⁸¹ According to Dallaire's military intelligence officer, Capt Amadou Deme, the inflow of *materiel* and troops from Uganda increased markedly in the weeks before April 1994:

A few weeks [before April 6], our team collected information regarding a massive incursion of troops, weapons and ammunitions from Uganda and that those troops were more from the NRA [the Ugandan army] to support RPF forces¹⁸². . . Furthermore, anyone who would differentiate RPF and NRA, meaning Ugandan forces, is simply proving his dishonesty and unreliability. . .¹⁸³

Among these weapons supplied from Uganda¹⁸⁴ were the missiles that the RPF eventually used to assassinate the two Presidents on the night of April 6, 1994.¹⁸⁵ The missiles were transported to the RPF headquarters, stored in Kagame's per-

¹⁸⁰ See Christian Davenport and Alan Stam, *What Really Happened in Rwanda*, MILLER-McCUNE, October 6, 2009, available at <http://www.miller-mccune.com/politics/what-really-happened-in-rwanda-3432>. See MADAME PROSECUTOR *supra* note 17, at 223; see also *Military-I Trial*, ICTR Case No. 98-41-T; see also *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DNT 216: Abdul Ruzibiza, *The Secret History of Rwanda*).

¹⁸¹ *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9-10, 2006); *Military-I*, ICTR Case No. 98-41-T (Testimony of BRA-1). See also *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DNT-216: Lt. Abdul Ruzibiza, *The Secret History of Rwanda*).

¹⁸² See also DEME, *supra* note 145, at 9.

¹⁸³ *Id.* at 28.

¹⁸⁴ Dallaire suspected RPF supplies were being transported from Uganda into Rwanda as early as September 1993. See DALLAIRE, *supra* note 150, at 88.

¹⁸⁵ *Id.* *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9-10, 2006); Testimony of BRA-1, *supra* note 181. See also

sonal quarters to as not to be discovered, then transported to the RPF base in Kigali disguised in loads of firewood¹⁸⁶ and put in place on the night of April 6, after a failed assassination attempt on the night of April 5.¹⁸⁷ According to Capt. Deme, after April 6 the presence of Ugandan troops with RPF troops became even more apparent at RPF headquarters in Kigali:

. . .the operations room and the whole CND [RPF headquarters in Kigali] were crowded with recently arrived military staff. . .they were different from regular RPF troops. They were English speakers with a pronounced accent and green army fatigues. They were certainly backed by Ugandan regular army. . .¹⁸⁸

***April 6, 1994: Two Presidents Assassinated and the RPF
“Blitzkrieg” Begins¹⁸⁹***

According to a document signed on March 28, 1994 by all parties to the continuing negotiations to implement the Arusha Accords, including the United States, the Rwandan government, the Ugandan government and the *papal nuncio*, the RPF was obligated to accept minority status and give up its superior military position.¹⁹⁰ The only party not to sign the agreement was the RPF.¹⁹¹ An April 1, 1994 cable from the U.S. embassy in

Military-I Trial, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9, 2006). See also DEME, *supra* note 145.

¹⁸⁶ DALLAIRE, *supra* note 150, at 88.

¹⁸⁷ *Id.*

¹⁸⁸ DEME, *supra* note 145, at 101.

¹⁸⁹ “The RPF offense . . . started in blitzkrieg fashion.” See *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DNT-111: Code Cable MIR 782 from Roméo Dallaire to Maurice Baril).

¹⁹⁰ *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DNT-104: Joint Statement Allowing CDR to Enter Government). This document reflects the countries that had been observing the Arusha Accords negotiations and implementation process since 1993, or before.

¹⁹¹ *Id.*

Kigali to the embassy in Kampala, Uganda made clear that U.S. State Department policy favored Kagame accepting minority political status, as did the entire diplomatic community that signed the document.¹⁹² But, according to the testimony of former RPF officers involved in the operation, on April 1, 1994 Kagame opted to use superior RPF military power and gave the order to assassinate Habyarimana to members of the shoot-down crew, who had infiltrated Kigali.¹⁹³

According to former RPF officer testifying under a pseudonym,¹⁹⁴ on April 4, all RPF commanders from the various combat battalions gathered in the RPF headquarters in Mulindi in northern Rwanda. The commanders were in position to receive simultaneous orders to launch a final assault when the time came. During the evening of April 6, while the troops and commanders were gathered in a common room watching the Africa Cup match, a messenger came into the room and whispered in Kagame's ear. He left the room with his security detail, returned in 15 to 20 minutes and announced that Habyarimana had been killed and that the assault to seize power had begun.¹⁹⁵

This order for the final assault on the night of April 6, 1994 was given within minutes of the assassination of the Presidents, and long before any violent reactions could have occurred in

¹⁹² *Military-I Trial*, ICTR Case No. 98-41-T, (Defence Exhibit DT-121: Code Cable from US Ambassador Rawson in Kigali to U.S. Embassy in Kampala, Uganda).

¹⁹³ *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9-10, 2006); *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9, 2006). RPF infiltration of Kigali, as well as many institutions including the military and the "militias" associated with political parties, was confirmed in the testimony of former RPF officer Aloys Ruyenzi in ICTR testimony in November 2010.

¹⁹⁴ For security of this witness, who testified in closed session and who is in asylum outside of Rwanda, the name and dates of testimony are being excluded by the author.

¹⁹⁵ *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9-10, 2006); *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9, 2006); *Military-I Trial*, ICTR CASE NO.-98-41-T (Testimony of BRA-1).

Kigali in reaction.¹⁹⁶ Confirmation that the RPF assault actually began within minutes of the assassination of the two Presidents was also confirmed by former Chief of U.N. military intelligence, Captain Amadou Deme, whose quarters were close to the RPF base at the CND in Kigali. According to Deme, the sound of aimed shots, as opposed to random, began in the valley area behind the RPF base long before FAR troops came out of their bases later that night, or early the next morning.¹⁹⁷

On the night of April 6, the RPF commanders returned to their units to begin the assault and within two-weeks, the eastern one-third of Rwanda (from the northeastern border to the southeastern border) was under RPF control. Meanwhile, the 6,000-7,000 FAR “fighting troops” of the Rwandan government were tied down defending Kigali and Ruhengeri in the northwest, as part of the RPF strategy to eliminate meaningful resistance in the rest of the country.¹⁹⁸ As Dallaire predicted, the new recruit “rabble” provided little organized resistance in the rest of the country as the highly efficient RPF swept them from their path. On April 24, 1994, Dallaire met Kagame at his Mulindi headquarters to ask why his highly organized troops seemed to be more interested in seizing territory than saving lives. According to Dallaire’s report of the meeting, Kagame told Dallaire that the civilian deaths were, in effect, collateral damage for his war plan.¹⁹⁹

We entered into a discussion of the situation on the battleground. . .there was no doubt Kagame

¹⁹⁶ *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9-10, 2006).

¹⁹⁷ DEME, *supra* note 145, at 57-59.

¹⁹⁸ See Davenport and Stam, *supra* note 180; MADAME PROSECUTOR *supra* note 17, at 223; *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9-10, 2006); *Military-I Trial*, ICTR Case No. 98-41-T (Testimony of Lt. Abdul Ruzibiza, March 9, 2006).

¹⁹⁹ See DALLAIRE & BEARDSLEY, *supra* note 56; see also *Military-I Trial*, IRTC Case No. 98-41-T (Defence Exhibit DNT-187: Code Cable from Roméo Dallaire to Kofi Annan).

had pinned down with minimum effort, a number of RGF battalions defending the Ruhengeri Hutu heartland. This permitted him, after seizing Byumba. . .to proceed south as far as the Tanzanian border and seal it up at the river. Concurrently, he was moving his assault forces west, below, Kigali on the main axis of the paved road to the capital. Kigali was clearly being surrounded for a show-down. . .I had asked Kagame why he wasn't going straight for the jugular in Kigali, and he ignored the implications of my question. He knew full well that every day of fighting on the periphery meant certain death for Tutsi still behind RPF lines.²⁰⁰

A similar conclusion was drawn by Dallaire's chief of military intelligence, Capt. Amadou Deme:

For weeks, [the] RPF seemed to have frozen its offensive over Kigali itself and was just putting pressure on the city with heavy shelling. Of course. . .that was giving enough time. . .and capacity to criminals to still carry on their killings on civilians. . .[the] RPF did not put efforts to. . .bring an end to the killings of civilians. . .²⁰¹

The details of this rapid "blitzkrieg" style advance were shown on maps during trial,²⁰² which has been duplicated by Professor Alan Stam of University of Michigan and Professor Christian Davenport of the University of Notre Dame who have tracked the day-by-day RPF military advance of the RPF in a power-point on their website.²⁰³

²⁰⁰ DALLAIRE, *supra* note 150, at 327.

²⁰¹ DEME, *supra* note 145, at 157.

²⁰² See *Military-I Trial*, ICTR-98-41-T (Testimony of Lt. Abdul Ruzibiza). (2006) See also, *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT-216).

²⁰³ See Genodynamics website showing daily progress of the RPF assault at <http://www.genodynamics.org>.

The fact of the “blitzkrieg” advance reveals RPF military planning and provisioning.²⁰⁴ The style of warfare itself, then, is evidence of “long-term planning” and highly organized supply lines and regular sources of supplies. Between early 1991 and April 1994 when the “blitzkrieg” was successfully launched, former RPF officers testified that the RPF continued to plan offensive military actions and to receive large amounts of military supplies through their supply lines in Uganda.²⁰⁵ These supply lines enabled the RPF to carry out offensive military actions on a large scale, as confirmed by the U.N. chief of military intelligence Captain Amadou Deme.²⁰⁶

After Burundi-like Massacres Sweep Rwanda, Reports of Kagame/RPF Crimes Begin to Mount

In addition to destabilizing the entire country to facilitate its military offensive, the assassination of President Habyarimana brought another advantage to the RPF as well. The senior members of the Rwandan military staff were also on the plane and were killed along with the President.²⁰⁷ In just one stroke, both the government and the military were de-stabilized and had to be re-organized at the same time that they had to defend against the RPF advance in the largely undefended eastern part of the country.²⁰⁸ To make matters even more challenging, Burundi-

²⁰⁴ Raymond Bonner, *How Minority Tutsi Won the War*, N.Y. TIMES, September 6, 1994.

²⁰⁵ See *Military-I Trial*, ICTR-98-41-T (Testimony of Lt. Abdul Ruzibiza). See also, *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT-216); *Military-I Trial*, ICTR-98-41-T (Testimony of BRA-1).

²⁰⁶ DEME, *supra* note 145, at 100-102. Capt. Deme also catalogues some 15 factors he observed that caused him to conclude that the RPF intended to resume their assault for power long before April 6, 1994. See *Id.* at 152-3.

²⁰⁷ *Id.* at 57. Also on board were the joint chief of staff of the Rwandan army, General Deogratias Nsabimana, the President’s chief of the cabinet, Colonel Sagatwa, and Major Bagaragaza. See *Military-I Trial*, ICTR-98-41-T (Defence Exhibits DB 103B1 and DB 103B2: Communique from the Minister of Defence).

²⁰⁸ *What Really Happened in Rwanda*, *supra* note 35.

like mass communal violence had started to break out in various parts of the country, as U.S. Ambassador Flaten had predicted.²⁰⁹

In fact, because of the differences in military capability, according to U.N. documents put into evidence through their author U.N. General Dallaire, the defending FAR army repeatedly requested a ceasefire or the assistance of the RPF to form a single army to quell the civilian violence triggered by the assassination of the Presidents. The FAR military acknowledged that it did not have the capacity to defend against the RPF assault and to put down the massacres at the same time, as noted by U.N. military intelligence chief, Captain Deme:²¹⁰

. . .all requests for a truce were refused by the RPF because their war machine was already en route [the FAR/RGF] were simply not able to face an offensive, destructive, fast, well-supported enemy to focus on the interior of the country to help organize and fight against the perpetrators of the killings. . .[the FAR/RGF] simply could not do both. . .having responsibility of the integrity of the territory and destabilizing order inside. . .the RPF [should have] accept truce for humanitarian life-saving purposes because they were facing major and generalized killings of. . .both ethnic groups. Failing to do so was a crime against humanity [t]hat was simply immoral.

The FAR requests for a ceasefire began on the night of the assassinations on April 6 and continued during the entire 100-days:

That evening [April 12, 1994] Brent [Beardsley] brought me a copy of a *communiqué commande-*

²⁰⁹ See *Military-I Trial*, ICTR-98-41-T (Testimony of Former Ambassador to Rwanda, Robert Flaten).

²¹⁰ DEME, *supra* note 145, at 29.

ment des forces armees Rwandaises, it pleaded for a face-to-face meeting between Gatsinzi and Kagame. . .they stated there was too much killing, and they were submitting to an unconditional surrender. . .I applauded the courage it took to make it, and their desire to stop the war. . .²¹¹

But, General Dallaire concluded within the following week that Kagame would not agree to a ceasefire to put down the massacres because “he was winning the war”²¹² for complete control over the entire country. According to Dallaire, the RPF refused to accept any proposal from the interim government. . . “[t]he RPF, winners on the battlefield so far, would never agree to these RGF points.”²¹³

At least one of these ceasefire requests from the Rwandan government to the RPF was conveyed through the U.N. on April 30, 1994, after negotiations in Nairobi. Gen. Dallaire met with Kagame to convey yet another ceasefire proposal. According to Dallaire, Kagame “was not going to be happy with any reinforcement of UNAMIR that looked like an intervention force. With the ceasefire going nowhere fast and his successes mounting on the battlefield, it was obvious why he wouldn’t be.”²¹⁴ According to Dallaire, Kagame also threatened to attack U.N. troops, if the Security Council should send in “peace-makers” to save the refugees being killed because of the war, and Kagame also denied that the killings were ethnically motivated:

The UN is looking at sending an intervention force on humanitarian grounds, but for what reason? Those that were to die are already dead. *If an*

²¹¹ DALLAIRE & BEARDSLEY, *supra* note 56 at 292.

²¹² See *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT-187: April 24, 1994 Code Cable from Roméo Dallaire to Kofi Annan); *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT-111: April 17, 1994 Code Cable MIR 782 from Roméo Dallaire to Baril). See also, DALLAIRE & BEARDSLEY, *supra* note 56, at 311.

²¹³ DALLAIRE & BEARDSLEY, *supra* note 56, at 340.

²¹⁴ *Id.* at 342.

*intervention force is sent to Rwanda we will fight it. Let us resolve the problem of the Rwandans. This force is to protect the criminals in power. The international community cannot even condemn the massacres of poor innocent people. It is presenting the Rwandan problem as an ethnic one, which is incorrect as the massacres were against Tutsi and the opposition. . . The SRSG (the U.N. representative) is not welcome anymore in Rwanda. We do not recognize him, and if he stays we will cease to collaborate with the UN.*²¹⁵

The documentary evidence and the testimony in the Military-I Trial show that the “hero of the Rwandan genocide,” Paul Kagame: triggered the mass violence by assassinating two presidents after having been warned by U.S. Ambassador Flaten of the consequences of resuming the war; refused to agree to a ceasefire to permit FAR troops to put down the massacres after they began; refused to permit RPF troops to put down the massacres in favor of his war-plan to seize total power; and, threatened to attack U.N. forces that might be sent to Rwanda to stop the massacres. And, in the midst of the “Rwanda genocide,” he denied that the mass killings were ethnically motivated.

Evidence of Other RPF Crimes Prior to April-July 1994

Evidence of the assassinations of the two Presidents was not the only RPF crime evidence that was put into the record in the Military-I Trial. The U.N. documents also showed that as early as May 17, 1994, the U.N. High Commission for Refugees began receiving reports of mass killings by RPF troops in the eastern one-third of Rwanda. The following are excerpts of a UNHCR-Ngara protection report, made on May 14-15:

²¹⁵ *Id.*

The presence of the RPF at the border and across the border. . .raises critical security concerns. . .

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. . .**
- 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 end the bloodshed, the atrocities, the massacres, in Rwanda²¹⁶.

Even before the RPF resumed its assault to seize power on April 6, 1994, investigating and reporting on crimes in RPF-controlled areas was extremely problematic because the RPF exercised absolute control over information in these areas. As discussed in a report issued by Amnesty International in October 1994:

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. . . .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.²¹⁷

²¹⁶ *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT-259: UNCHR Report of RPF killings at Rusomo Bridge to Tanzania, over Kagera River, in southeastern Rwanda) (emphasis added).

²¹⁷ *See Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT 258).

Reports from Human Rights Watch from September 1994 described additional RPF crimes, committed before the RPF seized state power in mid-July 1994:²¹⁸

- 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.

Not even the U.N. forces were able to get information on RPF activities behind their lines, before or after April 1994, as described by U.N. Capt. Deme:

. . .there never has been, even once, free movement of the UNAMIR or previous GOMN [border military observers] in [the] RPF zone. Even the Force Commander [General Dallaire] would never have been granted of such liberty. . .although he was authorized under his mandate at the Uganda/Rwanda border to monitor the movement of troops, ammunitions, and weapons on a few number of crossing points. . .that were

²¹⁸ *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT 261).

officially recognized.²¹⁹ This [NRA troops at RPF headquarters in Kigali after April 6] made me think of the total refusal of [the] RPF regarding the principle of conducting joint patrols with RGF (FAR) military and UNAMIR along the DMZ. . . That made sense if the RPF had on its agenda the idea of resuming hostilities.²²⁰

The total control of information in areas controlled by the RPF was not an accident. President Kagame has boasted that RPF skill in managing information to its benefit was part of the RPF arsenal of weapons.

We used communication and information warfare better than anyone. We have found a new way of doing things.²²¹

The inability to get information from behind RPF lines made total control of information regarding RPF crimes possible, but the evidence of the RPF crimes began to leak out and was recorded in the suppressed U.N. "Rwanda Genocide Papers."

Evidence of RPF Crimes Committed After July 1994

As described by Amnesty International, getting independent information from behind RPF was extremely difficult.²²² The documents secured from the U.N. also established that in August 1994 the U.N. High Commissioner for Refugees compiled the only known independent human rights investigation from *any* area controlled by the RPF before, during or after the war. Robert Gersony, a U.S. State Department Human Rights inves-

²¹⁹ DEME, *supra* note 145, at 28.

²²⁰ *Id.* at 101.

²²¹ Reyntjens, *supra* note 35, at 199 n.85-93 (citing NIK GOWING, NEW CHALLENGES, AND PROBLEMS FOR INFORMATION MANAGEMENT IN COMPLEX EMERGENCIES: OMINOUS LESSONS FROM THE GREAT LAKES AND EASTERN ZAIRE IN LATE 1996 AND EARLY 1997 (May 1998), available at http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:1848).

²²² See *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT 258).

tigator paid for by the USAID (United States Agency for International Development) and assigned to UNHCR (United Nations High Commission for Refugees), managed to spend July and August behind RPF lines. He reported to the U.N. High Commissioner Madame Sadako Ogata, that the RPF was killing thousands of civilians a month in military-style executions.²²³

Versions of this “Gersony Report,”²²⁴ which detailed massive RPF killings, was given to the U.N.’s Madame Ogata, Kofi Annan, and others, as well as the U.S. State Department’s Brian Atwood, George Moose and then Secretary of State Warren Christopher. A memorandum from the Undersecretary of State for Africa, George F. Moose notified U.S. Secretary of State Warren Christopher that the RPF was in the process of committing war crimes when the memo was sent in September 1994:

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

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**

²²³ *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DK-112).

²²⁴ Isabelle Vichniac, *Un rapport confidentiel faisait état de la mort de 30,000 Hutus, La controverse persiste sur les allegations du HCR*, LE MONDE, Oct. 10, 1994.

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 or 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.²²⁵

This memorandum shows that by mid-September 1994, the U.S. Secretary of State knew that the RPF was committing mass crimes which were either war crimes, crimes against humanity, or genocide. However, to date, no one in the RPF has ever been held accountable for these crimes.

Former RPF Foreign Minister Jean Marie Ndagijimana's testimony at the ICTR confirms that both the upper levels of U.N. and U.S. government were well aware of the crimes being systematically committed by the RPF no later than September 1994.²²⁶ Ndagijimana was a diplomat in the former Rwandan Government. He had been at his new post in the RPF Rwandan government for only a month in September 1994 when he attended meetings at the U.N. and Washington wherein Kofi Annan and representatives of the State Department informed him of the RPF crimes reported by Gersony. He testified he was not willing to take part in a cover-up of the crimes of a government he had just joined. Instead, Ndagijimana resigned immediately and went into exile.²²⁷ According to a recent report to the Brit-

²²⁵ *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DT-264).

²²⁶ *Id.*

²²⁷ *Military-I Trial*, ICTR-98-41-T (Testimony of Former RPF Foreign Minister Jean-Marie Ndagijimana).

ish Commonwealth regarding Rwanda's membership in the Commonwealth:

Kagame had the powerful support of the United States of America and the United Kingdom, as well as the UN. This is best illustrated by the Gersony report "incident". . . His report was scrutinized and forwarded by the High Commissioner for Human Rights, Ms. Sadako Ogata. . . UN Secretary General Boutros –Ghali became very concerned about the impact on the UN. He ensured that the report was not published, and initiated the process of de-legitimising Gersony's findings, with the approval of the United States of America. Kofi Annan. . . was instructed to follow up, and to ensure that the report was not made public. . . There certainly were crimes against humanity in that period within the ICTR jurisdiction, but powerful international forces in collusion with the RPF ensured that the ICTR took no action.²²⁸

Evidence put into the Military-I Trial record from contemporary news reports indicates that RPF crimes were not limited to the areas investigated by Robert Gersony. Following the RPF seizure of power in July 1994, a million or more Hutu refugees escaped to the Congo.²²⁹ Refugees who attempted to return to Rwanda reported to the *New York Times* that RPF killings greeted them on their return.²³⁰

²²⁸ COMMONWEALTH HUMAN RIGHTS INITIATIVE, RWANDA'S APPLICATION FOR MEMBERSHIP OF THE COMMONWEALTH: REPORT AND RECOMMENDATIONS OF THE COMMONWEALTH HUMAN RIGHTS INITIATIVE 33 (2009), available at http://www.humanrightsinitiative.org/publications/hradvocacy/rwanda%27s_application_for_membership_of_the_commonwealth.pdf.

²²⁹ See Reyntjens, *supra* note 35, at 194-97 (discussing RPF crimes dating from 1992 and continuing through publication of the article in 2004). See also Douglas Jehl, *Pact Reached on Return of Rwandans*, N.Y. TIMES, NOV. 30, 1995; Dilip Gahuly, *Hutu Bodies in Akagera River*, SEATTLE TIMES, Aug. 31, 1994.

²³⁰ See *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DNT-260A).

RPF Crimes Now in the Public Record 1993-Present

In November 2007, French Judge Bruguiere issued an indictment for members of the RPF assassination team that shot down President Habyarimana's and triggered the civilian killings.²³¹ And, in February 2008, Spanish Judge Merelles Abreu issued another detailed 182-page indictment²³² naming Kagame and his followers as responsible for more than 312,000 civilian deaths.

- Kigali-19,331 dead;
- Kigali Rural- 37,410 dead;
- Gitarama-39,912 dead;
- Butare-33,433 dead;
- Gikongo-17,545 dead;
- Kibuye-23,775 dead;
- Gisenyi-3,100 dead;
- Ruhengeri-8,750 dead;
- Byumba-73,365 dead;
- Kibungo (site of Gersony's investigations) -39,745 dead.

Because the U.N. Tribunal concerns itself only with crimes committed during 1994, the crimes committed by the RPF after 1994 were not relevant to the ICTR proceedings, but the evidence of massive crimes in the public record continues to mount. In April 1995, upwards of 10,000 unarmed refugees, mainly women and children, were massacred at the Kibeho refugee camp in southwestern Rwanda.²³³ In 1996 and 1998 Rwandan and Ugandan armies invaded the Congo, ostensibly to root out "genocidaires" who had escaped and were living among refugees there.

²³¹ See *Military-I Trial*, ICTR-98-41-T (Defence Exhibit DK-125).

²³² Merelles indictment, *supra* note 178.

²³³ See Reyntjens, *supra* note 35, at 194-97.

However, U.N. Security Council-commissioned expert reports of 2001,²³⁴ 2002²³⁵, 2003²³⁶ and December 2008²³⁷ reveal that these invasions have actually been a cover for the illegal exploitation of resources in the eastern Congo which has greatly increased the wealth of Rwandan and Ugandan Elites. Most recently, the 600-page report, compiled for the U.N. High Commissioner for Human Rights and recently leaked to *LeMonde* and the New York Times,²³⁸ documents crimes committed by RPF troops in the Congo. The Report discusses not only illegal exploitation of resources but also the commission of war crimes, crimes against humanity and “genocide against Hutus.”²³⁹

d. Evidence of the U.S.-Engineered ICTR Cover-up

The publication of the English language edition of Carla Del Ponte’s memoir in February 2009²⁴⁰ explains exactly how the U.S. State Department engineered the one-sided victor’s tribunal at the ICTR. Del Ponte details that she was sacked in 2003 for her willingness to prosecute the RPF at the ICTR.²⁴¹ The cover-up of RPF crimes, however, began long before Ms. Del Ponte was relieved of her duties in 2003.²⁴²

By the time Del Ponte had made her opening statement in the ICTR Military-I trial, she had already received Judge

²³⁴ U.N. S.C. Panel of Experts Rep. on the Illegal Exploitation of the Democratic Republic of the Congo, U.N. Doc. S/2002/1146 (Oct. 16, 2002).

²³⁵ U.N. S.C. Panel of Experts Rep. on the Illegal Exploitation of National Resources and Other Forms of Wealth from the Democratic Republic of the Congo, U.N. Doc. S/2003/1146 (Oct. 20, 2003).

²³⁶ U.N. S.C. Panel of Group of Experts Rep. on the Democratic Republic of the Congo, U.N. Doc. S/2004/551 (Jul. 15, 2004).

²³⁷ U.N. S.C. Panel of Experts Final Rep. on the Democratic Republic of the Congo, U.N. Doc. S/2008/773 (Dec. 12, 2008).

²³⁸ See *Congo Mapping Reports*, *supra* note 53. See also, Jason Stearns, *supra* note 7.

²³⁹ See *Congo Mapping Reports*, *supra* note 53.

²⁴⁰ MADAME PROSECUTOR, *supra* note 17, at 372.

²⁴¹ *Id.* at 233.

²⁴² *Id.* at 191-92.

Bruguière's confirmation of Kagame's culpability for Habyarimana's assassination.²⁴³ Del Ponte's predecessor, Louise Arbour, had long participated in covering-up Kagame's involvement in the assassination of the two Presidents as former ICTR Chief Investigative Prosecutor, Australian Queen's Prosecutor Michael Hourigan's affidavit describes:²⁴⁴

In late January, or early February 1997, members of the National Team were approached by three informants, either former or serving members 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. . .

I informed Judge Arbour in considerable detail about the information implicating President Kagame. . .

Judge Arbour then advised me that the National Team investigation was at an end because in her view it was not in our mandate. . .[and] asked me if the memo I prepared was the only copy. I informed her it was and she said she was pleased to hear that and placed it in her office filing cabinet. . .a short time later I resigned from the ICTR.²⁴⁵

In the fall of 1994, just after Gersony reported mass RPF crimes, Kofi Annan and other U.N. officials attended meetings in Nairobi. U.N. documents report that the purpose of these meetings was to devise a way to suppress the contents of the Gersony

²⁴³ *Id.*

²⁴⁴ This description of events is supported by a public statement by former FBI Special Agent James Lyons and former UNAMIR Military Intelligence Officer Amadou Deme, both of whom served with Hourigan on the National Team. *See Military-I Trial*, ICTR Case No. 98-41-T (Proposed Defence Exhibit DNT 366). *See generally*, DEME, *supra* note 145.

²⁴⁵ *See Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DNT 365).

report because the report would be “embarrassing to the U.N. and the Rwandan government.”²⁴⁶ Within the ICTR Prosecutor’s office this was far from a secret. According to Prof. Filip Reyntjens, formerly an expert witness for the ICTR prosecution:

Although it was clear that the RPF had committed crimes that fell squarely within the mandate of the ICTR²⁴⁷, the risk of impunity for the victors was apparent from the early days of the tribunal’s operation. During a conversation with the first Prosecutor, Richard Goldstone, in July 1996, I asked him whether he intended to prosecute RPF suspects. Irritated, he replied he saw no reason for doing so. When I told him that there was compelling *prima facie* evidence of these crimes, he got even more irritated and stated emphatically that there was no such *prima facie* evidence. That was the end of our brief conversation. Clearly, the OTP [Office of the Prosecutor] was not starting its operation with an open mind, and this mindset has handicapped it ever since.

In April 2003, towards the end of Carla Del Ponte’s term as Prosecutor, I was in Arusha together with Alison Des Forges to run a seminar for OTP staff. We were brought in contact with the so-called “special investigations” team, put in place to work on the “second mandate”, the one related to crimes committed by the RPF. The team wanted to discuss evidence and strategy. We were quite impressed by their work: they had assembled extensive data on between 15 and 20 massacres by

²⁴⁶ See *Military-I Trial*, ICTR Case No. 98-41-T (Defence Exhibit DK-112).

²⁴⁷ This was already unequivocally stated in the May 1994 report of UN special *rapporteur* René Degni-Segui. See Filip Reyntjens, *Governance in Post-Genocide Rwanda*, 9 AFR. AFFAIRS 1 (Jan. 2010).

the RPF. As it was unlikely that all these could be prosecuted, we exchanged on selecting files that could as a priority be formulated as indictments; and we agreed on four cases: Butare (in particular the killings at the agro-veterinary school and in the arboretum) upon the arrival of the RPF in July; the regional stadium of Byumba in April; Giti, an atypical municipality as no Tutsi were killed there, also in April; and Gakurazo, where the RPF killed bishops, other clergy and civilians in June. For all these cases, there is a great deal of evidence and the suspects are known. At the end of our meetings, we felt confident that indictments could soon be issued. More than six years later, nothing has happened.²⁴⁸

Moreover, the Gersony report was not the only suppressed report of RPF crimes in Rwanda in 1994. U.N. human rights investigator Roberto Garreton, a well-known Chilean lawyer who was to play an active role in the prosecution of Chilean dictator Pinochet in 1999 apparently submitted a report to the Security Council regarding RPF crimes in Rwanda in 1996, which was also suppressed.²⁴⁹ But, prosecution of the RPF is not on ICTR Prosecutor's agenda²⁵⁰, despite all of the evidence that showed that: there never *was* a "long-planned conspiracy to commit genocide" by the former military and government;²⁵¹ the RPF leaders were always the militarily superior aggressors;²⁵² that

²⁴⁸ Filip Reyntjens, "Prosecutorial Policies in the ICTR: Ensuring Impunity for the Victors," (Monograph, Institute of Development Policy and Management, University of Antwerp (July 30, 2010).

²⁴⁹ Michell Faul, *A second Rwanda genocide is revealed in Congo: UN Report ties Tutsi soldiers to deaths of thousands of Hutus*, Oct. 10, 2010 at <http://www.msnbc.com>.

²⁵⁰ See *supra* note 43 and accompanying text.

²⁵¹ Military-I Trial, ICTR Case No. 98-41-T (2004) (Testimony of Robert Flaten).

²⁵² Davenport, *supra* note 179; see also Military I, ICTR Case No. 98-41-T (2004) (Defense Exhibit DNT-216); Military-I Trial, ICTR Case No. 98-41-T

Paul Kagame ordered the assassination of the two Presidents;²⁵³ and, that Kagame took advantage of the predicted communal violence that followed to seize power.²⁵⁴

IV. THE CONSEQUENCES OF ICTR “VICTOR’S IMPUNITY” FOR AFRICA AND U.S. INFLUENCE IN THE DEVELOPING WORLD

Of course, common logic and experience teaches that the Rwanda War *could not* be the only war in history in which only the vanquished committed crimes. The one-sided prosecutions at the ICTR provide irrefutable evidence that the tribunal proceedings have been manipulated to ensure impunity for the crimes committed by the RPF and Paul Kagame. But, the revelations of Carla Del Ponte²⁵⁵ and Florence Hartmann²⁵⁶ make speculation unnecessary as to the source and nature of the behind-the-scenes manipulation. The government of the United States of America has provided Paul Kagame and the RPF with impunity for massive crimes for years and has muzzled and prosecuted former ICTR officials who have told the truth about the functioning of the ICTR. The question is, *why* would both Re-

(2004) (Defense Exhibit DB-71) p.12; *see also* KINZER, *supra* note 134; WAUGH, *supra* note 34.

²⁵³ *See supra* note 178 and accompanying text.

²⁵⁴ Military-I Trial, ICTR Case No. 98-41-T (2005) (Defence Exhibit DNT-111).

²⁵⁵ MADAME PROSECUTOR, *supra* note 17; *see also* Katie Paul, *Silent Warrior: She’s Faced Down the Mob and Genocidal Dictators. So Why is Carla Del Ponte Barred from Discussing Her Own Book?*, NEWSWEEK WEB, Feb. 27, 2009, available at <http://www.newsweek.com/2009/02/26/silent-warrior.html>.

²⁵⁶ HARTMANN, *supra* note 18; *see also* *Former ICTY Spokesperson in Dock for Contempt of Court*, HIRONDELLE NEWS AGENCY, Oct. 28, 2008, available at <http://www.hirondellenews.com/content/view/43/310/>; *see also* *Hague Court Charges Ex-Official: A Former Spokesperson for the United Nations War Crimes Court in the Hague Has Been Charged With Revealing Confidential Information*, BBC NEWS, Oct. 28, 2008.

publican and Democratic administrations go to such lengths to protect Kagame over some 15-years?

The only possible conclusion is that U.S. policy-makers *must* consider maintaining deniability of the crimes of Mr. Kagame's regime as extremely important to U.S. interests. But, Rwanda is not blessed with strategic minerals, or a strategically significant location (except as a launching point for extending military and commercial activities into the heart of the extraordinarily resource-rich eastern Congo)²⁵⁷ that would explain such unwavering U.S. support in the face of this evidence of the repeated commission of mass crimes by Kagame's RPF.²⁵⁸ The answer may lie in the apparent contradictions between Pentagon and State Department approaches to RPF support prior to the RPF seizure of power in July 1994. The U.N. and U.S. government documents in the Military-I record, as well as those on the Rwanda Documents Project website, provide a hint that the source of U.S. interest in protecting the Kagame regime may have arisen from the apparent contradiction between Pentagon military support for Kagame between 1990 and 1994, and State Department policy encouraging a non-military resolution of the Rwanda war.²⁵⁹

While State Department policy between 1991-1994 was to support the Arusha Accords peace agreement and RPF acceptance of minority political status,²⁶⁰ the rapid growth of RPF forces between 1991 and 1993 and the continuing military support flowing through U.S. /U.K. - supported Uganda between 1992 and July 1994, suggest that the State Department and Pentagon were acting at cross-purposes with respect to the balance of power in Rwanda. In retrospect, at the same time the State

²⁵⁷ See *infra* note 282.

²⁵⁸ Stearns *supra* note 7.

²⁵⁹ See J. Bryan Atwood & M. Peter McPherson, *Arrested Development: Making Foreign Aid More Effective*, FOREIGN AFFAIRS, Nov.-Dec. 2008 (discussing the problem of outsized Pentagon influence on foreign policy).

²⁶⁰ Military-I Trial, ICTR Case No. 98-41-T (2004) (Defence Exhibit DT-121).

Department was advocating compromise and acceptance of minority political status by the RPF prior to April 1994, the Pentagon apparently was assisting the RPF to develop and enlarge its military capability to achieve dominance which, by February 1993, made compromise and relinquishing RPF military superiority much less likely.

The public record provides confirmation of continuing Pentagon/RPF collaboration and cooperation both before and after the "Rwandan genocide". According to the U.N. chief of intelligence, Capt. Deme, a company of U.S. Marines and helicopters was in Burundi not later than April 8, 1994, which suggests that the command decision to send them there must have occurred either before, or very shortly after, April 6, 1994.²⁶¹ And, these military assets must have been moved from elsewhere in Africa, or from outside Africa, which implies that the Pentagon may well have had foreknowledge of instability breaking out in Rwanda before it occurred on April 6. Then within days of the RPF seizure of power in Kigali on July 19, 1994, U.S. troops landed in Kigali in tacit support of the new regime,²⁶² which *could* only occur if the Pentagon had prior contacts with the RPF which U.S. commanders considered positive enough to rely on the *bona fides* of the untested regime, despite the chaos of the 100-days following the assassination of the Presidents. The Pentagon respect for Kagame as a military leader was clearly expressed, shortly after the assassination of the two presidents and the RPF resumption of the war, was expressed in the *Washington Post* on April 27, 1994 by Colonel Jim McDonough, a U.S. Special Forces commander who later went to Rwanda in 1996-7, while Rwanda troops were invading the Congo for the first time. According to McDonough, Kagame was ". . .an intel-

²⁶¹ DEME, *supra* note 145, at 75.

²⁶² Tony Leonard, *U.S. Troops Arrive in Rwanda for Relief Effort*, SEATTLE TIMES, July 31, 1994.

lectual figure. I would rate him as a first rate operational fighter. . .”²⁶³

But, the close connection between Kagame’s RPF and the Pentagon appears in the public record in other ways, as well. Not only had Kagame received training at the U.S. Army Staff College at Ft. Leavenworth, Kansas in 1990, but one of his classmates Major Anthony Marley was the U.S. military observer at the Arusha Accords negotiations,²⁶⁴ following the RPF assault in February 1993 which established RPF military dominance, in fact. It seems unlikely that Marley did not grasp the implications of RPF military superiority, in light of Ambassador Flaten’s assessment of the political consequences of RPF military success, as early as 1992.²⁶⁵

Marley’s admiration for the command skills of Kagame, and presumably the Pentagon’s, were apparently undiminished by Kagame’s role the presidential assassinations, the assault to seize power in Rwanda, or the invasions of Congo in 1996 and 1998 because, at a 1998 conference on “peace and security in Africa,” Marley wrote:

One reason why American officials are enamored of Rwandan [then] vice-president Kagame is that he knows how to communicate with them in a quintessentially American way. He is blunt, direct and conveys an air of simplicity and sincerity.²⁶⁶

The apparently conflicting policies between the State Department and the Pentagon are also demonstrated during July and August 1994, when the State Department was sending a human rights investigator Robert Gersony behind RPF lines to surreptitiously investigate crimes committed by the same RPF military that U.S. troops were supporting in Kigali in mid-July 1994.

²⁶³ Steve Vogel, *Student of War Graduates on Battlefields of Rwanda: Rebel Leader Ran a Textbook Operation*, WASH. POST, Aug. 25, 1994.

²⁶⁴ *Id.*

²⁶⁵ See *supra* note 145 and accompanying text.

²⁶⁶ WAUGH *supra* note 34, at 222.

Then, when Gersony reported his findings about RPF crimes to the State Department, *any* prior Pentagon support for the RPF would certainly have been seen as a political and human rights liability. The fact that the Gersony report was suppressed, and RPF crimes aggressively covered-up at the ICTR for so many years, suggests that the exposure of possible Pentagon involvement with the RPF is the sort of motivation that might explain U.S. policy toward Kagame. If it can be shown that the Pentagon *had* been providing significant support to Kagame before and during 1994, the U.S., itself, would be directly implicated in the “Rwanda genocide,” along *with* the RPF.

The possibility that the Pentagon and State Department were acting at cross-purposes in Rwanda was further confirmed when the author interviewed former USAID director for Africa in 1994 former Ambassador Brian Atwood, regarding the Gersony investigation in an attempt to learn why the State Department would first employ Gersony to investigate RPF human rights abuses, and then immediately begin to suppress the report once RPF crimes were uncovered.²⁶⁷ Atwood’s role was mentioned in several of the U.N. documents from August to October 1994, reporting on reactions to the Gersony report.²⁶⁸

According to Atwood’s personal description, the Gersony report became an “inconvenient truth” because the State Department had not been aware of the Pentagon’s involvement with Kagame until after the report was received,²⁶⁹ and as the memo to Warren Christopher of September 1994 and other documents describe. The State Department documents confirm that the U.S. embassy may have been aware of the consequences RPF military superiority no later than 1992,²⁷⁰ but there is no evi-

²⁶⁷ Interview with Brian Atwood, Dean, Univ. of Minn. (Dec. 22, 2007); *see also supra* notes 222-24 and accompanying text.

²⁶⁸ *See* <http://www.rwandadocumentsproject.net>, UN documents dated August, September, October 1994.

²⁶⁹ *Id.*; *see* Peter Erlinder, *The Rwanda Genocide Cover-up*, JURIST, Feb. 19, 2008.

²⁷⁰ *See supra* text accompanying note 145.

dence that Pentagon representatives reported to the embassy the meaning of the success of the RPF advance in February 1993 or the extent of Pentagon involvement in the RPF, until the September 1994 memo from George Moose to Warren Christopher documenting the consequences of this military superiority in Gersony's report of RPF crimes.²⁷¹

However, if Kagame or high-level RPF officers *are* prosecuted at the ICTR, it is certain they will be asked to explain how the RPF's forces grew ten-fold between February 1991 and 1993 in the Virunga Mountains, becoming a more a larger and more effective light infantry force than Uganda, itself, was capable of supplying in 1990.²⁷² And, if the RPF *was* being supplied by the Pentagon and Kagame *is* responsible for the mass violence known as the "Rwandan genocide," Kagame's Pentagon sponsors would have much more to answer for than the "failure to intervene" to which Bill Clinton admitted in his famous *mea culpa* in Kigali in 1995.²⁷³

Whatever the reason for the U.S. engineered ICTR "cover-up," it can no longer be sustained and *both* sides must be prosecuted or the ICTR will go down in history as a "sham" tribunal, with complete justification.

The Costs of Super Power-Imposed ICTR Impunity for Africa

The "cover-up" of RPF crimes began no later than September 1994, when Warren Christopher received notification that the

²⁷¹ See Military-I Trial, ICTR Case No. 98-41-T (2004) (testimony of Robert Flaten); Author interview with senior member of the Kigali Embassy, July 1, 2005 (stating the Kigali Embassy was unable to get Pentagon DIA satellite photos of the progress of the war between 1990 and 1994 because there were clouds over Rwanda for three years and the source of funding for armaments coming from Uganda was a subject off limits even to the Kigali Embassy senior staff).

²⁷² KINZER, *supra* note 135, at 65.

²⁷³ Davide Heaps, *Clinton's Rwanda Apology Wasn't So Candid*, NY TIMES, Mar. 29, 1998.

RPF was committing mass crimes in areas they controlled well before having seized power in July 1994.²⁷⁴ The “cover-up” continued through 1997, when Louise Arbour scuttled the prosecution of Kagame for the assassination of the two presidents.²⁷⁵ The fact of the “cover-up” became obvious with Carla Del Ponte’s firing in 2003²⁷⁶ and was confirmed in the memoirs of Del Ponte and Hartmann in 2007-2009.²⁷⁷ And, it can no longer be credibly denied that the “cover-up” has had the effect of granting impunity to the Kagame regime for any and all crimes it has committed since the RPF withdrew to the Virunga Mountains in late 1990, where it underwent its stunning transformation into a military powerhouse.²⁷⁸ According to the August 2009 *Commonwealth Human Rights Initiative Report*:

The RPF has used an extraordinary amount of violence, domestically and internationally, in the pursuit of its illegitimate aims. It is responsible for killing almost 500,000 persons, whether citizens or not, and is responsible for the deaths of many times more through displacement, malnutrition and hunger. . .The U.N. has voluminously documented these practices. . .

The increasingly well-documented crimes committed by Kagame’s RPF in Rwanda in 1994²⁷⁹ were just the beginning of the U.S. sponsored impunity enjoyed by Kagame’s RPF for mass crimes committed in Central Africa.

Using the “Rwandan genocide” as justification, the armies of Rwanda and Uganda invaded the Congo in 1996 and 1998, where they continue to occupy large areas many times bigger

²⁷⁴ Military-I Trial, ICTR Case No. 98-41-T (1998) (Defense Exhibit DT-264).

²⁷⁵ See *supra* note 68 and accompanying text.

²⁷⁶ See *supra* note 83 and accompanying text.

²⁷⁷ *Id.*

²⁷⁸ See *supra* note 144 and accompanying text.

²⁷⁹ Faul, *supra* note 249.

than Rwanda that Congolese forces are unable to prevent.²⁸⁰ Reports to the Security Council in 2001, 2002, 2003,²⁸¹ and December 8, 2008,²⁸² explain that stolen Congolese resources explain the relative prosperity in Kigali and the fortunes being made by insiders in the Rwandan and Ugandan governments.²⁸³ This ongoing Rwandan “rape of the Congo” is well known in both the Security Council, and in high-level government circles in Washington, D.C.²⁸⁴ According to former State Department Undersecretary for Africa Hermann J. Cohen, who met with Kagame and Habyarimana during service to the first Bush administration, prior to 1994:

. . .from 1996 to today, the Tutsi-led Rwandan government has been in effective control of Congo’s eastern provinces of North and South Kivu. This control has been maintained through intermittent military occupation and the presence of Congolese financed and trained by the Rwandan Army. . .During these 12-years of Rwandan control, the mineral-rich provinces have been economically integrated into Rwanda.²⁸⁵

²⁸⁰ “Rwanda - President Paul Kagame’s Washington Visit,” February 1, 2001, Human Rights Watch at <http://www.hrw.org/en/news/2001/02/01/rwanda-president-paul-kagames-washington-visit>.

²⁸¹ U.N. Security Council Panel of Experts, *Illegal Exploitation of National Resources and Other Forms of Wealth from the Democratic Republic of the Congo*, delivered to the Security Council, U.N. Doc. S/2003/1027 (Oct. 20, 2003).

²⁸² U.N. Security Council Panel of Experts, *Illegal Exploitation of National Resources and Other Forms of Wealth from the Democratic Republic of the Congo*, delivered to the Security Council, (Dec. 8, 2008); Michelle Faul & Todd Pittman, *Fears Rise of Wider Conflict in the Congo*, ASS. PRESS, Nov. 4, 2004; Jeffrey Gettleman, *Rwanda Stirs Deadly Brew of Troubles in the Congo*, NY TIMES, Dec. 3, 2008.

²⁸³ Adam Hochschild, *The Dark Heart of Mineral Exploitation in Congo: Back on the Brink II*, INT’L HERALD TRIBUNE, Dec. 24, 2004, at 6.

²⁸⁴ Gettleman, *supra* note 282.

²⁸⁵ Herman J. Cohen, *Can Africa Trade its Way to Peace?*, INT’L HERALD TRIBUNE, Dec. 17, 2008, at 6.

While this article was being edited, the *New York Times* and *Le Monde* leaked copies of the 600-page “mapping report” prepared by the staff of the High Commission for Human Rights, which describes in detail massive crimes committed by the RPF across the border from Rwanda in the Congo between 1993 and 2003.²⁸⁶ Incredibly, this report was provided to Kagame and the RPF in draft form more than six months before its official release.²⁸⁷ The final report was published October 1, 2010, but differs in only minor respects from the “leaked” version.²⁸⁸ Preventing significant modifications in the report, some commentators have concluded, was the whole purpose for leaking the draft.²⁸⁹

The Costs of ICTR Impunity: Prospects for Damage to U.S. Influence

There are some signs that the costs of the U.S.’s unwavering support for Kagame and the RPF may be getting too high. President Kagame was re-elected in August 2010 with 93% of the vote, about the same percentage he received in 2003. Like the 2003 election,²⁹⁰ the 2010 election was accompanied by arrests of opponents, the outlawing of political parties, and mysterious murders and disappearances.²⁹¹ What was *very* different was the White House’s reaction, which unlike 2003, did *not* congratulate Kagame:

“. . . a series of disturbing events prior to the election including the suspension of two newspapers,

²⁸⁶ Faul, *supra* note 249; *see also* Report on Democratic Republic of Congo, *supra* note 50; *see also* DRC: Mapping Human Rights Violations 1993-2003, *supra* note 53.

²⁸⁷ Stearns, *supra* note 7.

²⁸⁸ Faul, *supra*, note 249.

²⁸⁹ Stearns, *supra* note 7.

²⁹⁰ Reyntjens, *supra* note 171, at 182-187 (discussing 2003 election conditions).

²⁹¹ *See supra* notes 272-275 and accompanying text.

the expulsion of a human rights activists, the barring of two opposition parties from taking part in the election, and the arrest of journalists. . .[S]tability and prosperity will be difficult to sustain without broad political debate and open political participation. . .” *Democracy is about more than holding elections. . .*”²⁹²

The White House statement was welcome and long overdue, but left out other “disturbing events” like the murder of a leading journalist²⁹³ investigating the attempted assassination of a former Chief of Staff seeking asylum in South Africa,²⁹⁴ the beheading of the vice-chair of an opposition party,²⁹⁵ the arrest of my former client, Victoire Ingabire for “genocide denial,”²⁹⁶ and my own arrest.²⁹⁷ As this article is being written, Rwanda has Madame Ingabire in custody on charges of terrorism and has announced its intention to prosecute the leading figure in the film *Hotel Rwanda*, Paul Rusesabagina, on charges of terrorism.²⁹⁸ Rwanda has also announced its intention to charge me

²⁹² Statement on the National Elections in Rwanda, The White House, August 13, 2010 <http://www.whitehouse.gov/the-press-office/2010/08/13/statement-national-elections-rwanda>.

²⁹³ Josh Kron, *Rwanda Editor Who Accused Officials in Shooting is Killed*, NY TIMES, June 25, 2010.

²⁹⁴ *Rwandan General Shot in S. Africa*, NY TIMES, June 19, 2010; *see also Rwanda ex-army chief Nyamwasa shot in Johannesburg*, BBC NEWS, June 19, 2010.

²⁹⁵ Josh Kron, *Rwandan Opposition Leader is Found Dead*, NY TIMES, July 14, 2010; *see also Ann Garrison, Rwandan Green Party Leader Beheaded*, S.F. BAY VIEW, July 14, 2010.

²⁹⁶ Jeffrey Gettleman & Josh Kron, *Presidential Candidate is Arrested in Rwanda*, NY TIMES, Apr. 21, 2010; *see also Kagame Rival Arrested in Rwanda*, BBC NEWS, Apr. 21, 2010.

²⁹⁷ Gettleman & Kron, *supra* note 4.

²⁹⁸ Edmund Kagire & Jason Straziuso, *Rwanda Says it Will Charge Hotel Rwanda Manager for Aiding Arrested Opposition Politician*, ASSOC'D PRESS, Oct. 27, 2010.

with genocide denial and to issue worldwide INTERPOL warrants if my lawyers advise me not to return to Rwanda.²⁹⁹

In light of my arrest, the White House's reference to "stability" *did* have the ring of irony, given that C.I.A. (Central Intelligence Agency) reports indicate that Rwanda's 6,000 pre-Kagame troops now number at least 65,000 (plus uncounted para-militaries and militias)—troops comprised of members as young as 16 carrying AK-47's.³⁰⁰ Moreover, the Rwandan "prosperity" referenced by the White House, comes from military occupation of the Congo and the theft of some \$250 million in natural resources each year.³⁰¹ In the year 2000, the added value of blood diamonds and minerals plundered from the Congo amounted to 190% of Rwanda's military budget and 110% of the publicly acknowledged aid received from foreign donors.³⁰² This at the cost of more than 5-million lives, according to former State Department Africa experts³⁰³ and U.N. Security Council Reports³⁰⁴ The U.S. has also given \$1 billion in aid since 2000, \$250 million more for 2010-11, *plus* Pentagon and off-the-books aid, NATO aid, and payments for troops on U.N. and AU "peacekeeping missions" in Darfur.³⁰⁵

For more than 15 years, the U.S. has calculated that its unwavering protection of RPF has been worth the political cost, no

²⁹⁹ *Id.*; Author's note: On October 6, 2010, the ICTR Appeal Chamber granted a motion to enjoin Rwanda from continuing my prosecution, but the response of Rwandan Prosecutor Ngoga was the threat to redraft the charging documents and to issue another charge based solely on writings posted on the internet, rather than mentioning arguments in court.

³⁰⁰ Military-I Trial, ICTR Case No. 98-41-T (2004) (Defence Exhibit DB71) at 12.

³⁰¹ Hochschild, *supra* note 283, at 6.

³⁰² Reyntjens, *supra* note 171, at 190.

³⁰³ Cohen, *supra* note 285.

³⁰⁴ UN Report (Oct. 16, 2002), *supra* note 234; UN Report (Oct. 20, 2002), *supra* note 50; UN Report (July 15, 2004), *supra* note 237; UN Report (Dec. 12, 2008), *supra* note 53.

³⁰⁵ *Ban Urges Rwanda Not to Withdraw UN Peacekeepers*, BBC News (Sept. 8, 2010), available at <http://www.bbc.co.uk/news/world-africa-11229201>.

matter what the RPF's crimes. But as the evidence mounts that the "Rwanda genocide" did not happen the way the victor says it happened;³⁰⁶ as it becomes clear that the ICTR trials have been manipulated to serve U.S. foreign policy interests;³⁰⁷ as the crimes of the RPF in Central Africa become more widely known;³⁰⁸ and, the U.S. "cover-up" more widely exposed³⁰⁹, the continuing cost to the United States, in terms of its ability to play the role of "honest broker" in Africa, will be enormous. By manipulating international institutions like the ICTR to "target" governments whose interests diverge from the United States, while conferring immunity on much more notorious criminal enterprises, the United States is not only "ridiculing principles of international justice," as Carla Del Ponte recognized:

*"It is unfair that politics undermines our work [at the ICTR]. 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]."*³¹⁰

But, it is also ensuring that Africans be unlikely to look to the U.S. for principled relations on which African nations can depend for a very long time.³¹¹

On a more fundamental level, the now-apparent use of both the ICTR and the ICC to reward America's "friends of the moment," and to "demonize" those with whom it disagrees, makes reconciliation of African conflicts between peoples who must

³⁰⁶ See *infra*.

³⁰⁷ See Del Ponte *infra*.

³⁰⁸ Faul, *supra* note 249.

³⁰⁹ Peter Erlinder, *The Great Rwanda Genocide Cover Up*, CENTRE FOR RESEARCH ON GLOBALIZATION, Sept. 3, 2009, <http://www.globalresearch.ca/index.php?context=va&aid=8137>; Peter Erlinder, *The Rwanda War Crimes Cover Up: UN Prosecutor Carla Del Ponte Has Confirmed the Cover Up*, CENTRE FOR RESEARCH ON GLOBALIZATION, Sept. 3, 2009, <http://www.globalresearch.ca/index.php?context=va&aid=15037>.

³¹⁰ HARTMANN, *supra* note 18, at 271-72.

³¹¹ Mamdani, *supra* note 29.

find ways to live together far more difficult to achieve, as it inserts super power interests and resources into one side of the conflict or the other. The consequence of the tribunal mechanism, particularly one underwritten by a superpower, is to force one contestant to shoulder the “blame” for the conflict, rather than recognizing that many, if not most, conflicts in Africa have deep roots that do not lend themselves to identifying a first cause.

One only need imagine the consequences for South Africa had the U.N. Security Council established an International Criminal Tribunal for South Africa, in which the United States exercised behind-the-scenes influence as it has at the ICTR, to ensure that *only* members of the apartheid regime were held responsible for crimes committed during the struggle for majority rule. Of course, the picture would have been much worse had a minority government composed of a former aristocracy been imposed by force upon a majority, which was then demonized by the “*myth* of the victors” and wrongfully damned by a foreign dominated international tribunal and cover-up of the crimes of the victors, as has occurred in Rwanda.

CONCLUSION

The Obama administration has taken an important first step toward rectifying the U.S.’s backing of a one-sided ICTR by not granting legitimacy to the illegitimate Kagame election. A next step should be ending U.S. protection for Kagame and his RPF forces at the U.N. Tribunal for the crimes they are known to have committed before, during and after the Rwandan genocide. Whether because the U.S. is complicit in the “Rwandan genocide,” or because of honest policy errors, the U.S’ use of the ICTR to cover-up the crimes of the RPF must stop and a foundation for the acceptance of mutual responsibility by both sides in the Rwanda War needs to be established. Once there is *truth*. . .reconciliation at least has a *chance*.