

July 17, 2010

The Evolution of a Partisan: Observations of a Criminal Defense Attorney at the ICTR

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THE EVOLUTION OF A PARTISAN: OBSERVATIONS OF A CRIMINAL DEFENSE ATTORNEY AT THE ICTR, BY BETH S. LYONS¹

Author’s Note – September 2009: I drafted this piece in 2006, after I had completed my first ICTR case as defense co-counsel for Mr. Aloys Simba in 2004 and 2005. I endeavored to write a more “personal” piece, rather than an analysis *per se* of fair trial violations, evidentiary errors, disclosure issues, etc. – all of which we litigated during the case. But, at the end of the day, it is difficult to separate the “personal” from the “legal” and the “political.” Each realm informs the others, and my perspectives were developed within our defense struggles in the legal processes, which are fundamentally determined by the greater political context.

If I were writing this piece today - in 2009 - the basic outlines would still be the same. But my positions would be even more unequivocal, fortified by the experiences of my second case as defense co-counsel for Major Francois-Xavier Nzuwonemeye in the “Military II” case. My overall perspectives on the lack of fundamental fairness at the ICTR, and the resulting conclusion that it is impossible for the ICTR to meet its mandate have not changed.

However, I want to call the reader’s attention to two points, as an update. First, to date, the Prosecution’s efforts to transfer the cases of ICTR detainees to Rwanda have failed, and their motions for transfer have been rejected at both the trial and appellate levels. Second, on the issue of conspiracy and planned genocide, the recent judgment in the “Military I” case [18 December 2008] acquitted all defendants of the charge of conspiracy to commit genocide. This verdict, in my view, rejects the fundamental Prosecution theory of a planned genocide. Its implications merit close analysis.

Introduction

I have worked for more than fifteen years as a criminal defense attorney for the Legal Aid Society in New York City. I have done trial and appellate work. Since January 2004, I have had the privilege to represent a client at the International Criminal Tribunal for Rwanda, in Arusha, Tanzania, as co-counsel on a defense team.

I had applied to the ICTR assigned counsel list because I wanted to work in an international court. I started at the ICTR with two expectations: (1) that international tribunals would implement a higher standard of due process and fair trial than I had experienced in the

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judicial system in New York City; and (2) that the international tribunal - a creation of the Security Council - would be universally respected, and that it would receive full co-operation of Member States. In retrospect, both of these expectations proved naive, idealistic and, most significantly, wrong.

As I worked at the ICTR, it became obvious that the Tribunal could not and/or would not implement its mandate - under Security Council Resolution 955, the ICCPR and other international treaties and covenants - to provide a fair and just process to prosecute all those responsible for the crimes committed in Rwanda during 1994. The ICTR has only prosecuted one side of the conflict, the Hutus, for alleged crimes under its Statute. Based on this, the ICTR is viewed as a proponent of one side of the conflict, a court of "victor's justice." This objective partiality de-legitimizes the Tribunal as an organ of international justice to end impunity, and blocks any possibility that it can contribute to national reconciliation, one the goals identified in the Security Council resolution. But, more importantly, its lack of justice desecrates the memory of all of the victims - both Hutus and Tutsis - who are entitled to accountability, under the rule of law, for crimes committed during one of the worst periods in humankind's history.

Getting to and through Arusha

After I was accepted to the ICTR's Assigned Counsel list, I waited three and one-half years for an assignment. A year or two before I was assigned a case, I had read Dr. Alison Des Forges' book, Leave None to Tell the Story, as an introduction to Rwanda. Her account is based on allegations and stories gathered by interviewers in the field. When I finished its seven hundred pages, I must confess that I had a few moments of "second thoughts." I asked myself,

Can I do this? Can I work as a defense counsel at the ICTR?

But, once I accepted an assignment, and started to work on a case, I was asking myself a very different question: As a person who believes in justice and a lawyer committed to the principles of fair trial and the universal and equitable application of the rule of law, How could I not have accepted to be a defense counsel at the ICTR?

What accounted for my change in perspective? There were two things: 1) very early on, I realized that if I were going to function as a defense attorney, I had to think and react like a defense attorney; and 2) as I read more widely, and started to do the work, I began to understand the “factual” untruths and one-sidedness of the Des Forges volume, which is the textbook *extraordinaire* for the ICTR Prosecution, and for whom Dr. Des Forges testifies as the consummate expert witness.

Reacting as a Defense Attorney

I know the defense attorney’s paradigm: the issue is not guilt or innocence, but whether the process is fair. The attorney is not a witness to the crime. I defend persons charged with crimes all the time. I have experienced the occupational hazard of being the object of criminal transference where, in court, the judge (and/or the prosecutor) transfers his or her attitude about the crimes charged against the defendant to the defense attorney. Both defendant and defense counsel become identified with the criminal acts alleged. One’s colleagues (and sometimes friends and relatives) ask, How can you defend “X” who is accused of a heinous crime?

Of course, I know the answer: everyone is presumed innocent. But, initially, I, too, reacted differently to the allegations of genocide and war crimes and crimes against humanity than

I did to other crimes which I come across daily in my work. I would like to say that I simply had internalized the criminal transference. But, I had to admit to myself that it was the magnitude of the heinous crimes alleged - genocide and crimes against humanity - which I thought, at first glance, placed this defense in a different category. I began to think about whether, and why, an ICTR case is different than any other case. But, the most gnawing question to myself was, why was I not applying the standards which I always ask jurors to apply -- to accept the presumption of innocence, and to look carefully at the evidence, and to use their common sense to assess its credibility?

What I came to realize was that the pivotal legal point - who was responsible for the crime - was similar to any other defense cases I had handled, and the legal tools with which to wage the defense were familiar. But there was one major, and crucial, difference: the ICTR cases are all politically-motivated cases.

Now, the fact that there is a relationship between law and politics was not foreign to me. For any Legal Aid attorney, even the most “apolitical,” it is immediately obvious that the courts and justice are not ensconced in a cocoon, free of outside influence. Working (or even watching) in arraignments in AR-1 or AR-2 in the middle of the night at 100 Centre Street, Manhattan is a quick lesson in how class and race interplay with “justice.”

I was ready to “see” political forces at work at the ICTR. But, what I did not realize until I actually worked on a case, and especially after I was working in the prisons in Rwanda, was how much overt State political intervention goes on, how much the Rwandan government tries to influence and control the ICTR, to intimidate Rwandan witnesses, to disregard its co-operation obligations, etc. There is a plethora of examples describing these State obstructions to justice:

those that are documented in ICTR decisions and judgments, and the countless unlitigated allegations of State interference with the defense witnesses.

The defendants at Arusha are on trial because of who they are: Hutus who are former members of the government which was militarily defeated by the current regime, and/or members of the Hutu intelligentsia or otherwise, regarded as national heroes. They are also the most credible potential witnesses against the crimes of the RPF during 1994, committed under the leadership of the current government, headed by Paul Kagame.

As a defense attorney, you are fighting a legal battle on a political minefield, in which the political stakes and political pressures on the ICTR determine the nature of the legal struggle for fundamental fairness to the defendant. The Defense, like in any case, endeavors to hold the Prosecution to the four corners of the indictment. But, at the ICTR, the indictment's "four corners" are so elasticized that they are hardly identifiable as parameters. The norm is that indictments barely - if at all in some counts - contain specific allegations of criminal conduct for your client; but, there is a plethora of general allegations about the conflicts between Hutus and Tutsis, and characterizations of the political context of Rwanda in 1994.

The ICTR is an international tribunal, established by the international community; hence, it should implement, and be judged by, international standards. The basic tenets of fair trial and presumption of innocence, enshrined in a myriad of international jurisprudence, treaties and other documents, as well as in most national jurisdictions are found in the ICTR's Statute, Article 20. This article mirrors the rights of an accused in the ICCPR, and includes, for example, the right of a defendant to a fair and public trial, to be presumed innocent, to be informed of the charges, the right to counsel and to adequate time and facilities to prepare a defense, the right to have an

interpreter, if necessary, and the right to not incriminate oneself. However, the struggle to ensure that these almost universally-accepted procedural rights are implemented in the ICTR is an incessant battle for the Defense. Simply perusing the large quantity of decisions on defense motions for translation of discovery or other prosecution documents into the language of the accused and counsel is sobering, and a (not so) tacit commentary on the constraints of international justice at the ICTR.

As an international tribunal, the ICTR's hybrid nature, mixing civil and common-law systems, logically should strengthen the basic guarantees for defendants, which is generally understood as fundamental to the functioning and legitimacy of the legal system. As Justice Robert H. Jackson said in his Opening Statement before the International Military Tribunal in 1945,

“. . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.”

Thus, the “hybrid” nature of the Tribunal, cannot explain why defendant's rights are abrogated as a matter of routine practice.

But, if you start from the premise that the ICTR is being used as a forum in which to continue the 1990-1993 war in Rwanda, then understanding the Prosecution's political agenda helps to explain why the legal battles over procedural issues, such as discovery of prior statements (particularly of the professional witnesses who testify in multiple ICTR cases under different pseudonyms, and of prosecution prisoner witnesses), are such a Sysiphean task for the Defense.

And, understanding Rwanda's position helps to explain why the Rwandan witnesses (both for the prosecution and defense) have sometimes been "held hostage" to pressure the ICTR. Unfortunately, in these political machinations within the ICTR process, the issue of justice is collateral.

Initial views

At the time that I first read the Des Forges volume, I was an outsider, albeit one who considered herself intellectually and politically astute. I knew, of course, that there were two sides in the conflict in Rwanda, but had not paid too much attention to the details of the Rwanda conflict.

My essential views were that:

1. Whatever had happened, or would happen, had to be determined by the Rwandan people, exercising self-determination, and without outside interference;
2. The world's non-response, especially in the West, to the tragic massacres of 1994 was unconscionable, and had to be addressed as a separate matter, regardless of whatever happened in Rwanda; and
3. The tribunal mandated to address genocide had to be a deterrent to stop impunity for heinous crimes, and had to adhere to the highest standards to function effectively and meet its goals.

But as I worked on the ICTR case, carried out investigations in Rwanda and went through the trial, my perspectives changed somewhat. I still uphold the fundamental right of self-determination of the Rwandan people, but understand that self-determination (which needs to be exercised by all of the Rwandan people), cannot be exercised while the current regime (one side in the conflict) holds power, and is still pursuing the war (triggered by its 1990 invasion) in the courtroom of the ICTR and in its current occupation of Western Zaire.

Secondly, I no longer characterize the West's and the UN's failure to affirmatively stop the tragic events in 1994 as a "non-response." Some who hold this view correctly point to the fact that African lives did not matter to the West, and therefore, the West did nothing. The value of African lives to the European West has not increased, and is still calculated from the same racist perspective. But, it is wrong to conclude, based on this lack of respect for African lives, that Africa is not important to the West. On the contrary, the U.S., France, Belgium and other colonialists have been involved in exploiting Africa for centuries. Africa, and especially the Great Lakes Region, is important because of its wealth and natural resources. Rwanda is a land-locked country, but it is a gateway to the riches of the Congo.

The West always knew what was happening. In fact, there was a deliberate policy which included training of the RPF leadership of the forces who invaded from Uganda in 1990, plunging Rwanda into civil war. This was more than a decade before French Judge Bruguiere's investigation into the shooting down of Rwandan President Habyarimana's plane on 6 April 1994, which revealed that the RPF was responsible for the assassination of two Presidents – of Rwanda and Burundi - in the region.² These murders triggered the spontaneous violence that spread throughout the country, resulting in killings, massacres, and burnings of communities during which 800,000 people - Tutsis and Hutus - perished. As the RPF advanced to occupy most of the country by June and July 1994, the massacres of the Hutus continued (and continued into later years as

²In November 2006, Judge Jean-Louis Bruguiere called for the issuance of arrest warrants against nine Rwandan officials. He could not prosecute President Paul Kagame, who was protected by head-of-state immunity. In response to Judge Bruguiere's statement that that he would write to the UN Secretary-General Kofi Annan, and request that the ICTR prosecute Kagame, the ICTR Acting Deputy Registrar, Everard O'Donnell, as reported in *The Independent*, 22 November 2006, stated: "Judge Bruguiere can write to Santa Claus if he likes. The ICTR is independent. Its prosecutor does not take instruction from Kofi Annan or anyone else." Thus, O'Donnell summarily dismissed, and effectively ridiculed the evidence that the RPF was responsible for the shooting down of the plane.

well). The choice “not to respond,” not to send in the Marines stationed in Bujumbura, Burundi, an hour outside of Kigali, was a conscious decision by the U.S. to let the RPF continue its war against the Hutus. But, to date, no Tutsis or RPF member has been indicted or prosecuted for the crimes committed during 1994, the temporal jurisdiction of the Tribunal. And, the “life cycle” of any investigations of the RPF has been determined by Rwanda.

The Prosecution’s Agenda

The agenda of the Prosecution is clear. It is to present the view of the current victors in power in Rwanda that there was a planned genocide, and secure convictions of essentially the Interim Government and a few other leading Hutus, whom it alleges are the planners of the genocide. The crimes of the RPF are essentially off the agenda.

In a recent article on prosecutorial discretion, Chief Prosecutor Hassan B. Jallow describes the overall strategy of the OTP to choose cases which concentrate on those who are responsible for the “serious” violations of international humanitarian law. He notes that the Statute does not delineate the definition of “serious.” “In practice, however, a number of factors provide guidance. The genocide in Rwanda was the result of a well-planned conspiracy by the members of the government and the ruling political party, Mouvement Revolutionnaire National pour le Developpement (MRND).”³

There is no mention of the serious crimes committed by others who were in opposition to the MRND, such as the crimes of the RPF. By implication, the Prosecution has judged the RPF crimes to be “less” serious – a conclusion which has been vigorously contested, including by

³ Jallow, H., “Prosecutorial Discretion and International Criminal Justice,” 3 *J. Int’l Crim. Just.* 145, March 2005, p.6.

impartial international authorities such as the U.N. Commission of Experts and non-governmental groups, as well as by Rwandans, including both Hutus and Tutsis, who claim that there has been selective prosecution of only one side of the conflict.

The Prosecution's thesis is that the killings and massacres constituted genocide, and were planned by the Hutu political and military leadership, and intelligentsia. The basic outline of the Prosecution cases and their indictments is founded on Des Forges' book.

These are elements of the Prosecution's theory:

1. The massacres during the 100 days starting in April 1994 were the result of a planned state policy and implemented by state institutions which were transformed into killing apparatus.
2. The victor in the situation was the RPF government, which installed itself into power in July 1994 after liberating Rwanda from the killings.
3. The killings were perpetrated by the MRND and CDR and their respective youth wings, the Interahamwe and Impuzamugami.
4. The victims were mainly Tutsi ethnicity, but also included "moderate" Hutus, who are assumed not to support the "extremists" of the MRND who took power.

Phantom Plan

The fundamental premise is that the killings, which were based on a plan, constitute genocide. The model is the state planned genocide of the Jews and others in Nazi Germany and other parts of the Europe. The character of the crimes in Nazi Germany and in Rwanda were both heinous. But, in the case of Rwanda, there is no proof that they were the result of a genocidal plan—as opposed to a spontaneous response to the killings of two Presidents, in the midst of a war which had been initiated by the RPF invasion from Uganda in 1990. This is not a semantics issue, or point of intellectual debate: it is a very fundamental legal issue in the defense of many persons

who are on trial and facing life imprisonment.

No plan has yet to be produced as evidence in any of the cases. As “proof” of a plan, the Prosecution adduces testimony that alleges a list separating Hutus and Tutsis was drawn up, by a responsible government official, sometime before the killings in a certain place, and that the official used the list to incite the population against the Tutsis. Or, the lists were developed in other meetings of the military or governmental officials. Or, there is some variation on this theme. No list, of course, is ever produced. In lieu of any evidence, the Prosecution’s opening and closing statements and pleadings simply allege the existence of a plan, as a fundamental assumption. The repeated allegations become a substitute for credible evidence.

However, the jurisprudence of the ICTR does not make the element of the plan a legal requirement of the crime of genocide; at most, it is viewed as one of the indices of genocidal intent. Hence, the Prosecution is able to allege the existence of a generic, amorphous plan, without the burden to prove that such a plan exists.

This “phantom” plan is challenged by the Defense, and debated in the testimonies of experts on both sides, for the defense and the prosecution. The reality is that in the 1930's, identity cards by ethnicity, introduced by the Belgian colonialists, distinguished Hutus and Tutsis. But through the intermarriage of Hutus and Tutsis, and the fluidity of identity cards, the veracity of the “carded” labels diminished and became meaningless. There is a mixing of ethnicity, and one’s ethnicity on paper often reflects political expediency, depending on which group is in power at the time.

But this basic Prosecution premise is dutifully supported in mainstream press, media and publications. For example, in films like “*Hotel Rwanda*.” The film channels human empathy towards the horrors in 1994, and is riveting at times. And, it shows the courageous efforts of

individuals, from both sides, who tried to save others, and the intermarriage and close living situations of the Hutus and Tutsis.

But beyond these “human condition” facets, the film depicts the violence as being one-sided: Hutu against Tutsi. As a Tutsi, who escaped the killings because of the courageous efforts of a prominent Hutu, recounted - there was violence on both sides; but the film never shows the Tutsi violence against the Hutus.

The film’s other important message is that there was a planned genocide: for example, the scene of the hotel manager, in the warehouse when he was looking for food, finding the machetes which were imported from China. This is an especially memorable moment in the film, because the starving refugees in the *Milles Collines* Hotel have been deserted by the UN and the West. The imported machetes were intended to support the idea of planned killings: obviously, the warehouse provisions had to have been ordered and delivered. But, the Hollywood film never posits or answers the incredibility of the warehouse scene: why would an agricultural country, where the common tool is a machete, have to import machetes?

Des Forges’ book fails the same reality test, and, like others (especially those who are writing English language texts), promotes only one side of the story. The Hutus are the villains, and the saviors and liberators are the Rwandan exiles who returned in 1990 as the RPF. This view is aggressively promulgated and marketed in films like *Hotel Rwanda*, and in most academic and other presentations on the events of 1994 in Rwanda.

The more critical problem, from the viewpoint of legal principle, is that the ICTR, in its “factual findings” in the judgments, accepts this ahistorical, one-sided view as a “context” in which to convict the losers of the war. The ICTR accepts the existence of a plan, without the requirement

of proof from the Prosecution. Even where the ICTR benignly acknowledges the existence of the allegations of RPF crimes during 1994, these acts are treated as if they are alien to, and estranged from the events of 1994 and are outside the ICTR's competence and jurisdiction. For example, in the infamous "Media" Judgment, the Chamber simply "notes that attacks by the RPF against civilians during this time have also been documented"⁴ in its discussion of evidence, and makes a factual finding that the "The RPF also engaged in attacks on civilians during this period."⁵ The ICTR, through its judgments, is achieving its *de facto* object: to write the history of what happened in Rwanda in 1994 from the victor's perspective. However, based only one side of the conflict, its version of "history" is inherently defective and fundamentally flawed.

"Fairness": To One Side Only

The issue of fairness is pivotal to the ICTR's legitimacy, and is also its most vulnerable point. The impartial Commission of Experts, established by the U.N. in 1994, found allegations of crimes on both sides of the conflict, a point underscored by then Secretary-General Boutros Boutros Ghali in his October 1994 letter to the Security Council. Yet, no member of the RPF, or individuals of Tutsi ethnicity, has faced prosecution at the ICTR.

According to Security Council Resolution 955 establishing the ICTR, the aim of prosecutions is to "contribute to the process of national reconciliation and to the restoration and maintenance of peace." To date, only Hutus have been prosecuted. Calls from NGOs since that time to prosecute both sides of the conflict have been rejected. In 1999, the former Prosecutor of

⁴ *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Judgment, 3 December 2003, para. 118.

⁵ *Ibid.*, para. 120.

the ICTR, Carla Del Ponte, initiated Special Investigations into the RPF activities, and promised prosecutions, but her efforts were squashed in response to pressures from the RPF government. Del Ponte was relieved of her duties as ICTR Prosecutor, and her contract was not renewed in 2003.

When speakers on the Rwandan events are questioned about the investigation and prosecution of the “other side,” especially since the ICTR is slated to complete its work by 2010, the responses range from simply wrong to shifting the responsibility. General Dallaire, at a forum in New York City in 2005, offered that the ICC could prosecute the RPF crimes (clearly not an option, since the ICC’s jurisdiction starts only in July 2002, when the Rome Treaty was entered into force). A representative of the Chief Prosecutor, at a Symposium for the War Crimes Research Centre at American University in 2005, responded that there is universal jurisdiction for crimes of genocide, implying that the shutting down of the ICTR did not preclude other judicial mechanisms from asserting jurisdiction (true, but clearly avoiding the issue of the ICTR’s mandate).

The bottom line is clear, the ICTR is not going to pursue the “other side” of the conflict. Period. There continue to be infrequent promises, and even reported attempts, to review the RPF crimes. The Prosecution cannot claim the defense of ignorance, and neither can the ICTR. Unwillingness and/or inability to prosecute- both linked - would be more accurate. The Prosecution was notified of allegations against the RPF in 1994, at least a dozen years ago. Prosecution efforts now, towards the end of the ICTR’s tenure in 2010, do not inspire confidence or commitment. The failure is a public, and international, disgrace. It is no coincidence that the strongest witnesses against the RPF’s criminal acts are detained in Arusha as indictees, or are serving sentences or are on trial. The obvious difficulties of obtaining their evidence grow exponentially, especially if Rwanda succeeds in becoming a state to which current cases could be transferred.

ICTR's Independence/Rwanda's Non-Cooperation

In order to implement the fundamental and universally accepted rights of a defendant, the judiciary must be able to act independently and impartially. As the Basic Principles on the Independence of the Judiciary (1985) state: "The judiciary shall decide matters before them impartially, on the basis of the facts and in accordance with the law, without . . . threats or interferences, direct or indirect, from any quarter for any reason."⁶

Unfortunately, at the ICTR, threats and interference by the Government of Rwanda have been the norm. These are cited in the U.S. State Department Country Report on Human Rights Practices in Rwanda, covering January - December 2004. It states, "Since 1994, the ICTR has delivered verdicts on 23 persons, including six during this year. Government authorities sporadically prevented witnesses from attending and giving testimony at the ICTR, which delayed the judicial process. . . ." Rwanda has opposed the ICTR from its beginning and has obstructed the process, subject to Rwanda's own agenda.

Rwanda, then a non-Permanent member of the Security Council in 1994, requested an international tribunal, but cast the sole vote against Resolution 955 which established the ICTR. It is instructive to read the full remarks of the Rwandan representative on 8 November 1994.⁷ In brief, Rwanda opposed a) the Tribunal's temporal jurisdiction, favoring instead the starting date to be the beginning of the war, the RPF invasion of Rwanda on 1 October 1990; b) the sharing of an Appeals Chamber and Prosecutor with the ICTY; c) the lack of prioritization of crimes in the

⁶ Basic Principles on the Independence of the Judiciary (1985), Article 2.

⁷ U.N. Document S/PV 3453, available on the U.N. website at www.un.org.

Statute; d) the potential candidature of judges from countries on the Security Council which took part in the civil war in Rwanda; e) the lack of decision-making power of Rwanda for those convicted defendants who are imprisoned outside Rwanda; f) the absence of the penalty of capital punishment; g) failure to indicate that the seat of the ICTR should be in Rwanda, where the crimes occurred and reconciliation must take place.

The political pressures which impede and undermine the judicial independence and impartiality of the Tribunal are illustrated by these examples: the tactic of Rwanda to use witnesses to hold the judicial process hostage, the pressure to reverse the release of Jean Bosco Barayagwiza, the suspension of investigations of the RPF and the removal of Carla Del Ponte as Chief Prosecutor.

On 3 November 1999, the Appeals Chamber ordered the dismissal of charges against Barayagwiza and ordered his release, with prejudice to the Prosecutor, based on the “egregious” conduct of the Prosecutor and the numerous due process violations.⁸ Later that month the government of Rwanda, angered by the decision, refused to grant a visa to ICTR Prosecutor Carla Del Ponte. Rwanda’s Special-Representative to the ICTR informed the press that the government was considering preventing Rwandan witnesses from testifying at the ICTR. Five months later, the Appeals Chamber reversed its decision. In the interim, the trial of Bagilishema had to be adjourned because Rwanda would not allow sixteen witnesses to testify.

This was followed, in the period 2002 - 2003, by the forced suspension of ICTR proceedings when victims groups, supported by the Rwandan government, refused to provide witnesses. The timing of the “resolution” of these crises coincided with the suspension of investigations of crimes of the RPF. In September 2003, Carla Del Ponte’s contract as Chief

⁸Appeals Chamber Decision, Barayagwiza v. Prosecutor, 3 November 1999, paras. 106 and 109.

Prosecutor for the ICTR was not renewed, due to pressure from the Rwandan government, as retaliation against her “Special Investigations” of the crimes of the RPF in 1994.

Although the current Prosecutor has allegedly renewed efforts to investigate the RPF, albeit almost too late to be effective, Rwanda has maintained its position. The State Department reported, “. . .In May [2004], the Government publicly criticized efforts by the ICTR to investigate alleged RPA war crimes and said civilian casualties were sometimes an unavoidable consequence of military operations.” In February 2006, Rwanda responded angrily to the proposed transfer of an ICTR indictee to Norway for trial, and accused the ICTR of “double standards,” since an ICTY indictee had been transferred to the former Yugoslavia.

Wither the victims. . .

At the ICTR, the Prosecution asserts its mantle as “fighters against evil.” The Prosecution would like it to be believed that it is the sole representative of the victims: it is the guardian of the victims’ interests, and it is the only side to present victim witnesses to the Tribunal. This is a far cry from the reality, and is patently false. The Prosecution has no monopoly on victims: both sides - the Prosecution and the Defense -have witnesses who are the victims of the events of 1994. The Prosecution’s victims are always only Tutsis. But, for the Defense, the victims are both Hutus and Tutsis.

But the Prosecution certainly treats the victims who testify for the Defense differently. Individuals, especially from Rwanda, or those who are in exile and who have contact with the Defense take great risks. And, those who are potential witnesses face graver threats. Witness intimidation and obstruction is not uncommon. But if they appear in court as witnesses, they face

one more obstacle: overcoming the Prosecution's efforts to make them defendants. Very often, especially male Hutu Defense witnesses are attacked in-court by the Prosecution and accused of being *genocidaires* and Interahamwe. This accusation has also been leveled at Hutu defense team members. The Prosecution appears to be continuing the civil war in the courtroom. And, it is evident that the Prosecution has yet to act affirmatively and publicly to pressure Rwanda to comply with ICTR statutory provisions under Article 28 (co-operation of Member States with requests for judicial assistance), in cases of Defense allegations of witness intimidation or obstruction.

Legitimacy and Truths

The argument is usually made that the rights of the defendants must be respected because the fairness of a trial impacts on the legitimacy of the proceedings. This is especially true because the proceedings result in judgments. Where a court accepts evidence which is less than credible, its judgment is unfair to the defendant who may be convicted on less than proof beyond a reasonable doubt. Thus, the legitimacy of the judgment is compromised, since the proceedings were based on a defective standard. And illegitimate proceedings can not result in justice. Nor can these illegitimate proceedings contribute to finding the truths.

The first lesson one learns as a criminal defense attorney is that there is no single truth, but there are many truths. While the task of "truth-finding" is not articulated in the ICTR Statute as an objective, it should be obvious that, as a minimal obligation, the ICTR is mandated to prosecute both sides of the conflict in Rwanda. This means hearing and judging evidence of the truths of the crimes of "the other side" which, to date, have escaped international legal scrutiny. As long as the

ICTR permits itself to be used as a vehicle through which to continue the RPF's war in Rwanda, any justice - - for defendants and for victims - is impossible. It is probably too late for the ICTR to salvage itself. Its abject failure to implement its mandate, thus far, has compromised any legitimacy, and foreclosed the possibility of making a contribution to ending impunity for the crimes within its competence, and to reconciliation within Rwanda. And the biggest tragedy is that justice for everyone - defendants, all victims and the international community - is the casualty.