

## Reliance Upon and Complications with State Cooperation

Kate Gibson\*

### 1. Introduction

From Rwanda's vehement opposition to the creation of the ICTR in 1994,<sup>1</sup> through to the first *11bis* transfer to Rwandan courts in April 2012, the relationship between Rwanda and the ICTR has oscillated between effective collaboration, and active hostility. The management of this relationship has been one of the most pervasive challenges in the work of the Tribunal.

The starting point of this relationship was the absolute 'primacy' attributed to the ICTR over Rwandan national courts. Initially, given the Tribunal's focus on securing the arrest or surrender of suspects, the ICTR aggressively asserted this primacy to ensure those deemed 'most responsible' were delivered up to the UNDF. Once trials began, focus shifted to maintaining the flow of witnesses from Rwanda, without which the trials could not progress. The 1999 Appeals Chamber decision quashing the charges against Barayagwiza prompted the suspension of all cooperation from Rwanda. The suggestion that the ICTR should try alleged perpetrators from within the Rwandan Patriotic Front (RPF) was met with an absolute insistence from the Rwandan regime that this be left to Rwandan domestic courts. Given the ability of the Rwandan authorities to effectively hold the ICTR hostage by suspending the flow of witnesses and evidence, the effectiveness of asserting absolute primacy began to wane. However, capitulating to Rwanda's demands exposed the Tribunal to criticism of failing to fulfill its mandate, and dispensing victor's justice.

No international criminal court will be free from the politically sensitive task of securing cooperation with the state in which the crimes occurred. As the ICC has quickly learnt, lack of state cooperation can be fatal to prosecuting cases. The evolution of the relationship between the ICTR and Rwanda over the course of two decades will be a fertile ground for precedent as to how a relationship between the court and the subject state can be effectively managed.

### 2. The Attribution of Primacy to the ICTR

From its inception, it was apparent that the ICTR was not the only court with jurisdiction to try those suspected of orchestrating or participating in the 1994 Rwandan genocide. Notably, the ICTR would exercise concurrent jurisdiction with domestic Rwandan courts. Because of the perceived inability of Rwanda to conduct trials, and the ICTR's extended mandate to restore and maintain peace and stability

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\* Defence Counsel before the ICTR, ICC and SCSL.

<sup>1</sup> U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453 (1994), page 16.

in the region,<sup>2</sup> it was vested with what was termed ‘primacy’ over domestic proceedings. The ICTR Statute provides that ‘[a]t any stage of the procedure, the International Tribunal may formally request national courts to defer to [its] competence...’<sup>3</sup>

As was later held by the Appeals Chamber, to allow concurrent jurisdiction without granting primacy to the Tribunals would, in effect, permit an accused to select his forum of choice:<sup>4</sup>

[W]hen an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as ‘ordinary crimes’... or proceedings being ‘designed to shield an accused’, or cases not being diligently prosecuted.

As such, any conflict between the ICTR and Rwandan national courts appeared to have been resolved in favour of the Tribunal.

### **3. The Evolution of Primacy**

#### **3.1 Asserting Absolute Primacy: Surrender and Transfer of the Accused<sup>5</sup>**

One of the first tasks of the ICTR was to physically get its hands on the accused spread throughout Africa, Europe and North America, and to ensure that their trials took place at the seat of the ICTR in Arusha, and not in national courts. In these initial stages, the Tribunal aggressively asserted its absolute primacy, taking cases from national courts, issuing requests for deferral, and halting national investigations into potential accused. Cameroon,<sup>6</sup> Kenya,<sup>7</sup> Tanzania,<sup>8</sup> South Africa,<sup>9</sup> Zambia,<sup>10</sup> the

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<sup>2</sup> UN Doc. S/25704/Add.1/Corr.1 (1993). *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, para. 28.

<sup>3</sup> ICTY Statute, Article 9; ICTR Statute, Article 8.

<sup>4</sup> *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 2005, para. 58.

<sup>5</sup> The Statutes and Rules of the ICTY and ICTR use the terms ‘surrender’ and ‘transfer’, rather than extradition, which is normally used to describe the rendition of a fugitive to one state to another. Professor Schabas notes that it was hoped that this nomenclature might avoid squabbles with States which have constitutional provisions which prevent extradition of their own nationals; William A. Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006), page 386.

<sup>6</sup> Jean Bosco Barayagwiza was transferred on 19 November 1997; Jerome Bicomumpaka, Justin Mugenzi and Prosper Mugiraneza were transferred on 31 July 1999; Ferdinand Nahimana was transferred on 23 January 1997; Anatole Nsengiyumva was transferred on 23 January 1997; Hormisdas

Democratic Republic of Congo,<sup>11</sup> Benin,<sup>12</sup> Angola,<sup>13</sup> Mali<sup>14</sup> and Togo<sup>15</sup> willingly arrested and handed over indictees following the issuance of arrest warrants. France,<sup>16</sup> Switzerland,<sup>17</sup> Belgium,<sup>18</sup> and the United Kingdom<sup>19</sup> also transferred accused without seeking to try them in national courts. One state unwilling to accept the ICTR's primacy, however, was Rwanda itself.

Significantly, the Rwandan government had been the only country to cast its vote against Security Council Resolution 955 establishing the ICTR. Rwanda's representative to the UN expressed the new government's litany of complaints against the proposed ICTR, including its opposition to a maximum sentence of life imprisonment, rather than the death penalty.<sup>20</sup> It was accordingly only a matter of time before the ICTR and the Rwandan government sought custody of the same suspect.<sup>21</sup>

In 1996, Rwandan officials learnt that the alleged 'mastermind' of the genocide, Colonel Théoneste Bagosora, had been arrested in Cameroon following the issuance

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Nsegimana was transferred on 10 April 2002; Andre Ntagerura was transferred on 23 January 1997; Laurent Semanza was transferred on 19 March 1997.

<sup>7</sup> Casimir Bizimungu was transferred on 23 February 1999; Samuel Imanishimwe was transferred on 11 August 1997; Gratién Kabiligi, Hassan Ngeze and Jean Kambanda were transferred on 18 July 1997; Francois Karera was transferred on 21 October 2001; Samuel Musabyimana was transferred on 26 April 2001.

<sup>8</sup> Michel Bagaragaza was transferred on 15 August 2005; Sylvestre Gacumbitsi was transferred on 20 June 2001; Callixte Kalimazira was transferred on 8 November 2005; Jean Mpambara was transferred on 23 June 2001; Mikaeli Muhimana was transferred on 8 November 1999; Simeon Nchamahigo was transferred on 25 May 2001; Vincent Rutaganira was transferred on 4 May 2002; Athanase Seromba was transferred on 6 February 2002.

<sup>9</sup> Ignace Baglishema was transferred on 20 February 1999; Gaspard Kanyarukiga was transferred on 19 July 2004.

<sup>10</sup> Jean-Paul Akayesu was transferred on 29 May 1996; Clément Kayishema and Georges Rutaganda was transferred on 26 May 1996.

<sup>11</sup> Jean-Baptiste Gatete was transferred on 13 September 2002; Yusuf Munyakazi was transferred on 7 May 2004; Tharcisse Renzaho was transferred on 30 September 2002.

<sup>12</sup> Juvenal Kajelijeli was transferred on 10 September 1998; Joseph Nzirorera was transferred on 10 July 1998.

<sup>13</sup> Augustin Bizimungu was transferred on 14 August 2002.

<sup>14</sup> Paul Bisengimana was transferred on 11 March 2002.

<sup>15</sup> Emmanuel Bagambiki was transferred on 10 July 1998; Edouard Karemera was transferred on 10 July 1998.

<sup>16</sup> Jean de Dieu Kamuhanda was transferred on 7 March 2000; Francois-Xavier Nzuwonemeye was transferred on 23 May 2003.

<sup>17</sup> Alfred Musema was transferred on 20 May 1997; Emmanuel Rukundo was transferred on 20 September 2001.

<sup>18</sup> Re Elie Ndayambaje, Joseph Kanyabashi and Alphonse Higaniro, ICTR-96-2-D, 11 January 1996

<sup>19</sup> Tharcisse Muvunyi was transferred on 30 October 2000.

<sup>20</sup> U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453 (1994), page 16.

<sup>21</sup> P. Gourevitch, 'Justice in Exile', *The New York Times*, 24 June 1996.

of a Belgian arrest warrant.<sup>22</sup> The Belgian government's interest in Colonel Bagosora stemmed from his alleged involvement in the killing of 10 Belgian peacekeepers in Camp Kigali on 7 April 1994. The Rwandan government filed an extradition request with the Cameroon authorities to have Bagosora returned to Kigali. At the same time, ICTR Prosecutor, Richard Goldstone filed a competing request to have Bagosora sent to the ICTR.<sup>23</sup>

The Rwandan prosecutors, however, were unwilling to concede. There were undoubtedly certain advantages for accused in appearing before the ICTR including more favourable prison conditions, various fair trial rights guarantees (including the assignment of defence counsel), and the lack of the death penalty. The Rwandan government claimed that these 'lenient' conditions were 'not conducive to national reconciliation in Rwanda.'<sup>24</sup>

Moreover, the Rwandan prosecutors were already faced with a task of unimaginable scale given their claim that approximately 90,000 cases had arisen out of the genocide.<sup>25</sup> Many of these cases would have to be settled by way of the gacaca hearings and plea-bargains. As such, it was important for the national courts to try some high-profile accused, to avoid a perception among survivors that perpetrators weren't being adequately punished, particularly when assessed against the scale and brutality of the crimes. In describing a 'very tense' meeting with the Rwandan officials concerning Colonel Bagosora, Prosecutor Goldstone recounted that:<sup>26</sup>

I think they realized that I wasn't just threatening, that I meant it when I said that I preferred to suggest closing down the tribunal than to defer a major criminal involved in the genocide.

In deference to the ICTR's primacy, Belgium dropped its extradition request, and in 1997 the Cameroonian authorities transferred Bagosora to Arusha to stand trial; the ICTR's jurisdictional supremacy winning the day.

The next tug-of-war over Froduald Karamira was to have a different outcome. The former head of the MDR party, Karamira was alleged to have given a famous speech in October 1993 coining the term 'Hutu power'. After his arrest in Mumbai, India

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<sup>22</sup> P. J. Magnarella, 'Judicial Responses to Genocide: the International Criminal Tribunal for Rwanda and Rwandan Genocide Courts', (1997) 1(1) Af. Stud. Q., 17.

<sup>23</sup> T. Cruvellier, *Court of No Remorse: Inside the International Criminal Tribunal for Rwanda* (2006), 12.

<sup>24</sup> UN Doc. S/PV.3453, Speech to the Security Council by Rwandan Ambassador Bakuramutsa, 8 November 1994, at 16.

<sup>25</sup> M. H. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' (1997) Duke J. Comp. & Int'l L. 349 at 357.

<sup>26</sup> V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (2008), 173.

with the cooperation of the Rwandan government, he was in the course of being extradited to Rwanda when he escaped during a stopover in Addis Ababa. At this point, the ICTR Prosecutor Richard Goldstone asked the Ethiopian government to detain him on behalf of the ICTR.<sup>27</sup> Karamira's lawyer then filed an asylum claim in Ethiopia, and asserted the ICTR's primacy as the basis to block his transfer back to Rwanda.<sup>28</sup>

Having just seen Bagosora slip through their grasp, the Rwandan authorities took a much tougher stance. The Rwandan Attorney-General, Gerard Gahima, was immediately dispatched to Addis Ababa, telling the press that: 'we are the ones spending our time and money to catch these people, the Tribunal steps onto the scene to take them. It is unacceptable.'<sup>29</sup> For the first time, but certainly not for the last, the Rwandan government threatened to stop cooperating with the ICTR unless Karamira was transferred back to Kigali.<sup>30</sup>

Goldstone capitulated, allowing Karamira to continue on his journey back to Rwanda, despite his ability to assert the absolute primacy afforded by the ICTR's Statute. Rwanda's non-cooperation was too great a risk to the fledgling Tribunal. Karamira's trial before the Rwandan domestic courts was brief. He was convicted and sentenced to death, and was publicly executed by a firing squad in Nyamirambo Stadium a year later.<sup>31</sup> Even at this early stage, the ICTR's primacy was being actively compromised by Rwanda's ability to turn off the tap to all-important witnesses and evidence.

### 3.2 Compromising Primacy: Access to Witnesses and Evidence

Following their surrender, the accused were then incarcerated in the United Nations Detention Facility in Arusha to start the long process of waiting for trials to begin. In the interim, both prosecutors and defence counsel attempted to secure evidence and witnesses to build or combat the case against the various accused. However, problems were encountered which had the potential to be debilitating for the ICTR's progress.

Having succeeded Goldstone, the ICTR Prosecutor Carla del Ponte decided to investigate not only those suspected of committing crimes on the side *Forces Armée*

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<sup>27</sup> M. H. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' (1997) *Duke J. Comp. & Int'l L.* 349 at 363.

<sup>28</sup> Letter from Mr. Kennedy Ogetto to the UNHCR Regional Representative, Addis Ababa, Ethiopia, Re: Mr. Frodouald Karamira, 12 July 1996.

<sup>29</sup> T. Cruvellier, *Court of No Remorse: Inside the International Criminal Tribunal for Rwanda* (2006), 12.

<sup>30</sup> V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (2008), 174.

<sup>31</sup> *Ministère Public v. Karamira*, Jugement du 14 Février 1997 du tribunal de 1<sup>è</sup> instance de Kigali.

*Rwandaise* and 1994 Interim Government, but also to try members of the invading RPF.<sup>32</sup> Following the genocide, it was the RPF who had gained control of the country and formed Rwanda's new government. General Paul Kagame, who orchestrated and led the RPF's 1994 operation, became President of Rwanda in March 2000.

Investigating the RPF was a risk, particularly given that Rwandan Government's reaction to a previous adverse decision. On 3 November 1999, the Appeals Chamber granted an appeal by Jean-Bosco Barayagwiza, accepting that there had been a violation of his procedural rights on account of his illegal pre-trial arrest and detention. As a result, the Appeals Chamber quashed the charges against him and ordered his release 'without prejudice', meaning he could not subsequently be tried for the same acts.<sup>33</sup> Barayagwiza had been charged with genocide, incitement, and crimes against humanity for his role as a founder and senior administrative official of Radio RTLM, and for allegedly having directed members of his CDR party to kill Tutsis in the Gisenyi préfecture.<sup>34</sup>

The Rwandan government denounced the decision, and announced that it was suspending cooperation with the ICTR unless the decision was reversed.<sup>35</sup> In defiance of the Appeals Chamber decision, it also filed an international arrest warrant, and requested that Tanzania extradite Barayagwiza for trial in Rwandan national courts in the event that he was released into Tanzania.<sup>36</sup> It blocked access to the Prosecutor, refusing her request for a visa to enter Rwanda.<sup>37</sup> Most significantly, it refused to issue visas to witnesses who were intending to testify in the proceedings before the ICTR.<sup>38</sup>

Without the cooperation of Rwanda in providing access to witnesses and evidence, the ICTR's trials stalled. The Tribunal's President, Judge Navi Pillay was open in her frustration:<sup>39</sup>

[t]he Rwandan Government's failure to issue travel documents in a timely manner to facilitate the appearance of witnesses

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<sup>32</sup> ICTR Press Release of 13 December 2000, ICTR/INFO-9-2-254.EN, available at: <http://www.ictor.org/ENGLISH/PRESSREL/2000/254.htm>

<sup>33</sup> *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision, 3 November 1999.

<sup>34</sup> *Prosecutor v. Jean-Bosco Barayagwiza*, ICTR-97-19-I, Indictment, 22 October 1997.

<sup>35</sup> R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, (2005), 142.

<sup>36</sup> W. A. Schabas, 'Barayagwiza v. Prosecutor', (2000) 94 Am. J of Int. L. 563 at 565.

<sup>37</sup> C. del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (2009), 73.

<sup>38</sup> O. Oko, *The Challenges of International Criminal Prosecutions in Africa*, (2008) 31(2) Fordham Int'l LJ 386.

<sup>39</sup> M. Lacey, 'Tribunal says Rwanda is Stalling its Inquiry into 1994 Killings', *New York Times*, 7 September 2002.

before the international tribunal has resulted in the unavailability of witnesses and consequently the postponement of three trials.

Only a reversal of the Appeals Chamber decision<sup>40</sup> led to Rwanda's renewed cooperation. While the Appeals Chamber was at pains to note that Rwanda's pledge not to cooperate with the ICTR had no bearing on its decision, some viewed this assertion as unconvincing.<sup>41</sup>

Against this background, any attempt to instigate proceedings against members of President Kagame's RPF was going to be difficult. Although appearing initially willing to cooperate,<sup>42</sup> the Rwandan government blocked investigative efforts,<sup>43</sup> and claimed to be pursuing any RPF perpetrators through the Rwandan national courts. Rwanda's Permanent Representative to the ICTR wrote in 2002 that:<sup>44</sup>

it would be best if the ICTR... would leave the cases of the RPA to national courts in the same way that suspected civilian perpetrators who are in custody in Rwanda have been left to national courts.

Only after the ICTR President reported Rwanda's non-cooperation to the Security Council,<sup>45</sup> and only after the Rwandan government began to (incorrectly) report that ICTR's investigations into the RPF had ended, was access to witnesses and evidence in the ICTR trials again made available.<sup>46</sup> The evidence of RPF crimes remained in Kigali, and out of the Prosecutor's reach.

Eventually, the impasse was broken by an offer from the Rwandan government to share information concerning national prosecutions of RPF troops, if Prosecutor Del

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<sup>40</sup> *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000.

<sup>41</sup> W. A. Schabas, 'Barayagwiza v. Prosecutor', (2000) 94 Am. J of Int. L. 563 at 570, 571.

<sup>42</sup> C. del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (2009), 184.

<sup>43</sup> Interview posted on 16 September 2003 on Hirondele's website:

<http://www.hirondele.org/arusha.nsf>: Hirondele: 'How far are the investigations into alleged abuses committed by members of the current Rwandan army?' Del Ponte: 'Naturally those investigations are confidential. All I can tell you is that they are still going on and that they are taking place outside Rwanda because we have not been allowed to conduct them within the country. The non-cooperation by the Rwanda government makes it very difficult.'

<sup>44</sup> UN Doc. S/2002/842, *Letter dated 26 July 2002 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council*, page 6.

<sup>45</sup> UN Doc. S/2002/938, Report to the Security Council dated 23 July 2002 of the Prosecutor of the International Tribunal of Rwanda; UN Doc. S/2002/847, Letter to the President of the Security Council dated 26 July 2002 from the President of the ICTR.

<sup>46</sup> C. del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (2009), 229.

Ponte would share her evidence relating to RPF massacres. Notably, this proposal provided that the Rwandan courts would have the first opportunity to prosecute these cases. The proposed agreement read:<sup>47</sup>

[t]he [Office of the Prosecutor] will not seek an indictment or otherwise bring a case before the ICTR unless it is determined that the [Rwandan government] investigation or prosecution was not genuine.

Del Ponte refused, unwilling to compromise the ICTR's primacy and defer to national prosecutions. Within months, she was removed from her post, and replaced by Gambian Judge, Hussan Bubacar Jallow.<sup>48</sup> Del Ponte is on record linking her removal to her investigations into the RPF.<sup>49</sup> Prosecutor Jallow's decision to allow the Rwandan courts to assert jurisdiction over alleged identified RPF suspects,<sup>50</sup> represented a clear retreat from the absolute primacy which had dictated the ICTR's relationships with national courts in its early years. However, the flow of witnesses and evidence from Rwanda was restored, and trials were able to continue.

The ICTR was accordingly exposed to criticism of being a true victor's court. The censure leveled at the Tribunal as a result of its perceived abandonment of the victims of RPF crimes was intense.<sup>51</sup> Touted as constituting a return to the Nuremberg paradigm of victor's justice,<sup>52</sup> the failure of the ICTR to prosecute both sides of the conflict was seen as a major stumbling block to the Tribunal's legitimacy

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<sup>47</sup> C. del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (2009), 234.

<sup>48</sup> UN Doc. SC Res 1505, 4 September 2003.

<sup>49</sup> J. Hooper, 'I was sacked as Rwanda genocide prosecutor for challenging president, says Del Ponte', *The Guardian*, 13 September 2003, available at:

<http://www.theguardian.com/world/2003/sep/13/johnhooper>; See also Interview posted on 16 September 2003 on Hironnelle's website: <http://www.hironnelle.org/arusha.nsf>: Hironnelle:

'Concerning your being dropped from the ICTR, you declared that you had been a victim of pressure from the Rwandan government. What did you mean by that?' Del Ponte: 'I do not feel like a 'victim' and I would not talk of 'being dropped'. My mandate was simply not renewed. But it is true that politics played a big role. Rwanda demanded my resignation several times. It is clear that it all started when we embarked on these Special Investigations. Therefore, yes, pressure from Rwanda contributed to the non-renewal of my mandate.'

<sup>50</sup> Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the UN Security Council, 4 June 2009, available at: <http://ict-r-archiv09.library.cornell.edu/ENGLISH/speeches/jallow080604.html>.

<sup>51</sup> Human Rights Watch, *Rwandan Tribunal Should Pursue Justice for RPF Crimes*, 12 December 2008; L. Reydams, 'The ICTR Ten Years On Back to the Nuremberg Paradigm?', (2005) 3 JICJ at 977; K. Roth, (Executive Director of Human Rights Watch), *Letter to US Ambassador to the UN John Negroponte and Permanent Members of the Security Council*, 9 August 2004; V. Peskin, *International Justice in Rwanda and the Balkans*, (2008), 225 - 231; M. A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, (2005) 31 Ohio N UL Rev, 41 at 63, 64.

<sup>52</sup> L. Reydams, 'The ICTR Ten Years On Back to the Nuremberg Paradigm?', (2005) 3 JICJ at 977.

and legacy, and also as fostering the cycle of impunity which the ICTR claimed to be breaking. A different approach was needed. Where absolute primacy, or primacy 'proper' had failed, perhaps a diluted version could succeed.

### 3.3 The Retreat of Primacy: Transfer of Cases to National Courts

Several years into the operation of the *ad hoc* tribunals, UN member states started to experience 'tribunal fatigue'. The widely perceived inefficiency and length of proceedings, and the amount of resources absorbed by the Tribunals in proportion to their geographical focus,<sup>53</sup> led to a concerted push to bring the Tribunals to a close. Devised by Judges, and endorsed by the Security Council, a 'completion strategy' was established which required the completion of all trials within a proscribed timeframe.<sup>54</sup> The 'transfer of cases involving lower and intermediate accused to competent national jurisdictions'<sup>55</sup> was an integral part of this completion strategy, and Rule 11*bis* was enacted for this purpose.

In mid-2006, Prosecutor Jallow told the Security Council that 'Rwanda continues to be our major focus for referral of cases of indictees for trial.'<sup>56</sup> However in 2008, three separate Trial Chambers of the ICTR refused requests for transfer ICTR accused Munyakazi, Kanyarukiga and Hategekimana for prosecution before the Rwandan High Court, on the basis that transferees to the Rwandan national courts could not be guaranteed a fair trial.<sup>57</sup>

Upheld by the Appeals Chamber,<sup>58</sup> these decisions were grounded in an acceptance that the majority of defence witnesses would reside outside Rwanda, and the fears

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<sup>53</sup> D. Raab, 'Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals', (2005) 3 JICJ (2005) 82, at 82-84: quoting a legal advisor of the British Foreign Office who noted that '[t]he attitude of the international community to war crimes tribunals is currently characterized by a degree of ambivalence. Whilst the principle of accountability is increasingly ingrained in attitudes to conflict resolution, the dire state of funding for war crimes tribunals demonstrates frustration with the efficiency of such tribunals in practice.'

<sup>54</sup> UN Doc. S/RES/1503 (2003): 'Calls on the ICTY and ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010.'

<sup>55</sup> UN Doc. S/RES/1503 (2003), preambular paragraph 8; UN Doc. S/RES/1534 (2004), para. 5.

<sup>56</sup> Statement by Justice Hassan B. Jallow to the United Nations Security Council, 7 June 2006, available at: <http://ictt-archiv09.library.cornell.edu/ENGLISH/speeches/jallow070606.html>.

<sup>57</sup> *Prosecutor v. Munyakazi*, ICTR-97-36-R11*bis* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 28 May 2008; *Prosecutor v. Hategekimana*, ICTR-00-55B-R11*bis* Decision on the Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, 19 June 2008; *Prosecutor v. Kanyarukiga*, ICTR-2002-78-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008.

<sup>58</sup> *Prosecutor v. Munyakazi*, ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under 11*bis*, 8 October 2008; *Prosecutor v. Kanyarukiga*, ICTR-2002-78-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under 11*bis*, 30 October 2008; *Prosecutor v.*

expressed by the Rwandan diaspora of intimidation, threats or arrest should they return to Kigali to testify were genuine. Accordingly, an accused would not be able to exercise his right to obtain the attendance of, and examine his witnesses under the same conditions as witnesses called by the prosecution.<sup>59</sup> This problem had no legislative remedy. It was difficult to see how transfers to Rwandan courts could ever succeed, given the complex historical issues at play.

This all changed in April 2012, when former Pentecostal pastor Jean Uwinkindi was transferred for trial before the Rwandan High Court. In opposing transfer, Uwinkindi filed affidavits from 49 of his identified witnesses, each stating that they would be unwilling to testify should Uwinkindi be transferred to Rwanda, due to their fears of being threatened, harassed, jailed or killed, particularly in light of the failure of Rwanda to establish an operational or effective witness protection program for defence witnesses.<sup>60</sup>

The Trial Chamber found that the witness' fears were premature;<sup>61</sup> that the immunities and protections provided to witnesses in the newly-enacted Transfer Law were impossible to evaluate in the abstract; and as such 'the relevant Rwandan laws must be given a chance to operate before being held to be defective.'<sup>62</sup>

Transfers to Rwanda illustrated a deliberate rollback of the ICTR's primacy in favour of domestic Rwandan prosecutions. From the tense stand-off over Bagosora and Karamira, a relationship of complementarity developed which appeared to be mutually beneficial. The 11*bis* transfers also seemed to herald a semi-permanent truce between Rwanda and the ICTR. This truce, however, was not of long duration.

#### **2.4 Undermining Primacy: Reactions to acquittals, and the attempted re-trial of acquitted persons**

Each of the acquittals handed down by the ICTR have been met with outrage by the Rwandan authorities.<sup>63</sup> In February 2013, the Rwandan Prosecutor-General criticised

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*Hategkimana*, ICTR-00-55B-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under 11*bis*, 4 December 2008.

<sup>59</sup> *Prosecutor v. Munyakazi*, ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under 11*bis*, 8 October 2008, paras 40, 43.

<sup>60</sup> *Prosecutor v. Uwinkindi*, ICTR-2001-75-R11*bis*, Defence Response to the Prosecution's Request for the Referral of the case of Jean Uwinkindi to Rwanda pursuant to Rule 11*bis* of the Rules of Procedure and Evidence, 14 March 2011.

<sup>61</sup> *Prosecutor v. Uwinkindi*, ICTR-2001-75-R11*bis*, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, *Uwinkindi*, 28 June 2011, para. 88.

<sup>62</sup> *Ibid.*, para. 103.

<sup>63</sup> See, for example, E. Kagire, 'Government Disappointed by Gen. Kabiligi Acquittal', *The New Times*, 19 January 2009; 'RWANDA: Appeals court confirms ex-minister's acquittal', *IRIN*, 8 February 2006, available at: <http://www.irinnews.org/printreport.aspx?reportid=58074> : 'We do not expect such a

the acquittal Mugenzi and Mugiraneza, two members of the 1994 Interim Government, claiming that either the Trial Chamber or Appeals Chamber must have been 'completely incompetent' to have a divergence of opinions. He stated:<sup>64</sup>

The most recent decisions of the Appeals Chamber have tended to adopt simplistic treatment of facts and are creating a trend of exonerating political leadership from responsibility in the Genocide.<sup>65</sup>

Statements of this kind are not merely rhetoric; they have practical consequences for those acquitted by the Tribunal. Emmanuel Bagambiki was acquitted of all charges at both the trial and appellate level at the ICTR. After the ICTR Appeals Chamber confirmed his acquittal on 8 February 2006,<sup>66</sup> Rwanda's Permanent Representative to the ICTR stated that:<sup>67</sup>

[i]t is an unforgivable act to release Bagambiki, and those who did it will forever be haunted by that decision.

Rwanda then announced its intention to prosecute Bagambiki for rape, which had not been one of the crimes for which he had been tried at the ICTR. Rwanda claimed the ICTR's decision not to include rape in the indictment must have been a result of 'poor investigation.'<sup>68</sup> On 10 March 2006, the ICTR was presented with an international arrest warrant against Bagambiki,<sup>69</sup> and when extradition was not forthcoming, he was sentenced to life imprisonment *in absentia* in the Court of First Instance of Ruzizi, on 10 October 2007, for rape and incitement to commit rape.<sup>70</sup>

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decision from the court. The people in Cyangugu who suffered the killings may not be able to understand the decision of the court,' Aloys Mutabingwa, the special representative of the Rwandan government to the ICTR, told IRIN.' P. Ntambara, 'Rwanda: Jean Mpambara's Acquittal Enrages Residents', *The New Times*, 16 September 2006, available at <http://allafrica.com/stories/200609180227.html>; B. Henander, 'ICTR acquittal of Zigiranyirazo shocked Rwanda: minister', *Foreign Policy Association*, 21 December 2009, available at <http://foreignpolicyblogs.com/2009/12/21/ictr-acquittal-of-zigiranyirazo-shocked-rwanda-minister/>; D. Bideri, 'ICTR: Justice Held Hostage by Judge Theodor Meron', 13 May 2014, available at <http://www.cnl.gov.rw/ictr-justice-held-hostage-by-judge.html>

<sup>64</sup> Interview with Rwandan Prosecutor-General Martin Ngoga, 5 February 2013, available at: <http://www.youtube.com/watch?v=FrJG5ej3HmQ>

<sup>65</sup> G. Muramira, 'Rwanda Shocked By ICTR Acquittals', *The New Times*, 5 February 2013, available at <http://allafrica.com/stories/201302050082.html>

<sup>66</sup> *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 8 February 2006.

<sup>67</sup> J. Munyaneza, 'Rwanda Plots Bagambiki's Re-Arrest', *The New Times*, 10 July 2006.

<sup>68</sup> *Ibid.*

<sup>69</sup> 'Rwanda Requests ICTR Hand Over Acquitted Man to Face New Charges', *Hirondelle News Agency*, 26 May 2006.

<sup>70</sup> 'Belgium Investigates Acquitted Ex-Rwandan Governor Bagambiki', *Hirondelle News Agency*, 3 June 2008, available at <http://www.hirondellenews.com/ictr-rwanda/352-acquittals/bagambiki->

Bagambiki's *in absentia* conviction set an alarming precedent for other acquitted persons. Seven years later, the Rwandan Minister of Justice Tharcisse Karugarama told the ICTR Registrar in February 2013 that those acquitted by the ICTR and those who have served their sentences and have 'nothing to fear in Rwanda' and 'will not be tried again'.<sup>71</sup> The statement has failed to assuage the fears of acquitted persons, none of whom have agreed to return.

More recent statements from the Rwandan Prosecutor General's office have adopted a conciliatory tone, with Prosecutor General Muhumuza stating in November 2014 that although some suspects believed to be key perpetrators in the genocide were freed by the ICTR Appeals Chamber, 'while we can criticise and disagree with the decisions, we must respect the decisions of the court.'<sup>72</sup> This represents a marked shift in Rwanda's approach towards the legitimacy of the ICTR's judgments.

However, even in the final days of the ICTR's operation, a dispute arose over the location of its archives. Security Council Resolution 1966 (2010) provided that the archives remained the property of the UN,<sup>73</sup> with their management being entrusted to the MICT, the mechanism responsible for carrying out the ICTR's residual functions. This decision was met with opposition in Rwanda. President Kagame, speaking at the 18<sup>th</sup> commemoration of the genocide at Amahoro Stadium in Kigali, stated:<sup>74</sup>

I wish to point out that the history of a people belongs primarily to them and although many of our people perished in the genocide, it is still our history. The aftermath of the genocide, whether it is in evidence given in court, judgements delivered by those courts, or a new country that emerged after it, these are ours...

The archives were ultimately handed over to the MICT,<sup>75</sup> leading to discord between the ICTR and Rwanda even in the Tribunal's final days.

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<sup>71</sup> 'ICTR acquitted can come home', 24 February 2013, available at [www.focus.rw/wp/2013/02/ictr-acquitted-can-come-home/](http://www.focus.rw/wp/2013/02/ictr-acquitted-can-come-home/)

<sup>72</sup> F. Kimenyi, 'ICTR would have served Rwandans better', *The New Times*, 17 November 2012, available at: <http://www.newtimes.co.rw/section/article/2014-11-17/183131/>

<sup>73</sup> S/RES/1966 (2010), Statute of the International Residual Mechanism for Criminal Tribunals, Article 27.

<sup>74</sup> G. Kigambo, 'Kigali wants ICTR genocide archives', *The East African*, 28 April 2012.

<sup>75</sup> Press Release, 'Mechanism Takes Custody of Archives and Records Centres at Arusha Branch', 17 September 2013, available at: <http://www.unmict.org/en/news/mechanism-takes-custody-archives-and-records-centres-arusha-branch>

### 3. Conclusion

Managing the relationship between the ICTR and Rwanda has required striking a balance between a regime determined to seek retribution for crimes of unimaginable horror committed on an unimaginable scale, and an international tribunal searching for the truth of the events in question while acting within immovable legal and procedural constraints.

There is much to learn from the way in which differences were managed over the course of two decades. Perhaps most significantly, the relationship between Rwanda and the ICTR demonstrated the unsustainability of a situation where the state in question can unilaterally stop the flow of evidence and witnesses. Agreements must be negotiated and put in place so that access to physical evidence, investigatory rights, and the flow of witnesses and other evidence is not linked to the exercise of prosecutorial or judicial discretion.

Also essential is an unambiguous statement on jurisdiction; namely who will have primacy over accused falling within the jurisdiction of both the domestic and international courts. If transfer of accused to national courts is anticipated as an aspect of an international court's work, this should be addressed through capacity building and ensuring national courts have the ability to conduct fair trials, rather than as a mid-stream correction.

While it is important not to minimise the significant challenges which arose out of the interaction between the ICTR and Rwanda, the successful completion of the ICTR's mandate would not have been possible without some measure of success on behalf of those involved in ensuring that impasses were eventually broken and the trials could always continue. Whether the compromises struck will have a lasting effect on the Tribunal's legacy will be a question for future generations to consider.

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