# The ICTR at Sunset: an Evaluation of the Prosecution's Strategy (1994-2004)

*Larissa J. van den Herik* *



## INTRODUCTION

The Security Council established the International Criminal Tribunal for Rwanda (ICTR) in November 1994. Now, more than ten years later, the Council is urging the ICTR to come to a close. At this juncture, it seems appropriate to examine the work of the ICTR Prosecution, its achievements so far and the challenges still ahead.

The article focuses on the ICTR Prosecution's discretion and strategy. Section 1 studies the formal position and tasks of the ICTR Prosecution. In so doing, it analyses the relationship between the Prosecution and Chambers, and it studies to what extent the ICTR Prosecution enjoys discretion. Section 2 outlines which strategy the ICTR Prosecution has devised within its discretion and how this strategy has been implemented in practice. Subsequently, section 3 discusses the three models of prosecutorial strategy that have served the Prosecution in some more detail. The problems that the

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ICTR Prosecution faces are considered in section 4. In section 5, the work of the Prosecution is evaluated.

## THE ICTR PROSECUTION

The current ICTR Prosecutor is Mr. Hassan B. Jallow. Mr. Jallow is the first Prosecutor focusing solely on the ICTR, since before his appointment, the ICTR had to share its Prosecutor with the International Criminal Tribunal for the former Yugoslavia (ICTY).[(1)] This section outlines in some detail the role and the tasks of the ICTR Prosecution.

### 1.1 THE ROLE OF THE ICTR PROSECUTION

In the absence of a more explicit description of its role in the Statute, the Prosecution has further clarified its role in practice. In a Memorial in the *Bagosora* case, the Prosecution stated that it represented the community of all member states of the United Nations, as well as all victims of the Rwandan conflict.[(2)] The Prosecution's Memorial addressed a request of Belgium to appear at Bagosora's trial as *amicus curiae*.[(3)] One of the reasons why Belgium wanted to appear as *amicus curiae* was that it desired to call witnesses to testify on the murder on the ten Belgian UNAMIR soldiers, as well as on the killings of three members of the Belgian technical assistance mission.[(4)] The Prosecution did not contest Belgium's request to appear as *amicus curiae* as such, but argued that Belgium should not be permitted standing as a party to lead evidence. The Prosecution submitted that it was its role to represent all member states of the United Nations including Belgium, and to represent all victims as well. Therefore, it had to be presumed that the Prosecution would take all the interests concerned into account. Moreover, the Prosecution pointed to Article 17(1) and (2) of the ICTR Statute, which gave Belgium the explicit possibility to provide the Prosecution with evidence.[(5)]

The ICTY appeared to confirm the Prosecution's view that it represents the international community. In a decision in the *Kupreškić* case, the Trial Chamber stated that the Prosecution should not only act as a party in an

adversarial proceeding searching for a conviction, but also as an organ of the Tribunal and as such as an organ of international criminal justice. Therefore, the Prosecution should have the additional object of assisting Chambers in unveiling the 'judicial truth'.[6] In the setting of the ICTR, the Prosecution qualified this aspect of its mandate. In the opening speech of the Military case,[7] it stressed that the ICTR did not have the capacity or the mandate to record the genocide from a historical truth-finding point of view. Yet, the Prosecution stated, it could and should prosecute those most responsible and thus find justice. Justice in this sense may be regarded as the 'judicial truth' referred to by the ICTY Trial Chamber.

Hence, on behalf of the international community[8] and of the victims, the Prosecution must independently prosecute those most responsible in a way so as to contribute to the process of finding justice. The tasks assigned to the Prosecution to fulfil this role are set out in the next sub-section.

### 1.2 TASKS OF THE ICTR PROSECUTION

Article 15(1) of the ICTR Statute allocates two main tasks to the Prosecution, namely investigation and prosecution.[9] The tasks are spelled out in some more detail in Article 17(1) and (4) of the ICTR Statute. These provisions confirm that the Prosecution enjoys a considerable independence in the execution of its tasks vis-à-vis Chambers as well as institutions outside the ICTR. This sub-section outlines the legal position of the Prosecution and sets out examples to illustrate the extent of independence that the Prosecution enjoys.[10]

Article 17(1) of the ICTR Statute states that the Prosecution shall start an investigation on its own initiative or pursuant to information received from external sources, such as governments, United Nations organs, intergovernmental and non-governmental organisations. Even if information is passed to the Prosecution from an external source, it is the prerogative of the Prosecution to decide whether there is sufficient information to proceed. It is equally the Prosecution who may eventually determine that a *prima facie* case exists, and who may prepare an indictment upon that determination, pursuant to Article 17(4) of the ICTR Statute. Despite the

mandatory wording of Article 17, the Prosecution enjoys a considerable discretion in its decision-making.[11] Article 15(2) of the ICTR Statute embeds the independence of the Prosecution. It states: "the Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source." The scope of the comparable ICTY provision was set out in a decision in the case of *Milošević*. In that decision the ICTY Trial Chamber stated that the encouragement of the Security Council in Resolution 1160 (1998) to start investigations in Kosovo did not impugn the Prosecution's independence. The Chamber indicated that there was no evidence that the Prosecutor had started investigations *mala fide*, and it further stipulated that the Prosecution's independence regarded the assessment of evidence and the specific decision as to the indictment of a particular person, rather than the decision to initiate investigations regarding a certain situation.[12] The Prosecution can decide to initiate an investigation based upon information from an external source. This decision is non-reviewable, as indicated by the ICTY President in a letter to the Prosecutor.[13]

Chambers can also not instruct the Prosecution to open investigations on a certain matter. This was underlined in the case of *Nzirorera*. In a motion, Nzirorera asked the Trial Chamber to direct the Prosecution to open an investigation into the plane crash that assassinated President Habyarimana, the incident that triggered the genocide. The Trial Chamber dismissed the motion. It stressed that there was no legal basis that empowered Chambers to instruct the Prosecution to open specific investigations or prosecutions, and that the Prosecution was independent in this respect.[14] Moreover the argument that the Prosecution pursues a discriminatory strategy by only prosecuting Hutu individuals will not easily result in a stay of proceedings or other judicial activity in a specific case. In the *Akayesu* Appeal Judgement, the Appeals Chamber, following the *Čelebići* Appeal Judgement has stated that: "the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds

were not prosecuted."[15] Nevertheless, the fact that an accused person cannot easily invoke selective prosecution as an argument in favour of judicial interference in his specific case, does not mean that the Prosecution should ignore the claim altogether. From a broader perspective, the fact that the Prosecution omitted to prosecute certain crimes that did fall within its mandate may have an adverse impact on the overall evaluation of its achievements.

Another instance also underlines that the prosecution enjoys a wide discretion. This concerns the Prosecution's decision that a *prima facie* case exists. This decision is subject to review by a single judge. If the Prosecution decides that a *prima facie* case exists, it draws up an indictment. A judge reviews this indictment along with any supporting materials. He may confirm or dismiss the indictment as either whole or separate counts, depending on whether he is satisfied that a *prima facie* case exists.[16] After the confirmation, the Prosecution may only amend or withdraw the indictment with leave of a judge or of a Trial Chamber.[17]

In the case of *Ntuyahaga*, the Trial Chamber granted such leave to withdraw the indictment, but it did not set any material conditions that would affect the Prosecution's responsibility.[18] The Prosecution wanted to withdraw the indictment against Ntuyahaga, since Judge Ostrovsky had dismissed most of the counts. Only one count had been confirmed concerning the murder of Prime Minister Agathe Uwilingiyimana and the ten Belgian peacekeepers as a crime against humanity.[19] The Prosecution explained, *inter alia*, that further proceedings against Ntuyahaga would not be in line with her policy of "shedding light on the events that occurred in Rwanda in 1994 and highlighting the complete landscape of the criminal acts perpetrated at the time". The Trial Chamber declined to assess this argument of the Prosecution in substance and noted that the Prosecution was solely responsible for its prosecutorial strategy. The request for withdrawal on this ground was thus granted.

The Prosecution further stressed that withdrawal of the indictment would enhance the complementarity principle, since Belgium had indicated its willingness to prosecute Ntuyahaga. The Trial Chamber stated that the

notion of concurrent jurisdiction could not be invoked at this stage to support a withdrawal.[20] So, as opposed to the argument relating to the Prosecution's strategy, the Trial Chamber did fully assess this more formal argument in support of the request for withdrawal. The example illustrates that even in instances where that Chambers does have the power to review the Prosecution's strategy, they have refrained from controlling the Prosecutor's strategy doing so.

Also in the case of *Rusatira*, the Prosecution requested leave to withdraw an indictment that had been confirmed already. Four months after confirmation of the indictment, the Prosecution submitted that the "evidence obtained in the course of further investigation of the accused had been found to be insufficient at this time to proceed to trial", and it reserved the right to seek a new indictment in the future. Without any further substantive considerations, Judge Pillay accepted the Prosecution's submissions and granted the request pursuant to Rule 51 of the ICTR RPE.[21]

In accordance with these two decisions, it may be argued that the Prosecution is also entirely free to decide not to bring a case to court at all despite the fact that there may be sufficient evidence. In the case of *Ntuyahaga*, complete withdrawal of the indictment was allowed, even though a *prima facie* case for one count on crimes against humanity had already been established. In the case of *Rusatira*, the confirming Judge had even confirmed the whole indictment.

These cases thus underline that the ICTR Prosecution enjoys certain discretion, and that the legality principle (all cases must be adjudicated in the courtroom) does not apply to the ICTR Prosecution, even not in cases where there is sufficient evidence.

Hence, on the one hand, the Prosecution enjoys broad discretion as regards the initiation of investigations as well as the decision to prosecute. Despite the word 'shall' in Article 17(1), Chambers has refrained from ordering the Prosecution to initiate certain investigations upon the request of the defendant. Moreover, the Prosecution may decline to prosecute out of strategic reasons, and it may withdraw an indictment after the confirmation if further investigations do not provide sufficient evidence in its view.

Yet, on the other hand, the discretion of the ICTR Prosecutor is as limited as the jurisdiction of the Tribunal is. Many political choices were predetermined by the Security Council, such as the substantive, personal, geographical, temporal jurisdiction. The discretion that is left to the ICTR Prosecutor mainly pertains to the questions of who to indict and what to charge. Since it is clear that the Prosecution cannot prosecute *all* perpetrators of the genocide and other violations of international humanitarian law, it thus enjoys a considerable degree of discretion in this regard.

## 2. THE STRATEGY OF THE ICTR PROSECUTION IN THEORY AND IN PRACTICE

So far, the Prosecution has not drawn up any binding substantive guidelines itself to regulate its discretion, although rule 37(A) of the ICTR RPE grants the Prosecution a general power to draft regulations that are necessary for the performance of its functions.(22) Thus, the Prosecution has chosen not to limit its own discretion in a binding manner. Nevertheless, the Tribunal as a whole has to report annually to the Security Council and the General Assembly.(23) The annual reports to the Security Council and the General Assembly do give some insight into the strategy that the Prosecution has designed so far.

### 2.1 THE STRATEGY IN THEORY: THE ANNUAL REPORTS

The annual reports of the ICTR outline how the Prosecution developed a comprehensive plan. The first annual report of the ICTR, covering the starting period until 30 June 1996, stated that the Prosecution intended to give priority to those persons who were *mainly* responsible for the events of 1994.(24) It was stressed that the Prosecution was limited by its financial and human resources.(25) As documented by subsequent annual reports the strategy was refined various times. The second annual report indicated that investigations were aimed at individuals who had held positions of *national authority* during the genocide.(26) According to the third and fourth annual reports, two specific crimes were investigated within this broader policy.

These two priorities concerned conspiracy to commit genocide and sexual crimes.[27] The fifth annual report took the conspiracy theory as a starting point for a 'two-pronged prosecutorial strategy'. Firstly, military and political officials of the highest level were targeted, and secondly indictments were joined by theme, for example the media, or by region.[28] The sixth annual report reported the consolidated consolidation of this strategy. In general terms, the Prosecutor reiterated that her aim was to investigate the most serious crimes within the jurisdiction of the Tribunal. Besides, the report mentioned that those responsible for these crimes had to be prosecuted in accordance with the highest international standards.[29] It was further stated that crimes committed by the RPF in the aftermath of the genocide could also be subject of investigation.[30] Again, reference was made to the limited availability of resources which necessitated a high decree of selectivity on the part of the Prosecutor.[31]

The seventh annual report announced that 80 persons had been indicted at the time of reporting. Of these 80 persons, 60 were held in custody (or had been tried already) and 20 were still at large. In the exit strategy, published in January 2001, the Prosecutor had announced her intention to investigate some 136 more cases, excluding possible RPF-investigations.[32] Under international pressure to come to a closure, the Prosecutor revised this strategy, and declared that 14 more persons would be indicted on top of the existing indictments and ongoing investigations.[33] In the eighth annual report, the Prosecution announced that a total of 26 new indictments would be lodged before the end of 2004 in addition to the existing indictments. Not all of these indictments were expected to lead to trials as some of the suspects might never be found, or might be dead.[34] The numbers were adjusted in the completion strategy, based on the information available on 26 April 2004. The Prosecution estimated that altogether the ICTR would try 65 to 70 persons.[35] These figures were repeated in the ninth annual report.[36]

## 2.2 THE STRATEGY IN PRACTICE: SOME REMARKS

Keeping in mind the Prosecutor's focus on conspiracy to commit genocide and sexual crimes as well as the aim to investigate the leaders, this section assesses the practice so far.

To start with one may note that the two spearheads of the Prosecution's strategy, conspiracy to commit genocide and sexual crimes, do not seem to have dictated exclusively the Prosecution's choice of who to indict as there are also indictments that do not hold counts on these crimes A substantial number of indictments do not include counts on these crimes. It may further be noted that some conspiracy charges denote a local conspiracy rather than a national conspiracy.(37)

In regards to the first persons actually tried by the ICTR, the following observations may be made. The first to be convicted by the ICTR was the Mayor Jean-Paul Akayesu. Although Akayesu bore responsibility for genocide committed in his commune Taba, it is hard to see how a Mayor fits the category of either 'those who held national authority during the genocide', or 'those mainly responsible for the genocide in Rwanda'.(38) The second ICTR judgment concerned the Prime Minister during the genocide, Jean Kambanda. This judgment has been heralded as the Tribunal's great success. It is true that Kambanda held a position of national authority and thus fits the Prosecution's strategy in that respect. Yet, it must also be noted that Kambanda was *not* one of the masterminds of the genocide.(39)

The next judgments regarded a great variety of persons from different positions in society, like several Ministers and Prefects, people related to the army and the militia *Interahamwe*, a journalist of the hate radio RTLM (Radio et Télévision des Milles Collines) and other people involved in the media, Mayors and businessmen. The first to be acquitted by the ICTR was Ignace Bagilishema, a Mayor in the commune of Mabanza, in the Prefecture of Kibuye. The very first judgments convicted each accused individually, and in later judgments cases of two or three people were joined. As the Prosecution proceeded though, it developed the theory that the genocide was the result of a conspiracy to commit genocide, and it adjusted its strategy accordingly. Thus originated the initiative to join indictments.

On 6 March 1998, the Prosecution presented a comprehensive indictment against 29 persons with conspiracy as the central count.[40] This new indictment compiled cases of accused in custody that had already made their initial appearance, of accused who remained at large, but whose indictments had been confirmed, and of new suspects also remaining at large. The reason why the Prosecution sought to join these ongoing and new cases was that new evidence had come up denoting a national conspiracy.[41] The Prosecution submitted that this new evidence would 'assist the Tribunal to fulfil its mandate, object and purpose, as provided in the Preamble of the Statute, (*i.e.*, to prosecute those responsible for the serious violations of international humanitarian law).' The reviewing Judge Hossain Khan did not consider this argument, but dismissed the indictment. He held that he could neither have concurrent jurisdiction over cases already at trial before Trial Chambers, nor could he assume jurisdiction over cases that had already been confirmed by other reviewing Judges.[42]

The Prosecution appealed the dismissal of the new indictment. It argued that this appeal was admissible, since the decision to dismiss adversely affected its ability to discharge its mandate, and thus contravened the Tribunal's purposes and objectives.[43] The Prosecutor submitted that Article 1 ICTR Statute required positive action of Chambers towards fulfilling the Tribunal's mandate. Accordingly, the decision to dismiss resulted in a failure of Chambers to complement it in executing its tasks and thus constituted a miscarriage of justice.[44] The Appeals Chamber firmly rejected this line of reasoning.[45] It stated that the decision did not pose an obstacle as regards the mandate of the Tribunal, and pointed to other provisions that enabled the Prosecution to achieve its goals. The Appeals Chamber further stressed that the judicial organs of the Tribunal could not in any way assist or complements the Prosecution in the execution of its tasks. It emphasised once again, this time to the Prosecution's disadvantage, that the Prosecution enjoyed sole responsibility in this respect.

Hence, even though the request for joinder would have been favourable to fulfilling the Prosecution's tasks and mandate, the reviewing judge did not confirm it. The dismissal was upheld in appeal. This may illustrate that

eventually procedural regulations can limit the Prosecution's discretion. If it had not been for these procedural limitations, one could still have questioned the Prosecution's wish to join as many as 29 cases from a procedural perspective. While it is understandable that the Prosecution tries to alleviate the burden for witnesses by reducing the times that they have to testify, one must equally reckon that joinder of too many cases may entail unnecessary delays[46] and may infringe also in other ways on the rights of the defence.[47]

Given the objective to incapacitate the masterminds of the genocide, some cases are of special importance. These are the military cases,[48] the government cases,[49] and the media case.[50] These cases indict key suspects and their prosecution directly addresses some of the root causes of the genocide.[51] Therefore, these cases should be top priority to the Prosecution. Yet, the man who is generally said to be *the* main architect of the genocide spent some six years in pre-trial detention, before his case came to trial.[52] Thus, the International Crisis Group (ICG) has urged the ICTR Prosecution to get its priorities straight and criticized the Prosecution's apparent focus on quantity instead of quality. The ICG also scrutinized the arrests of the period May 2001-May 2002, and noted that these implied a rather broad notion of the concept 'those most responsible'.[53] The arrests included not only the former Minister of Finance,[54] the Prefect of Kigali-Rural,[55] Colonel of the Rwandan army[56] and some Mayors,[57] but also a military chaplain,[58] the rector of a religious school,[59] a Catholic priest,[60] and a community counselor.[61]

All in all, the indictments concern a great array of different kinds of persons. Not only people from the military and the political scene – national as well as local - are held responsible have been made to account before the ICTR, but also religious leaders and other prominent figures of the Rwandan society, such as businessmen,[62] a medical doctor,[63] and a popular pop-singer[64] must face ICTR-charges. Consequently, we a pattern may be discerned within the prosecutorial strategy outlined above to indict people representing the various sectors of the society that were involved in the organization and the execution of the genocide.

## 3. THREE MODELS FOR THE PROSECUTION'S STRATEGY

From the annual reports and the practice, it becomes clear that the Prosecution's strategy is in fact a mixture of three models. These models are discussed in this section.

### 3.1 LEGALITY PRINCIPLE BASED UPON THE ARREST OF SUSPECTS

Initially, the policy of the ICTR Prosecution depended largely upon the 'coincidence' of who was caught. The Prosecution's initial ability to pursue a strategy was more or less directed by the willingness of states to co-operate and by the arrests and surrenders that these states undertook. Following this reality, a strategy could be devised that follows the legality principle based upon the arrest of suspects. According to such principle, the Prosecution must prosecute if a suspect has been caught and if there is enough evidence. Yet, this was certainly too random. The Prosecution must try to pursue the specific goals as much as possible, and it therefore has the task to devise a more specific strategy. Consequently, states must be forced to co-operate, if necessary, to fulfil the strategy. Even though the Prosecution's powers in this respect are very limited, it has managed to have some key suspects arrested in states that initially shielded these persons, and the Prosecution has thus shown some ability to create a reality rather than just to follow it.

Moreover, the obligation to prosecute if a defendant is caught and if there are enough evidence contrasts sharply with the newly established rule 11*bis* RPE.[(65)] This Rule enables the Trial Chamber, at the request of the Prosecutor or *proprio motu*, to defer a case to a national authority if that is appropriate in the circumstances of the case. Application of this Rule depends on the preparedness of the arresting state to prosecute, and possibly also of a third state to which the arresting state may extradite the accused. The Rule is inspired by the notion of universal jurisdiction and may be regarded as a reinforcement of this principle in international law. The purpose of the Rule is to alleviate the task of the ICTR, and to enable the Prosecutor to address the most important cases and to implement her strategy within the timeframe set.[(66)] The inclusion of the possibility of 'reversed

surrender' re-emphasises the Prosecution's discretion to decide which cases it pursues before the ICTR and which cases it leaves to national courts. Such discretion contrasts with some sort of legality principle as outlined above.

### 3.2 TOP LEADERSHIP: MASTERMINDS AND MAIN ORGANISERS

Alternatively, the Prosecution could have construed the concept of 'those most responsible' very restrictively, and prosecute only those persons who have actually masterminded the genocide. This strategy would be appropriate in light of the special characteristics of genocide. *The* distinguishing element of genocide is the *mens rea*, or the specific intent to destroy a certain group. Even though the *ad hoc* Tribunals stated in a general fashion that genocide could be committed by a single individual, the ICTR indicated with regard to the Rwandan situation that the genocide appeared to have been committed pursuant to a plan drafted by (*de facto*) state officials.[(67)] Moreover, the *rationale* of criminalizing genocide as an international crime is to address the organised destruction of minority groups.[(68)] Consequently, the aim of the prosecution of genocide on an international level should in the first place be to catch the organisers, and not lower level perpetrators who knowingly participated in the execution of the genocidal policy, but who did not conceive this policy. Such leadership-strategy would apparently exclude mayors such as Akayesu.[(69)] The limitation of this strategy is that in first instance it is only focused on the crime of genocide, leaving possible RPF-crimes out of consideration. Such initial focus concurs with the establishment of the Tribunal as a means to address to post-genocide situation. Yet, the mandate of the Tribunal also includes the goal to pursue national reconciliation. From this perspective, investigation of the main perpetrators of alleged RPF-crimes may be required.

### 3.3 EXEMPLARY JUSTICE

As a third strategy the Prosecution focussed on rendering exemplary justice. According to this strategy, it seemed not only to indict individuals for their own actions, but also as a symbol for a larger entity. This exemplary justice

was thematic, in the sense that a representative from each segment of society that was involved in the genocide was indicted, namely from the military, the political arena, civil society, the church, the RPF, etc. Exemplary justice was also distributed on a geographical basis, since persons were indicted for crimes committed in the various provinces. Whereas the first cases concerned crimes committed in Kibuye Prefecture, there were also cases called the *Butare* case and the *Cyangugu* case. However, this strategy may not lead to the top leaders of the genocide.

Although the Prosecutors of the Nuremberg Tribunal did not choose suspects upon the basis of clear prosecutorial principles, in practice their strategy was to indict persons from various segments of society who co-operated in executing the genocide. Yet, it seems somewhat paradoxical that in the specific case of Rwanda such strategy would concur with the express purpose of the genocidal architects to involve the whole society as well as the international community as accomplices in the genocide with a view to ensuring impunity of all.(70)

### 3.4 STRATEGY VERSUS DISCRETION

As indicated below, the strategy of the ICTR Prosecution is a mix of the models outlined. However, even though the Prosecution may pursue a certain strategy, there must still be some flexibility to indict persons that do not directly fit in the strategy. Such discretion is necessary to fulfill the mandate of the ICTR. Furthermore, discretion provides the Prosecution with the opportunity to address specific, unforeseen, problems. As an example of such unexpected developments two cases mat be noted in which defense investigators appeared to be *génocidaires*. This development may corrupt the ICTR's image and legitimacy. The Prosecution must be able to act upon such negative developments and prosecute these persons to set a clear example, as it did on both occasions.(71)

## 4. HURDLES FOR THE PROSECUTOR

In the execution of its tasks, the Prosecution has encountered some difficulties of various natures. These should be taken into account when evaluating the Prosecution's strategy. Therefore, this section sets out the most important hurdles and gives some direct examples of how they influenced the Prosecution's actions.

In the annual reports, the Prosecution alludes to some factors that complicate the complete and expedient execution of its task. In this regard, the limited availability of resources is emphasised, as well as the high standards of prosecution that must be respected. Yet, the factor that may eventually be the most decisive to the Prosecution's strategy is state co-operation. Of course, according to the letter of the Statute, all states are obliged to co-operate and to comply fully and without delay with any request for assistance. In practice though, the ICTR itself has no means to enforce this obligation, and is dependent on its political parent body, the Security Council, to effectively ensure co-operation if necessary.(72) The discretion of the Prosecution to choose whom to indict may be seriously hampered by uncooperative states. Even though some big fish were eventually surrendered to the ICTR, there have been ample examples of unwilling states. Co-operation of the Democratic Republic of Congo(73) regarding the surrender of suspects did not occur until September 2002, with the unexpected surrender of Renzaho, the Prefect of Kigali during the genocide.(74) Another notorious uncooperative state is Congo Brazzaville.(75) Kenya, for its part, threatened in the first years of the ICTR's existence to arrest every ICTR official that would enter its territory.(76) In 1996 though, Kenya appeared to change its attitude with the successful Operation NAKI surrendering leading to the transfer of 9 suspects.(77) However, one of the key figures Félicien Kabuga, allegedly one of the financiers of the genocide, escaped this operation and it is asserted that he continued to reside in Kenya for several years.(78)

A second hurdle that the Prosecutor faces continually concerns the relationship between the ICTR and the current Rwandan government. From the outset, Rwanda's attitude towards the Tribunal has been ambiguous.

Even though it requested the Security Council to establish an international tribunal, it voted against the Resolution that created it. Of all states, the ICTR is most dependent on Rwanda for co-operation, not only for its own well functioning in a legal sense, but also because the ICTR was established for the cause of the Rwandans in the first place. As to legal matters, Rwanda, as the scene of the crime, is of course the seminal source of evidence. Many witnesses are coming from Rwanda and the ICTR investigators perform a great deal of their work in Rwanda. Therefore legal assistance of Rwanda to the ICTR proceedings is crucial.(79) This provides the Rwandan government with an important ace to play in case of undesired developments. When the Appeals Chamber dismissed the indictment against Barayagwiza as a consequence of grave violations of the defendant's rights, the Rwandan government openly threatened to withdraw all further co-operation with the Tribunal.(80) The Prosecutor pleaded for a reversal of the decision and on an oral hearing outlined the impasse that would arise if the Rwandan government definitely withdrew its co-operation with the Tribunal.(81) Subsequently, the Appeals Chamber decision was reversed on the basis of 'new facts'. The Judges in the Appeals Camber though – especially those who had also rendered the previous decision – did not yield to political considerations explicitly.(82) Yet, in its decision the Appeals Chamber constructed the conditions of Rule 120 (Request for review) remarkably creatively.(83)

A few years later, when the indictment against Rutasira was withdrawn by the Prosecutor, the Rwandan government was again not pleased but it reacted in a somewhat milder fashion, without clear-cut threats. At that time, the governments' concerns primarily regarded another aspect of the Prosecutor's strategy, namely the intention to investigate some RPF cases.(84) In its 2002-report, the ICG accused the Rwandan government of blackmailing the Tribunal either directly through the threat of suspending its co-operation,(85) or more indirectly through the victims' organizations Ibuka and Avega.(86) The ICG noted that these actions supported or organized by the Rwandan government remarkably coincided with the announced change of direction in the Prosecution's strategy so as to accommodate the

investigation of alleged RPF crimes, as well as the ongoing investigations into the plane crash by the French investigating Judge Jean-Louis Bruguière.[87] The Prosecution seems thus uncomfortably tied to the whims of the Rwandan government. For the well functioning of its office as well as that of the entire Tribunal, firm backing of the Security Council is imperative.[88] In this regard, the Council could have reacted more decisively to the letters of the President of the ICTR conveying Rwanda's uncooperative attitude towards the Tribunal,[89] than merely reiterating that all states have the obligation to co-operate with the Tribunal.[90] Instead, unfortunately, the Security Council seems to have given in to Rwanda. As observed above, the ICTR has recently received its own Prosecutor, and in so doing Carla del Ponte was taken off the Rwandan files. Del Ponte and her determination to investigate and if necessary prosecute RPF crimes have now been replaced by Jallow and his different stand vis-à-vis the RPF.[91]

A third constraint to the Prosecution is posed by the limited temporal jurisdiction of the Tribunal. One may be inclined to argue that the Prosecution as an organ of the ICTR should not act as the puppet of the Security Council, but that it should rather challenge this political limitation and seek the largest possible interpretation, or circumvent it as much as possible. The opening to do so relates to the Prosecution's pivotal count, namely conspiracy to commit genocide. The *Media* case provided a good opportunity. According to the Prosecution's allegations in this case, the conspiracy had already started before 1994, and consequently the indictments referred to many pre-1994 events. Pre-trial defence motions protested against this course of action, pointing to the limits of temporal jurisdiction that had been set by the Security Council. The Trial Chamber remarked thereupon that the issue would be fully deliberated at the assessment of the evidence during trial. Nevertheless, the Chamber stated already that it could take note of events that fall outside the temporal jurisdiction to appreciate the context of the alleged crimes. The Chamber further accepted the Prosecution's submissions that it would only rely upon the allegations that fell outside the timeframe in order to prove the elements of crimes that were allegedly committed in 1994.[92] Another Trial Chamber

stated more articulately in the case of *Nsengiyumva* that conspiracy was a continuing crime, which did not end once an agreement was made, and those activities before 1994 could be relevant to prove conspiracy in 1994.(93)

In an interlocutory appeal in the *Media* case, the Appeals Chamber adhered to the view of the Trial Chamber in general, but several judges explored the matter in more detail in separate opinions.(94) Judges Lal Grand Vohrah and Rafael Nieto-Navia emphasised that the limits of the temporal jurisdiction applied to all crimes, including inchoate crimes and continuing crimes, such as incitement and conspiracy to commit genocide respectively. The opinion especially posed problems to the Prosecution's count on conspiracy, since this alleged that the conspiracy had started before 1994 and continued into 1994. On the question as to how the pre-1994 events should be appreciated, the two Judges argued that these events could not be considered in any way in support of the charge. Therefore, the Judges claimed that a description of pre-1994 facts should henceforth be clearly separated from the charges. In contrast, Judge Shahabuddeen favoured a clear distinction between the elements of a crime on the one hand and proving these elements on the other. The temporal jurisdiction concerns the presence of the elements, whereas prove proof of these elements may derive from pre-1994 facts. The fact that the agreement to conspire was made before 1994 is not decisive according to Shahabuddeen. Similar to Trial Chamber's reasoning in the *Nsengiyumva* case, the Judge argued that the conspiracy to commit genocide was a continuing threat against the society of Rwanda that persisted in the year of 1994, and could thus be considered as constantly renewed.(95)

In subsequent decisions, the Trial Chambers relied on their earlier case law that pre-1994 facts could be used to prove charges relating to crimes allegedly committed in 1994, in addition to using other proof.(96) A specific claim against the admissibility of evidence can still be made during trial. In the Judgement in the first instance in the *Media* case, the Trial Chamber recalled its decision that pre-1994 events could be used as evidence. The Judgement noted the Appeals Chamber decision as well as the two Separate Opinions. Without expressly deviating from the opinion of Judges Vohrah

and Nieto-Navia, the Trial Chamber adopted Shahabuddeen's point of view.[97] In practice, this resulted, for example, in the Chamber taking account of Nahimana's role as Director of the Rwanda Office of Information, a post he had held in 1992, when radio incitements had reinforced the massacres in Bugesera.[98] In a Decision in the *Military I* case, the Trial Chamber emphasised and elaborated on the Opinion of Judge Shahabuddeen. The Trial Chamber listed three situations in which evidence of pre-1994 events could be relevant, viz. (i) when it concerned evidence of a continuing offence that had started before 1994 and continued into 1994; (ii) when it concerned crucial background information; and (iii) when it concerned 'similar fact evidence'. In this last situation, it was indicated that such evidence could only be used in exceptional cases,[99] for instance to prove systematic conduct on the part of the accused.[100]

With regard to the charge of conspiracy, the Prosecution has encountered an additional difficulty which has an evidentiary nature. In practice, the Judges have posed some requirements to sustain a conspiracy count to ensure that the accused understands the nature of the charges against him. These include the requirement that the indictment should name some of the alleged conspirators,[101] and that it specifies other details such as dates, locations and purposes of meetings as much as possible.[102] Further, the Prosecutor must lead some direct evidence of an agreement to commit genocide in the presentation of her case.[103] Lack of sufficient evidence has already resulted in acquittals on conspiracy counts in several cases.[104]

Another evidentiary problem that the Prosecutor must confront concerns those persons who were very influential before or during the genocide, but who did not hold a specific post. Especially the clan of Madame Habyarimana – the wife of the former President - is generally suspected to have been implicated in the genocide.[105] Yet, it may be extremely difficult to prove decisively the role that these people played and the criminal responsibility that they bear.

Somewhat related to these evidentiary problems is the time-consuming nature of the ICTR-trials. The Prosecution must balance the pressure of the international community for results, the victim's need of timely justice with

the defendants right to a fair trial. Whereas the Judges bear the greatest responsibility to administrate justice swiftly, the Prosecution must also make a choice within her strategy whether it wants to prosecute a case fully exposing all criminal deeds of the accused, or whether it chooses to confine its case proving only those acts necessary to sustain a conviction.(106) Given that prosecution of the all main perpetrators is the primary objective, and that the establishment of a legal record serves a more as an additional goal, the Prosecution should opt for the second, more restricted approach.

The Prosecutor also faces a complex query dilemma within its discretion regarding the question to what extent she must investigate actions that are somewhat more indirectly related to the commission of genocide. This concerns not only the alleged crimes committed by the RPF, but also for instance the plane crash that triggered the genocide. Prosecution of these cases may provide a more overall picture of what happened. A consideration that would especially support prosecution of alleged RPF crimes concerns one of the reasons for the establishment of the ICTR. International prosecution may be regarded as a means to break through international immunity rules regarding state officials, and this may serve as an extra imperative to hold the RPF – now holding state power in Rwanda – accountable for its deeds.

## 5. EVALUATION

The article demonstrated that the Prosecution enjoys a considerable discretion with regard to the question what to investigate, who to prosecute and what to charge. The general strategy of the Prosecution can be considered a mixture of different models that were discussed in this article. The initiative to join cases on a geographic and thematic basis denotes an exemplary-justice strategy. In contrast, in the annual reports, the Prosecution stressed its intentions to focus on the main leaders. And naturally, the Prosecution was also dependent on state co-operation with regard to the surrender of suspects. Although the Security Council particularly emphasised the importance of prosecuting the most senior leaders that bear

most responsibility,[107] the ICTR Prosecution maintained that also other criteria remained relevant for its prosecutorial strategy. These criteria included the geographical spread, the extent of participation, and prospects for dealing with the suspect or accused through other mechanisms.[108]

At this point of time in the Tribunal's life span, the incapacitation strategy should prevail with regard to the genocide charges. This concurs with one of the reasons why the choice for an international tribunal prevailed over re-enforcing national prosecution in the case of Rwanda, namely to capture those responsible at the state level who had found refuge in third states. On the basis of the Tribunal's mandate to contribute to the process of national reconciliation, this strategy should be complemented with investigations of RPF-crimes.

Although for reasons of evidentiary nature and public pressure, it is understandable that the Prosecutor started with some cases that did not entirely fit such strategy, such as Akayesu, time has now come to give full attention to the most important cases, first of all the military case, and to leave the cases of smaller fry to national jurisdictions. The new Rule for 'reversed surrender', Rule 11*bis*, may serve well to emphasize the responsibilities that states have in this regard. Had this new policy of the ICTR been implemented before, Musema could have been tried in Switzerland, alleviating the Tribunals task.[109] All in all, it is clear that the Prosecution can only execute its tasks and strategy well if supported by states and by the Security Council. This relates to the prosecution of the masterminds of the genocide as well as to the investigation of the alleged RPF crimes. ❖

## NOTES:

1. For more details, see section 4 below.

2. *The Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Prosecutor's Memorial (in response to the motion filed by the Kingdom of Belgium on 10 February 1998 to appear at the trial and lead evidence as *amicus curiae*), 10 February 1998.

3. Previously, Belgium had been requested by the Tribunal to defer its investigations and criminal proceedings in the case of Bagosora, which Belgium had conducted simultaneously with the Tribunal, *The Prosecutor v. Bagosora*, Case No. ICTR-96-7-D, T.Ch.I, Decision of the Trial Chamber on the application of the Prosecutor for a formal request of deferral to the competence of the International Criminal Tribunal for Rwanda in the matter of Théoneste Bagosora (pursuant to rules 9 and 10 of the Rules of Procedure and Evidence), 17 May 1996.

4. Secondly, Belgium sought to realise that it – or its citizens – could appear before the ICTR as plaintiffs, comparable to a *partie civile*, instead of witnesses.

5. Finally, Belgium was invited as *amicus curiae* to make submissions relating to the killings of the ten UNAMIR soldiers. As regards the leading of evidence, the Trial Chamber stated that indeed only the Prosecutor and the Defence could bring witnesses before it. *The Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, T.Ch.II, Decision on the amicus curiae application by the government of the Kingdom of Belgium, 6 June 1998.

6. *The Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović, Papić, Santić, also known as 'Vlado'*, Case No. IT-95-16, T.Ch.II, Decision on communications between the parties and their witnesses, 21 September 1998.

7. The Military case joins the indictments against Bagosora, Nsengiyumva, Kabiligi, Ntabakuze, see below. The opening speech was delivered on 2 April 2002.

8. Also in a joint statement of the Prosecutors of the International Criminal Court, the ICTY, the ICTR and the Special Court for Sierra Leone pf 27 November 2004, the Prosecutors took the position that they represented all the regions of the world.

9. As pointed out by Ntanda Nserenko, in national jurisdictions, these two tasks are not always assigned to one and the same person or institution, D.D. Ntanda Nserenko,

Prosecutorial discretion before national courts and international tribunals, in 3 *J. of Int. Crim. Justice* 124, p. 135 (2004).

10. See also L.J. van den Herik and N.J. Schrijver, Commentary on Decisions in Prosecutor v. Krajišnik and Prosecutor v. Kvočka et al., in A. Klip en G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals; The International Criminal Tribunal for the former Yugoslavia 2000-2001,* Volume V, Antwerp: Intersentia, p. 98 (2003).

11. L. Côté, Reflections on the exercise of prosecutorial discretion in international criminal law, in 3 *J. of Int. Crime. Justice* 162, p. 165 (2004). But see also Ntanda Nserenko who argues that the Prosecution has only a limited discretion in deciding whether to prosecute or not, Ntanda Nserenko (2004), *op.cit.*, pp. 135-136.

12. *Prosecutor v. Milošević*, Case No. IT-99-37-PT, T.Ch., Decision on Preliminary Motions, 8 November 2001, para. 15.

13. Letter of ICTY President Kirk McDonald to Prosecutor Justice Arbour, 16 March 1999, at www.un.org/icty/pressreal/p386-e.htm (visited at 11 September 2002).

14. *The Prosecutor v. Nzirorera*, Case No. ICTR-97-20-I, T.Ch.II, Decision on the defence motion seeking an order to the Prosecutor to investigate the circumstances of the crash of president Habyarimana's plane, 2 June 2000.

15. *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, A.Ch. Appeal Judgement, 1 June 2001, para. 96, following *The Prosecutor v. Delalić, MucićHazim Delić, and Landžo* ('*Čelebići*' case), Case No. IT-96-21-A, A.Ch., Appeal Judgement, 20 February 2001, para. 613. As confirmed in *The Prosecutor v. Gérard and Elizaphan Ntakirutimana*, Case No. ICTR-96-10 and ICTR-96-17-T, T.Ch., 21 February 2003, paras. 870-887 and *The Prosecutor v. Ndindiliyimana*, Case No. ICTR-2000-56-I, T.Ch. 26 March 2004. See also Côté (2004), *op.cit.*, pp. 172-177, and H.B. Jallow, Prosecutorial discretion and international criminal justice, in 3 *J. of Int. Crime. Justice* 146-161, pp. 154-160 (2004).

16. Article 18 of the ICTR Statute and Rule 47 of the ICTR RPE. On what exactly constitutes a '*prima facie* case', see A. Obote-Odora, Drafting indictments for the International Criminal Tribunal for Rwanda, in 12 *Crim. L. F.* 335, pp. 338-341 (2001).

17. Rules 50 and 51 of the ICTR RPE.

18. *The Prosecutor v. Ntuyahaga*, Case No. ICTR-98-40-T, T.Ch.I, Decision on the Prosecutor's motion to withdraw the indictment, 18 March 1999.

19. *The Prosecutor v. Ntuyahaga*, Case No. ICTR-98-40-I, Judge Ostrovsky, Decision on the review of the indictment, 29 September 1998.

20. After the withdrawal of the indictment, Ntuyahaga could not be transferred to Belgium, since there was no provision in the Statute or the Rules enabling such reversed

surrender. Therefore, Ntuyahaga had to be released. This unsatisfactory situation was adapted afterwards on the 12th Plenary Session, 5-6 July 2002 with the inclusion of Rule 11*bis* (B). For more on this Rule, see below, sub-section 5.1. See for subsequent developments relating to the release of Ntuyahaga an excellent commentary by G. Sluiter, in *Annotated Leading Cases of International Criminal Tribunals; The International Criminal Tribunal for Rwanda 1994-1999*, A. Klip and G. Sluiter (eds.), Antwerp: Intersentia (2001), p. 103.

21. *The Prosecutor v. Léonidas Rusatira*, Case No. ICTR-2002-80-I, Judge Pillay, Decision on the Prosecutor's *ex parte* application for leave to withdraw the indictment, 14 August 2002.

22. M. Bergsmo, C. Cissé, C. Staker, The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC compared, in *The Prosecutor of a Permanent International Criminal Court*, L. Arbour, A. Eser, K. Ambos, A. Sanders (eds.), Freiburg im Breisgau: Iuscrim, (2000), p. 130.

23. Article 32 of the ICTR Statute.

24. First annual report of the ICTR, *UN Docs*. A/51/399- and S/1996/778, 24 September 1996, para. 42.

25. *Ibid.*

26. Second annual report of the ICTR, *UN Docs*. A/52/582 and S/1997/868, 2 September 1997, para. 52.

27. Third and fourth annual report of the ICTR, Resp. *UN Docs*. A/53/429 and S/1998/857, 23 September 1998, para. 49 and *UN Docs.* A/54/315 and S/1999/943, 7 September 1999, paras. 52 and 53.

28. Fifth annual report of the ICTR, *UN Docs*. A./55/435 and S/2000/927, 2 October 2000, paras. 120 and 121.

29. Sixth annual report of the ICTR, *UN Docs*. A/56/351 and S/2001/863, 14 September 2001, para. 91.

30. *Ibid.*, para. 103.

31. *Ibid.*, para. 119.

32. International Crisis Group, *Tribunal Pénal pour le Rwanda: Le Compte à Rebours*, Rapport Afrique n; 50, 1 August 2002, p. 7.

33. Seventh annual report of the ICTR, *UN Docs*. A/57/163 and S/2002/733, 2 July 2002, paras. 1, 9, 74.

34. *UN Docs.* A/58/140 and S/2003/707, 11 July 2003, para. 9.

35. *UN Doc.* S/2004/341, 3 May 2004, para. 62. Also see the fourth updated version of the completion strategy, 19 November 2004, para. 63.

36. *UN Docs.* A/59/183 and S/2004/601, 27 July 2004.

37. E.g., The Prosecutor v. Seromba, Case No. ICTR-01-66-I, The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-17-I, The Prosecutor v. Musema, Case No. ICTR-96-13-I.

38. See T. Howland and W. Calathes, The U.N.'s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation, in 39 *Virg. J. Int'l. L.* 135, pp. 158-159 (1998).

39. International Crisis Group, *Tribunal Pénal pour le Rwanda L'urgence de juger*, Rapport Afriquen; 30, 7 June 2001, p. 6.

40. *The Prosecutor v. Bagosora and 28 Others*, Case No. ICTR-98-37-I, Indictment, 6 March 1998.

41. *The Prosecutor v. Bagosora and 28 Others*, Case No. ICTR-98-37-I, Judge Hossain Khan, Dismissal of indictment, 31 March 1998.

42. *Ibid*.

43. *The Prosecutor v. Bagosora and 28 Others*, Case No. ICTR-98-37-I, A.Ch., Decision on the admissibility of the Prosecutor's appeal from the decision of a confirming judge dismissing an indictment against Théoneste Bagosora and 28 others, 8 June 1998, paras. 25-26.

44. Article 24 of the ICTR Statute allows an appeal on two grounds, namely (a) an error on a question of law invalidating the decision, or (b) an error of fact which has occasioned a miscarriage of justice.

45. *The Prosecutor v. Bagosora and 28 Others*, Case No. ICTR-98-37-I, A.Ch., Decision on the admissibility of the Prosecutor's appeal from the decision of a confirming judge dismissing an indictment against Théoneste Bagosora and 28 others, 8 June 1998, paras. 27-32.

46. As a Report of an Expert Group stated: “The greater the number of suspects joined, the greater will be the danger of multiple adjournments.” Report of the Expert Group to conduct a review of the effective operation and functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, *UN Doc.* A/54/634, 11 November 1999.

47. For instance, in the case of Mugenzi, the Defence requested severance of trial asserting that a conflict of interest between the co-accused existed, and that criticism by the Defence of Mugenzi on this co-accused might result in attempts to discredit Mugenzi, *The Prosecutor v. Mugenzi et al.*, Case No. ICTR-99-50-I, Decision on Justin Mugenzi's motion for stay of proceedings or in the alternative provisional release (Rule 65) and in addition

severance (Rule 82(B)), T.Ch.II, 8 November 2002, para. 22. The Trial Chamber was not convinced by this argument.

48. Military case I groups the following cases: *The Prosecutor v. Bagosora*, Case No. ICTR-98-7-I, (former *directeur de cabinet* of the Ministry of Defence); *The Prosecutor v. Nsengiyumva*, Case No. ICTR-96-12-I, (colonel, former commander in the Gisenyi); *The Prosecutor v. Kabiligi*, Case No. ICTR-97-34-I, (Brigadier-General in the former Rwandese army); *The Prosecutor v. Ntabakuze*, Case No. ICTR-97-30-I, (Commander of Battalion in former Rwandan army). Military case II comprises the cases of: *The Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-I, (Chief of Staff of Gendarmerie Nationale); *The Prosecutor v. Nzuwonemeye*, Case No. ICTR-00-56-I, (Commander of the 42nd Battalion); *The Prosecutor v. Sagahutu*, Case No. ICTR-00-56-I, (Second-in-command of the Reconnaissance Battalion); *The Prosecutor v. Bizimungu*, Case No. ICTR-00-56-I, (Chief of Staff of Rwandan Army), *The Prosecutor v. Mpiranya*, (colonel, head of the Presidential Guard).

49. Government case I joins the following cases: *The Prosecutor v. Bizimungu* (Minister of Health), *The Prosecutor v. Mugenzi* (Minister of Commerce), *The Prosecutor v. Mugiraneza* (Minister of Civil Service), *The Prosecutor v. Bicamumpaka* (Minister of Foreign Affairs), Case No. ICTR-99-50-I. Government case II indicts: *The Prosecutor v. Karemera* (Minister of Interior), *The Prosecutor v. Rwamakuba* (Minister of Education), *The Prosecutor v. Ngirumpatse* (President of the political party MRND), *The Prosecutor v. Nzirorera* (Secretary-General of the MRND), Case No. ICTR-98-44-I. If caught timely the following persons are also part of this case, namely Bizimana (Minister of Defence – generally presumed to be deceased), Nzabonimana (Minister of Youth), and Kabuga (Businessman and president of RTLM). On 14 February 2005, the Trial Chamber ordered that the case of Rwamabuka be severed.

50. The media case consists of the following cases: *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, Indictment, (one of the founders of RTLM and senior officer of RTLM radio station, founding member of the political party CDR); *The Prosecutor v. Nahimana*, Case No. ICTR-96-11-I, Indictment, (one of the founders of RTLM and senior officer of RTLM radio station, proclaimed Minister of Higher Education, Scientific Research and Culture under the Arusha Peace Accords of 1993, which were never implemented); *The Prosecutor v. Ngeze*, Case No. ICTR-97-27-I, Indictment, (Editor-in-Chief of the journal Kangura)

51. The Special Rapporteur on Rwanda identified three root causes, namely the rejection of alternate power, the incitement to racial hatred and impunity. Report on the situation of

human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, *UN Doc.* E/CN.4/1995/71, 17 January 1995, paras. 22-25. See also P. Akhavan, Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda, in 7 *Duke J. Comp. & Int.'l L.* 325, p. 333 (1997)

52. On 8 April 2002, Bagosora filed a motion for provisional release, arguing that his excessive pre-trial detention constituted an exceptional circumstance warranting such a measure. In its decision, Trial Chamber III stated that the length of detention was not the only factor to be taken into account and pointed to the risk of flight and the possible threat of witnesses. Moreover, the Trial Chamber recalled that even while in custody the accused had not attended the proceedings on 2 April 2002. *The Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, T.Ch.III, Decision on the Defence Motion for Release, 12 July 2002.

53. ICG 2002, *op.cit*., p. 9.

54. The Prosecutor v. Ndindabahizi, Case No. ICTR-01-71-I.

55. *The Prosecutor v. Karera*, Case No. ICTR-01-74-I.

56. *The Prosecutor v. Simba*, Case No. ICTR-01-76.

57. The Prosecutor v. Bisengimana, Case No. ICTR-00-60, The Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-I, and The Prosecutor v. Mpambara, Case No. ICTR-01-65-I.

58. *The Prosecutor v. Rukundo*, Case No. ICTR-01-70-I.

59. *The Prosecutor v. Nsengimana*, Case No. ICTR-01-69-I.

60. *The Prosecutor v. Seromba*, Case No. ICTR-01-66-I.

61. *The Prosecutor v. Rutaganira*, Case No. ICTR-95-1C-I.

62. *The Prosecutor v. Musema*, Case No. ICTR-96-13-I and *The Prosecutor v. Ruzindana*, Case No. ICTR-95-1-I.

63. The Prosecutor v. Gérard Ntakirutimana, Case No. ICTR-96-17-I.

64. *The Prosecutor v. Bikindi*, Case No. ICTR-01-72-I.

65. Rule 11*bis* was adopted at the 12th plenary session of the Judges, 5/6 July 2002.

66. See press briefing by the spokesman of the ICTR, ICTR/INFO-9-13-22.EN, Arusha, 8 July 2002.

67. *The Prosecutor v.* Akayesu, Case No. ICTR-96-4-T, T.Ch.I, Judgment, 2 September 1998, para. 126, *The Prosecutor v. Ruzindana and Kayishema*, Case No. ICTR-95-1-T, T.Ch.II, Judgment, 21 May 1999, paras. 273-291.

68. In this respect, the case of Jelišić is also notable. The ICTY Trial Chamber had acquitted Jelisic from the genocide count and had described him as an individually disturbed person. The ICTY Appeals Chamber though found that the Trial Chamber had erred when

acquitting Jelišić from genocide under Rule 98*bis* ICTY RPE. Yet, considering *inter alia* the limited means and resources of the Tribunal, the ICTY Appeals Chamber did not deem a retrial on this count in the interest of justice. *The Prosecutor v. Jelišić*, Case No. IT-95-10, A.Ch, Judgment, 5 July 2001, paras. 53-77.

69. In his defence, Akayesu argued in a similar vein that he was not a 'genocidal ideologue', and that he could thus not be convicted for genocide. The Trial Chamber did not accept this defence. It even found that Akayesu had had the specific intent and that he had not just knowingly participated, and convicted Akayesu for genocide. *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, T.Ch. I, Judgment, 2 September 1998, paras. 34 and 726. The argument above does not relate to the question whether Akayesu committed genocide but rather to the issue of whether he should be prosecuted before the ICTR.

70. J.A. Alvarez, Crimes of State/Crimes of Hate: Lessons from Rwanda, 24 *Yale J. Int'l L.* 365, p. 400 (1999).

71. The Prosecutor v. Nshamihigo, Case No. ICTR-01-63-I, and The Prosecutor v. Nzabirinda, Case No. ICTR-01-77-I.

72. For example, the Security Council called upon states to co-operate in Resolution 1165 (1998), but it did not name specific states. *UN Doc.* S/RES/1165, 30 April 1998.

73. Allegedly, *génocidaires* escaped to the DRC through the security zone that France had established under its mandate to enforce the peace in Rwanda, *Le Figaro*, 17 December 1998. This was denied by France in its Parliamentary Report, *Rapport d'information sur les opérations menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, Tome 1, Rapport N; 1271, p. 345 www.assemblee-nationale.fr (visited at 9 October 2002).

74. For more about the arrest of Tharcisse Renzaho, see www.hirondelle.org (visited at 8 October 2002).

75. ICG 2002, *op.cit.*, p. 16.

76. *Prosecuting genocide in Rwanda: the ICTR and national trials*, Lawyers Committee for Human Rights, July 1997, para. IV, www.lchr.org (visited at 8 October 2002)

77. The representative of Kenya recalled Kenya's co-operation when voting on Resolution 1165 (1998), *UN Doc.* S/PV.3877, 30 April 1998, p. 5.

78. ICG 2001, *op.cit.*, pp. 18-20.

79. On the scope and exact contents of the obligations in this respect, see G. Sluiter, *International Criminal Adjudication and the Collection of Evidence - Obligations of States*, Antwerp: Intersentia (2002).

80. *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A.Ch., Decision (Prosecutor's request for review or reconsideration), 31 March 2000, para. 34.

81. *Ibid.*, para. 24.

82. *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A.Ch., Decision (Prosecutor's request for review or reconsideration) – Declaration of Judge Nieto-Navia, 31 March 2000, paras. 1-18. See especially the Separate Opinion of Judge Shahabuddeen, and the Declaration of Judge Lal Chand Vohrah.

83. *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A.Ch., Decision (Prosecutor's request for review or reconsideration), 31 March 2000, paras. 63-70. See also the comment on this decision by W.A. Schabas, in 94 *Am. J. Int'l. L.* 563, pp. 567-568 (2000).

84. In a letter of 17 September 2002 to the Security Council, the Prosecutor complains of Rwanda's obstructive position towards the Tribunal. The Prosecutor states that she has been informed by reliable sources that the lack of cooperation is a direct consequence of her announcements to investigate alleged RPF crimes, *UN Doc.* S/2002-1043, 19 September 2002.

85. For example, in June 2002 the Rwandan government suddenly introduced new rules pertaining to visa requirements for witnesses travelling to the ICTR, causing great delays in several cases, see the letters of the President of the ICTR to the Security Council of 26 July and 8 August 2002, *UN Docs*. S/2002/847 and S/2002/923.

86. These victims organisation suspended their co-operation with the ICTR and for some time they called upon their members not to testify any longer. See for their reasons, the letter to the Security Council, *UN Doc.* S/2002/1043, 19 September 2002.

87. ICG 2002, *op.cit.*, pp. 10-15.

88. See also the plea for such backing by the ICG, ICG 2002, *op.cit.*, p. iii, and see the letter of Human Rights Watch sent to the US Ambassador John Negroponte, President of the Security Council, 9 August 2002, requesting the Security Council to support the Prosecutor in her efforts in this regard, www.hrw.org (visited at 10 October 2002).

89. Letters of the President of the ICTR to the Security Council of 26 July and 8 August 2002, *UN Docs*. S/2002/847 and S/2002/923.

90. Resolution 1431 (2002), *UN Doc.* S/RES/1431, 14 August 2002, para. 3.

91. Jallow described the war that started with the RPF invasion as a "war of liberation", which may be considered an oversimplification, Jallow (2004), *op.cit.*, p. 156.

92. *Prosecutor v. Ngeze*, Case No. ICTR-97-27-I, T.Ch.I, Decision on the Prosecutor's request for leave to amend the indictment, 5 November 1999, para. 3, and *Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, T.Ch.I, Decision on the Prosecutor's request for leave to file an amended indictment, 5 November 1999, paras. 25-28, and *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, T.Ch.I, Decision on the Prosecutor's request for leave to file an

amended indictment, 11 April 2000, and *Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, T.Ch.I, Decision on the defence preliminary motion, pursuant to rule 72 of the rules of procedure and evidence, 12 July 2000.

93. *Prosecutor v. Nsengiyumva*, Case No. ICTR-96-12-I, T.Ch.III, Decision on the defence motions objecting to the jurisdiction of the Trial Chamber on the amended indictment, 13 April 2000, paras. 28-33.

94. *Ngeze and Nahimana v. the Prosecutor*, Case No. ICTR 97-27-AR72 and ICTR 96-11-AR 72 resp., A.Ch., Decision on interlocutory appeal, 5 September 2000. See also *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, A.Ch., Decision, 14 September 2000.

95. The ICTR jurisprudence on continuing crimes is directly relevant to the ICC. According to Article 11 of the ICC Statute, the Court only has jurisdiction over crimes committed after the entry into force of the Statute. From a different angle, Article 24 also states that the Court cannot try persons for conduct prior to the entry into force of the Statute. From the exact wording of these Articles, it remains unclear whether jurisdiction over continuing crimes, such as forced disappearances, is excluded if these crimes started before the entry into force of the Statute and continued thereafter. The separate opinions described above also denote opposing views regarding the admission of pre-1994 facts to prove the charge of conspiracy. Judges Vohrah and Nieto-Navia take the view that pre-1994 facts may not in any way support the indictment, whereas Judge Shahabuddeen emphasises the constant renewal of continuing crimes and thus allows such evidence. On Articles 11 and 24 ICC Statute, see also P. Saland (1999) 'International Criminal Law Principles' in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, R.S. Lee (ed.), p. 197 (The Hague: Kluwer, 1999). See also M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes*, Antwerpen: Intersentia (2002), p. 371.

96. The Prosecutor v. Niyitegeka, Decision, 20 November 2000, para. 38; The Prosecutor v. Kajelijeli, Decision, 13 March 2001, para. 5; The Prosecutor v. Bikindi, Decision, 22 September 2003, para. 34; The Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe, Judgement, 25 February 2004, para. 86.

97. The Prosecutor v. Nahimana, Barayagwize, and Ngeze, Judgement, 3 December 2003, paras. 100-106.

98. *The Prosecutor v. Nahimana, Barayagwize, and Ngeze*, Judgement, 3 December 2003, paras. 620, 668-691.

99. Pursuant to common law jurisdictions from which this concept originated, similar fact evidence is prejudicial and therefore inadmissible if used solely to denote the bad character of the accused, *The Prosecutor v. Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva*, Decision, 18 September 2003, paras. 11-13.

100. The Prosecutor v. Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva, Decision, 18 September 2003.

101. *Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, Decision on the preliminary motion filed by the defence based on the defects in the form of the indictment, 24 November 1997, paras. 26-27. See also A. Obote-Odora (2001), *op cit.*, p. 351.

102. *Prosecutor v. Bagambiki, Imanishimwe, Munyakazi*, Case No. ICTR-97-36-(I), T.Ch.II, Decision on the defence motion on the defects in the form of the indictment, 24 September 1998, para. 11. See also the separate opinion of Judge Sekule in this decision arguing that naming other conspirators entails a serious risk of prejudice to these others whereas they are not present to be tried nor represented.

103. Samuel Imanishimwe was acquitted on the conspiracy count pursuant to Rule 98*bis*, as there was not sufficient evidence for a 'reasonable trier of fact' to convict him on that count, *Prosecutor v. Imanishimwe*, Case No. ICTR-99-46-T, T.Ch.III, Oral Decision, 6 March 2002. In a separate concurring opinion of 13 March 2002, Judge Williams stated that indirect evidence on the basis of which an agreement must be inferred is not sufficient.

104. *Ibid.*, and *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, T.Ch.II, Decision on Kamuhanda's motion for partial acquittal pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 20 August 2002. In contrast, in the media case, the Trial Chamber did not grant a motion for acquittal, *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Case No. ICTR-99-52-T, T.Ch.I, Reasons for oral decision of 17 September 2002 on the motions for acquittal (Rule 98 *bis* of the Rules of Procedure and Evidence), 25 September 2002.

105. ICG 2001, *op.cit.*, p. 17. See for the role of the clan of Madame Habyarimana also G. Prunier, *The Rwanda Crisis 1959-1994: History of a Genocide*, pp. 85-87, London: Hurst and Co, 1997.

106. This choice also touches upon the issue of cumulative charging. See for an examination of the jurisprudence of both *ad hoc* Tribunals on this issue, A. Bogdan, Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda, in 3 *Melb. J. of Int.'l L.* 1: 1-32 (2002).

107. *E.g., UN Doc.* S/RES/1503, 28 August 2003.

108. *UN Doc.* S/2004/341, 3 May 2004, para. 14. Also see the fourth updated version of the completion strategy, 19 November 2004, para. 14. See also Jallo (2004), *op.cit.*, pp. 152-154.

109. Before his surrender to the ICTR, criminal investigations regarding Musema had been started by Switzerland, *Prosecutor v. Musema*, Case No. ICTR-96-5-D, T.Ch.I, Decision on the formal request for referral presented by the Prosecutor, 12 March 1996. Also in the case of Niyonteze, Switzerland showed its preparedness to prosecute Rwandan suspects who had sought their refuge in Switzerland. In that case, Switzerland denied Rwanda's request for extradition for similar reasons as described in section 1. For a note on the case of Niyonteze, see L. Reydams, International Decisions – Niyonteze v. Public Prosecutor, 96 *Am. J. of Int. L.* 231 (2002). The Swiss judgments of 27 April 2001 and 26 May 2000 can be retrieved at www.vbs.admin.ch/internet/OA/d/urteile.htm, under: Wichtige Fälle (visited at 21 October 2002).