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# Accountability in the Aftermath of Rwanda's Genocide

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**INTERNATIONAL  
AND  
COMPARATIVE  
CRIMINAL  
LAW  
SERIES**

# ACCOUNTABILITY FOR ATROCITIES

National and  
International  
Responses

**EDITED BY JANE E. STROMSETH**

*T r a n s n a t i o n a l   P u b l i s h e r s*

## CHAPTER 3

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### ACCOUNTABILITY IN THE AFTERMATH OF RWANDA'S GENOCIDE

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Jason Strain and Elizabeth Keyes\*

#### A. INTRODUCTION

Over the span of 100 days in 1994, almost one million Rwandans died in a genocide that left Rwandan society traumatized and its institutions in disarray. The genocide implicated not only the actual instigators and killers, who came from all levels of Rwandan society, but also the culture of impunity that had thrived in Rwanda for decades. This culture of impunity and inaction in the face of atrocities eerily mirrored the international community's failure to intervene to prevent or respond to the genocide. The genocide provoked a process of reflection within Rwanda and the broader international community about how the genocide came to pass and how Rwanda can rebuild so that such an event will never happen again. This chapter attempts one element of this reflection by considering how the legal mechanisms established in the aftermath of the genocide might help transform the Rwandan culture of impunity into a culture of accountability.

Although the world in 1994 thought about the genocide as an ethnic or "tribal" problem, ethnicity masked deeper problems in Rwandan society. Since colonial times, Rwandans experienced variations on the politics of exclusion, practiced alternately by the Tutsi under colonial rule and the Hutu after independence.<sup>1</sup> Power became an all-or-

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1. See generally, PHILIP GOLREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* (1998); MAHMOOD MAMDANI, *WHEN*

nothing proposition, and fear of losing power justified any actions, no matter how violent. A cycle of exclusion, fear and repression thus developed. As the Rwandan Ambassador to the United Nations remarked in late 1994, "the perpetrators of [earlier massacres] were never brought to justice for their acts. The recent genocide in Rwanda . . . is the direct result of this culture of impunity."<sup>2</sup> The legal response to genocide must therefore do more than hold perpetrators responsible for their actions; it must also provide a new model of accountability and reconciliation that will serve in the broader societal project of dismantling the culture of impunity.

The legal response to the genocide needs to achieve multiple, often competing goals: justice, reconciliation and deterrence, all in the service of breaking the cycle of fear and repression that has too long characterized Rwandan politics. The model developing in Rwanda exists at three levels: the International Criminal Tribunal for Rwanda (ICTR) is the international community's effort to hold some of the most serious perpetrators accountable for their crimes; the Rwandan national judicial system has shared jurisdiction with the ICTR for the most serious crimes, and also handles the many thousands of lower level crimes; and the recently inaugurated *gacaca* courts use a traditional community-based legal approach to try all but the most serious of crimes. Each of these systems has particular reasons for existence and particular areas of expertise; each has also encountered serious criticism, ranging from lack of efficiency for the ICTR and the national system, to concerns about due process in *gacaca*. This chapter examines how the three mechanisms, taken as a whole, may rise above the weaknesses of each component part to offer a coherent legal response to genocide, and how the different mechanisms can work together in a complementary manner to achieve the multiple goals at stake as Rwanda rebuilds.

Rwanda's creation of a suitably complex and sophisticated legal response to the genocide is one reason for cautious hope today. This chapter argues that despite the tensions inherent in this tripartite judicial framework, these types of innovative actions can promote account-

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VICTIMS BECOME KILLERS (2001); GERARD PRUNIER, *THE RWANDA CRISIS 1959-1994: HISTORY OF A GENOCIDE* (1995).

2. The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighboring States, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/PV.3453 (1994) [hereinafter ICTR ESTABLISHMENT] (statement of Manzi Bakuramutsa of Rwanda); see also MAMDANI, *supra* note 1, 185-233.

ability for crimes against humanity. The framework provides the Rwandan people, their leaders, and the international community with the opportunity to shape a new political culture where genocide and violence are no longer viewed as acceptable responses to societal frustrations. The legal structure cannot ensure the political will to create this new culture, but it remains the *sine qua non* for these efforts and therefore deserves support from all levels.

Section B of this chapter discusses the sources of the genocide in Rwandan history and provides the background for the national and international legal response. Section C examines the role of the ICTR and its effectiveness as a legal response by the international community. Section D turns to the Rwandan national judicial system, discussing its prospects for achieving both accountability and reconciliation. Section E examines the hopes and concerns relating to the *gacaca* process, the most innovative part of the tripartite legal response. Section F assesses the interrelationships among these three approaches to accountability for the Rwandan experience and sets forth lessons for the future, particularly for the newly created International Criminal Court.

## B. BACKGROUND

### 1. Roots of Conflict

On April 6, 1994, a missile shot down the plane carrying President Habyarimana of Rwanda and President Ntaryamira of Burundi, providing the immediate spark for the genocide in Rwanda. The sources of the conflagration, however, reach much farther back into Rwanda's history. The three ethnic groups that comprise the Rwandan population—Hutu (roughly 84 percent of the population of 8 million), Tutsi (roughly 15 percent) and Twa (roughly 1 percent)—coexisted in a densely populated area of land smaller than the state of Maryland. These groups spoke the same Kinyarwanda language, worshipped in the same way, and often intermarried.<sup>3</sup>

Despite the groups' unifying characteristics, salient differences existed even before colonization. Each group once held a different function in Rwandan society: the Twa were hunter-gatherers, the Hutu were cultivators, and the Tutsi were pastoralists. In a society that measured wealth in terms of cattle, the Tutsi once stood as the preeminent social group. Moreover, notwithstanding the intermarriages and fluid boundaries among the groups, Tutsis also tended to have Nilotic features, in contrast

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3. See generally PRUNIER, *supra* note 1; GOUREVITCH, *supra* note 1.



to the Bantu features of the Hutu.<sup>4</sup> European explorers of the late 19th century, preoccupied with "race science," seized upon the Tutsi features as evidence of innate Tutsi superiority over the Hutu; indeed, these early ethnographers cast the Tutsi pedigree back to the Bible and popularized the myth that Tutsis were descendants of Ham.<sup>5</sup> Although the Hamitic myth elevated the Tutsi in European eyes, it gave them an ultimately undesirable outsider status within Rwanda, which became a powerful tool in the 1990s for proponents of Hutu Power.

During the colonial period, first the Germans (1897–1916) and later the Belgians (1916–1959) ignored commonalities among the groups and instead built their colonial systems around their beliefs that the minority Tutsi were the superior group in Rwanda. This system depended upon the rigid classification and separation of ethnic groups, and so each Rwandan was issued an identity card establishing whether he or she was Hutu, Tutsi or Twa.<sup>6</sup> Anyone with one Hutu parent and one Tutsi parent had to choose one ethnicity. The rigid colonial structure simply would not accommodate the real fluidity among the groups.<sup>7</sup> Once the colonizers classified the population, they systematically excluded all but a few Hutu and Twa from the privileges bestowed upon Tutsis, specifically education and employment within the colonial government.<sup>8</sup>

In the 1950s, the forces that underlay the colonial structure began to shift. Hutu intellectuals began to argue against the unfairness of the existing system. A new wave of colonial administrators, whose working class origins in Flemish Belgium led them to sympathize more with the Hutu masses than the Tutsi elite, encouraged these arguments. In 1959, the first episode of political violence between Hutu and Tutsi erupted, from which the Hutu emerged as the dominant political force. In the midst of the violence, Belgium began organizing the transition to Rwandan self-government. Independence came in 1962, and with it a short-lived regime that shared power between Hutu and Tutsi parties. Events in 1963, however, altered the way that the two groups would interact for years to come. Tutsis in exile in Burundi launched the so-called *inyenzi*<sup>9</sup> raids against the new Hutu government; the raids were

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4. Generally, Nilotic ethnicities tend to be taller and have lighter complexions and more angular facial features, while many Bantu ethnicities tend to be shorter and "stockier," with less sharp facial features. See MAMDANI, *supra* note 1, at 44.

5. See GOUREVITCH, *supra* note 1, at 55.

6. *Id.* at 56–57.

7. *Id.*

8. See PRUNIER, *supra* note 1, at 33.

9. *Inyenzi* means cockroach in Kinyarwanda; the term was used from the

quickly suppressed, but their real costs were profound—Hutus killed 10,000 Tutsis in retribution, and the Hutu government closed the door on Tutsi political participation.<sup>10</sup> The raids provided a vital tool to those in favor of exclusion, who manipulated Hutu fears of future Tutsi invasions into support for completely excluding Tutsis.<sup>11</sup> Tutsis would be denied any meaningful political voice for another three decades.

## 2. Events Leading Up to 1994

By the late 1980s, a split arose within Juvenal Habyarimana's Hutu government. Moderates within his party held an inclusive vision of Rwandan society and engaged in reforms to reopen Rwandan politics to Tutsi participation; this group's influence led the Rwandan government to adopt the 1993 Arusha Accords establishing a transition to true power-sharing. The party's extremist wing, which saw exclusion and extermination of Tutsis as the only way to secure peace in Rwanda, increasingly criticized the moderate vision. This political force gave rise to the genocidal "Hutu Power" movement in the 1990s.<sup>12</sup> Although the extremist wing originally lacked a broad base of popular support, its proponents were at the center of power and included Habyarimana's wife and her politically powerful extended family. As moderates moved closer and closer to power-sharing, the extremists became ever more virulent in their crusade against Tutsis, employing all available media resources in their efforts to create anti-Tutsi sentiment across Rwanda.

This extremism gained in popularity as Tutsis made their first serious efforts since the early 1960s to regain their place in Rwanda. The more than 300,000 Tutsis who fled Rwanda in the 1959–1963 period had settled as semi-permanent refugees in neighboring Congo,<sup>13</sup> Uganda, Burundi, and Tanzania.<sup>14</sup> This original refugee population doubled as the Hutu government in Rwanda scapegoated Tutsis, provoking periodic massacres which encouraged more Tutsis to flee.<sup>15</sup> Particularly in

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1960s through the early 1990s, when Hutu Power radio stations broadcast their message of destruction using "inyenzi" as a code word for Tutsi. *See id.*

10. *See* PRUNIER, *supra* note 1 at 56–57.

11. MAMDANI, *supra* note 1 at 130–131.

12. PRUNIER, *supra* note 1, at 188.

13. Congo became Zaire in 1971, and was renamed the Democratic Republic of Congo in 1997. *See, e.g., Timeline: Democratic Republic of Congo*, BBC NEWS, available at <http://news.bbc.co.uk/2/hi/africa/1072684.stm>.

14. Estimates of the refugee population vary, but range from 330,000 in the camps to 500,000, including "self-settled" refugees. *See* PRUNIER, *supra* note 1, at 67.

15. J. Matthew Vaccaro, *Politics of Genocide: Peacekeeping and Disaster Relief*

Uganda, many of these exiled Tutsis received schooling and were welcomed into the army and government service.<sup>16</sup> These refugees formed the nucleus of what became the Rwandan Patriotic Front (RPF), a military and political entity determined to return to Rwanda which, in 1990, launched an invasion into northwestern Rwanda calling for an end to exclusion.<sup>17</sup>

The RPF invasion and subsequent civil war increased the appeal of the extremist Hutu Power message, ensuring the extremists' victory in the power struggle within Habyarimana's government. As Mahmood Mamdani, a noted scholar of post-colonial identity in Africa, writes, "for the first time since the *inyenzi* raids of the early 1960s, the 1990 invasion raised the specter of Tutsi Power inside Rwanda . . . the fact was that many inside the country agreed that RPF rule would mean nothing but the return of Tutsi domination."<sup>18</sup> The interplay of history and fear served the most radical goals of the extremists, who set about organizing the events that the world watched unfold in April 1994.

### 3. The Genocide of 1994

The genocide sparked by Habyarimana's assassination on the night of April 6 began quickly. Within 45 minutes of the plane crash, militias set up roadblocks in the capital to stop and kill Tutsis who were passing through the city or trying to escape. By daybreak the Presidential Guard had brutally murdered Prime Minister Agathe Uwilingiyimana.<sup>19</sup> Uwilingiyimana was a leading proponent of the Arusha power-sharing arrangement, and with her death the "agenda of reconciliation ceased to exist."<sup>20</sup> Lists that Hutu Power proponents had compiled in painstaking detail for this purpose months earlier were used to quickly find and kill Tutsis and moderate Hutus throughout Kigali. The interim government used the infamous *Radio Télévision Libre des Mille Collines* to full effect, bombarding the airwaves with incitement to violence and geno-

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in Rwanda, in UN PEACEKEEPING, AMERICAN POLICY AND THE UNCIVIL WARS OF THE 1990s, 367, 370 (William J. Durch ed., 1996).

16. PRUNIER, *supra* note 1, at 67. Ugandan President Yoweri Museveni was once considered a dangerous outsider, and was even accused by his predecessor Milton Obote of being a Rwandan himself. Museveni was therefore sympathetic to the Rwandan exiles, and his rise to power in 1986 was a boon to the Rwandan exile community in Uganda. See *id.*

17. MAMDANI, *supra* note 1, at 189.

18. *Id.*

19. Vaccaro, *supra* note 15, at 373.

20. See MAMDANI, *supra* note 1, at 216.



cide every hour of the day. Within two weeks, an estimated 250,000 Tutsis had been killed across the country.<sup>21</sup> The killings were done at road-blocks and in churches, at the behest of Hutu mayors and by neighbors in rural villages. Resistance was not tolerated; one prefect who disobeyed orders and kept his district calm in the first weeks of the genocide was murdered by the interim government's hand-picked replacement in late April in front of the citizens of the town.<sup>22</sup>

The role played by the churches exemplifies the complete social and institutional decay that prevailed during the genocide. Many Tutsis initially sought sanctuary in the churches, believing that the *génocidaires* would not enter houses of worship. However, despite some remarkable instances of courage and resistance, the sanctuaries became scenes of some of the grisliest killings of the genocide when priests and ministers abandoned those gathered to the killing mobs outside. The chilling title of Philip Gourevitch's book *We Wish to Inform You that Tomorrow We Will Be Killed With Our Families* tells of a group gathered at an Adventist church, who learned that they were scheduled to be killed the next day. They wrote their Hutu pastor seeking his intercession on their behalf, believing that he could help them if he would. The pastor responded, "You must be eliminated. God no longer wants you."<sup>23</sup> The close association between the Hutu government and the Catholic Church in particular led to several notorious instances of church complicity with the genocide. Even where the churches were not complicit, they were often ineffective at calling for an end to the violence.<sup>24</sup> In either case, when the genocide was finished, the churches had lost most if not all of their moral authority, and were ill-positioned to promote peace or reconciliation.

By the time the RPF secured its military victory in the civil war and put an end to the genocide in August 1994, an estimated 800,000 people had been killed, the vast majority of them Tutsi.<sup>25</sup> The RPF had succeeded

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21. ALLISON DES FORGES, *LEAVE NONE TO TELL THE STORY. GENOCIDE IN RWANDA* (Human Rights Watch, 1994).

22. See MAMDANI, *supra* note 1, at 218.

23. GOUREVITCH, *supra* note 1, at 28.

24. PRUNIER, *supra* note 1, at 250.

25. Finding an exact number has proved exceedingly difficult. See Letter from Kofi Annan, Secretary-General of the United Nations, to President of the United Nations Security Council, Dec. 9, 1994, U.N. SCOR 49th Sess., P 20, U.N. Doc. S/1994/1405 (1994) [hereinafter ANNAN LETTER] (estimating 500,000 dead); Hironde Foundation, *Official Census Puts Genocide Toll at Over One Million*, available at <http://www.hironde.org/hironde.nsf/> (Feb. 11, 2002) (last visited May 22, 2002) (citing new Rwandan Census Figures that place the death toll at over 1 million). Recent estimates almost unanimously place the figure at close to 1 million.

in regaining power, but it inherited a country whose institutions had been frayed if not destroyed, and whose population was deeply traumatized by the genocide. Meanwhile, approximately 1.2 million Hutu refugees fled across the border into Zaire, into refugee camps run by international aid organizations at a cost of roughly \$1 million a day. Although many of the refugees were simply swept up in the chaos and had not participated in the genocide, the *génocidaires* quickly asserted control over the camps, benefiting from the international aid while posing a terrifying security risk to those attempting to resume their lives just across the border in Rwanda.

The genocide left no aspect of Rwandan life unharmed. The Rwandan economy, long in decline, was in shreds by August 1994.<sup>26</sup> Land, infrastructure and financial structures were all destroyed. The legal system fared no better; the judiciary existed more in theory than in practice, with fewer than 400 surviving judges, prosecutors and investigators. Some of those lawyers who survived were charged with taking part in the genocide.<sup>27</sup> Most important, the new government had to face the reality of governing a nation comprised of an extraordinary number of highly traumatized individuals. Genocide survivors included legions of children rendered orphans by the violence, children born of rape, families displaced from their homes, and witnesses to unspeakable atrocities. Rwandans had to begin the task of figuring out how perpetrators and victims could live side-by-side while the smell of death hung in the air.

#### 4. International Role and Response

Among the international community, only the neighboring countries and France and Belgium took a real interest in Rwanda's political developments.<sup>28</sup> Eventually, as part of the Arusha Accords, the United Nations agreed to place a peacekeeping force, the U.N. Assistance Mission for Rwanda (UNAMIR), in Rwanda in late 1993. UNAMIR was limited by its mandate (no Chapter VII ability to enforce peace), by its size and location (2,500 personnel in Kigali alone) and most of all by the frayed nerves of the international community following the deaths of 18

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26. See PRUNIER, *supra* note 1, at 306

27. See e.g., Hirondelle News Agency, *Survivors Accuse 14 Defence Investigators of Genocide Crimes* (Mar. 25, 2002), available at <http://www.hirondelle.org/hirondelle.nsf/>.

28. Belgium became involved because it had many Belgian nationals living in Rwanda, and France took an interest for less clear reasons, possibly relating to what Prunier has called its "Fashoda syndrome," or fear of Anglophone supremacy in Africa. PRUNIER, *supra* note 1, at 105.

American peacekeepers in Somalia in October 1993.<sup>29</sup> Although the prospects for severe violence, if not genocide, were well known to General Dallaire of Canada, the commander of UNAMIR forces, he was unable to convince the U.N. to increase UNAMIR's size or change its mandate.<sup>30</sup> Indeed, as the genocide broke out and ten Belgian peacekeepers were killed, the U.N. Security Council voted to scale down its operations in Rwanda, leaving Dallaire with only 620 troops.<sup>31</sup> By August 1994, only the French had actually mobilized troops to intervene; unfortunately, the French intervention, known as *Opération Turquoise*, seemed suspiciously pro-Hutu at the time, and has been even more widely discredited since 1994.<sup>32</sup>

The United States was notoriously slow to use the word "genocide" to describe what was unfolding in Rwanda. Although debate rages about who knew what and when, observers widely assumed at the time that the slowness was motivated by fear of the legal repercussions triggered by using the word genocide—repercussions that would have demanded action.<sup>33</sup> Then-President Bill Clinton told genocide survivors at Kigali airport in 1998 that the international community "did not do as much as we could have and should have done to try to limit what occurred in Rwanda. . . . The international community, together with the nations in Africa, must bear its share of responsibility for this tragedy."<sup>34</sup> This admission seems inadequate, however, in light of the active efforts the U.S. Administration led to prevent deployment of peacekeepers and to keep the U.N. from using the word "genocide."<sup>35</sup>

This collective inaction in the face of one of the 20th century's worst genocides has left a complicated legacy of guilt in the international community, from the United Nations to the aid organizations who, with very few exceptions, did not help the victims of the genocide but did help

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29. PRUNIER, *supra* note 1, at 274–75.

30. See Samantha Power, *Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen*, ATL. MONTHLY (Sept. 2001), available at <http://www.theatlantic.com/issues/2001/09/power.htm>.

31. Vaccaro, *supra* note 15, at 383.

32. See e.g., Jean Marie Kamatali, *Freedom of Expression and Its Limitations: The Case of the Rwandan Genocide* 38 STAN. J. INT'L L. 57, 70 (2002) (noting that France, in Operation Turquoise, "protected the forces that committed genocide and facilitated their flight to Congo").

33. See e.g., Douglas Jehl, *Officials Told to Avoid Calling Rwanda Killings 'Genocide'*, N.Y. TIMES, June 10, 1994, at A8 (noting that the Clinton Administration feared both legal repercussions and moral imperatives to intervene).

34. James Bennet, *Clinton Declares U.S., With World, Failed Rwandans*, N.Y. TIMES, Mar. 26, 1998, at 1A.

35. See Power, *supra* note 30.

Hutu refugees, including both perpetrators and other Hutus swept up in the chaos. U.N. Secretary-General Kofi Annan, Under-Secretary for peacekeeping at the time of the genocide, acknowledged that "[a]ll of us must bitterly regret that we did not do more to prevent it."<sup>36</sup> Such guilt spurred belated interest in the Rwandan situation, and the United Nations took concrete action by creating an international criminal tribunal in late 1994.<sup>37</sup>

### C. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

After passing numerous resolutions on the tumultuous situation in Rwanda both before and after the genocide,<sup>38</sup> the Security Council established the ICTR on November 8, 1994 with the passage of Resolution 955.<sup>39</sup> The ICTR became the second Security Council-implemented insti-

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36. United Nations, *Secretary-General Statement on Receiving the Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda* (Dec. 16, 1999), available at [http://www.un.org/News/ossg/sgsm\\_rwanda.htm](http://www.un.org/News/ossg/sgsm_rwanda.htm).

37. Mark Matthews, *Justice Still Eludes Survivors of 1994 Genocide in Rwanda*, BALTIMORE SUN, May 6, 1996, at 1A (quoting Alison desForges, who said that the ICTR sprang from an "excess of guilt" after the world body failed to intervene to prevent or to stop the slaughter the previous spring).

38. See, e.g., U.N. Security Council Resolution 929, U.N. SCOR, 49th Sess., 3392nd Meeting, U.N. Doc. S/RES/929 (June 22, 1994) (establishing a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded U.N. Assistance Mission for Rwanda); U.N. Security Council Resolution 928, U.N. SCOR, 49th Sess., 3391st Meeting, U.N. Doc. S/RES/928 (June 20, 1994) (extending the mandate of the U.N. Observer Mission Uganda-Rwanda); U.N. Security Council Resolution 925, U.N. SCOR, 49th Sess., 3388th Meeting, U.N. Doc. S/RES/925 (June 8, 1994) (extending the mandate of and deploying two additional battalions of the U.N. Assistance Mission for Rwanda and settlement of the conflict in Rwanda); U.N. Security Council Resolution 918, U.N. SCOR, 49th Sess., 3377th Meeting, U.N. Doc. S/RES/918 (May 17, 1994) (expanding the mandate of the U.N. Assistance Mission for Rwanda and imposing an arms embargo on Rwanda); U.N. Security Council Resolution 912, U.N. SCOR, 49th Sess., 3368th Meeting, U.N. Doc. S/RES/912 (Apr. 21, 1994) (adjusting the mandate of the U.N. Assistance Mission for Rwanda due to the new events in the Rwandan conflict); U.N. Security Council Resolution 909, U.N. SCOR, 49th Sess., 3358th Meeting, U.N. Doc. S/RES/909 (Apr. 5, 1994) (extending the mandate of the U.N. Assistance Mission for Rwanda and implementing the Arusha Peace Agreement); U.N. Security Council Resolution 893, U.N. SCOR, 49th Sess., 3326th Meeting, U.N. Doc. S/RES/893 (Jan. 6, 1994) (deploying the U.N. Assistance Mission for Rwanda and implementing the Arusha Peace Agreement).

39. U.N. Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453rd

tution created to deal with violations of international humanitarian law in a span of only a few years. In 1995, the ICTR initiated proceedings in Arusha, Tanzania. In the subsequent seven years, the ICTR has amassed a mixed but increasingly strong record in its prosecution of high level *génocidaires*. Its success in achieving the other goals of post-genocide Rwanda, however, has been more limited.

## 1. Background and Goals of the ICTR

International community inaction during the genocide quickly transformed into a post-genocide drive to establish an international tribunal to hold the *génocidaires* accountable. Although the initial request for such a tribunal came from the Government of Rwanda,<sup>40</sup> members of the U.N. Security Council readily embraced the proposal.

The Rwandan government's goals for the ICTR were several. First, the tribunal would involve the international community in seeking accountability for the genocide, which would ensure impartiality and avoid a perception of "victor's justice" in Rwanda.<sup>41</sup> Second, the Rwandan government pragmatically believed that an international body would have better access to criminals residing in foreign countries.<sup>42</sup> Third, and perhaps most important, the Rwandan government felt that a high-level, international commitment to prosecuting the genocide crimes would recognize that what happened in Rwanda rose to the level of crimes against humanity and against the international community as a whole. As the Rwandan ambassador diplomatically stated, the international community was "also harmed by the genocide."<sup>43</sup> Indeed, reminding the international community of Rwanda's suffering continued to be important to Rwandans; when then-President Clinton arrived at Kigali airport in 1998, one government official told a reporter, "to feel the President of the United States shares our sadness and the tragedy with us is very good."<sup>44</sup> In short, achieving accountability for the genocide in Rwanda was a responsibility shouldered more broadly than by Rwanda alone.

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Meeting, U.N. Doc. S/RES/955 (1994). The Annex to this resolution is the Statute of the International Tribunal for Rwanda, hereinafter ICTR Statute.

40. See Letter from Manzi Bakuramutsa, Permanent Representative of Rwanda to the President of the Security Council, Sept. 28, 1994, U.N. SCOR, 49th Sess., 4, U.N. Doc. S/1994/1115.

41. See ICTR ESTABLISHMENT, *supra* note 2 (Statement of Manzi Bakuramutsa of Rwanda).

42. *Id.*

43. *Id.*

44. Bennet, *supra* note 34.

The international community shared many of the initial goals articulated by the Rwandan government. As the British Ambassador to the U.N. stated on approving the ICTR Resolution: "It is our hope that the Tribunal . . . will prove by experience to be one which meets the objectives shared by the international community and Rwanda: that justice should be done and that thereby the communities may be reconciled."<sup>45</sup> Specific objectives of the international community in establishing the ICTR were to bring those responsible to justice and to recognize that the egregious crimes committed in Rwanda clearly violated international law.<sup>46</sup> As Nigerian Ambassador Ibrahim Gambari stated, "the issue at stake here is the need to punish collectively criminal acts against humanity; the issue is not geographical location."<sup>47</sup> Those who established the ICTR also hoped to deter future genocide and ultimately contribute to a process of reconciliation in Rwanda.

Additionally, the international community agreed with the need to avoid any appearance of victor's justice.<sup>48</sup> As the Rwandans themselves recognized, the overwhelmed legal system in Rwanda had little prospect of objectively, impartially and expeditiously moving through the enormous docket of cases before it. The United Nations Commission of Experts, created by the Secretary General following the genocide, found that the scale of crimes committed would pose daunting problems for the Rwandan judicial system, and that the environment for domestic trials would be too raw to permit impartiality.<sup>49</sup> The international community agreed that to change the culture of impunity a tribunal needed to be established to handle these cases as neutrally as possible.<sup>50</sup>

One subtle difference between the international community's goals and those of Rwanda can be glimpsed through the diplomatic statements of the various ambassadors to the Security Council. Both the international community and Rwanda stated the importance of recognizing the genocide as a crime against all humanity. However, the Rwandan government was understandably especially concerned with creating a deterrent effect within Rwanda itself, while the international community saw

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45. See ICTR ESTABLISHMENT, *supra* note 2 (statement of David Hannay of the United Kingdom).

46. *Id.*

47. See ICTR ESTABLISHMENT, *supra* note 2 (statement of Ibrahim Gambari of Nigeria).

48. See ICTR ESTABLISHMENT, *supra* note 2 (statement of Madeline Albright of the United States); see also ICTR ESTABLISHMENT, *supra* note 2 (statement of David Hannay of the United Kingdom).

49. See Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/1994/1125 (1994).

50. See *id.*; ICTR ESTABLISHMENT, *supra* note 2 (statement of David Hannay of the United Kingdom).



the possibility for using the ICTR in a less context-specific way to send a message across the world that perpetrators of genocide would be held accountable for their actions.<sup>51</sup> Yet both Rwanda and the members of the Security Council hoped that an international tribunal could help to dispense justice as well as deter genocide in the future.

Despite this general convergence in goals for the ICTR, the government of Rwanda was ultimately disappointed with the Statute establishing the tribunal. Indeed Rwanda was sufficiently dissatisfied that it offered the lone dissenting vote on November 8, 1994 when the Security Council approved the Statute.<sup>52</sup> The Rwandan government disagreed less with the Statute's overall goals than with the means adopted for achieving them. The Rwandan Ambassador named seven reasons why his government could not support the Statute as drafted. First, he believed the temporal jurisdiction was inadequate to recognize the extent of the planning for the genocide, much of which happened prior to 1994.<sup>53</sup> Second, he predicted that the structure of the tribunal, with its limited number of chambers and staff, would be overwhelmed with the "magnitude of the task awaiting [it]."<sup>54</sup> Third, the Statute did not adequately prioritize which crimes would be prosecuted, and he feared that crimes of genocide might not receive the highest level of attention.<sup>55</sup> Fourth, the Ambassador opposed the idea that countries involved with the Hutu regime could nominate candidates for positions as ICTR judges.<sup>56</sup> Fifth, he was dismayed that decisions about where to hold detainees would be made not by Rwanda or the ICTR, but by other countries.<sup>57</sup> Sixth, the Ambassador protested the disparity in sentencing possibilities between the Rwandan penal code, which permitted capital punishment, and the ICTR Statute, which did not.<sup>58</sup> Finally, the Ambassador expressed grave reservations about the decision to locate the ICTR outside of Rwanda.<sup>59</sup> In short, the tribunal as structured fell short of what the Rwandan government deemed necessary to prosecute the crimes of genocide at the level and intensity which it believed was merited. Whether these fears were justified will be addressed below.

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51. Compare ICTR ESTABLISHMENT, *supra* note 2 (statement of David Hannay of the United Kingdom), with ICTR ESTABLISHMENT, *supra* note 2 (statement of Manzi Bakuramutsa of Rwanda).

52. See Voting Information, S/RES/955 (1994), available at [www.unbis.un.org/](http://www.unbis.un.org/) (last visited Apr. 1, 2002).

53. ICTR ESTABLISHMENT, *supra* note 2 (statement of Manzi Bakuramutsa).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

## 2. Structure, Jurisdiction and Procedures of the ICTR

The U.N. Security Council defined the structure, jurisdictional limits, and basic procedural rules for the ICTR in the Annex to Resolution 955. Structurally, the ICTR Statute establishes three trial chambers in Arusha, Tanzania, a registry also in Arusha, and an appeals chamber and head prosecutor which the tribunal shares with the International Criminal Tribunal for Yugoslavia (ICTY). The Security Council established this infrastructure-sharing with the ICTY to minimize costs.

The ICTR Statute lays out the subject-matter jurisdiction of the ICTR. Article I of the Statute mandates that the ICTR focus on cases that deal with crimes of "genocide and other serious violations of international humanitarian law" that occurred in Rwanda or that were perpetrated by Rwandan citizens in neighboring states.<sup>60</sup> Article 2 of the ICTR Statute defines genocide as any of several acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."<sup>61</sup> The ICTR also has authority to try cases of crimes against humanity<sup>62</sup> and violations of Article 3 of the Geneva Conventions and of Additional Protocol II.<sup>63</sup>

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60. U.N. Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453rd Meeting, U.N. Doc. S/Res/955 § 1 (Nov. 8, 1994); see also ICTR Statute, *supra* note 39, at art. 1.

61. ICTR Statute, *supra* note 39, at art. 2. The listed acts are as follows: "(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." Genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide are all listed as punishable acts. *Id.*

62. See ICTR Statute, *supra* note 39, at art. 3 (listing murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, or religious grounds, and other inhumane acts as crimes against humanity).

63. See ICTR Statute, *supra* note 39, at art. 4; Geneva Conventions; Additional Protocol II. The ICTR Statute lists these violations as including "(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishment; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized

Two jurisdictional features of the Statute are particularly noteworthy. First, Resolution 955 and the ICTR Statute limit the tribunal's jurisdiction by both date and subject matter.<sup>64</sup> The ICTR's jurisdiction is limited temporally to crimes that occurred between January 1, 1994 and December 31, 1994, the period immediately before and immediately after the genocide.<sup>65</sup> This temporal limitation has contributed to the tension that exists between the ICTR and the Rwandan government. Second, the ICTR Statute creates concurrent jurisdiction with the Rwandan national courts, with primacy given to the international tribunal.<sup>66</sup> Article 8 of the ICTR Statute expressly states that the ICTR "shall have primacy over the national courts of all states;" moreover, the tribunal is empowered to intervene in any national trial subject to its jurisdiction and formally request any state to defer to ICTR's competence.<sup>67</sup> Concurrent jurisdiction generally will be present in future attempts to prosecute genocide, war crimes, and crimes against humanity by the International Criminal Court, and this presents challenging issues of law and policy regarding the relationships among different courts.<sup>68</sup> The Rwanda experience, discussed below, illuminates some of the difficult issues that can arise in pursuing complementary national and international approaches to accountability that do not work at cross purposes.

The U.N. Security Council ensured that states would be obligated to cooperate with the ICTR by establishing the tribunal under Chapter VII of the U.N. Charter.<sup>69</sup> Resolution 955 requires states to "cooperate fully"

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peoples; (h) Threats to commit any of the foregoing acts." ICTR Statute, *supra* note 39, at art. 4.

64. Compare Statute of the International Tribunal for the Former Yugoslavia art. 1, available at <http://www.un.org/icty/basic/statut/statute.html> (last visited Oct. 22, 2002) (no temporal restriction) with ICTR Statute (temporal jurisdiction limited to 1994), *supra* note 39.

65. U.N. Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453rd Meeting, U.N. Doc. S/RES/955 § 1 (1994); see also ICTR Statute, *supra* note 39, at art. 1. Note that in this respect the ICTR Statute differs from the Rwandan Genocide Law, which covers offenses dating back to October 1, 1990. See Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990 [hereinafter Rwandan Genocide Law].

66. ICTR Statute, *supra* note 39, at art. 8.

67. *Id.*

68. The jurisdictional provisions of the Rome Statute of the International Criminal Court and issues of complementarity are discussed *infra*, in Section F.3.

69. See U.N. Charter, Ch. VII; PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS, AND THE UN CRIMINAL TRIBUNAL 43 (2000) (By going the U.N. Chapter VII route, the Security Council obliged all U.N. member states to cooperate with the tribunal and to honor any lawful requests it makes for assistance under the ICTR Statute.).

with the ICTR, to formulate domestic law measures necessary to implement the resolution, and to comply with orders and requests issued by the ICTR.<sup>70</sup> Through Resolution 955, the U.N. Security Council also "urge[d] states and non-governmental organizations to contribute funds, equipment and services to the ICTR."<sup>71</sup> In short, the ICTR looks to many states for assistance in fulfilling its goals.

The ICTR's rules of procedure and decision come from the broad outlines laid out in the ICTR Statute, from the practice of the ICTY, and from the judges of the ICTR. A dynamic common to the creation of other international courts arose in formulating rules of procedure for the ICTR: how best to meld the common law and civil law systems into a single functioning tribunal?<sup>72</sup> An interesting aspect of the civil-common law debate is the varying treatment accorded to witnesses in the two systems. In Rwanda's civil law system, and under its rules of criminal procedure, witnesses for the prosecution provide written statements, and testify only if the defense seeks to cross-examine them.<sup>73</sup> In the common law system, evidence for the prosecution is adduced only by having each witness testify.<sup>74</sup> The two approaches make some trade-offs between efficiency and transparency.<sup>75</sup> Ultimately, the ICTR is more balanced

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70. U.N. Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453rd Meeting, U.N. Doc. S/RES/955 (Nov. 8, 1994). Article 28 of the ICTR Statute clarifies states' obligations with regard to cooperation and judicial assistance. States are required to cooperate with the ICTR in investigating and punishing violations of humanitarian law, and to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber," including requests to locate individuals, take testimony, give up evidence, serve documents, arrest or detain individuals, and surrender or transfer accused individuals to the ICTR. See ICTR Statute, *supra* note 39, at art. 28. Obviously, the obligation to surrender or transfer individuals located within another country is controversial. In practice, the ICTR tries to avoid direct confrontation when possible, through the use of negotiations and other more subtle tactics. However, it reserves the right to report non-complying states to the Security Council. See Frederik Harhoff, *Consonance or Rivalry? Calibrating the Efforts to Prosecute War Crimes in National and International Tribunals*, 7 DUKE J. COMP. & INT'L L. 571, at 580-81 (1997).

71. U.N. Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453rd Meeting, U.N. Doc. S/RES/955 (Nov. 8, 1994).

72. See generally INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS (Horst Fischer, Claus Kress, & Sascha Rolf Lüder, eds., 2001).

73. See Reply of the Government of the Republic of Rwanda to the Report of Amnesty International Entitled "Rwanda: Unfair Trials-Justice Denied" (1997), available at <http://www.rwandemb.org/prosecution/reply.htm> (last visited Aug. 2, 2002) [hereinafter RWANDAN RESPONSE TO AMNESTY INTERNATIONAL].

74. See *id.*

75. Compare RWANDAN RESPONSE TO AMNESTY INTERNATIONAL *supra*, note 73,

towards the common law system, while the Rwandan genocide trials are conducted within the civil law system, as will be discussed below.<sup>76</sup> Thus established, the ICTR began its work in earnest in 1995.<sup>77</sup>

### 3. Achievements of the ICTR

As of October 2002, the ICTR has produced a small but ever-growing body of case law. It has completed 11 trials, with the following results: five prisoners have received life imprisonment; three more have received sentences of 25, 15, and 12 years, respectively. One suspect has been acquitted, and the acquittal was upheld on appeal.<sup>78</sup> One defendant who received a life sentence at trial still has an appeal pending. As of October 2002, the ICTR had 61 detainees in custody. In addition to those whose trials have been completed and who are serving sentences, 22 individuals are currently on trial in 8 separate proceedings; 31 others presently await trial.<sup>79</sup> Those convicted, on trial, or awaiting trial encompass a broad spectrum of Rwandan society, including national and local political officials, military officers, businessmen, students, doctors, pastors, musicians, and journalists; they include the pastor who refused to help his Adventist congregation, and the man who ran the hate radio station, *Radio Télévision Libre des Mille Collines*.<sup>80</sup> In less than a decade, more than 230 witnesses have appeared before the Tribunal to give testimony in support of the prosecution or defense, and the ICTR has decided more than 500 motions.<sup>81</sup>

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with AMNESTY INTERNATIONAL, RWANDA: THE TROUBLED COURSE OF JUSTICE, AFR 47/015/2000 (Apr. 26, 2000), available at <http://web.amnesty.org/ai.nsf/Index/AFR470152000> (last visited Aug. 2, 2002) [hereinafter TROUBLED COURSE OF JUSTICE].

76. See, e.g., VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 49, 416 (1998) (The ICTY and the ICTR essentially followed "the adversarial approach of the common law systems," although they incorporated elements of the inquisitorial civil law system.). For more information about ICTR procedures beyond the scope of this chapter, see ICTR Rules of Procedure and Evidence, available at <http://www.ictor.org/wwwroot.ENG-LISH/rules/310501/index.htm> (last visited May 17, 2002).

77. See International Criminal Tribunal for Rwanda, *The Tribunal at a Glance*, available at <http://www.ictor.org/> (last visited Oct. 10, 2002).

78. See International Criminal Tribunal for Rwanda, *ICTR Detainees—Status on February 8, 2002*, available at <http://www.ictor.org/ENGLISH/factsheets/detainee.htm> (last visited Oct. 10, 2002). Other individuals have been detained since Feb. 8, 2002. See <http://www.ictor.org>.

79. See *id.*

80. See *id.*

81. See International Criminal Tribunal for Rwanda, *The Tribunal at a*

Two trials are particularly significant for international criminal justice. First, on September 2, 1998, Jean Paul Akayesu became the first individual convicted of the crime of genocide by an international criminal court.<sup>82</sup> Akayesu, the former Bourgmestre of Taba in Gitarama province, was found guilty on nine counts, including genocide, direct and public incitement to commit genocide, and crimes against humanity (torture, rape, and other inhumane acts).<sup>83</sup> Second, on September 4, 1998, the ICTR Trial Chamber sentenced former Rwandan Prime Minister Jean Kambanda to life in prison; Kambanda had pled guilty to counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity.<sup>84</sup> The *Kambanda* decision showed that international tribunals would not necessarily shy away from punishing heads of state for heinous acts taken during their terms of office—it may set a precedent for future ICC or tribunal action. The prosecution of national leaders such as Kambanda may present special opportunities for cooperation between international and national actors, as a head of state may fear international judgment more than the judgment of a domestic court over which he or she has influence, or continues to have vestiges of influence after leaving office. The deterrent effect on criminal activities by heads of state may therefore be greater in the international tribunal.

#### 4. Effectiveness of the ICTR

Rwanda's relationship with the ICTR has been strained from the Tribunal's inception, because of Rwanda's unmet expectations and because of the performance of the ICTR itself. One of the most important sources of disagreement between Rwanda and the ICTR has been the Tribunal's limited temporal jurisdiction. On the one hand, the limited jurisdiction provides a clear mandate and scope of power to the Rwandan tribunal. This sort of bright-line starting and stopping point

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Glance, Fact Sheet No. 1, June 2001, available at <http://www.ictr.org/ENGLISH/factsheets/1.htm> (last visited Feb. 20, 2002).

82. See *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T (Sept. 2, 1998), available at <http://www.ictr.org> (last visited Sept. 29, 2002). This decision was subsequently upheld by the ICTR Appeals Chamber in *The Prosecutor v. Jean-Paul Akayesu* (June 1, 2001), available at <http://www.ictr.org> (last visited Sept. 29, 2002).

83. See *id.*

84. See *The Prosecutor v. Jean Kambanda*, ICTR-97-23-S (May 1, 1998), available at <http://www.ictr.org> (last visited Sept. 29, 2002). This decision was subsequently upheld by the ICTR Appeals Chamber in *Jean Kambanda v. The Prosecutor*, ICTR-97-23-A (Oct. 19, 2000), available at <http://www.ictr.org> (last visited Mar. 22, 2002).



makes clear where the international community's responsibility ends and where the Rwandan government's responsibility begins. Additionally, an unlimited temporal mandate would have further congested the already slow ICTR process, possibly preventing important leaders of the 1994 genocide from going to trial. On the other hand, the Rwandan government has criticized the limited jurisdiction for failing to cover most of the planning period for the genocide, and has argued that a tribunal "which refuses to consider the causes of the genocide in Rwanda and its planning . . . will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation."<sup>85</sup> Interestingly, the limited jurisdiction now allows the Rwandan government to avoid being held accountable for many of the violations of humanitarian law that observers say have occurred since 1994.<sup>86</sup> These include not just reprisal killings in Rwanda, but massacres that have occurred in Rwandan-controlled areas of the Democratic Republic of Congo since 1994.<sup>87</sup> The failure to hold the RPF and other Tutsis accountable will be discussed in more detail below.

Another frustrated expectation for the Rwandan government centers on the ICTR's refusal to impose the death penalty. The government has disagreed with the tribunal's sentencing possibilities for two reasons. First, because the ICTR Statute forbade capital punishment, those being tried for the most egregious crimes in Arusha faced lesser sentences than those being tried for lesser crimes in Rwanda, where the death penalty was available. Second, some of those convicted by the ICTR were expected to serve their sentences in Europe.<sup>88</sup> As one RPF official remarked, "It doesn't fit our definition of justice to think of the authors of the Rwandan genocide sitting in a full-service Swedish prison with a television."<sup>89</sup> A third reason, not officially articulated by the Rwandan government, but suspected by several Rwanda observers, is that the sentencing disparity seems hypocritical to the Rwandan government; the same international community that sat by and let the

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85. See ICTR ESTABLISHMENT, *supra* note 2 (statement of Manzi Bakuramutsa).

86. See DES FORCES, *supra* note 21 (describing RPF killings of persons suspected to have been involved in the genocide, after the fighting had ended); Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 175-76 (2000).

87. See e.g., Chris McGreal, *Genocide Tribunal Ready to Indict First Tutsis*, GUARDIAN (LONDON), Apr. 5, 2002, at 16.

88. Denmark, Norway, and Belgium, as well as a few African countries, offered to incarcerate those convicted at the ICTR. See ICTR, *International Cooperation with the Tribunal*, FACT SHEET NO. 6, available at <http://www.ictr.org>.

89. GOUREVITCH, *supra* note 1, at 255.

genocide unfold now takes the moral high ground about how the death penalty violates international human rights norms.<sup>90</sup>

Rwanda has also been largely disappointed by the actual performance of the ICTR. First, the ICTR has been seen as unnecessarily slow; the Rwandan government does not want the quest for "deluxe justice" to come at the expense of urgency.<sup>91</sup> Second, Rwanda has been frustrated by episodes of procedural bungling that resulted in suspects being released. For a time in late 1999, Rwanda had neither an ambassador nor a permanent representative at the ICTR. This resulted from a rift over the release of a particularly notorious prisoner, Jean-Bosco Barayagwiza, who was released following some procedural irregularities.<sup>92</sup> That situation was finally remedied in 2000, when the ICTR agreed to reconsider its decision, and Barayagwiza now awaits trial in Arusha.<sup>93</sup> But the Rwandan government remains concerned that "[t]he performance of the tribunal thus far has been disappointing," citing such factors as poor tribunal organizational structure, incompetent tribunal personnel, and tribunal leadership that shows a perceived "hostility towards cooperation with the Government of Rwanda" in making its assessment.<sup>94</sup> Third, the Rwandan government remains frustrated by the cost of the proceedings at the ICTR, seeing large sums of money dispensed on relatively few cases. As the government noted in a report published in 2001, the Rwandan national system could have achieved more "if the international community had put at our disposal resource[s] of the magnitude that has for example been squandered on the International Criminal Tribunal for Rwanda."<sup>95</sup> Rwandans feel that the ICTR has never realized its initial promise to efficiently conduct and conclude high-profile criminal trials.

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90. Jose Alvarez, *Crimes of State, Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 407 (1999).

91. Official Website of the Rwandan Government, GENOCIDE, at <http://www.rwanda1.com/gov> [hereinafter RWANDAN GOVERNMENT].

92. See Chris Simpson, *Rwanda Tribunal's Shaky Progress*, available at [http://news.bbc.co.uk/hi/english/world/africa/newsid\\_645000/645070.stm](http://news.bbc.co.uk/hi/english/world/africa/newsid_645000/645070.stm) (Feb. 16, 2000) (last visited Apr. 1, 2002). This article and the incident sparked by Jean-Bosco Barayagwiza's release illustrate the Rwandan government's concern that the ICTR and western observers value the rights of defendants over those of the victims.

93. See *id.*

94. Official web site of the Rwandan Embassy in the United States, THE JUDICIAL SYSTEM IN RWANDA: A REPORT ON JUSTICE, at <http://www.rwandaemb.org/justice/justice.htm> (last visited on July 14, 2002) [hereinafter JUDICIAL SYSTEM IN RWANDA].

95. See RWANDAN RESPONSE TO AMNESTY INTERNATIONAL, *supra* note 73.

Finally, the tribunal's inaccessibility also complicates the average Rwandan's relationship with the ICTR. The ICTR's location in Arusha makes it difficult for Rwandans to attend court proceedings or hear news of ICTR trials. The international community located the tribunal in a neutral country to enhance the appearance of impartiality and fairness, but that decision only exacerbated Rwanda's feelings that the nation was being denied justice. The Rwandan Ambassador to the Security Council noted in voting against the ICTR Statute that it was deeply important for the tribunal to be located in Rwanda so that Rwandans could see up close what it means to fight against impunity; this lesson was lost by situating the tribunal in Arusha. Only recently have Rwandans been able to get news from the ICTR in Kinyarwanda, the national language of Rwanda.<sup>96</sup> Although the Rwandan Government has acknowledged certain ICTR successes, it is clear that its overall sense of ICTR performance is negative.<sup>97</sup>

Popular sentiment toward the ICTR is no different. When ICTR Chief Prosecutor Carla del Ponte traveled to Kigali in June 2002, she was met with protests from 3,500 genocide survivors marching with placards inscribed, "No justice from ICTR."<sup>98</sup> This sentiment is best and most consistently articulated by a group called IBUKA, which is the principal Rwandan organization for survivors of the genocide. IBUKA has been critical of the pace of the ICTR proceedings; their view is that the slow pace diminishes the value of the justice that is served.<sup>99</sup> Victims' groups also protest certain procedures like fee-splitting between defense counsels and their clients, whereby defense lawyers share some of their remuneration with their clients so that they will continue to be retained as

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96. For example, in 2000, the ICTR undertook a major outreach program towards Rwanda. A reporter from Radio Rwanda was permanently based at the ICTR to broadcast daily reports from the trial chambers. He also traveled to The Hague to report on an appellate proceeding. See Sixth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between January 1, and December 31, 1994, 56th Sess., U.N. Doc. A/56/351-S/2001/863, available at <http://www.ictr.org> (last visited Apr. 1, 2002).

97. See JUDICIAL SYSTEM IN RWANDA, *supra* note 94.

98. *Genocide Survivors Demonstrate Against ICTR Chief*, IRIN (June 28, 2002), available at <http://allafrica.com/stories/printable/200206280543.html> (last visited Aug. 2, 2002) [hereinafter *Genocide Survivors Demonstrate*].

99. Stef Vandeginste, *Rwanda: Dealing with Genocide and Crimes Against Humanity in the Context of Armed Conflict and Failed Political Transition*, in BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT, at 31 (Nigel Biggar ed., 2001).

lawyers.<sup>100</sup> They view this practice as unjustly enriching suspected *génocidaires* while they await trial.<sup>101</sup>

International opinion of the ICTR is more positive. Although scholars recognize that many of Rwanda's complaints about delays and poor management are valid, the ICTR has nevertheless achieved a remarkable number of high-level indictments and convictions. Moreover, in the painstaking accumulation of evidence prepared for trial, the ICTR has amassed impressive documentation of many of the worst acts of genocide in Rwanda. The ICTR therefore goes far toward meeting one goal expressed at its creation: international recognition of the scope of crimes against humanity that occurred in Rwanda in 1994. These positive achievements of the ICTR, however, seem to be directed more at the international community than at Rwanda; where the Rwandans generally feel disconnected from the justice being meted out in Arusha, the international community senses the establishment of important precedents for international human rights law.<sup>102</sup> This difference in approach to the ICTR's record is understandable given the seemingly subtle difference in goals elaborated at the ICTR's formation: in addition to seeking justice by holding perpetrators accountable, Rwanda wanted an emphasis on the deterrent effect within Rwanda, while the international community was more concerned with the ICTR's potential impact on human rights worldwide.<sup>103</sup>

One particularly serious criticism of the ICTR is only recently rising to the fore, namely the tribunal's inability to prosecute Tutsis who are accused of committing war crimes. Although the tribunal's mandate encompasses prosecution of crimes against humanity committed by both

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100. *Rwanda: Reforms Introduced At the International Criminal Tribunal*, IRIN (July 9, 2002).

101. *Genocide Survivors Demonstrate*, *supra* note 98; Betsy Pisik, *Frustration in Rwanda*, WASH. TIMES, July 29, 2002, at A14.

102. Vandeginste, *supra* note 99, at 230–31 (2001).

103. In the statements accompanying the establishment of the ICTR, for example, Ambassador Hannay of the United Kingdom emphasized the global aspect of the crimes that were committed in Rwanda, arguing that the "human rights violations committed in Rwanda . . . concerned the international community as a whole" and he situated the need for justice and "deterrence for the future" in this area of international concern. See ICTR ESTABLISHMENT, *supra* note 2 (Statement of David Hannay of the United Kingdom). By contrast, Ambassador Bakuramutsa of Rwanda acknowledged that the international community had important interests in the prosecution of those accused of committing genocide, but his statement is replete with the very particular needs and concerns for justice, deterrence, and reconciliation within Rwanda itself. See ICTR ESTABLISHMENT, *supra* note 2 (Statement of Manzi Bakuramutsa of Rwanda); see also the discussion of Ambassador Bakuramutsa's concerns, *supra* Section C.1.

Hutu and Tutsi, in reality only Hutu suspects have been brought before the ICTR. Prosecutor Del Ponte announced her intention to investigate suspected Tutsi war criminals in 2001, but as yet she has issued no indictments.<sup>104</sup> According to Del Ponte, Rwandan President Paul Kagame—head of the RPF in 1994—has “not delivered on a pledge to cooperate.”<sup>105</sup> This stalemate again raises the specter of “victor’s justice,” a specter that would counteract all the efforts being made to dismantle the culture of impunity in Rwanda.

Because the ICTR as constituted cannot meet all the goals Rwanda has for post-genocide accountability, and because the ICTR handles only a small number of cases, the Rwandan national judicial system, which handles the vast majority of genocide trials, plays a critical role in the long-term process of eliminating the cycle of impunity and violence.

#### D. NATIONAL JUDICIAL RESPONSE

Despite the existence of the ICTR, the Rwandan national judicial system has borne and will continue to bear the brunt of the genocide trials. Because of its resource limitations and limited mandate, the ICTR ultimately cannot resolve the grim situation in Rwanda—its processes take too long and its resources are too limited. Moreover, the United States and other nations have mentioned the need for an “endgame strategy” for the ad hoc war crimes tribunals in Rwanda and Yugoslavia.<sup>106</sup> It seems highly unlikely that the genocide trials will be finished before the ICTR is disbanded. When that occurs, the Rwandan system will go forward alone.

Most important for Rwanda, the ICTR’s goals are more internationally focused, aimed in part at deterring leaders in other nations from carrying out similar campaigns of violence. Rwanda’s goals, as noted above, place much more emphasis upon achieving justice inside Rwanda, and upon the deterrent effect *within* Rwanda and the importance of breaking down Rwanda’s culture of impunity. For this reason, even an ICTR with infinite capacity and resources could not play the role that the Rwandan legal system must play to achieve this ultimate goal.

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104. See Marc Lacey, *Tribunal Says Rwanda Is Stalling Inquiry Into 1994 Killings*, N.Y. TIMES, Sept. 7, 2002, at A3.

105. Chris McGreal, *Genocide Tribunal Ready to Indict First Tutsis*, GUARDIAN (LONDON), Apr. 5, 2002, at 16.

106. See Hironde Foundation, *US Pushing Closure Strategy for UN Tribunals, Says Envoy*, available at <http://www.hironde.org/hironde.nsf/> (last visited Mar. 17, 2002) (discussing remarks made by U.S. Ambassador for War Crimes Issues Pierre Richard Prosper, suggesting that the ICTR should wind down by 2007 or 2008).

## 1. Background and Goals

The 1994 genocide left Rwandan legal institutions, like the rest of civil society, in tatters. Rwanda's most urgent problems arise from its limited human and physical capacity to address the massive legal challenges posed by the genocide. The statistics on Rwanda's diminished post-genocide legal capacity are grim. Two-thirds of Rwanda's judges and attorneys fled or were killed during the months of fighting, leaving the country largely devoid of experts on the law.<sup>107</sup> Law enforcement mechanisms such as the police force ceased to exist for a time following the genocide.<sup>108</sup> The system lacks both trained investigators (only 39 were left after the genocide, compared to 193 before)<sup>109</sup> and the resources needed to pursue investigations, especially in rural areas.<sup>110</sup> The lack of staff capacity and resources for the legal system means that the trials of those accused of genocide have proceeded at a glacial pace. As of March 2001, the most recent month for which figures are available, only 5,310 trials had been completed.<sup>111</sup> By the Rwandan government's most recent estimate, it would take 200 years to prosecute all those accused of genocide if the courts maintained their current speed.<sup>112</sup>

The second capacity problem is that of the overwhelmed jail facilities. As of 2001, 106,000 individuals remained incarcerated on genocide charges in jails with an official capacity of only 30,000.<sup>113</sup> The terrible conditions created by such overcrowding have been the subject of many complaints by human rights organizations;<sup>114</sup> as one international observer described the Kigali prison, "the prison revealed wall-to-wall people, with the prisoner hierarchy determined by those who had to stand, those who could sit, those who could lie down, and those who could lie down in the shade."<sup>115</sup> In 2001, 708 detainees died in prison as a result of these conditions. Amnesty International has reported that

107. JUDICIAL SYSTEM IN RWANDA, *supra* note 94.

108. *Id.*

109. *Id.*

110. Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64 (2001).

111. Human Rights Watch, *Human Rights Watch World Report 2002: Rwanda, Human Rights Developments*, available at <http://hrw.org/wr2k2/africa9.html> (last visited Aug. 2, 2002) [hereinafter HRWatch 2002].

112. See RWANDAN GOVERNMENT, *supra* note 91.

113. UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES. RWANDA (2001) [hereinafter STATE DEPARTMENT 2001 HUMAN RIGHTS REPORT].

114. See HRWatch 2002, *supra* note 111.

115. Peter H. Sennett, *Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes*, 12 ST. JOHN'S J. LEGAL COMMENT. 425, 438 (1997).



these conditions amount to "cruel, inhuman or degrading treatment."<sup>116</sup> The overwhelmed jail facilities combined with the slow pace of the trials raises important due process concerns for defendants.

Rwanda's goal since 1994 has been to rebuild its capacity so that it can move expeditiously to bring these thousands to justice. The genocide trials permit the Rwandan government to dispense justice by individualizing culpability for the genocide. Instead of treating all Hutus as guilty, the trials allow those who participated in the genocide to be brought to justice, and those who did not participate to be exonerated in the eyes of the state and, more important, in the eyes of the communities where they have had to live for years under clouds of suspicion. Convinced that the ICTR is located too far away to help teach Rwandans about justice and accountability, the Rwandan government also hopes to provide a sound model of accountability at home. Although the trials are situated within and are an integral part of the government's broader effort to achieve reconciliation, this particular aspect of the legal response to genocide exclusively emphasizes individual accountability and specific deterrence for those convicted.

## 2. Jurisdiction and Procedures of the Rwandan National Courts

Rwanda had no domestic genocide law prior to the events of 1994, although it had previously ratified the U.N. Convention on the Prevention and Punishment of the Crime of Genocide.<sup>117</sup> Thus, the country established an entirely new substantive and procedural framework *ex post facto*, with all the practical, political and legal problems such an approach entails. On August 30, 1996, Rwanda adopted the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990.<sup>118</sup> The 1996 law divided genocide-related crimes into four categories. Category One covers the most serious criminals, including "planners, organizers, instigators, supervisors, and leaders of the crime of genocide or of a crime against humanity," those who acted from positions of power to foster the genocide, "notorious murderers who by virtue of zeal or excessive malice" stood apart from the average participant in the killings, and individuals who committed acts of sexual

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116. TROUBLED COURSE OF JUSTICE, *supra* note 75.

117. See Convention on the Prevention and Punishment of the Crime of Genocide, U.N.T.S. No. 1021, Vol. 78 at 277 (1951) (defining genocide and laying out a series of punishable acts).

118. See Rwandan Genocide Law, *supra* note 65.

torture.<sup>119</sup> Category Two consists of individuals who perpetrated or conspired to commit intentional homicide or serious assault ending in death.<sup>120</sup> Category Three deals with persons who committed "other serious assaults."<sup>121</sup> Category Four is reserved for those who committed offenses against property.<sup>122</sup>

All of the trials of persons charged under the Organic Law are conducted in the regular Rwandan judicial system; the government decided against creating special bodies to handle genocide trials.<sup>123</sup> The Rwandan courts use a civil law system, which has two primary implications for how the trials of suspected *génocidaires* are conducted. First, in civil law trials, the prosecution is not obliged to put witnesses for the prosecution on the stand for cross-examination. Instead, witnesses provide written statements in advance, and defendants may specifically request that a witness appear for cross-examination. The Rwandan government believes that one merit of this system is that it helps judges move through any given case more quickly than if all testimony had to be offered in person in front of the court.<sup>124</sup> Second, in the civil law system, the judge has more discretion to determine what evidence should be submitted at trial; such discretion is consistent with penal codes in France and Belgium, which also emphasize the discretion of the judge.<sup>125</sup>

The Rwandan courts have introduced two innovations to move through the backlog of cases. The first innovation is the introduction of the plea bargain, which had not previously existed in Rwanda. Chapter III of the Rwandan Genocide Law sets forth a plea-bargaining system whereby perpetrators can receive reduced sentences in exchange for guilty pleas, a measure that aims to reduce the backlog of cases.<sup>126</sup> The introduction of the plea-bargaining system was contentious in Rwanda, traditionally a civil law nation where plea-bargaining was seen as a foreign, common law practice.<sup>127</sup> The guilty pleas ran counter to the deep passions accompanying the prosecution of each crime; the efficiency gains were directly countered by a sense that people were receiving less

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119. *Id.* at art. 2

120. *Id.*

121. *Id.*

122. *Id.*

123. RWANDAN RESPONSE TO AMNESTY INTERNATIONAL, *supra* note 73.

124. *Id.*

125. *Id.*

126. Rwandan Genocide Law, *supra* note 65, art. 2. See also Sennett, *supra* note 115.

127. See Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: The ICTR and National Trials* 50–51 (July 1997) ("Most traditional civil law systems did not allow plea-bargaining and some viewed it as distasteful if not immoral.").

than full justice.<sup>128</sup> However, this controversy may be somewhat mitigated because Chapter III's leniency is forbidden to individuals whose alleged crimes fall within the most serious Category One acts.<sup>129</sup>

The second innovation is the Gisovu project, a release program that seeks to achieve faster justice for many of those in detention. The Gisovu project focuses on detainees who have no files, and on elderly or ill prisoners, among others. Starting in late 2000, prosecutors accompany these detainees and prisoners to their home communities, where the prosecutors ask if anyone has testimony against them. If no one comes forward with any testimony, the suspects are freed.<sup>130</sup> Among those who are investigated through the Gisovu project, between 30 percent and 40 percent are released.<sup>131</sup>

### 3. Achievements and Remaining Challenges

Since 1994, the Rwandan government, with the help of international aid, has made great efforts to increase its number of qualified judicial personnel and improve the basic office infrastructure for all of the country's trial and appellate courts. According to a study released by the Rwandan Embassy in the United States, the overall number of judicial personnel such as judges, prosecutors, investigators and others is now higher than it was before 1994.<sup>132</sup> An increase in judicial personnel, however, is only a partial indicator of the efficacy and fairness of the Rwandan judicial system. Domestic trials began in December 1996, and the number of trials has increased in each subsequent year, but more than 100,000 individuals remain in jails around the country.<sup>133</sup> Only 5,300 trials had concluded as of May 2001, which is only 5 percent of the total docket. Another 1,335 prisoners have been released through the Gisovu project as of May 2001.<sup>134</sup> The plea-bargain innovation has been less efficient than anticipated because each confession must be examined for validity before the prosecutor can move forward with Chapter III leniency. With some 15,000 persons having confessed (a little more than 10 percent of the total in detention), even this device will take time to implement, and will only reduce the backlog of cases to around 90,000

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128. See Sennett, *supra* note 115.

129. Rwandan Genocide Law, *supra* note 65, art. 3.

130. HRWatch 2002, *supra* note 111.

131. STATE DEPARTMENT 2001 HUMAN RIGHTS REPORT, *supra* note 113, at §1(d).

132. JUDICIAL SYSTEM IN RWANDA, *supra* note 94.

133. STATE DEPARTMENT 2001 HUMAN RIGHTS REPORT, *supra* note 113.

134. *Id.*

suspects.<sup>135</sup> Despite the real progress that has been made in strengthening legal capacity in the country, the challenge posed in absolute terms by these high numbers remains almost the same as it was in 1994.

#### 4. Effectiveness of the Rwandan Courts

In the early days following the genocide, observers sharply criticized Rwandan courts for failing to afford proper procedural protections to defendants, and they feared that the domestic courts would be used as illegitimate tools of victor's justice rather than appropriately constituted and impartial courts of law. The early genocide trials were held inconspicuously, to avoid western attention to procedural deficiencies like lack of defense counsel, poor quality of investigations, and speedy judgments that bordered on hastiness.<sup>136</sup> At the same time, until international help came forth, this situation was caused more by practical and logistical problems than by any lack of commitment to due process. Given the Rwandan judicial system's miserable situation immediately following the genocide, little more could be expected.

Portions of the international community continue to monitor and criticize the Rwandan legal system's response to the genocide. Human rights groups regularly issue scathing reports condemning Rwanda's treatment of its prisoners and the Rwandan trial process.<sup>137</sup> In 2000, Amnesty International released a report, *The Troubled Course of Justice*, which harshly criticized six elements of Rwanda's legal system: detention without trial; re-arrest of suspected *génocidaires* after formal acquittal in the courts; overcrowded, inhuman jail conditions; torture and ill-treatment; unlawful detention of civilians in military custody; and imposition of the death penalty.<sup>138</sup> Amnesty also noted that even in trials where defendants had attorneys and more opportunities to prepare their defenses, standards of fairness and procedure varied widely between defendants, with more prominent defendants often receiving better treatment than indigent and uneducated individuals.<sup>139</sup>

135. HRWatch 2002, *supra* note 111. As this book went to press, several thousand prisoners were released, pending their appearance at *gacaca* trials, discussed in Section E, *infra*. This brings the number of genocide suspects in Rwandan prisons down to roughly 80,000 persons. See *Rwanda: Thousands of Genocide Suspects Released from Solidarity Camps*, HIRONDELLE NEWS AGENCY, May 6, 2003.

136. GOUREVITCH, *supra* note 1, at 343–44.

137. See e.g., TROUBLED COURSE OF JUSTICE, *supra* note 75; HRWatch 2002, *supra* note 111; HUMAN RIGHTS WATCH, WORLD REPORT 2001 RWANDA, HUMAN RIGHTS DEVELOPMENTS, available at <http://www.hrw.org/wr2k1/africa/rwanda.html> (last visited Sept. 28, 2002).

138. TROUBLED COURSE OF JUSTICE, *supra* note 75.

139. See *id.*

The Rwandan government readily and regretfully admits that its trial system still has problems. It acknowledges that "[j]udicial institutions in Rwanda have at the best of times been ineffective, run by poorly paid and ill trained personnel. At worst, these institutions have been partisan and corrupt, staffed with many political appointees eager to please the powers that be, the highest bidder, or both."<sup>140</sup> This self-criticism is an encouraging sign, as it shows the possibility that the post-genocide government is willing to establish a system that values accountability for all, not just for its political opponents. The government consistently asks the international community, however, to carefully consider the broader context in which these institutions are operating. In its response to Amnesty International's *Troubled Course of Justice* Report, the government comments that the international community "proceeds on the assumption that the same standards which apply in states with abundant resources and limited number of criminal suspects should equally apply to a country like Rwanda with limited resources and an almost insurmountable problem of having to render justice for around 100,000 suspects now in custody awaiting trial."<sup>141</sup> The government's view is that the international community should adjust its standards enough to be realistic about Rwanda's still weak legal capacity.

The dialogue between the government of Rwanda and human rights groups helps focus attention on the ways in which the Rwandan national judicial system can continue to be improved. On balance, however, the Rwandan government has gone a long way toward achieving its goals. The legal infrastructure is substantially improved from its 1994 condition, and as the United States Department of State has stated in each of its Human Rights reports from 1999 through 2002, the "vast majority" of genocide trials meet international standards.<sup>142</sup> Rwanda is therefore starting to provide a visible model of accountability at home, meeting one of its critical objectives.

One serious unaddressed concern remains, however, and that is the question of whether it is "victor's justice" that is being pursued in Rwanda. The Organic Law permits prosecution of all crimes arising after

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140. JUDICIAL SYSTEM IN RWANDA, *supra* note 94 (further arguing that "[t]he absence of competent impartial and independent judicial organs in post independence Rwanda is one of the factors that have contributed significantly to foster the culture of impunity that led to the 1994 genocide").

141. See RWANDAN RESPONSE TO AMNESTY INTERNATIONAL, *supra* note 73.

142. See STATE DEPT 2001 HUMAN RIGHTS REPORT, *supra* note 113; UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: RWANDA, at § 1(d) (2000); UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: RWANDA, at § 1(d) (1999); UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: RWANDA, at § 1(d) (1997).

the RPF invasion of Rwanda in 1990.<sup>143</sup> The RPF itself has been accused of (and admitted to) crimes against humanity during the civil war and its aftermath, but those responsible have not been called before the judicial system to account for their crimes. As the Rwandan government becomes increasingly implicated in human rights abuses conducted by its forces and allies in the Eastern Democratic Republic of Congo,<sup>144</sup> this lack of accountability goes from being worrisome to being absolutely counter to the goal of eradicating the culture of impunity. The unwillingness to hold itself to the same standards it demands of others is characteristic of previous regimes, both Hutu and Tutsi, whose actions built mistrust, fear, and hatred instead of tolerance and inclusion. If the Rwandan government remains committed to its original goal of eradicating the culture of impunity in Rwanda, then it must change its approach in this area.

Notwithstanding this remaining untackled issue of "victor's justice," the real achievements of the Rwandan justice system merit continued international community support, both financial and technical. International aid should continue to finance capacity-building projects that focus on all levels of the judiciary from the investigators to the judges, as well as projects that provide legal counsel to indigent defendants. Even with this support, however, the Rwandan government is unlikely to be able to satisfactorily respond to the international community's concerns. If the courts focus on being thorough, they will be unable to address the concern for moving through the enormous volume of cases facing the courts and would pose particular dangers to those who may be innocent but who are presently detained. Likewise, if the courts focus on speed, they would generate fundamental due process concerns for most of those accused. Indeed, any justice system with such a backlog of cases would find the task of providing speedy but thorough justice Herculean.<sup>145</sup> This situation presents a strong case for an alternative means of finding justice. Rwanda's chosen alternative is the *gacaca* process, the innovative third arm of the tripartite legal response to genocide.

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143. See Rwandan Genocide Law, *supra* note 65.

144. See, e.g., Human Rights Watch, *Rwanda: Observing the Rules of War?* 13(8) (Dec. 2001), available at <http://www.hrw.org/reports/2001/rwanda2/> (last visited Aug. 2, 2002).

145. For the sake of comparison, the Board of Immigration Appeals in the United States has a comparatively small number in its case backlog—9,000 cases—and to dispense with the backlog, the Attorney General has authorized judges to spend only 15 minutes to review each appeal. See Lawyers Committee for Human Rights, *New Justice Department Rules Gut Due Process for Refugees Seeking Asylum in the United States* (May 13, 2002), available at <http://www.lchr.org/>

## E. GACACA

Faced with an overwhelming judicial caseload and a large number of suspects in prison awaiting trials that may never come, Rwanda recently implemented a system of community-based justice called *gacaca*. *Gacaca* is modeled after a traditional community conflict-resolution mechanism with the same name, which loosely translates from Kinyarwanda as "justice on the grass."<sup>146</sup> Traditionally, *gacaca* was used to settle land disputes. In post-genocide Rwanda, the new version of *gacaca* will be used to try individuals charged with crimes in Categories Two, Three and Four, with some level of court supervision. Category One offenses will remain in the national courts.<sup>147</sup>

The *gacaca* process meets two urgent needs not met by either the ICTR or the national judicial process: speed and inclusiveness. The need for speed responds directly to the lengthy detentions of suspected *génocidaires* and to the overcrowded jail conditions. The need for inclusiveness responds to the ineffectiveness of both the ICTR and the national genocide trials in engaging individuals and communities in the work of reconciliation. Although *gacaca* is still in its early stages, it promises to complement the existing international and national accountability mechanisms responding to the genocide.

### 1. Background and Goals

Rwanda has two principal goals for the *gacaca* process.<sup>148</sup> First, the government hopes *gacaca* will speed case resolution, lowering the economic impact of the trials on the country's limited finances and minimizing criticism by the international human rights groups who oppose its past and current treatment of prisoners.<sup>149</sup> Second, and more important, the government of Rwanda hopes *gacaca* will help attain reconciliation between Hutu and Tutsi, and between victims and *génocidaires*, in a way that the ICTR and the national judicial system have thus far failed to do.<sup>150</sup> As noted above, the Rwandan government was frustrated by

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refugees/torchlight/newsletter/newslet\_si1.htm. As in Rwanda, the needs for speed and for thoroughness compete directly with each other.

146. Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 175 (2001).

147. See RWANDAN GOVERNMENT, *supra* note 91.

148. See generally, Peter Nantulya, *The Gacaca System in Rwanda* (2001), available at <http://www.accord.org.za/>.

149. *Id.*; see also RWANDAN GOVERNMENT, *supra* note 91.

150. See RWANDAN GOVERNMENT, *supra* note 91.

the decision to locate the ICTR in Arusha, where its lessons about accountability would be removed from the people of Rwanda. Likewise, the pace of the trials in the national judicial system and the terrible ongoing situation with the overcrowded prisons have done little to instill popular trust in accountability mechanisms. By contrast, the *gacaca* trials will take place in and involve the communities where atrocities were committed, and the trials will be held in front of those most directly affected—the victims, the families of victims, and the communities for whom reconciliation is not an abstract goal but a constant daily struggle.

Despite the prominent language about reconciliation in Rwandan references to *gacaca*, the new system also purposefully retains a retributive element. The community ownership of the process is geared toward reconciliation along the model of the South African Truth and Reconciliation Commission (TRC). But unlike the TRC, defendants who come before the *gacaca* may receive prison sentences even when they confess. The system was explicitly chosen over a wide-spread amnesty system or investigative body because Rwanda did not want to relinquish its emphasis on individual accountability.<sup>151</sup>

The Rwandan government's embrace of the *gacaca* also asserts the primacy of its own traditions over those imposed by the international community in the early days following the genocide. Unhappy with the performance of the ICTR, the government hopes that this innately Rwandan process will join all Rwandans in the work of rebuilding the culture of law in Rwanda.

## 2. The *Gacaca* Process

Rwanda passed its law governing the *gacaca* process in January 2001.<sup>152</sup> Rwandans elected 200,000 *gacaca* judges in October 2001 and began training these judges in April 2002, eight years after the genocide began.<sup>153</sup> The judges must be "persons of integrity," but they are not required to have any prior legal training or experience. *Gacaca* judges take responsibility for the fairness and orderliness of proceed-

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151. Peter Uvin, *The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and the Massacres of 1994 in Rwanda: A Discussion Paper Prepared for the Belgian Secretary of State for Development Cooperation* (2001), available at <http://www.macconsortium.org/ITV/2001/Uvin.gacaca.report.htm>.

152. See Organic Law on *Gacaca*, Organic Law No. 40/2000 (2001) [hereinafter *GACACA LAW*].

153. See Hironde Foundation, *Training of Gacaca Judges Starts 8 April 2002*, available at <http://www.hironde.org/hironde/nsf/> (Apr. 3, 2002) (last visited May 22, 2002).



ings. *Gacaca*'s Assembly, which consists of all inhabitants of the community over 18 years of age, holds the task of identifying which crimes will be prosecuted and who will be accused of those crimes. The duties of the General Assembly also include creating lists of those who died, those who were raped, and those who moved away, and gathering evidence which incriminates or exonerates those who have been accused of participating in the genocide.<sup>154</sup> At the higher levels of *gacaca*, the General Assemblies consist of elected representatives from these local assemblies.<sup>155</sup>

*Gacaca* courts are organized on levels that reflect the Rwandan administrative structure, with authority and jurisdiction allocated over four increasingly large territorial areas: cell, sector, district and province. *Gacaca* courts at the most local level, the cell, will try only prisoners and suspects accused of Category Four crimes (property damage and vandalism).<sup>156</sup> Sector-level courts will try Category Three offenses, while district-level courts will try Category Two offenses and appeals from Category Three cases. The province-level courts will handle appeals from district-level decisions. Those accused of Category One offenses cannot use the *gacaca* process; these most serious cases remain in the national judicial system.

*Gacaca* trials look very different from those taking place in the ICTR and the national judicial system.<sup>157</sup> In a *gacaca* trial, the defendant has no lawyer and faces a judge who is also the prosecutor. The trial takes place in the community where the crime allegedly took place, in front of a crowd that would normally include the victim and/or the victim's family and friends. When the judge reads the charges against the defendant, the defendant is allowed to respond with his or her version of the events in question, and may call upon witnesses from the assembled community to verify his or her story. If no one in the community has any evidence against the defendant, then the defendant is freed. The defendant may also enter a guilty plea to reduce his or her sentence. As in the national judicial system, this introduction of the guilty plea has provoked controversy. Given the number of years some of these defendants have already been in jail awaiting trial, the reduced sentence they receive by pleading guilty means that many of them will be freed immediately.

The *gacaca* process began on a pilot basis in May 2001, with seven trials of suspects who had been detained in prison for more than four

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154. See RWANDAN GOVERNMENT, *supra* note 91.

155. *Id.*

156. See GACACA LAW, *supra* note 152.

157. See generally, Nantulya, *supra* note 148; Uvin, *supra* note 151.

years.<sup>158</sup> In the case of one 18-year-old, the judge read the charges and asked the community for their evidence. After the judge's request was met three times with silence, the defendant was freed. Another defendant was accused of participating in the killing, and several women spoke up against her after the charges were read. The judge warned them that they needed to be able to produce evidence, and that false testimony was a serious offense. The defendant was taken back to jail, and her case will be handled in a later (non-pilot) *gacaca* session.<sup>159</sup> In all, four people were released that day, and the other cases were postponed until the official process began in 2002.

By the time all courts are operational, there will be 11,000 *gacaca* courts throughout Rwanda, involving more than 250,000 judges.<sup>160</sup> In the meantime, 73 *gacaca* courts in 11 provinces have begun their duties.<sup>161</sup> The first task for the *gacaca* courts is developing the list of genocide victims and suspected perpetrators; this list will be the basis for the actual trials scheduled to commence in late 2002. As of August 2002, the process remains popular with genocide survivors, and with prisoners and their families.<sup>162</sup> Some troubles have arisen as to whether crimes committed by the Rwandan Patriotic Front should also be brought before the *gacaca* courts; this issue has not been resolved as of October 2002.<sup>163</sup>

It would be a mistake to think of *gacaca* as an entirely traditional legal mechanism. Although the process has its roots in the older community-based conflict resolution mechanism whose name it has adopted, the post-genocide *gacaca* has been initiated and will be administered by the state, and will use the coercive power of the state to imprison both those who are found guilty of genocide-related crimes and those who are found guilty of offering false evidence against the defendants. Moreover, unlike the traditional *gacaca* which was contained within individual communities, the modern variant moves into larger and larger administrative units as defendants lodge appeals and as the seriousness of the charges increases.<sup>164</sup>

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158. See Mary Kimani, *Community Frees Four Genocide Suspects During Pilot Gacaca Justice Process*, Internews Network Reporting from the ICTR (2001), available at [http://www.internews.org/activities/ICTR\\_reports/ICTR\\_reports\\_may2001.htm](http://www.internews.org/activities/ICTR_reports/ICTR_reports_may2001.htm).

159. See *id.*

160. See Herve Bar, *Watchdog Criticises Rwanda's Village Courts*, AGENCE FRANCE PRESSE (Aug. 23, 2002).

161. Hirondelle Foundation, *Le Lent Decollage des Gacaca* (Oct. 1, 2002), available at <http://www.hirondelle.org/hirondelle.nsf/>.

162. See Bar, *supra* note 160.

163. Hirondelle Foundation, *supra* note 161.

164. See generally Human Rights Watch, *Rwanda: Elections May Speed Genocide*

### 3. Hopes and Concerns

The Rwandan government and people have enormous hopes for the *gacaca* process, seeing it as the practical and philosophical answer to what has been missing in the ICTR and national judicial trials. The practical hope is that *gacaca* trials will expedite the judicial process. The greater philosophical hope is that by engaging Rwandans in the act of holding individuals accountable for specific acts of genocide, the trials will instill an expectation of accountability and will contribute to breaking down the culture of impunity in Rwanda.

In the *gacaca* model, participation is seen not just as a means to an end, but as an end in itself.<sup>165</sup> The hopes embedded in the international community's embrace of participation are equally embedded in *gacaca*: participation as empowering and sustainable, participation as the route to building peace, participation as the key to societal transformation. This transformation is possible in three ways. First, the community's participation is hoped to have a cathartic element for the victim or victim's family whose suffering will be publicly acknowledged. Second, participation should lead to greater social acceptance of the results of the trials and facilitate the reintegration of those found innocent, or those who have already served their time while in detention. Third, participation acknowledges that what happened in 1994 happened in and to communities, and allows Rwandans to experience a different sort of community mobilization that is geared at rebuilding, not destruction.

Although many in the international community share the Rwandan government's hopes for *gacaca*, human rights groups are approaching the *gacaca* process with strong reservations. The most serious concern is about the lack of traditional due process; some see *gacaca* as a form of mob justice, incapable of protecting defendants' rights to a fair trial. The opposite result may also occur—some criminal suspects may be freed at hearings where witnesses are afraid to publicly identify themselves and present evidence. In either case, the Western understanding of "due process of law" is largely absent from these proceedings in several

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*Trials* (Oct. 4, 2001), available at <http://www.hrw.org/press/2001/10/rwanda1004.htm> (last visited Nov. 16, 2002) [hereinafter ELECTIONS MAY SPEED GENOCIDE TRIALS].

165. The model's emphasis on participation puts it in perfect step with the preeminent international development approach of the 1990s, which emphasizes the virtue of participation. The methodology is not new (first and best articulated by Paolo Freire in the 1970s), but it became mainstream wisdom from the World Bank to the tiniest NGOs in the 1990s. See, e.g., WORLD BANK PARTICIPATION SOURCEBOOK (1996), available at <http://www.worldbank.org/wbi/sourcebook/sbhome.htm>.

respects. First, defendants have no right to counsel, and the state's resources go to investigations and prosecutions, but not to defense. Second, judges play a prosecutorial role in addition to their convicting and sentencing role. Third, the system relies largely upon the willingness of community members to speak out and trusts that social pressure will encourage honesty. Social pressure, however, may work against the desired honesty, and defendants may find themselves at the mercy of fearful witnesses, unwilling to speak out in their defense.

The most reasonable approaches to *gacaca* balance these hopes and concerns. Genocide survivors' group IBUKA notes that survivors may be traumatized by reviving painful memories, but that the nation has no choice given the "deluge" of cases facing the Rwandan government.<sup>166</sup> Others weigh the speedy resolution of trials against the lack of traditional due process; as articulated by Alison DesForges of Human Rights Watch, "[t]he system has flaws, but it provides the only real hope for trials in the foreseeable future for more than 100,000 persons now detained in inhumane conditions."<sup>167</sup> In desperate need of a way to move quickly but in a spirit of justice, the Rwandan government has developed what seems likely to be a sturdy mechanism to empower thousands of communities to move forward together in their reconstruction of society under the law.

## F. COMPLEMENTARITY AMONG THE SYSTEMS OF ACCOUNTABILITY

The experience of Rwanda's efforts to create accountability for genocide provides a valuable model of complementarity among distinct accountability mechanisms. The model's complicated structure is without precedent in international law, and is all the more impressive for having developed organically; as one mechanism's inadequacies showed, another mechanism was developed to compensate for those weaknesses. This architecture for accountability experienced its share of growing pains and still has room for improvement, but the functioning of these three mechanisms offers Rwanda an opportunity to achieve its goals of justice, deterrence and reconciliation, as well its broader goal of eliminating the culture of impunity.

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166. Helen Vesperini, *Rwanda to Start Genocide Trials at Village Courts*, EASTERN AFRICA TIMES (ONLINE EDITION) (July 25, 2002), available at <http://www.easternafricatimes.com/news/2002/june/rwa1006.htm> (last visited Aug. 2, 2002).

167. See ELECTIONS MAY SPEED GENOCIDE TRIALS, *supra* note 164.

The lessons emerging from the response to genocide in Rwanda are instructive not just for the pursuit of justice within Rwanda, but for the international community more broadly and for any future efforts to build structures of accountability in similarly challenging contexts. No single prescription from the U.N. and other international bodies can fix every country's ailments, but the Rwandan experience does provide a general template for action, urging international and national actors to learn to work together in mutually reinforcing ways. Having addressed the relative effectiveness of each mechanism earlier in the chapter, we now look not at whether the mechanisms are as good as they could be, but rather at whether the overarching goal of accountability for genocide in Rwanda could be achieved adequately without all three instruments working together. We will describe the ways in which the three mechanisms complement each other, examine the sometimes difficult lessons from the Rwandan experience, and consider what that entire experience may mean for the future operation of the International Criminal Court.

## 1. The Vision of Complementarity

An exceptionally complex event like the Rwandan genocide calls for exceptional legal responses. As this chapter attempts to show, no one legal body is equipped to respond on the necessary scale, and no one legal body's mandate is flexible and diverse enough to accommodate the often-competing goals for accountability in the aftermath of massive crimes against humanity. The concept of complementarity recognizes such complexities and offers a way through them: by allowing multiple mechanisms to respond to events like the Rwandan genocide, the legal response becomes greater and more effective than the sum of its parts.

It would be helpful to first clarify what complementarity is *not*. Complementarity is not simply about dividing up the judicial workload. In the early vision of the ICTR's role, for example, commentators seemed to confine its role to being little more than an extra pair of hands in the task of holding perpetrators of the genocide accountable. Indeed, the Rwandan government occasionally subscribes to this perspective and bemoans the resources that are "wasted" on the ICTR. Nor should a mechanism like *gacaca* be understood as primarily being about reducing the backlog of cases, although this will be a significant benefit of the process. Such views are short-sighted. Complementarity's effectiveness should not be measured in simple terms of the numbers of cases tried or the numbers of individuals released from prison. Rather, complementarity must be understood in terms of its ability to advance the over-

all goals of accountability, and in terms of the role that each mechanism plays in achieving those goals.

If complementarity relates to each mechanism's role in achieving an overall goal—here, accountability—then the international community and Rwanda have clearly forged complementary relationships despite some grinding tensions along the way, and despite ongoing room for improvements in the various mechanisms. The ICTR clearly plays a role that no other body at the time could have played, notwithstanding its tense relationship with the Rwandan government. First, the creation of the ICTR holds the international community accountable for what it failed to do in 1994. The genocide indicted the international community's failure to intervene, and the creation of the ICTR by the Security Council was a belated but appropriate recognition that the international community had some responsibility for what happened in Rwanda in 1994. Only a visible institution with an international mandate could effectively acknowledge this responsibility; international support for Rwandan efforts would have been less visible and probably less durable, since funding could have been cut without the world paying much attention. Second, the ICTR's creation permitted the world to acknowledge the events of 1994 and to keep an accurate record of the genocide. The ICTR has created an impressive official body of detailed information that will brook no denial of the horrors of the genocide. This truth-gathering function of the ICTR will aid in the quest for reconciliation, much as the Truth and Reconciliation Commission in South Africa was designed to do. Third, on a practical level, the ICTR was able to compel the extradition of suspected *génocidaires*, something that Rwanda has had difficulty doing on its own.

The national genocide trials in Rwanda likewise meet unique needs in the quest for accountability for genocide. First, these trials permit Rwanda to show the world and its own people that the post-genocide government intends to dismantle the culture of impunity in Rwanda. Three decades of impunity for violence against Tutsis ended in 1996 when the genocide trials began. Adhering as well as possible to international standards for fair trials, the courts have already brought thousands of suspects to justice. The courts have therefore played an instructive role, showing Rwandans how to achieve justice through the rule of law. Second, the Rwandan judicial system's tremendous increase in capacity serves another critical goal, namely sustainability. The ICTR is not permanent, and when it finishes, the Rwandan judicial system will need to keep working, not just on genocide crimes but on the full range of crimes awaiting prosecution in Rwanda. Increasing the durability and sturdiness of the Rwandan judicial system is the only way to maintain accountability over the long term.

Finally, the Rwandan genocide trials serve the goal of deterrence in a way that the ICTR does not. The deterrent effect of the ICTR, such as it is, seems directed at the international community writ large, not at Rwandans in particular. The limited temporal mandate of the ICTR means that Rwandans know that nothing they do in the future will be the subject of an ICTR investigation or indictment. Because the ICTR will not exist permanently, and because the ICTR's mandate is limited, it can only hope to deter genocide in a general way: by creating fear that the international community would establish a similar body to deal with future crimes. By contrast, the Rwandan system is more permanent. The short-term goal of the genocide trials in Rwanda may be individual accountability for the perpetrators of genocide, but the longer term goal is the creation of a system that Rwandans of all ethnicities believe will prosecute such crimes in the future, should they occur, and which therefore exerts an important deterrent pressure on would-be *génocidaires*.

*Gacaca*, too, plays a unique role in the Rwandan architecture for accountability. *Gacaca* is the only mechanism explicitly designed to achieve one of the principle objectives of the Rwandan government: reconciliation. With their emphasis on individual accountability, neither the ICTR nor the Rwandan national judicial system could play this role directly. Because *gacaca* occurs in and is governed by the communities that suffered during the genocide, *gacaca* allows Rwandans to participate in the new model of accountability and the new efforts to break down the culture of impunity.

Beyond its unique role, *gacaca* is likely to complement the ICTR and the national genocide trials in three ways. First, *gacaca* complements the deterrent role played by the national genocide trials. Fear that one may be judged by one's neighbors, and knowledge that such a judgment could carry a prison sentence, should act as at least a minor deterrent to those who might consider partaking in any renewed violence. Second, *gacaca* has a truth-telling aspect that complements the records being created at the national and international levels. Although the *gacaca* courts will not keep the same kinds of formal records that the Rwandan judiciary and the ICTR keep, the effect of speaking the truth in front of a large community cannot be underestimated in a country where oral tradition and oral history is so important.<sup>168</sup> Third, the thousands of *gacaca* trials that are currently underway in Rwanda will create a wealth of information that will be useful to the national genocide trials and the

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168. Andrew Harding, *Rwanda's Slow Justice*, BBC News (May 19, 2001) (noting the influence of oral tradition on other parts of the legal response to genocide, specifically the ICTR), available at [http://news.bbc.co.uk/2/hi/programmes/from\\_our\\_own\\_correspondent/1338263.stm](http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/1338263.stm).

ICTR trials. One human rights organization has already directed U.S. Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper, to the *gacaca* trials in one commune for evidence that might convince the United States to find and extradite a suspected *génocidaire*.<sup>169</sup>

Beyond the role that each mechanism plays in furthering the overall goals of accountability in the aftermath of the Rwandan genocide, the complementarity of mechanisms seems like an appropriate symbol of the gruesome fact that local, national and international actors all need to atone for actions taken and not taken in 1994. Any legal response that existed on only one or two of these levels would be unable to fully meet the demands of accountability.

## 2. The Particular Challenges Posed by Concurrent Jurisdiction

Despite ongoing setbacks and remaining hurdles, the three mechanisms chosen to pursue accountability and justice in Rwanda have functioned together remarkably well, given the challenges of delivering justice on three levels simultaneously. However, two key challenges remain, both related to the concurrent jurisdiction shared by the ICTR and the Rwandan national judiciary.

The first challenge relates to the sometimes-competing principles of concurrent jurisdiction and national sovereignty. The ICTR's primacy over the Rwandan judiciary has led to some of the worst tension in the relationship between these bodies. Fundamental to international law is the principle that "a nation-state has jurisdiction to prosecute crimes committed within its territory and by its own nationals."<sup>170</sup> In the Rwandan case, the ICTR can prosecute such crimes, regardless of whether or not the Rwandan government is able and willing to prosecute the crimes itself. The ICTR's primacy has created resentment in Rwanda over Rwanda's inability to prosecute some of the most serious cases of genocide and has diminished the educational and deterrent effects sought by the United Nations Security Council when establishing the ICTR.<sup>171</sup> This disempowering aspect of ICTR thus frustrates and diminishes the work the Rwandan government is doing to break down the culture of impunity.

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169. Rakiya Omaar, *Communication to Ambassador-at-Large for War Crimes Issues*, AFRICA NEWS SERV. (July 25, 2002).

170. Evo Popoff, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT'L L. REV. 363, 371 (2001).

171. See Stanley Foundation, *Post-Conflict Justice: The Role of the International Community* (Apr. 1997), available at <http://reports.stanleyfoundation.org/Vantage97.pdf> (last visited Sept. 5, 2002).



Despite the Rwandan government's substantial efforts to reconstruct the national judiciary and make it function according to international standards of due process,<sup>172</sup> the ICTR's ability to exercise jurisdiction over certain cases implies that the international community believes that Rwanda's commitment to justice and capacity to provide it are not now, and never will be, quite good enough.

The concurrent jurisdiction problem also relates to a second challenge, which is the disparity in sentencing possibilities. Those accused of the worst crimes are usually tried by the ICTR, which does not permit the death penalty, while many of those accused of lesser crimes face the death penalty in Rwanda; such inequities frustrate the Rwandans and alarm international human rights groups. Notwithstanding the increasing conviction among members of the international community that the death penalty is a violation of human rights, no legal consensus under international law expressly forbids the death penalty.<sup>173</sup> The decision not to impose the death penalty in ICTR trials is "essentially a question of determining whether, because of moral considerations, conceptions of justice prevailing in certain societies should prevail over that of the Rwandese people."<sup>174</sup> In this contest between competing conceptions of justice, the Rwandan conception did not carry the day, which compounds the disempowering aspects of the ICTR. Anytime that choices are being made about concurrent jurisdiction, the benefits must be weighed against these real costs to both national sovereignty and the empowerment of national judicial systems.

### 3. Lessons for the Future and for the ICC

The Rwandan experience with three different accountability mechanisms provides a rich source of lessons for future efforts to provide accountability in the aftermath of crimes against humanity. Many have noted that Rwanda's long tradition of lack of accountability helped lead to the 1994 genocide. This tradition can best be remedied through cooperation between the international community and the Rwandan government.

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172. The extent to which Rwanda is successfully adhering to due process standards is debated. Compare STATE DEPARTMENT 2001 HUMAN RIGHTS REPORT, *supra* note 113, with TROUBLED COURSE OF JUSTICE, *supra* note 75.

173. Payam Akhavan, *Current Developments: The International Criminal Tribunal for Rwanda, the Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 508 (1996). But see Council of Europe: Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, 22 I.L.M. 538 (1985).

174. See Akhavan, *supra* note 173, at 508.

The new International Criminal Court (ICC) will substantially alter the way the international community handles genocide and wide-spread crimes against humanity, such as occurred in Rwanda. The ICC will create an entirely new set of issues regarding international-national relationships over the prosecution of genocide, war crimes, and crimes against humanity. Unlike the jurisdictional rules of the Rwanda tribunal, the ICC's jurisdictional mandate took effect before the crimes it will prosecute occur.<sup>175</sup> Thus, the debates over temporal jurisdiction, so contentious in Rwanda, will not be an issue. The ICC will also have jurisdiction over individuals around the world, in contrast to the ICTR's jurisdiction only over individuals who committed crimes in Rwanda, or Rwandans who committed crimes in neighboring states. Nevertheless, the Rwandan experience offers important lessons for the new world of international accountability, in which the ICC is bound to play a pivotal role.

a. Each Level Needs to See Itself as Being Part of a Whole

Each accountability mechanism may have some subset of goals that are unique to itself, but one lesson from Rwanda is that the actors in these separate mechanisms must remember that they all share the same ultimate goal: accountability for the genocide. Where those involved in each mechanism remember this, as in the relationship between the national genocide trials and the *gacaca* trials, complementarity is at its best. Where they forget this, as in the relationship between the Rwandan government and the ICTR, complementarity is weaker.

The Rwandan government initiated both the national genocide trials and the *gacaca* process as two mechanisms working together toward the same goal. Both mechanisms have an overarching goal of accountability and justice; *gacaca* emphasizes accountability and reconciliation. Nevertheless, these efforts are viewed as mutually reinforcing, so it is perhaps unsurprising that little tension has arisen between the two mechanisms thus far. Indeed, the complementarity between these two bodies' roles is striking. Together, they build the legal capacity of institutions (national genocide trials) and individuals (*gacaca*), engaging both in the project of rebuilding and reconciliation. The jurisdictional boundaries

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175. ICC jurisdiction took effect on July 1, 2002. See Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9, July 17, 1998, available at <http://www.un.org/law/icc/statute/rome.htm>; U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Doc. L/2889 (July 20, 1998).

of each are clear, and there have been no reports of tension about which cases get tried in which forum.

By contrast, both the international community and the Rwandan government often perceive the national genocide trials and the ICTR trials as being in direct competition. By focusing on resources and speed of trials, the Rwandan government ignores the real contributions that ICTR can make and has made toward its specific goals and toward the goal shared by all three mechanisms: accountability for genocide. Likewise, the international community's criticisms of the Rwandan national genocide trials ignore the distinct hope that the Rwandan government has for using the trials to teach Rwandans about justice and for eliminating the culture of impunity. Each side must view the other as a necessary part of achieving full and lasting accountability, and filter criticisms through that lens.

The frequent lack of understanding between the Rwandan government and the ICTR points toward the need for education and exchange between all levels involved in the process of creating accountability. The disagreement over the death penalty is but one example of a disagreement where the U.N. and human rights groups could have better explained their justification for opposing the death penalty for the crimes of genocide that occurred in Rwanda, and could have worked to increase judicial and legal competency in national courts where the death penalty was to be applied. Another source of tension—the plea bargain—could possibly have been circumvented had the ICTR presented the concept, not as a *fait accompli*, but as a subject for national dialogue and debate in Rwanda; when such innovations are imposed without discussion, they may initially undermine the efforts to achieve local legitimacy.

b. The International Community and the National Government  
Must Take the Long View in Their Response to Genocide and  
Crimes Against Humanity

The theme of breaking down the culture of impunity emerged early in the aftermath of the Rwandan genocide, and helped provide a long-term vision for the legal response to genocide. This long-term vision is both appropriate and necessary. It is appropriate because the genocide was not caused by the assassination of President Habyarimana but instead had roots that stretched back through decades of Rwandan history. It is necessary because a legal response that took only a short-term view would have done little to prevent such crimes from recurring in the future.

The ICTR's lack of focus on the long term is its greatest weakness; the ICC's focus on the long term is its greatest hope. The ICTR's temporal jurisdiction takes a narrow view of the timeframe for the genocide, and its lack of permanence makes it unlikely that it would be in existence to prosecute such crimes in the future. By comparison, the ICC's jurisdiction became effective in July 2002, and if such atrocities were to recur in the future, the ICC would be able to prosecute crimes committed during the planning stages as effectively as the execution of the atrocities themselves. Moreover, the ICC's permanence is bound to help it play a greater deterrent role than the ICTR ever could, since would-be *génocidaires* know that they could be called before the tribunal regardless of who holds power domestically. The very existence of the ICC therefore helps break down the culture of impunity by holding out the possibility of justice for all.

c. International Assistance Must Focus Not Just on International Bodies, but also on Strengthening Domestic Systems

The Rwandan experience clearly shows that a purely international response could not meet all the goals of accountability in the aftermath of genocide and crimes against humanity. The ICTR has been successful with individual-level accountability, but has been unsuccessful at promoting reconciliation and at helping Rwanda rebuild a culture based on the rule of law. The best equipped, best staffed, best funded international tribunal in the world would still have some disempowering effect on local efforts to achieve justice and would still do little to promote reconciliation. The Rwandan experience emphasizes that national institutions must be strengthened before nations can grapple seriously with accountability.

The international role in strengthening domestic systems cannot be overstated: from direct funding for public defenders to high-level training of judges, from the physical restoration of courts to the provision of law books, international aid for national judiciaries would be money well spent. The expense associated with making judicial projects a priority should be assessed *not* in comparison to other in-country priorities like health or education, but in comparison to the peacekeeping expenses associated with preventing crimes against humanity and restoring order once those crimes have occurred; any foreign aid that helps break down a country's culture of impunity must be considered cost-effective in this longer term view.

The international community must also be willing to support innovations like *gacaca*. If for no other reason, interested donors can help to

ensure that such mechanisms are fair. More fundamentally, support for locally developed processes acknowledges that exclusive reliance on courtroom-style judicial proceedings is probably inadequate, and may perversely exacerbate local tensions and alienate the individuals the international community is hoping to protect. *Gacaca* has met with a great deal of skepticism internationally, but it is seen domestically as a hope and a possible salvation; support despite misgivings would be a humble but appropriate measure for an international community that clearly has not always acted in Rwanda's best interests.

d. The Architecture for Accountability Must Be Innovative and Flexible

The Rwandan experience shows the limits of formal court tribunals, and points toward the need for innovation and flexibility as part of a comprehensive response to crimes against humanity. The *gacaca* process is perhaps the most interesting element of the legal response to the Rwandan genocide. The *gacaca* process is an innovation highly appropriate for the local culture, since its roots lie in the Rwandan tradition of community-based justice. *Gacaca* is also highly appropriate for the goal of making accountability the project of every Rwandan affected by genocide—its emphasis on participation ensures that the lessons of breaking down the culture of impunity will be learned in all the communities where the genocide took place.

We do not argue that a *gacaca*-style process is called for in every situation where genocide or crimes against humanity occur, or that *gacaca* is a faultless process that will in itself solve the problem of the Rwandan culture of impunity. Rather we argue that accountability is ultimately best served by the inclusion of an innovative locally designed process in the legal response to genocide. What the Rwandan government did in the aftermath of genocide was to define its goals, and look to see how those goals were and were not being met by existing mechanisms. The *gacaca* process emerged from the recognition that the existing mechanisms could deliver justice neither swiftly enough nor inclusively enough. It is this willingness to be flexible in trying different approaches, and to use innovation to make the legal response whole that is a powerful lesson from the Rwandan experience.

This lesson will become increasingly important as the ICC firmly establishes itself. With permanent staff, time-tested procedures and an ever-growing body of case law, the ICC in a few years may induce a kind of inertia that would make national-level innovation less appealing, especially in resource-poor countries, and possibly more difficult.

If countries that lack resources start to use the ICC trials as a substitute for domestic processes, then accountability will suffer for, as we have seen, the extent to which such trials can achieve accountability is sharply circumscribed by mandate, process and distance. There will almost always be a useful role for some kind of locally developed forum to participate in the work of accountability, and reliance on the ICC must not blind countries to that reality.

e. International Accountability Mechanisms Must Respect Domestic Views of Justice

One important and positive difference between the ICC and the ICTR is that, although there is concurrent jurisdiction between the ICC and the country which otherwise has jurisdiction, the ICC will not have the same primacy over national courts. If a trial is being prosecuted fairly and effectively in the national court, then that court maintains jurisdiction. The ICC steps in only where a state with jurisdiction over the matter of concern "is unwilling or unable genuinely to carry out the investigation or prosecution" or where a state decision not to prosecute "resulted from the unwillingness or inability of the State genuinely to prosecute."<sup>176</sup> Therefore, tensions like those that existed in Rwanda over national sovereignty and the death penalty will be much less likely to arise.

Nonetheless, the ICC and the U.N. will still need to walk a careful line between aggressive international prosecutions and the protection of local autonomy in judicial matters. Aggressive international prosecution could have the same disempowering effects that have been described above in terms of the ICTR's relationship to the Rwandan government. Especially where the failure to prosecute results from weak capacity and not weak political will, the international community should first consider ways to strengthen domestic systems instead of consistently opting for international prosecution. Another reason to favor national prosecutions is the problem posed by conducting justice at a distance. The disconnect that average Rwandans feel toward the proceedings in Arusha bodes poorly for the extent to which the ICC will be a useful tool for reconciliation. Although it may be extremely effective for individual-level accountability, the people who were harmed by the genocide or by crimes against humanity are unlikely to feel as vested in the results of a far-away tribunal as they are in the results of a tribunal whose daily proceedings they can follow closely. There will always be a role for trials at both levels, and the international community will do well to support local-level trials wherever possible.

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176. *Id.* at art. 17.

## G. CONCLUSION

The international community has played an active role in punishing those accused of genocide and other crimes against humanity on several occasions during the 20th century. International actors should continue to focus on these matters in the 21st century, but they should also build upon promising innovations that go beyond traditional court-centered means of accountability, and search for numerous, complementary ways to heal nations torn apart by violence. In time, an international strategy that goes beyond the creation of international criminal tribunals and that works with, rather than above, local governments will be more effective in redressing wrongs and preventing future atrocities. With careful attention to the lessons offered by the Rwandan experience, the International Criminal Court can be an integral part of any such complementary response to genocide and crimes against humanity in the future.

While the international community absorbs the lessons from Rwanda's experience, it must not forget that this is a living process, a process with room for improvement and with need for continued international support. The three legal mechanisms responding to the genocide in Rwanda should, at a minimum, be able to bring most of those guilty of genocide in Rwanda to justice, but neither Rwanda nor the international community should lose sight of an even higher goal. The highest honor that can be paid to those whose lives were destroyed in the genocide will be the rebuilding of Rwandan society along more inclusive lines, so that the events of 1994 are not repeated. If law is to play a central role in this larger task, the Rwandan government must allow its legal system to serve as a model of accountability for all and to become an institution in which all Rwandans, of any ethnic or political background, can place their trust. Only then will the culture of impunity be truly dismantled and the cycle of fear, exclusion and repression be truly halted. The international community must continue to support Rwanda as it makes this difficult but essential journey.