Pathways Toward Reconciliation: A Comparative Analysis

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Pathways Toward Reconciliation

A Comparative Analysis
I. INTRODUCTION

Human rights violations have commanded markedly different responses from international organizations, nations and affected communities. Although divergent in structure, jurisdiction and procedure, each systemic response shares a common goal – national reconciliation and social reconstruction. This paper primarily focuses on a more traditional system, the International Criminal Tribunal of Rwanda (ICTR), in an effort to compare and distinguish its reconciliatory impact with alternative systems employed by the Rwandese government, its localities and South Africa post apartheid.

In order to assess the likely impact of alternative systems on a nation of genocide survivors, one must first understand the historical precursors – the origin, enormity and longevity of tensions that gave rise to the tragedy itself. With that in mind, this paper provides a brief history of events leading up to the 1994 Rwandese genocide. It then presents an overview of the ICTR’s formation and the criticisms that ensued and concludes with an exploration of the alternatives.

II. A HISTORY OF ETHNIC TENSION

a. The Precursors

The Hutu-Tutsi power struggle began long ago in 1860 when Tutsi invaders conquered the Hutu in Rwanda.1 From that point on, the Hutu-Tutsi conflict was never about achieving racial equality. It was, however, about domination.

In the beginning, the Tutsi subjugated the Hutu in every context – militarily, politically and economically. The Tutsi were born into a rigid class structure and raised

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within an ideology of Tutsi superiority. This was most evident under the Rwandese penal system which allowed Tutsi to escape with impunity for crimes that would have required a death sentence for the Hutu.

Following World War I (WWI), Belgium ruled Rwanda as an administrative trusteeship under the League of Nations mandate system. From the outset, Belgian administrators perpetuated Tutsi superiority by demonstrating great favoritism of the Tutsi. For example, the Belgians instituted a system of forced labor wherein the Tutsis were assigned as taskmasters of the Hutu. Also, Belgian administrators excluded Hutu from certain government employment and opportunities for higher education. After World War II (WWII), however, certain events turned the tides of Belgian sentiment in favor of the Hutu. A flood of Flemish missionaries entered Rwanda in the 1950’s, identified with the Hutu, and supported their political ambitions. At the same time, Belgian administrators realized that with a Rwandese population of 80% Hutu, a post independence power struggle was inevitable. Reluctant to usher into independence an unstable government, the Belgian colonial powers crafted a democratic revolution. Between 1960 and Rwandese independence on July 1, 1962, colonial administrators replaced Tutsi chiefs with Hutu, marshaled in 229 new mayors (only 19 of which were

\[2 \text{ Id. at 5.} \]
\[3 \text{ Id. at 7.} \]
\[4 \text{ ALISON DES FORGES, LEAVE NONE TO TELL THE STORY 34-35 (Human Rights Watch 1999)(from 1894 until the end of WWI, Rwanda was under the control of German East Africa).} \]
\[5 \text{ MAGNARELLA, supra note 1, at 11.} \]
\[6 \text{ DES FORGES, supra note 4, at 35.} \]
\[7 \text{ MAGNARELLA, supra note 1, at 12 (historically in Belgium, the Francophone Walloon minority had dominated the Flemish majority).} \]
\[8 \text{ Id.} \]
\[9 \text{ Id.} \]
Tutsi) and facilitated the election of President Gregoire Kayibanda, a Hutu.\textsuperscript{10} Armed with their newfound power and eager for retribution, Hutu leaders instigated a campaign of persecution against the Tutsi, a period known as the “Hutu Revolution.”\textsuperscript{11} By 1967, over 300,000 Tutsi had fled the country in fear and more than 20,000 had been slaughtered,\textsuperscript{12} most in retaliation for Tutsi refugee invasions.\textsuperscript{13}

In July 1973, the Hutu-led Rwandese government was overthrown in a coup d’état led by Major Juvenal Habyarimana, a Hutu.\textsuperscript{14} Over the next two decades, Habyarimana ruled by dictatorship through a single party, the *Mouvement Revolutionnaire National Pour le Developpement* (MRND).\textsuperscript{15} Throughout his administration, Habyarimana encouraged the eradication of the Tutsi, Hutu opposition, and virtually anyone thought to be affiliated with the Rwandese Patriotic Front (RPF), a group of exiled Rwandese stationed in Uganda.\textsuperscript{16} Habyarimana eventually allowed a multiparty system within Rwanda in 1990 that resulted in the formation of a new party called the *Coalition pour la Défense de la République* (CDR).\textsuperscript{17} The CDR, however,

\textsuperscript{10} *Id.*

\textsuperscript{11} *DES FORGES*, supra note 4, at 39.

\textsuperscript{12} *Id.* at 40

\textsuperscript{13} *MAGNARELLA*, supra note 1, at 14. The Tutsi population in 1991 measured approximately half (8.4%) of what it had been in 1952 (17.5%). *DES FORGES*, supra note 5, at 40.

\textsuperscript{14} *MAGNARELLA*, supra note 1, at 15.

\textsuperscript{15} *Id.*


\textsuperscript{17} *DES FORGES*, supra note 4, at 52-53.
was critical of the MNRD for its concessions to the RPF and merely served to intensify Tutsi oppression.\textsuperscript{18}

Habyarimana and the RPF signed the Arusha Accords, a cease fire agreement, on August 3, 1993, calling for a power-sharing government, repatriation of Rwandese refugees and the integration of Tutsi into the armed forces.\textsuperscript{19} The Arusha Accords, however, were not well received by Habyarimana’s pro-Hutu constituency. Consequently, anti-Tutsi and anti-Accord propaganda in Rwanda escalated. Then, a Tutsi-led \textit{coup d'état} against neighboring Burundi’s Hutu president on October 1, 1993 precipitated additional violence against the Hutu in Rwanda.\textsuperscript{20} With a flood of Burundian-Hutu refugees at his doorstep, Habyarimana reneged on the Arusha agreement.\textsuperscript{21}

In the latter half of 1993, the MNRD and CDR collectively recruited and trained youth militias, or death squads, known as the \textit{Interahamwe} (those who attack together) and \textit{Impuzamugambi} (those with a single purpose) to seek out and destroy prominent Tutsi opponents and Hutu sympathizers.\textsuperscript{22} Meanwhile, Habyarimana was being cast as a “Tutsi-loving RPF accomplice” due to renewed negotiations over Arusha Accord compliance.\textsuperscript{23} On April 6, 1994, during his return from Accord negotiations,

\begin{table}
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\textbf{Id.} & at 53. \\
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\textbf{Id.} & at 16-17. \\
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\textbf{Id.} & at 17-18. \\
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\textbf{Id.} & at 18. \\
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\textbf{Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, ¶ 99 (Chamber I, Sept. 2, 1998) [hereinafter Akayesu].} \\
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\textbf{MAGNARELLA, supra note 1, at 19.} \\
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Habyarima’s presidential plane was destroyed by a Rwandese missile.\textsuperscript{24} His death unleashed the tension that had been building within Rwanda for more than a century.

b. The Genocide: “Our enemy is one, we know him, it is the Tutsi.”\textsuperscript{25}

Within hours of the Habyarimana’s death, the \textit{Interahamwe} and \textit{Impuzamugambi} had constructed road blocks in the capital city of Kigali and proceeded to kill Tutsi, opposition parties, and human rights activists with machetes and iron bars.\textsuperscript{26} Lists of Hutu opponents, compiled months before by Habyarimana’s presidential entourage, guided Hutus in their campaign.\textsuperscript{27} Tutsis were raped, dismembered, and burned alive and fetus of mixed blood were destroyed.\textsuperscript{28} The perpetrators, however, were not only members of the CDR and MNRD; the civilian Hutu population was also complicit in the killing:

With the encouragement of [radio] messages and leaders at every level of society, the slaughter of Tutsis and the assassination of Hutu oppositionists spread from region to region. Following the militias’ example, Hutus young and old rose to the task. Neighbors hacked neighbors to death in their homes, and colleagues hacked colleagues to death in their workplaces. Doctors killed their patients, and schoolteachers killed their pupils. Within days, the Tutsi populations of many villages were all but eliminated . . . .\textsuperscript{29}

After three months of fighting their way down into the capital of Kigali, the RPF defeated their Hutu opposition and declared a unilateral cease-fire on

\textsuperscript{24} \textsc{des forges}, \textit{supra} note 4, at 181.

\textsuperscript{25} \textit{Id.}, at 203 (lyrics sung by perpetrators on the streets of Kigali).

\textsuperscript{26} \textsc{Magnarella}, \textit{supra} note 1, at 19.

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textsc{Philip Gourevitch, \textit{We Wish To Inform You That Tomorrow We Will Be Killed with Our Families}} 114-15 (New York, Farrar Straus and Giroux 1998).
July 18, 1994. By that time, however, eleven percent of the total Rwandese population, including 800,000 Tutsi and between 20,000 and 30,000 Hutu had been murdered. The RPF pledged to abide by the power sharing and integration protocols of the Arusha Accords. The new government had the support of the UN Security Council, which sanctioned the Arusha Peace Accords as the “appropriate framework for reconciliation.”

III. THE CREATION OF THE INTERNATIONAL TRIBUNAL

Rwandese and the international community called out for punitive measures to be taken against all perpetrators of the genocide. The general consensus, however, was that Rwanda lacked the necessary political and financial resources to reach persons who had escaped across its borders. Moreover, the UN feared that an RPF-led prosecutorial initiative would instigate more internal reprisals. Therefore, on November 8, 1994, the UN Secretary-General submitted Resolution 955 to the Security Council, calling for the formation of the ICTR. The Security Council was “convinced” that

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30 MAGNARELLA, supra note 1, at 21.
31 Id.
32 Id. at 22.
33 Id. at 23 (citing UN Doc. S/PRST/1994/42).
34 For example, Rwanda did not have an extensive network of extradition treaties with which it could compel the return of perpetrators whom had fled into neighboring countries.
prosecutions in an international criminal court would "contribute to the process of national reconciliation and the restoration and maintenance of peace." 36

Resolution 955 passed a UN Security Council vote with one dissent – Rwanda. 37 Rwanda objected on various grounds, including: (1) the ICTR statute did not provide for capital punishment; (2) the statute's temporal jurisdiction did not extend back to 1990, when hostilities began; (3) the Tribunal was based outside Rwanda, in Arusha, Tanzania; (4) the Tribunal would have primacy over Rwandese courts; and (5) Rwandese judges were prohibited from sitting on the Tribunal. 38 Under the Statute of the International Criminal Tribunal for Rwanda, however, the Rwandese government is not without independent recourse. 39 Rwanda has been granted concurrent prosecutorial jurisdiction. This jurisdiction, however, is limited. For example, Rwanda must defer to the Tribunal upon request. 40 In addition, the ICTR may retry national court cases if

36 Magnarella, supra note 1, at 42; Res. 955, supra note 35, preamble ("Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim [bringing justice to the perpetrators] to be achieved and would contribute to the process of national reconciliation and to the restoration of maintenance and peace. . .").


40 Id. Art. 8(1-2).
the acts at issue are mischaracterized as ordinary crimes,\footnote{E.g., "murder" in lieu of "genocide."} not diligently prosecuted, or proceedings are carried out in a non-impartial manner.\footnote{ICTR Statute, supra note 39, Art. 9.}

By June, 1995, the ICTR had pooled a tremendous amount of international resources and had four-hundred suspects under investigation.\footnote{MAGNARELLA, supra note 1, at 50.} Obtaining international cooperation with the extradition of persons indicted by the ICTR was initially difficult, particularly with allied African states of the former Habyarimana government.\footnote{Id., at 51.} Those states, however, eventually acquiesced upon threat of sanction by the UN Security Council.\footnote{Id. (African states could not afford the sanction of a moratorium on economic aid).} It was the successful apprehension and ultimate prosecution of several principle actors that improved political relations between the Tribunal and Rwanda.\footnote{Gabriele Kirk McDonald, Assessing the Impact of the International Criminal Tribunal For the Former Yugoslavia, in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 22 (Steven R. Ratner and James L. Bischoff, Eds. Nov. 2003).}

**IV. THE ICTR – A CRITIQUE**

Almost ten years after the Tribunal commenced operations and less than six years from its estimated close,\footnote{Gabriele Kirk McDonald, Assessing the Impact of the International Criminal Tribunal For the Former Yugoslavia, in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 22 (Steven R. Ratner and James L. Bischoff, Eds. Nov. 2003).} the ICTR has endured a large number of criticisms. Opponents accuse the Tribunal of being overly focused on the “law” of genocide rather than the “survivors” of it, having little impact on Rwandese lives, and being a waste of resources. These criticisms, along with those of the author, are set forth below:
a. The ICTR Is Only Concerned With The Development of International Jurisprudence, Not the Reconciliation Of Rwanda

The ICTR is criticized for simplistically viewing itself as a funnel for the development of international criminal law. Indeed, the ICTR handed down the first-ever judgment on the crime of genocide by an international court, and thus is seen, from the inside and out, as a groundbreaking legal institution. While praising the Tribunal’s contributions to international jurisprudence, legal critics and the Rwandese government argue that more focus should be given to the impact that ICTR trials are having on genocide survivors and social reconstruction. Upon doing so, the Tribunal would inevitably have to account for its actual contributions to reconciliation.

b. The ICTR Has No Impact On The Lives Of Rwandese

The Rwandese government claims that the majority of genocide survivors are barely cognizant of the ICTR’s existence, let alone its purpose. Findings in a survey of 2,091 Rwandese within four communes, conducted by the Human Rights Center at the University of California, Berkley in 2002 (“Berkley

48 Akayesu, supra note 22, at Section 8, Verdict.

49 Message from Kofi Annan, Secretary-General of the United Nations, available at http://www.ictr.org/default.htm (last visited March 15, 2005)(Kofi Annan highlights the first-ever genocide judgment in Akayesu as one that will contribute to national reconciliation).


51 Key Rwandese Genocide Trial Begins ¶ 1 (BBC news online, Nov. 6, 2003), at http://news.bbc.co.uk (last visited Nov. 6, 2003)(quoting the Rwanda’s Attorney General, Gerard Gahima, as saying, “[i]t [the ICTR] has no impact in our country. Few people know about it, let alone care.”).
survey”), lend support to these claims. Of those polled, .7% of respondents claimed to be well informed about the Tribunal and 10.5% said that they were informed. 55.9%, however, claimed to be not well informed and 31.3% claimed to be not at all informed.

The Rwandese population’s lack of affiliation with the ICTR has been a growing concern to the Tribunal and the international legal community. Most recognize that in order for the ICTR to contribute to reconciliation in Rwanda, Rwandese must know, understand, and appreciate the work of the Tribunal. Indeed, the Berkley survey revealed that only 29.5% of respondents felt that the ICTR would make a significant or very significant contribution to reconciliation. Contrast this figure with the 74.1% of respondents whom felt that the domestic genocide trials would make a significant or very significant contribution to reconciliation.

Part of the disconnect between genocide survivors and the work of the ICTR can be attributed to the location of the Tribunal in Arusha, Tanzania, beyond the sight or sound of most Rwandese. In the Berkley survey, 67.5% of Rwandese agreed or strongly agreed with the statement “The International

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52 See generally Timothy Longman et al., Connecting justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda, in MY NEIGHBOR, MY ENEMY: REBUILDING COMMUNITIES IN THE AFTERMATH OF GENOCIDE AND ETHNIC CLEANSING 208 (Harvey Weinstein & Eric Stover eds. 2004).

53 Id.


55 Longman et al., supra note 52, at 208.

56 Id.
Criminal Trials should be held in Rwanda rather than Arusha,” and only 19.1% disagreed. Relocation of the Tribunal at the brink of its close is not an option. In recognition of the problem, however, the ICTR has implemented an Outreach Program through which a range of techniques are being used to explain the Tribunal’s work and its significance to Rwanda.

The focal point of this effort is the Information Center in the capital city of Kigali that has been operational since 2000. The center’s mission is to increase the public’s understanding of the Tribunal through hardcopy documentation, briefings and films. The Outreach Program also supports daily broadcasts from Arusha to the provinces by Rwandese journalists and provides for the live broadcast of all judgments through Radio Rwanda. These measures are merely a sampling of the Tribunal’s outreach initiative. The most effective outreach programs, some claim, are not being instituted by the Tribunal but by grassroots and non-governmental organizations (NGOs). For example, one NGO films ICTR proceedings for later viewing by the Rwandese public and detainees. Viewer feedback and questions are presented to the Tribunal and the Tribunal’s responses are communicated back to the origin of the inquiry.

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57 Id. at 209.
59 Id. ¶ 37.
60 Id. ¶ 39.
61 Longman, supra note 50, at 46-47.
62 Id
63 Id.
Tribunal appears to be doing what it can to raise its credibility in the eyes of the Rwandese people. The result of these efforts, however, remains to be seen.

c. The Tribunal Is Slow, A Waste Of Resources And Ineffective

Another criticism of the Tribunal is that it commands too many resources for too little a result.\footnote{LAWYERS COMMITTEE FOR HUMAN RIGHTS, PROSECUTING GENOCIDE IN RWANDA: A LAWYERS COMMITTEE REPORT ON THE ICTR AND NATIONAL COURTS AND NATIONAL TRIALS 3-4 (July 1997).} Between 1997 and January 2005, the ICTR issued seventeen judgments involving twenty-three accused; currently, the Tribunal is adjudicating eight cases involving another twenty-five defendants.\footnote{The Tribunal at a Glance, Status of Cases ¶ 1, 6, 9, available at http://www.ictr.org/default.htm (last visited March 20, 2005).} Under the Tribunal’s “completion strategy,” no additional defendants will be identified prior to the Tribunal’s anticipated close in 2010.\footnote{UN Doc. S/Res./1503, ¶ 7 (2003).} Therefore, these 48 defendants represent the whole of those that will have been prosecuted by the ICTR during its existence. These defendants are equivalent to .06% of the total persons detained on suspicion of genocide inside Rwanda after hostilities ceased in August, 1996.\footnote{This figure is based on an estimate by the International Committee of the Red Cross (ICRC) of 80,000 persons detained inside Rwandese prisons as of August 1996. MAGNARELLA, supra note 1, at 71, cf. Id. at 80-81 (reporting an estimate by the Rwandese government of 125,000 prisoners as of January 1999). Estimates varied, depending on the source and time period. United States Institute for Peace, Special Report 13, Rwanda: Accountability for War Crimes and Genocide, Trials Before Rwandese Courts ¶ 3 (1995)(“Estimates of potential defendants in the trials before Rwandese courts range from 20,000 to 100,000.”), available at http://www.usip.org/pubs/specialreports/early/rwanda1.html (last visited March 10, 2005).} Since operations commenced, the ICTR has expended an operating budget of more than 567.81 million dollars.\footnote{Hirondelle News Agency: Arusha, Basic Facts on the ICTR, Section I, available at http://www.hirondelle.org/hirondelle.nsf/0/d5df8df93c71b8aac1256e69004c22ce?OpenDocument (last visited March 20, 2005)(figure includes operating budget from 1994 to 2003).} If the budget for
retribution is the price tag of reconciliation, the question then is whether the international community afford it.

While critics tout the ICTR as a waste of resources, it is not clear as to whether Rwandese are as uniformly critical. In fact, 51.3% of Rwandese in the Berkley survey disagreed with the statement “The Arusha Tribunal has been a waste of money,” but only 27.1% agreed. So, even though a large majority of Rwandese know very little about the Tribunal and do not think it will make a very significant contribution to reconciliation within Rwanda, a slight majority do not believe it to be a fruitless institution. What could explain this apparent inconsistency? Possibly, the Rwandese who were polled in the Berkley survey did not completely understand the enormity of the Tribunal’s budget. Then again, maybe Rwandese value the Tribunal for some other purpose, other than its ability to hold certain perpetrators accountable.

Some believe that the Tribunal exists only because it is a means through which the international community can assuage their own guilt for failing to take action against the genocide. Some speculate that the world will continue to send money to the Tribunal regardless of negative opinion polls and without any real commitment to social reconstruction or victim impact. Indeed, 61.3% of Rwandese polled in the Berkley survey agreed or strongly agreed with the statement “The Arusha Tribunal is there above all to hide the shame of

69 Longman et al., supra note 52, at 215.
70 See discussion supra IV(b).
72 Id.
foreigners.  

The survey, however, did not reveal whether or not Rwandese were troubled by this purpose. The author speculates that at least part of the reason Rwandese do not view the Tribunal as a complete waste of resources is because it is recognized as a symbol of international accountability. In that regard, although the ICTR might not make a significant contribution to national reconciliation, its impact on international reconciliation might be more profound.


Like its domestic counterparts, the ICTR individualizes guilt. Unlike domestic crime, however, the root cause of mass violence on the scale of genocide is complex: a culmination of precursors occurring over long periods of time. It is clear that the Rwandese genocide was incited by political and military figureheads, but the civilian masses were co-opted into the killing through a form of psychological warfare that capitalized on long-standing ethnic tensions. These tensions were perpetuated by Belgian colonial administrators after WWI and ignored by much of the international community for over a century. Even the United Nations, an organization dedicated to the maintenance of international peace and security, refused to intervene after their own commander, Gen. Romeo Dallaire of Canada, made it known that mass-murder was imminent. Then, there were individuals, both Hutu and Tutsi, who sympathized, did

73 Longman, supra note 50, at 39.
74 See discussion supra Section II.
not participate in the killing, but watched. Where does the culpability for genocide reside, with its architects, actors, or enablers? If it exists with any combination of the three, how can the ICTR’s apprehension of a few architects, and even fewer actors, heal a nation?

If the goal of national reconciliation requires collective accountability, there are few legal pathways towards that end. The actions or inactions of international persons that contributed to historical ethnic tensions within Rwanda lack the requisite mens rea to qualify as punishable offenses under the ICTR statute, Genocide Convention, or Rome Statute. Moreover, those actions or inactions are beyond the temporal jurisdiction of certain courts and tribunals. Without a means through which to achieve formal accountability from indirect actors, Rwandese might be satisfied with an informal acknowledgment, or maybe even a symbolic gesture – such as the ICTR. In any event, it is evident that Rwandese blame the enablers, as well as the architects and

Samantha Powers, Bystanders to Genocide, ATLANTIC MONTHLY, Sept., 2001, at 15. Powers accounts for the Clinton administration’s actions and inactions throughout the genocide. She notes how the Clinton administration refused to send additional American forces to reinforce the small UN presence in Rwanda. Powers also notes that the Clinton administration refused to persuade other UN governments to send peacekeepers, but rather, strongly encouraged Security Council members to completely dismantle the peacekeeping force.

77 See discussion supra Section II (e.g., Belgium administration post WWII).
78 ICTR Statute, supra note 39, Art. 2(2)(Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . .)(emphasis supplied).
80 The Rome Statute of the International Criminal Court, UN Doc. A/CONF/183/9*, 1998, Art. 30 (“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”)(emphasis supplied)[hereinafter Rome Statute].
81 E.g., ICTR Statute, supra note 39, Art. 7 (limiting the temporal jurisdiction of the tribunal to the year 1994).
82 See discussion supra Section IV(c)(noting that Rwandese might view the ICTR as important for more than its ability to hand out retributive justice).
direct actors. This blame is implied in the fact that so many Rwandeses see the ICTR as a form of penance for the passive complicity of the international community.\(^{83}\) Although it is uncertain whether informal or symbolic recognition might further reconciliation, it is unlikely that twenty-five judgments against forty-eight orchestrators and actors will be alone sufficient.

V. THE ICTR MOUNTS A DEFENSE

The forgoing criticisms demonstrate that the process of national reconciliation might fail if it is outsourced to an international institution. This reality was incorporated into the Rome Statute of the International Criminal Court which provides for the admissibility of claims only if a state is unable or unwilling to prosecute (complementary jurisdiction).\(^{84}\) In its defense, however, the ICTR never claimed to be a panacea for national reconciliation. Its purpose, as set forth in Resolution 955 was to “contribute to the process of reconciliation in Rwanda”\(^{85}\) Kelly Askin, a legal advisor and consultant to the ICTR, attempts to clarify the Tribunal’s mission, and notably, its limitations:

Survivors must be advised that the primary function of most internationalized tribunals is to bring justice to those considered most responsible for atrocities committed during war or mass violence. It is important that they understand that the number of accused tried will inevitably be small in number, and that the vast majority of perpetrators will escape trial; providing individual criminal responsibility for war crimes, crimes against humanity, or genocide and typically involves a long, slow, and expensive process; securing evidence and arresting indictees is often exceedingly difficult . . . \(^{86}\)

\(^{83}\) Longman, supra note 50, at 39; see discussion supra Section IV(c).

\(^{84}\) Rome Statute, supra note 80, at Art. 17(1)(a)(emphasis supplied).

\(^{85}\) Res. 955, supra note 35, preamble (emphasis supplied).

\(^{86}\) Askin, supra note 54, at 49.
Proponents of the ICTR argue that, despite its limitations, the Tribunal has much to contribute. For example, a formal assignment of individual guilt alleviates the sense of “collective guilt” felt by societies whose leaders carry out aggressions.\textsuperscript{87} In addition, tribunals deter further violence, detain the persons most responsible and signal to the victims that the international community is “willing to invest a significant amount of time, money, and effort to redress . . . crimes committed against them.”\textsuperscript{88} With a greater understanding of the ICTR, and its limitations, one can compare the Tribunal’s progress with that of alternative systems.

VI. THE ALTERNATIVES

Less traditional systems than the ICTR have grown out of the need for national healing and social reconstruction in Rwanda. For example, the Rwandese Ministry of Justice has been conducting domestic trials since January, 1997\textsuperscript{89} and a more localized system called the gacaca has been instituted. The attributes and limitations of these systems are discussed below.

a. The Rwandese Courts – Progress and Criticism

In August 1996, Rwanda’s National Assembly approved the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of

\begin{itemize}
  \item \textsuperscript{87} Magnarella, \textit{supra} note 1, at 56.
  \item \textsuperscript{88} Askin, \textit{supra} note 54, at 50-51.
  \item \textsuperscript{89} Magnarella, \textit{supra} note 1, at 80. The genocide had devastated what structural or other resources Rwanda once had. The Rwandese ministry of justice was located in a building without telephones or windows. Rudimentary materials, such as paper and typewriters, were unavailable as most government buildings had been pillaged. Of the 162 judges who once presided, only a few were left and there were almost no trained lawyers.
\end{itemize}
Genocide or Crimes against Humanity.\textsuperscript{90} The Organic Law provides for jurisdiction over all offenses committed between 1990 and 1994, the possibility of capital punishment and leniency for confessions.\textsuperscript{91} Under the Organic Law, Rwandese courts have tried over one thousand detainees and issued over one hundred death sentences by 1999.\textsuperscript{92} Twenty-two executions (by firing squad), carried out in April 1998,\textsuperscript{93} were followed by more than two thousand confessions in 3 months\textsuperscript{94} and notably, a wave of criticism from international human rights activists. Certain scholars have boldly taken a stand against these critics, encouraging them to "stop dictating norms and moralizing."\textsuperscript{95} The point being, the survivors of genocide should be able to determine, in accordance with their own cultural norms, what retributive measures are best suited to facilitate their nation's reconciliation. In any event, death sentences from Rwandese courts have diminished. The percentage of accused receiving the death penalty has fallen from 45\% in 1997 to 16\% in 1998 to 8\% in 2000.\textsuperscript{96}

Due process, or lack thereof, in Rwandese courts has been criticized. During 1997, very few convicted defendants had access to legal counsel because reportedly, no lawyer could be found to represent them.\textsuperscript{97} Since January 1997,
the *Avocats sans Frontières* (Lawyers without Borders) have maintained a contingent of defense attorneys in Rwanda and several human rights organizations are training those willing to provide legal representation for either victims or defendants. The quality and availability of representation for defendants in Rwandese courts, however, will inevitably not be as consistent as what is available to defendants indicted by the ICTR.

Although the procedural due process norms of the Rwandese Ministry of Justice might be substandard when juxtaposed to those of the ICTR, domestic procedure is somewhat protected by its sovereign roots. The ICTR, however, is under an international spotlight and must commit itself not only to the international norms of due process but also whatever supplemental measures are needed (e.g., an Outreach Program) to advance its impact.

Domestic courts have also been criticized for their unwillingness to provide those persons who are acquitted and released with reintegration assistance. In December 1998 and March 1999, the Rwandese League for the Promotion and Defense of Human Rights (PSAG) conducted a study of persons released from Rwandese prisons to assess their reintegration progress. The PSAG discovered that former prisoners frequently endured violent detentions and homecomings only to discover that their homes had been looted and former employers were unwilling to rehire them.

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98 *Id.*

99 *Id.* at 77.

100 *Id.* at 81 (34,000 prisoners were released between 1994 and 1999).

101 *Id.* at 81-82 (In 1997, 24 freed prisoners were killed in Butare and in 1998 fourteen family members of a freed pastor were massacred in Gitarama. These actions might have been spurred on by the fact
Procedural criticisms aside, the fact remains that 74.1% of Rwandese feel that the domestic trials are making a significant or very significant contribution to reconciliation within their country.¹⁰² This belief might emanate from the proximity and accessibility of Rwandese courts or the number of defendants convicted. Whatever its origin, the benefit of its reconciliatory impact should be weighed against the collateral risks of wrongful prosecution and disproportional sentencing. Regardless of the outcome, Rwandese might feel that these risks are worth the impact that domestic trials are having on reconciliation.

b. Restorative Justice

Reconciliatory processes that emphasize victim healing, offender accountability, reparation of losses, forgiveness and reintegration have come to be known as “restorative justice.”¹⁰³ This brand of justice is not new; it was used by the ancient Asian, Arab, Greek, Roman and African civilizations.¹⁰⁴ The approach was modeled for the first time in modern justice systems in 1974, and since then, more than 300 programs have evolved in North America and 500 in Europe.¹⁰⁵ Since its rediscovery, restorative processes have been applied in a

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¹⁰² Longman et al., supra note 52, at 217.
broad variety of situations, from juvenile justice programs to national truth and reconciliation commissions.\(^{106}\)

\[i. \quad \textit{South Africa}\]

In March, 2003, South Africa’s TRC completed its seven-year investigation into crimes committed during apartheid.\(^{107}\) Apartheid was a system based on racial oppression that was implemented by South Africa’s National Party (NP) government in 1948.\(^{108}\) The apartheid movement perpetuated acts of manipulation, coercion and violence until 1990 when South Africa’s president F.W. De Klerk announced the systematic dismantling of apartheid and the institution of a transitional government.\(^{109}\) Although the political transition took place almost over night, the social transition was hindered by South Africans who resented decades of institutionalized inequality. These people demanded more consideration. In response, a South African TRC was established under the Promotion of National Unity and Reconciliation Act\(^{110}\) to help Rwandese reconcile past wrongs and facilitate national unity.

The Commission was structured into three committees, including the Human Rights Violation (HRV) Committee, Amnesty Committee and Reparation and Rehabilitation (R&R) Committee. The HRV Committee heard public testimony and determined victim status, a designation that qualified individuals

\(^{106}\) Naudé, \textit{supra} note 104, at 3.

\(^{107}\) Young, \textit{supra} note 103, ¶ 5.

\(^{108}\) \textit{Id.} at iii, ¶ 1.

\(^{109}\) \textit{Id.}

\(^{110}\) Promotion of National Unity and Reconciliation Act, The Republic of South Africa, Act No. 34 of 1995, as am. by the Promotion of national Unity and Reconciliation Amendment Act No. 84 of 1995 [hereinafter \textit{the Act}].
for government reparations. The Amnesty Committee was responsible for granting amnesty for specific acts in exchange for a truthful account of their commission. The R&R Committee was responsible for making recommendations for reparations and victim rehabilitation. Reparations took the form of individual grants; symbolic gestures such as monuments, memorial days, and the establishment of museums; rehabilitation, including psychological and physical care; and empowerment initiatives, including resettlement, skills training, and educational assistance.

Through its committees, the Commission held hearings and solicited testimonials to incorporate into a chronological compilation of apartheid-related events. This accounting allowed victims the opportunity to know exactly who they were being asked to forgive and for what magnitude of offense. This record was the "truth" that was intended to lead to reconciliation.

While the South African TRC has been praised and emulated for its work, Reverend Desmond Tutu, its former chair, acknowledges that for South Africa, a restorative approach was the only alternative. Rev. Tutu believes that if white politicians in Rwanda had no opportunity for amnesty through admission,

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111 Id., s.1(xix), s.3(14).
112 Id., s.4(20)(c).
113 Id., s.2(3)(3)(c).
115 Liewellyn & Howse, supra note 105, iii, ¶ 8.
116 Reverend Desmond Tutu is heralded as one of the greatest civil rights activists for his work against the former apartheid system. He was awarded the Nobel Peace Prize in 1984 for his work as Secretary General of the South African Council of Churches to end apartheid, and he chaired the Peace and Reconciliation Commission in South Africa in the 1990s.
117 Young, supra note 103, ¶ 4-5.
but only punishment through prosecution, social unrest and violent reprisals
would have ensued.118 Moreover, a TRC was the more fiscally sound alternative
for a nation that had been economically strained by apartheid-induced
boycotts.119

Supporters of the South African TRC argue that a restorative justice
system is ideal for countries in transition, like South Africa and Rwanda, where
historical abuses were “perpetrated, supported, and maintained systemically,”
involving most, if not all, of the population.120 Under these circumstances, the
moral restoration of a community requires the involvement of all of its members,
including the victims and perpetrators, as well as the supporters and silent
observers.121 It provides a means through which they can assuage their own guilt
for actions or inactions that might not qualify as punishable offenses. In this
respect, restorative models, such as the South African TRC, provide a platform
for collective accountability that retributive systems do not.122

What is particularly attractive about the South African TRC is its
commitment to an understanding of the social and institutional foundations for
past violence. An entire chapter of the TRC’s 1998 multi-volume report is
dedicated to a greater understanding of the motives and perspectives of
perpetrators during Apartheid.123 The Commission has made an effort to

118 Id., ¶ 5.
119 Id.
120 Liewellyn & Howse, supra note 105, iii(d), ¶ 2.
121 Id.
122 See discussion supra Section IV(d).
123 See generally Report, supra note 114, at vol. 5, c.7.
understand the psychology of politically and racially motivated killings and in doing so, it has incorporated prevention into restoration. Without a thorough understanding of the precursors to gross violations of human rights, reconciliatory systems are alleviating the pain, but are unequipped to ameliorate the problem.

Despite its international acclaim, the TRC has received considerable criticism. For example, the TRC has been called the “Total Revenge Commission” by those who see it only as a means through which to “rip open old wounds that should be left to heal.” Also, retributivists argue that restorative justice is not ‘just justice’ without punishment and inadequate to the task of reconciliation.

Clearer criticisms include the allegation that a TRC cannot sufficiently protect victims who are susceptible to repeat attacks. The credibility of this criticism would seem to depend on the political environment. In the case of South Africa, the apartheid system had been dismantled and the political transition had been peacefully negotiated. Therefore, it is doubtful that offenders from previous system of government would wage an offensive attack on their victims. Rwanda, on the other hand, was not a peaceful transition, and many of the genocide’s orchestrators had sought refuge in neighboring countries where counter-offensives could be built. In that case, the extradition and

124 Liewellyn & Howse, supra note 105, iii, ¶ 9.
125 Id. at iii., ¶ 11.
126 Id. at iii(d), ¶ 8.
detainment of offenders might have been more essential for the protection of victims.

Another criticism of the South African TRC is that it procedurally segregated victims from perpetrators.\textsuperscript{127} The HRV Committee interacts with victims and the Amnesty Committee deals with perpetrators.\textsuperscript{128} The subject of reparations is never broached in front of perpetrators during amnesty hearings and no provision is made at that time for dialogue between the two parties.\textsuperscript{129} Moreover, reparations originate from the state, not from the perpetrator.\textsuperscript{130} For these reasons, the South African TRC might leave victims wanting for more restoration directly from an accused.

In retrospect, South Africa's "restorative" approach might have been more suitable to the needs of Rwandese, and thus, reconciliation. In 1997, a delegation of Rwandese visited South Africa in inquiry of the policies and operations of the TRC.\textsuperscript{131} The delegation ultimately decided that a TRC in Rwanda would be an "inappropriate" and "unacceptable" model of justice to survivors of the Rwandese genocide.\textsuperscript{132} The 2002 Berkley survey,\textsuperscript{133} however, does not support this conclusion. Survey administrators reported that

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\textsuperscript{127} \textit{Id.} at iv, \S 9-10.
\textsuperscript{128} See discussion \textit{supra} VI(b)(i).
\textsuperscript{129} Liewellyn & Howse, \textit{supra} note 105, at iv, \S 9-10.
\textsuperscript{130} \textit{Id.}\textsuperscript{.}
\textsuperscript{131} \textit{MAGNARELLA, supra} note 1, at 77.
\textsuperscript{132} \textit{Id.}\textsuperscript{.}
\textsuperscript{133} See generally, \textit{Longman et al., supra} note 52.
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respondents placed greater importance on admissions, requests for forgiveness, and reparations, whether material or symbolic, than retribution.\(^{134}\)

The South African TRC, like the ICTR, is not a flawless model and should not be considered a blanket solution for reconciliation within all communities. It does, however, remedy certain inadequacies of retributive justice within Rwanda. For example, the TRC model provides victim reparations rather than the more intangible alternative of punishment. In addition, the process is more participatory, allowing community members a greater opportunity to influence who will be held accountable and under what facts. Control of the process itself, however, was still highly centralized.

c. *Gacaca*: Rwandese "Lawn Justice"\(^{135}\)

A new form of decentralized justice has evolved within Rwanda known as the *gacaca*. It was formally initiated by the Rwandese government in 2001 to expedite the genocide trials of lower-level accused.\(^{136}\) The process draws upon a customary system of community dispute resolution used to resolve differences between families and individual community members.\(^{137}\) The modern process, however, is distinct from the traditional system in that its operation and

\(^{134}\) *Id.*, at 215.

\(^{135}\) "*Gacaca*" is Kinyarwanda for "lawn" or "lawn-justice," a place where local communities traditionally gathered to settle disputes between members of the same family, different families, or the same community. Amnesty International, *RWANDA-Gacaca: A question of Justice*, n.1 (December 2002), available at http://web.amnesty.org/library/index/engafrr470072002 (last visited March 15, 2005).

\(^{136}\) Longman, *supra* note 50, at 44.

sentencing options are governed by national legislation.\textsuperscript{138} Since its application in the trials of genocide detainees, the \textit{gacaca} has been "wildly popular"\textsuperscript{139} with Rwandese who have been only mildly favorable of the national trials, and even less enamored with the ICTR. A large majority of Rwandese feel that it is their "greatest hope" for reconciliation.\textsuperscript{140}

The \textit{gacaca} process is a hybrid of both the retributive and restorative models, providing for punishment in lieu of or in addition to reparations. Like the South African TRC, the \textit{gacaca} places considerable emphasis on admission and forgiveness, but also allows for imprisonment up to a duration of life.\textsuperscript{141} The guilty may reduce their prison sentence by as much as fifty percent through participation in community service projects or tasks specific to the needs of a victim or a victim’s family.\textsuperscript{142} By allowing those convicted to carry out their sentence within the affected community, the \textit{gacaca} has masterfully incorporated reintegration into reparation. This is an attribute that the ICTR, domestic courts and South Africa’s TRC do not possess.

Like the TRC, the \textit{gacaca} empowers victims and communities by allowing their direct participation, but to an even greater degree. During a \textit{gacaca} session, the community gathers to assess the loss of life and material damage


\textsuperscript{139} Longman, \textit{supra} note 50, at 44.

\textsuperscript{140} \textit{Id.}.

\textsuperscript{141} Amnesty International, \textit{supra} note 135, VI, ¶ 1.

\textsuperscript{142} Longman, \textit{supra} note 50, at 44.
caused by an individual perpetrator. Community members have an opportunity to listen to and provide testimony in the presence of the accused concerning specific offenses committed within their community. Those who sit in judgment over their neighbors consist of locally elected “people of integrity.” Unlike the South African TRC, there is no procedural partition by way of “committees” to segregate victim testimony from confession and reparation or sentencing. In this respect, the gacaca is a more transparent and all-inclusive process. In effect, the gacaca hands over implementation of the process to victimized communities.

The gacaca, unfortunately, has been criticized for being even more devoid of due process considerations than domestic trials. For example, Amnesty International has reported that, in observed instances, defendants are given no opportunity to speak on their own behalf, cross examine adverse witnesses or solicit testimony from family members. To the contrary, defense witnesses are cross examined aggressively in a manner that implies involvement in the accused crime. Also, no oaths are taken and hearsay testimony is permissible.

If accurate, these aspects of the gacaca violate the Rwandese Code of Criminal Procedure, including a requirement for confidentiality in judicial investigations, the presumption of innocence, and the burden of proof requiring

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144 Id.
145 Longman, supra note 50, at 44 (noting that as of November 2003, over 200,000 judges had been elected to preside over gacaca proceedings).
147 Id.
148 Id.
evidence to substantiate guilt. Moreover, Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Rwanda is a signatory, requires that “all persons shall be equal before courts and tribunals.” Within this mandate is the understanding that each party in a criminal proceeding must be afforded reasonable opportunity to present their case. The gacaca, assuming that the forgoing allegations are true, does not provided that opportunity. These due process deviations leave a “wildly popular” process, with a considerable potential to further reconciliation, open to serious international criticism.

VII. CONCLUSION

The success of any one pathway towards reconciliation appears to be dependent upon the nature of political transition, breadth of accountability, and willingness of government to support localized processes. In some cases, these factors might call for the simultaneous operation of multiple systems.

In isolation, international tribunals like the ICTR are unlikely to reconcile a divided nation due to their limited focus and tendency to be disconnected from the general population. Tribunals, however, might increase their role through greater coordination with and sensitivity to local needs. Under circumstances where a peaceful government transition would not be advanced by formal punishment and imprisonment is not necessary for the restoration of moral order, a restorative model such as the South African TRC stands a good chance at

149 Id. VI(1)(b) (citing Art. 2, 16, and 20).
151 Id. Art. 14(3)(e)(requiring full opportunity to cross-examine witnesses under the same conditions as adverse witnesses).
furthering reconciliation. The separation of victims from perpetrators within that
process, however, might limit its potential impact.

The ICTR, domestic courts, and the gacaca are acting in concert to
facilitate reconciliation within Rwanda. In this respect, each system is not a
different path to the same end, but separate lanes on the same road, and if one
disappears, progress will slow. The ICTR’s authority under the U.N. Charter is
needed to obtain the extradition of suspects. Domestic trials are necessary to
maintain a sovereign presence and some form of centralized control over
reconciliation. The gacaca is imperative to expediting trials and the smooth
reintegration of the thousands of lower-level accused.

Unfortunately, the more localized and informal the process, the fewer due
process protections are utilized. If these shortcomings offend the Rwandese,
then the process should be modified. Considering the gacaca’s domestic
approval rating, however, it is likely that the driving force behind due process
concerns originates from outside Rwanda. If that is the case, and the goal of
reconciliation must be achieved within Rwanda and between Rwandese, the
international community might consider restraining their criticisms, gaining
some cultural relativity, and giving Rwanda some room to run. Subtle and
gradual encouragement towards compliance with due process norms might prove
more effective in the long run and will avoid the risk of upsetting what looks to
be a remarkably promising multilane road to reconciliation.