

THE PARADOX OF IMPARTIALITY:
A CRITICAL DEFENSE OF THE INTERNATIONAL CRIMINAL
TRIBUNAL FOR RWANDA

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I. INTRODUCTION	

In the misty mountainside city of Arusha, Tanzania, the International Criminal Tribunal for Rwanda (the "ICTR" or the "Tribunal") is developing a body of law that has never existed before: the law of genocide.² The ICTR was created by the United Nations ("UN") Security Council to prosecute those most responsible for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law committed in and around Rwanda from January 1st to December 31st, 1994.³ From

² William A. Schabas, *Genocide in International Law* 1 (2000) ("The fact of genocide is as old as humanity," wrote Jean-Paul Sartre. The law, however, is considerably younger. This dialectic of the ancient fact yet the modern law of genocide follows from the observation that, historically, genocide has gone unpunished"); See Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, 11 FLA. J. INT'L L. 517 (1997) ("Jean-Paul Akayesu is the first person in history to have been found guilty of genocide after a trial by an international tribunal...represent[ing] the first time an international tribunal has conceptualized sexual violence, including rape, as an act of genocide").

³ S.C. Res. 955, art. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

April to July of 1994, Rwandans murdered each other⁴ at a rate five times faster than even the Nazis could achieve during the Holocaust.⁵

This article will explain how efforts to reinforce the impartiality of the ICTR have, paradoxically, rendered the institution uniquely vulnerable to accusations of partiality. This is “the paradox of impartiality” and it implicates not only the troubling legacy of Western law in Rwanda⁶ and the contentious relationship between the UN and post-genocide Rwanda,⁷ but also the resolution of unique complexities faced by non-Rwandan judges seeking to both understand and “write” Rwandan history.⁸ An objective evaluation of the ICTR’s successes may only be achieved by understanding the significance of these institutional challenges to the ICTR’s efforts.

The ICTR’s statutory mandate, geographic location, innovations in judicial practice, and contributions to international criminal jurisprudence are truly unique.⁹ Equally unique are the ICTR’s operational limitations and challenges. Although similar limitations affect the operations of other international criminal courts, the extent and consequences of these limitations are unusually significant at the ICTR. Both substantive and procedural problems have been significant and troubling on many levels. By considering the nexus between these limitations and the imperative of institutional impartiality, this paper will explain why those demands make it structurally impossible for the ICTR to fulfill its legal mandate of prosecuting those most responsible for the Rwandan

⁴ Mark A. Drumbl, *Punishment, Post[-]genocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U.L. REV. 1221, 1245 (2000) (“The Rwandan genocide was organized by the Rwandan government, supported by local authorities, and undertaken by ordinary Rwandan men and women.”).

⁵ HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 156 (1999).

⁶ See *infra* Part II.

⁷ See *infra* Part III.

⁸ See *infra* Part IV.

⁹ See U.N. Secretary-General, *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations: Report of the Secretary-General*, Sec. Res. 977, pp. 3-5, U.N. Doc. S/RES/977 (Feb. 22, 1995) (identifying Arusha, Tanzania as the seat of the Tribunal notwithstanding the Rwandan government’s protests that a Tribunal in Rwanda itself was more likely to achieve accountability and national reconciliation).

genocide without making significant political concessions to the governments of UN member states, most importantly Rwanda itself.

Part II will begin with an overview of the circumstances leading up to the Rwandan genocide of 1994. This section will focus on the role of Western law in transforming the previously socioeconomic distinction between Hutu and Tutsi into a racial division of catastrophic proportions. Because the ICTR considers the creation of a unified and comprehensive history of the genocide and its causes to be part of its mandate, Rwandan history itself creates unique problems for the ICTR. Since it simply could not operate without the consent of Rwanda's government, the ICTR has been required to make certain political concessions to that government. The most controversial of these concessions is the decision not to indict any members of the current government despite the availability of reliable evidence against them. This discussion will show how political developments since the genocide in Rwanda constitutes the foundation of the ICTR's paradox of impartiality.

Part III will explore the connection between the ICTR's commitment to impartiality and its corresponding dependence on the political cooperation of Rwanda's government. Contemporary accusations of "victor's justice" fail to take this connection into account.¹⁰ Rwanda's contradictory role in first requesting and then opposing the creation of the ICTR has enmeshed the court in a web of unique political complexities that distinguish it from every other international criminal court.¹¹ In light of the political context in which

¹⁰ LARS WALDORF, "A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal, 33 FORDHAM INT'L L.J. 1221 (2010); Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV. 49 (2011); see Jean-Marie Kamatali, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT'L & COMP. L. 89, 100-02 (2005).

¹¹ Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 54 (2004) ("Although the ICTR was created to satisfy the needs of the people of Rwanda for justice, the government of Rwanda has treated it with hostility. In the immediate aftermath of the genocide, the Rwandan government asked the UN to consider forming a tribunal but then, displeased with some aspects of the final Security Council resolution, cast the sole dissenting vote against the tribunal's formation.").

the ICTR was created, as well as additional infrastructural, legal and financial limitations of the ICTR's early days,¹² this section will explain why common criticisms of the ICTR often reflect unrealistic expectations.¹³

Part IV will examine a few of the most significant legal decisions issued by the ICTR.¹⁴ From delivering international criminal law's first genocide conviction to defining rape and hate speech as crimes of genocide, the ICTR's contributions to international criminal jurisprudence are nothing less than revolutionary. Because none of the ICTR's judges are themselves Rwandan, the emphasis ICTR judges place on Rwandan history and cultural understandings of legal proof and evidentiary admissibility is highly significant. Judicial deference toward Rwandan cultural understandings that the ICTR has incorporated into its jurisprudence is a unique jurisprudential method of bridging the geographic, cultural and linguistic¹⁵ distance between the international community responsible for creating the ICTR and the Rwandans in whose name it was created.

¹² *Id.* at 53 ("At the start, the prosecutor's office, which was originally housed in a devastated hotel that was being converted into an office structure, had no logistical and material support. Staff often lacked basic supplies such as pencils and paper, let alone typewriters or computers. They lacked vehicles to go to massacre sites or to travel to interview witnesses. These problems persisted largely because the [Tribunal] had no powerful advocate on the Security Council or UN Secretariat.").

¹³ ERIC STOVER & HARVEY M. WEINSTEIN, *Introduction: Conflict, Justice and Reclamation*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 11 (2004) ("The reality is that these tribunals have limited mandates and resources, restricted powers of subpoena, and no authority to make arrests. With such limitations, they can never come close to meting out justice to all war criminals, let alone serve as a beacon for reconciliation in countries torn apart by ethnic cleansing and genocide. Even the idea that they will individualize guilt and thus differentiate between the criminal leaders of a nation and their deceived populations is fraught with ambiguity.").

¹⁴ *E.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); Prosecutor v. Nahimana *et. al.*, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003); Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (June 16, 2006).

¹⁵ Hassan B. Jallow, ICTR Chief Prosecutor, "Challenges of International Criminal Justice: The ICTR Experience," <http://ictr-archive09.library.cornell.edu/ENGLISH/colloquium04/jallow.html> (last visited September 1, 2012).

Part V will conclude with personal observations and general reflections based on the author's time spent working at the ICTR, as well as an overview of how the ICTR's work has and continues to expand the outer limits of international criminal law itself. This article will conclude with an overview of the ways in which both the successes and setbacks of the ICTR have already begun to provide valuable guidance for future international criminal institutions to carry on the ICTR's legacy of fighting impunity.

II: THE LEGAL ORIGINS OF THE RWANDAN GENOCIDE

A. *Rwanda Before Colonialism*

In the years immediately preceding the "hundred days' genocide" of 1994, Rwanda – a tiny but increasingly overpopulated Central African country¹⁶ – was rapidly approaching complete political collapse.¹⁷ With nearly all of the arable land already cultivated, a birth rate rising between 3% and 3.5% annually, and approximately 95% of the population dependent on subsistence agriculture for survival,¹⁸ tensions between Rwanda's two largest ethnic groups – the Tutsi and the Hutu¹⁹ – began intensifying almost exponentially.²⁰ With the October 1990 invasion of the Rwandan

¹⁶ Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* 313, 319 (2005) ("Rwanda's average population density is triple even that of Africa's third most densely populated country (Nigeria), and 10 times that of neighboring Tanzania...By 1990, even after the killings and mass exilings of the previous decades, Rwanda's average population density was 760 people per square mile, higher than that of the United Kingdom (610) and approaching that of Holland (950).").

¹⁷ Gérard Prunier, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 90 (1995) (noting that after 1990, "the Rwandese political system was on the verge of collapse and any strong push from outside would complete the process.").

¹⁸ CHRISTOPHER C. TAYLOR, *MILK, HONEY AND MONEY: CHANGING CONCEPTS IN RWANDAN HEALING* 77 (1992).

¹⁹ Ball, *supra* note 5, at 15 (stating that prior to the genocide, the ethnic make-up of Rwanda was 85% Hutu, 14% Tutsi, and 1% Twa).

²⁰ Larissa J. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, 21 (2005) ("Two concurrent developments mark the four years that preceded the genocide. These developments first concern the external attack on Rwanda by Rwandan refugees residing in Uganda, and secondly

Patriotic Front (“RPF”), an English-speaking militia from Uganda largely composed of Tutsi refugees from earlier ethnic clashes, Rwandan society began an inexorable descent into chaos and terror, ultimately culminating in the systematic and widespread slaughter of approximately one million people in 1994, mostly Tutsi and moderate Hutu.²¹

Despite the fact that power struggles between the two groups had led to earlier massacres of Tutsi civilians in 1963, 1964, 1973, 1990, 1992, and 1993, relations between Hutu and Tutsi in Rwanda had traditionally been characterized by inequality, but not violence.²² Although the division between Tutsi and Hutu predated the arrival of the European colonial powers, it had historically been conceptualized as a socioeconomic distinction, not a racial one:

If a Hutu...became prominent as a soldier or army chief, or sufficiently wealthy in cattle, he might marry a woman from a well-placed Tutsi lineage. The descendants of such unions were often considered Tutsi. Sometimes an entire Hutu lineage might be elevated to Tutsi status by entering into alliance relations with a prominent Tutsi group. Social transformations such as these occurred frequently enough to justify a specific term in Kinyarwanda, *kwi hutura*, which signified ‘to become Tutsi, to cease being Hutu.’²³

the changes on the internal political scene of Rwanda. The events were interrelated: the invasion of the Rwandese Patriotic Front (RPF) from Uganda on 1 October 1990 added to the volatile political situation and eventually led to a complete radicalisation of the political scene of Rwanda.”).

²¹ JARED COHEN, *ONE HUNDRED DAYS OF SILENCE: AMERICA AND THE RWANDA GENOCIDE* 13 (2007).

²² James E. Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* 221-222 (2002) (noting that, in precolonial Rwanda, “[i]nequality was inscribed in the differential treatment accorded to each group and, as a result, the potential for conflict certainly existed between Hutus and Tutsi. For most of their history, however, the two groups coexisted relatively peacefully.”).

²³ CHRISTOPHER C. TAYLOR, *SACRIFICE AS TERROR: THE RWANDAN GENOCIDE OF 1994* 66 (1999).

Logically, if the difference had been understood as racial, it could not have been possible to change from Hutu to Tutsi by simply becoming "sufficiently wealthy in cattle."²⁴ Although a significant degree of social mobility existed between Hutu and Tutsi, this does not mean that they were equal in terms of either population size or political power in precolonial times.²⁵ Hutu made up an 85% majority in the country despite the fact that it was ruled by a Tutsi monarchy.²⁶

Most Rwandans believe that Tutsi and Hutu originally had separate historical origins.²⁷ The identity of "Hutu," however, was a politically created ethnicity; the Hutu consisted of the aggregate

²⁴ *Id.* (The socioeconomic nature of the Hutu/Tutsi distinction is reflected both historically and linguistically; in Kinyarwanda, the native language of Rwanda, the term "Hutu" literally means "social son, client, or someone who does not possess cattle," while the term "Tutsi" is derived from the verb *gutuuka*, which means "to enrich someone.").

²⁵ Official Website of the Republic of Rwanda: History, <http://www.gov.rw/pre-colonial> (last visited Feb. 22, 2012) ("While the relationship between the [Tutsi] king and the rest of the population was unequal, the relationship between the ordinary [Hutu], [Tutsi] and [Twa] was one of mutual benefit mainly through the exchange of their labour. The relationship was symbiotic."). Independent research has corroborated both the existence of a degree of symbiosis between the groups as well as a fundamental inequality between them, with the Tutsi controlling the kingship and, therefore, the apparatus of the pre-colonial Rwandan government and economy. The "superiority" of the Tutsi during this time was reinforced both institutionally, through the administration of the Tutsi kingship, as well as culturally, through widely told national creation myths that asserted both a common origin among Rwanda's three groups and the inherent "fitness" of the Tutsi for rule over his brothers. See MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 80 (2001).

²⁶ Ball, *supra* note 5, at 156.

²⁷ Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 *DENV. J. INT'L L. & POL'Y* 125, 127 (2008) ("[M]any Hutus believe that Tutsi herders were foreigners to Rwanda who considered themselves superior to the Hutu pastoralists and took control of the region between the eleventh and fifteenth century. The failure of the Tutsi-controlled government to address the Hutu version of history further highlights the significant ideological split between Tutsis and Hutus. Hutus and Tutsis view themselves as different ethnic groups, even though they share the same language (Kinyarwanda), culture, clan names, customs, taboos, and have intermarried for centuries.").

population – originally of different ethnicities – who were “subjugated to the power of the state of Rwanda.”²⁸

B. Rwanda Under Colonial Subjugation

Although Germany was the first European colonial power to claim dominion over Rwanda in 1897, they “maintained only a very light presence” there, granting considerable autonomy to the pre-existing Tutsi monarchy.²⁹ At the end of World War I, the Allied Powers stripped Germany of its colonial possessions and distributed these territories among themselves.³⁰ Soon, some of the colonial powers began applying the English doctrine of “indirect rule” to their new Central African “possessions.”³¹ Under this model of colonial administration, precolonial governmental structures – like the Tutsi monarchy in Rwanda – were left intact, allowing Europeans to minimize their visibility while maintaining *de facto* control over the colonies by selecting a class of native elites to administer their colonial policies on their behalf.³²

²⁸ MAMDANI, *supra* note 25, at 74 (“Hutu did not exist as an identity outside of the state of Rwanda; it emerged as a transethnic identity of subjects in the state of Rwanda. The predecessors of the Hutu were simply those from different ethnicities who were subjugated to the power of the state of Rwanda.”).

²⁹ Prunier, *supra* note 17, at 25 (noting that the German colonial presence in Rwanda lasted from 1897 to 1916).

³⁰ M. CROWDER, *The First World War and Its Consequences*, in GENERAL HISTORY OF AFRICA IV: AFRICA UNDER COLONIAL DOMINATION 1880-1935 309 (A. Adu Boahen ed., 1985).

³¹ Sally Engle Merry, *From Law and Colonialism to Law and Globalization*, 28 LAW & SOC. INQUIRY 569, 580 (2003).

³² Rahman Ford, Comment, *Law, History, and the Colonial Discourse: Davies v. Commissioner and Zimbabwe as a Colonialist Case Study*, 45 HOW. L.J. 213, 226-27 (2001); A. Peter Mutharika, *Some Thoughts on Rebuilding African State Capability*, 76 WASH. U. L. Q. 281, 282 (1998) (noting that “African subjugation was achieved through a system of ‘indirect rule,’ originally devised by Lord Lugard in Nigeria, under which the colonial state made conscious efforts to co-opt one ethnic group, usually one not large enough to challenge the colonial power, through which the state ruled the other ethnic groups. At the end of colonial rule, power was handed over to the Africans in a manner that left political and economic power in the hands of the co-opted groups. At the end of colonial rule, power was handed over to the Africans in a manner that left political and economic power in the hands of the co-opted group. Burundi and Rwanda are excellent examples of this policy.”).

It was not until the arrival of the Belgians, whose military occupation of Rwanda in 1916 was made official by a League of Nations Mandate in 1919,³³ that the dynamics of colonial subjugation truly began to lay the groundwork for ethnic violence and, ultimately, genocide.³⁴ For the Belgians in Rwanda, the choice of which group to empower as a proxy for their both absolute and “indirect” authority was clear: the Tutsi already existed as a privileged minority, controlled most of the mechanisms of state power, and even looked more like Europeans.³⁵ The Belgians decided that concentrating virtually all Rwandan power and privilege in a carefully cultivated Tutsi elite would be the best way of maximizing their control of the country while avoiding the economic and social costs that would be required to dramatically restructure the entire state in a more direct way.³⁶ Consequently, implementation of indirect rule in Rwanda consolidated virtually all political power – which had, to a significant degree, customarily been shared between Hutu and Tutsi on the local level – exclusively into the hands of the Tutsi.³⁷

In 1933, the Belgian colonial administration conducted a census in Rwanda, culminating in the first ascription of Hutu and Tutsi as not merely socioeconomic, but legal identities.³⁸ The most powerful instrument of this transformation, which bears immense significance for the uniqueness of the ICTR’s challenges, was the introduction of Western law through colonial conquest:

³³ Prunier, *supra* note 17, at 25.

³⁴ Waller, *supra* note 22, at 222 (“The Belgians, in particular, were devoted to the idea of a racialized Tutsi superiority and imposed a system of apartheid on Rwanda in which Hutus were denied all privileges.”).

³⁵ Touko Piiparinen, *The Transformation of UN Conflict Management: Producing Images of Genocide from Rwanda to Darfur and Beyond* 18 (2010) (noting that colonial European explorers, missionaries and anthropologists in Central Africa viewed the Tutsi “as a relative race to the Europeans, both descending from the Caucasus, and therefore the Tutsi were ‘bound’ to lead and rule over the ‘promitive’ Hutu... That the physical features of the Tutsi resembled those of the Europeans was seen as proof of their superiority.”).

³⁶ *Id.* at 26.

³⁷ *Id.* at 27.

³⁸ Mamdani, *supra* note 25, at 101.

Wherever in the non-Western world the white man carved out colonies, the civilizational project was marked by a turn-key import: Western law. At its outset, the Western colonial project was no less than to wipe clean the civilizational slate so as to introduce Western norms through Western law.³⁹

The Belgians essentially used the 1933 census to legally construct “the Tutsi as nonindigenous and the Hutu as indigenous.”⁴⁰ This idea was called Hamitism, based on the Biblical story of Noah’s son Ham, who was ordered by God to serve and labor for his brothers Shem and Japheth as punishment for the sin of witnessing his father’s nakedness.⁴¹

As the yoke of colonial subjugation weighed down on Rwandan society, the privilege and power of the European colonial elite began, in the minds of many Rwandans, to become equated with the now absolute privilege of the Tutsi elite.⁴² The ID card system that the Belgians implemented through the census completed the transformation of Hutu and Tutsi into now legally defined races,

³⁹ *Id.* at 24.

⁴⁰ Adrienne Katherine Wing & Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 260 (2002); Mamdani, *supra* note 25, at 80 (Hamitism, or the idea that the Tutsi were both inherently superior to the Hutu and originally foreign to Rwanda, was “shared by rival colonists, Belgians, Germans, English, all of whom were convinced that wherever in Africa there was evidence of organized state life, there the ruling groups must have come from elsewhere. These mobile groups were known as the Hamites, and the notion that they were the hidden hand behind every bit of civilization on the continent was known as the ‘Hamitic hypothesis.’”).

⁴¹ *Id.* at 80 (“The account in Genesis tells of Ham’s contempt for his father, whom he saw drunk and lying naked in a stupor. While Noah’s other sons covered their father’s nakedness, averting their eyes so as not to witness his shame, Ham did not look away. Noah blessed the descendants of Shem and Japheth, but cursed those of Ham. While Genesis says nothing about the descendants of Ham being black, the claim that they were cursed by being black first appeared in the oral traditions of the Jews when these were recorded in the sixth-century Babylonian Talmud; that same myth depicts Ham as a sinful man and his progeny as degenerates.”).

⁴² *Id.* at 14 (arguing that, in the context of colonial European racial doctrines, “Tutsi, a group with a privileged relationship to power before colonialism, got constructed as a privileged *alien settler* presence...”).

laying a legal foundation for systematic discrimination.⁴³ "Thus, the colonialists, in constructing [the Tutsi as] an alien race that could be used to rule over the indigenous population, ultimately created enmity between the Tutsi and Hutu."⁴⁴ For the first time in Rwandan history, the formerly malleable socioeconomic categories of "Hutu" and "Tutsi" were now frozen into unchangeable racial identities.⁴⁵

By legally requiring all Rwandans to carry state-issued identification displaying each individual's name and ethnicity, the ID card system facilitated the wholesale disenfranchisement of Rwanda's Hutu population by categorically excluding them from employment in the educational, employment and civil administration sectors.⁴⁶ Even "[i]n the educational arena, Catholic schools freely and blatantly preferred Tutsi students at the expense of Hutu children."⁴⁷ While most of the best jobs were now reserved for Tutsi, the Belgians instituted programs of forced labor for the majority Hutu population.⁴⁸ All of this was facilitated by the ID card system, which created an "increased polarization between the ethnicities," and whose long-term consequences would not fully manifest themselves until the 1994 genocide, during which the ID cards ultimately aided "the Hutus in identifying fleeing Tutsis at roadblocks and checkpoints so that they could be slaughtered on the spot."⁴⁹

In Rwanda after 1933, race was not only popularly conceived of as a difference in ancestral origin, but it also functioned as the *sine qua non* of legalized group discrimination.⁵⁰ Although the process of legally dividing the indigenous populations of colonized territories into separate races was characteristic of the indirect rule doctrine, the creation of legal structures – like the ID card system in Rwanda – designed to disenfranchise native majorities functioned the same way

⁴³ *Id.* at 258-59.

⁴⁴ *Id.* at 260.

⁴⁵ *Id.*

⁴⁶ U.N. Dep't of Pub. Info., *The United Nations and Rwanda: 1993-1996*, 10 United Nations Bluebook Series 8 (1996) [hereinafter "Dep't of Pub. Info."].

⁴⁷ Wing & Johnson, *supra* note 40, at 258.

⁴⁸ Prunier, *supra* note 17, at 27.

⁴⁹ Wing & Johnson, *supra* note 40, at 258-59.

⁵⁰ Mamdani, *supra* note 25, at 25.

in colonies under direct European rule; under both direct and indirect rule:

the law separated the minority of civilized from the majority of those yet-to-be-civilized, incorporating the minority into a regime of rights while excluding the majority from that same regime. The law thus enfranchised and empowered as citizens the minority it identified as civilized, and at the same time disempowered and disenfranchised the majority it identified as yet-to-be-civilized.⁵¹

The phenomenon unique to the indirect model, however, was the progressive identification of this “civilized” minority – in Rwanda, the Tutsi – with the foreign colonizing power itself. The legal system “blurr[ed] the colonial difference rather than illuminating it” by “highlighting the commonality between the colonizer and a minority among the colonized.”⁵² Under the stress of colonial subjugation, the complex and dynamic networks of personal relations that had formed the fabric of social and cultural life in Rwanda were displaced by the static, binary ascription of race. This new racial division of colonial manufacture functioned as both the principal justification for, and the primary mechanism of, legalized inequality in colonial Rwanda.⁵³

C. From Independence to Genocide in Rwanda

By the time Rwanda achieved independence in 1959, a majority of Rwandans, both Hutu and Tutsi, had internalized the idea of Tutsi superiority and foreignness that served as a justification

⁵¹ *Id.* at 25.

⁵² *Id.* at 27.

⁵³ *Id.* at 22 (“If the law recognizes you as a member of an ethnicity, and state institutions treat you as a member of that ethnicity, then you become an ethnic being legally and institutionally. In contrast, if the law recognizes you as a member of a racial group, then your relationship to the state, and to other legally defined groups, is mediated through the law and the state. It is a consequence of your legally inscribed identity.”).

for their legally privileged status under colonialism.⁵⁴ With this collective internalization of racial difference – the cornerstone of the entire colonial program – this idea became central to both Hutu and Tutsi claims to power; Tutsi would cite the history of the pre-colonial Tutsi kingship as evidence of their superiority, while the Hutu would claim true ownership as the natives of Rwanda by focusing even further back in history to the time before the Tutsi supposedly arrived.⁵⁵ Tutsi extremists would draw upon this idea of racial difference “to claim intellectual superiority” while Hutu extremists would point to it as proof that the Tutsi were an alien race in Rwanda and, therefore, entitled to nothing.⁵⁶

With independence came representative democracy; for the first time in its history, political power in Rwanda was proportional to population size.⁵⁷ Perhaps sensing the tidal wave of sociopolitical upheaval that decolonization would bring, Belgium began replacing members of the Tutsi political elite with Hutu citizens.⁵⁸ In the months immediately prior to the UN General Assembly’s vote for Rwanda’s independence, outbursts of anti-Tutsi violence left hundreds dead and thousands more were displaced and forced to flee to Rwanda’s neighboring countries.⁵⁹ For Rwanda, Independence Day marked not only the formal end of colonialism, but also “the first-ever documented case of systematic political violence between the Hutu and Tutsi.”⁶⁰

Mayor-General Juvenal Habyarimana, a Hutu military commander, took control of the Rwandan government in 1973

⁵⁴ See Wing & Johnson, *supra* note 40, at 258-59.

⁵⁵ Taylor, *supra* note 23, at 57.

⁵⁶ *Id.* at 55 (“Since Rwanda’s and Burundi’s independence in 1962, the main proponents of Hamitism have not been Europeans – they have been Rwandans and Burundians.”).

⁵⁷ Linda Maguire, *Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi*, 2 BUFF. J. INT’L L. 49, 57 (1995) (“Led primarily by the Hutu-dominated, anti-monarchy Parti du Mouvement de l’Émancipation Hutu (PARMEHUTU), the push for majority-rule resulted in local elections in 1960, which PARMEHUTU won overwhelmingly.”).

⁵⁸ *Id.* at 55.

⁵⁹ Dep’t of Pub. Info., *supra* note 46, at 8.

⁶⁰ Wing & Johnson, *supra* note 40, at 261.

through a bloodless military coup.⁶¹ During Habyarimana's rule, he imposed severe restrictions on Tutsi employment in the public sector and intermarriage between Hutu and Tutsi.⁶² Hutu military officers were prohibited from marrying Tutsi women and all citizens were legally required to carry the ethnic ID cards first introduced by the Belgians.⁶³ Habyarimana also supported Hutu ultranationalist movements that would periodically attack Tutsi civilians, leading to the proliferation of Tutsi refugee communities in the borderlands of Rwanda's neighbors.⁶⁴

By the late 1980s, approximately 500,000 Tutsis were living as refugees in Rwanda's neighboring countries.⁶⁵ Eventually, a group of Tutsi refugees living near Rwanda's borders formed a militia called the Rwandan Patriotic Front ("RPF").⁶⁶ On October 1, 1990, the RPF invaded Rwanda from the north.⁶⁷ This was the beginning of a civil war that would culminate in genocide.⁶⁸ It was at this moment in Rwandan history that the Hutu extremists, now controlling the Rwandan government, could make full use of the colonial ideology

⁶¹ Major Peter H. Sennett & Lieutenant Commander Gregory P. Noone, *Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes*, 12 ST. JOHN'S J. LEGAL COMMENT 423, 433 (1997).

⁶² Magnarella, *supra* note 2, at 519-20 ("During [Habyarimana's] twenty-one years of rule (1973-1994), there were no Tutsi mayors or governors, only one Tutsi military officer, just two Tutsi members of parliament, and only one Tutsi cabinet minister. In addition, Hutu in the military were prohibited from marrying Tutsi, and all citizens were required to carry ethnic identity cards.").

⁶³ *Id.*

⁶⁴ *Id.* at 520.

⁶⁵ Dep't of Pub. Info., *supra* note 46, at 11.

⁶⁶ MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 137 (2004) ("In 1988 the children of the first refugee flights from the 1960s formed the Rwandan Patriotic Front (RPF) as a political and military organization with the goals of repatriating the Tutsi refugees and establishing a power-sharing arrangement with the Hutu-dominated Rwandan government. In October 1990 the RPF launched an offensive designed to topple the Rwandan government...Even though many Rwandan Tutsis viewed the RPF as an alien force and rallied behind the government, Habyarimana played the ethnic card and branded the Tutsi minority a fifth column.").

⁶⁷ Wing & Johnson, *supra* note 40, at 266.

⁶⁸ *Id.*

originally implemented to subjugate them.⁶⁹ With the arrival of a foreign and mostly Tutsi invading force, the colonial idea of a fundamental racial difference suddenly became more than a suspicion or belief among Rwandans; it was now a reality that could very well mean the difference between life and death.

On April 6, 1994, the airplane of Hutu President Juvenal Habyarimana was shot out of the sky by a surface-to-air missile, signaling the start of the genocide.⁷⁰ Before the sun rose the next morning,⁷¹ a systematic and widespread slaughter of unprecedented brutality quickly spread through the country:

[R]ape, torture, mutilation, unspeakably cruel murder; mothers forced to watch their children die before being killed themselves; children forced to kill their families. Mutilations were common, and macabre ritual was evident: brutality...did not end with murder. At massacre sites, corpses, many of them those of children, have been methodically dismembered and the body parts stacked neatly in separate piles.⁷²

By the time the killings stopped, one hundred days later, between 800,000 and 1,000,000⁷³ Tutsi civilians had been systematically

⁶⁹ ML Johnson, "Embodied Mind: Phenomenological Approaches to Cognitive Science, Psychology, and Anthropology," *Perspectives on Embodiment: The Intersections of Nature and Culture*, Routledge, New York & London, 1999, pp. 81-102 ("One needs to remember that the Tutsi were killed as Hamites, not as Tutsi. Whereas the Tutsi of precolonial vintage never claimed political privilege because they came from elsewhere, the Hamites of colonial vintage were said to be 'a civilizing influence' for no other reason than that they were said to have come from elsewhere.").

⁷⁰ Magnarella, *supra* note 2, at 518.

⁷¹ Jessica Raper, *The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 21 (2005).

⁷² JOHN READER, AFRICA: A BIOGRAPHY OF THE CONTINENT 677 (1998).

⁷³ See, e.g., BERT INGELAERE, *The Gacaca Courts in Rwanda*, in TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 25 (2008) (stating that "approximately 800,000 people died"); Paul Kagame, *Preface* to AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND xxi (Philip Clark

murdered by their government and neighbors, and the RPF had killed approximately 30,000 Hutu.⁷⁴ Led by Rwanda's current President Paul Kagame, the RPF took control of Kigali, Rwanda's capital, ending the genocide by winning the civil war.⁷⁵

D. *The ICTR's Historical Challenges*

One byproduct of the racialization of Rwandan identity was the binary division of Rwandan history into two separate narratives: a Hutu history and a Tutsi history.⁷⁶ Partly for this reason, the ICTR considers the creation of a historical record of the Rwandan genocide to be an essential part of its mandate.⁷⁷ According to the judicial officers of the ICTR,⁷⁸ this history writing serves two purposes: (1) to promote reconciliation and justice within Rwanda; and (2) to serve as a genocide-detering resource for the rest of the world.⁷⁹ As a result,

& Zachary Kaufman eds., 2008) (stating that “an estimated one million people were murdered”).

⁷⁴ ALISON DES FORGES, “LEAVE NONE TO TELL THE STORY”: GENOCIDE IN RWANDA 734 (1999).

⁷⁵ Haskell & Waldorf, *supra* note 10, at 50 (2011).

⁷⁶ Mamdani, *supra* note 25, at 267-68 (“Ever since the colonial period, the cycle of violence has been fed by a victim psychology on both sides. Every round of perpetrators has justified the use of violence as the only effective guarantee against being victimized again.”).

⁷⁷ Although the responsibility of writing a historical record of the Rwandan conflict appears nowhere in the Tribunal's Statute, the truth of this proposition is evident from the Tribunal's jurisprudential focus on this history as well as a unanimity of views on this subject among the judges I personally spoke with during my two internships at the Tribunal.

⁷⁸ During my second internship at the Tribunal, I became more familiar with the Tribunal's judiciary and judicial practices by assisting in the research and drafting of a judgment. Having worked closely with several of the Tribunal's judges throughout the years, my overall impression is that these are highly competent, compassionate, and dedicated individuals who have reached the highest echelons of their respective domestic jurisdictions. In terms of knowledge, dedication and impartiality, these judges exemplify the ideal judicial temperament.

⁷⁹ See U.N. Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, ¶ 38, U.N. Doc. S/2004/616 (Aug. 23, 2004) (objectives sought by international criminal tribunals include “bringing to justice those responsible for serious violations of human rights and international humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for

the ICTR is in the unique position of actively mediating conflicting historical truths while adjudicating the personal responsibility of individual defendants.⁸⁰

The complexity of this task is compounded in light of Rwanda's historical experience with Western legal systems. This is not to suggest that the UN should be viewed as a contemporary proxy for the colonial powers of the twentieth century. On the contrary, Rwandans seem to perceive the UN as a singularly ineffective institution whose power is, at best, rhetorical.⁸¹ One basis for general Rwandan skepticism toward the UN is the organization's failure to act while hundreds of thousands of Rwandans were slaughtered in the streets.⁸² After ten Belgian peacekeepers were killed at the beginning of the genocide,⁸³ the Security Council

the victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law, and contributing to the restoration of peace.”).

⁸⁰ SHOSHANA FELMAN, *THE JUDICIAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY* 12 (2002) (“The significance of all these legal cases that put history on trial...is not only that they are revolutionary in the sense that what they judge is both ‘the private’ and ‘the public’ but also, even more significantly, that in them the court provides a stage for the expression of the persecuted. The court allows...‘the tradition of the oppressed’ to articulate its claim to justice in the name of a judgment – of an explicit or implicit prosecution – of history itself. The court helps in the coming into expression of what historically has been ‘expressionless.’”).

⁸¹ JOSIAS SEMUJANGA, *ORIGINS OF RWANDAN GENOCIDE* 229 (2003) (“The UN, which Rwandans call *Loni* in their language, Kinyarwanda, is described as an incompetent organization with the features of a children’s tale. The adage of the 1960s, when the UN was involved for the first time in the internal affairs of modern Rwanda, shows the international organization as inefficient: *Loni ni akavumburamashyiga*. That is, *Loni* is a mythical animal in children’s tales, called upon when a disobedient child does not want to go to bed...Indeed, the UN is rejected every time on the *saying* side and never on the *doing* side.”).

⁸² L.R. Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide* 236 (2000) (“In Rwanda, the anger and bitterness against the UN will last for decades. Hundreds of thousands of victims of genocide had thought that with the UN in their country they would be safe. But in the end the barbarians were allowed to triumph. There is nothing the West can say now to the people of Rwanda to compensate for the failure to intervene in their hour of need.”).

⁸³ Heather Alexander, Comment, *Justice for Rwanda Toward a Universal Law of Armed Conflict*, 44 *GOLDEN GATE U. L. REV.* 427, 433 (2004) (“On the day after President Habyarimana’s plane crashed, Rwandan soldiers killed ten Belgian UNAMIR ‘Blue Helmets.’ The Blue Helmets had been sent to guard the Prime Minister of Rwanda, Agathe Uwilingiyimana, a moderate leader who was targeted

responded by reducing the size of its peacekeeping force from 2,500 to 270.⁸⁴

As a result, the ICTR attempted to expand the very limits of Western law⁸⁵ not only to facilitate the reconciliation of Hutu and Tutsi – categories originally *created* by Western law – but also to reconcile the international community with Rwanda. Paradoxically, as we will now see, the structural characteristics that ensure the ICTR’s appearance of impartiality are exactly the same as those that render the entire operation impossible without the continuous consent and cooperation of Rwanda’s government.

III. THE ICTR’S CREATION: INSIDE THE PARADOX OF IMPARTIALITY

A. *Tensions between Rwanda and the UN*

One of the most significant aspects of the ICTR’s uniqueness is the fact that the very same peacekeeping principles that prevented the UN from taking action during the Rwandan genocide – neutrality, impartiality and consent – are central to the ICTR’s legitimacy as an international court.⁸⁶ Because the UN chose to

for assassination by Hutu extremists within the Rwandan government. The ten Belgian soldiers were originally assisted in their mission by five Ghanaian UNAMIR troops, who were separated from the Belgians after a rumor spread among the Rwandan troops that the Belgian soldiers were responsible for shooting down the president’s plane. Thus, only the Belgian soldiers were killed. After the murders, Belgium withdrew its troops from the UNAMIR mission.”).

⁸⁴ James Sloan, *The Use of Offensive Force in U.N. Peacekeeping: A Cycle of Boom and Bust?* 30 HASTINGS INT’L & COMP. L. REV. 385, 417 (2007) (The Security Council also downgraded this 270-member peacekeeping mission’s mandate to “only act[ing] as an intermediary in securing a cease-fire, help[ing] in the resumption of humanitarian assistance and monitor[ing] developments.”).

⁸⁵ See GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 6 (2003) (Although they incorporate many elements of the French civil law tradition, the ICTR’s Rules of Procedure and Evidence adhere more closely to the basic adversarial conventions of Anglo-American common law).

⁸⁶ BARNETT & FINNEMORE, *SUPRA* NOTE 66, AT 155 (The UN’s rules for peacekeeping and direct intervention in violent domestic crises “generated indifference to such crises. They created an organizational culture where it was tolerable, even desirable, to disregard mass violations of human rights not only in Rwanda but elsewhere, most famously in Srebrenica [former Yugoslavia] in July 1995. Rwanda, in this

categorize the violence in Rwanda as a civil war rather than genocide,⁸⁷ the doctrines of neutrality and impartiality actually necessitated inaction until one of the warring factions emerged victorious:

The paradox here is that at the time of the Rwandan crisis the Secretariat's self-understanding of how to best preserve its moral authority was tied to the rules of consent and impartiality. But soon thereafter it was the willingness to adhere to these rules in the face of genocide that threatened its moral authority as perceived by many publics. Although UN officials tried to put the best face on their actions, relentless questions and pressure forced them to begin to acknowledge that their behavior was unbecoming and that perhaps part of the reason was the emergence of an 'institutional ideology of impartiality.'⁸⁸

Consent of UN member states is the foundation upon which the ICTR's entire operation is built, primarily because it has limited "resources, restricted powers of subpoena, and no authority to make arrests."⁸⁹ The ICTR's lack of an independent arrest power gives rise

respect, was not an unfortunate mistake. It was the predictable result of an organizational culture that shaped how the UN evaluated and responded to violent crises.").

⁸⁷ *Id.* at 149.

⁸⁸ *Id.* at 155 ("The UN Secretariat argued during the peacekeeping expansion of the early 1990s that it could not be placed in conflict situations like Somalia where it was expected to be both a party to the conflict and a neutral, impartial intermediary. Its failure to resolve these dilemmas led it to retreat to strict rules of impartiality in Rwanda and to avoid any active attempt to stop violence. The result was to induce an 'institutional ideology of impartiality' even in the face of genocide.").

⁸⁹ Stover & Weinstein, *supra* note 13, at 11; Parker Patterson, *Partial Justice: Successes and Failures of the International Criminal Tribunal for Rwanda in Ending Impunity for Violations of International Criminal Law*, 19 TUL. J. INT'L & COMP. L. 369, 387 (2010) ("Escaping Rwanda after losing the civil war to the RPF, the genocidaires fled far and wide. Many ended up in neighboring African countries...to continue the war against the Tutsis...Rwanda, on its own, could never have accomplished the capture of all these far-flung fugitives and, whatever its complaints

to a corresponding dependence on states for the arrest, extradition, and long-term incarceration of individuals indicted and convicted by the ICTR.⁹⁰ Thus, many of the processes necessary to fulfill the ICTR's prosecutorial mandate are political, not legal.⁹¹

The one state whose cooperation remains both the most essential and problematic for the ICTR is Rwanda itself.⁹² While the ICTR is dependent on other countries for the arrest and transfer of suspects, most of whom fled Rwanda around the end of the genocide, the availability of Rwandan witnesses for travel and testimony in Arusha has proven to be impossible without the cooperation of Rwanda's RPF-controlled government:

When the chief [ICTR] prosecutor announced in 2002 that she had launched investigations of several high-ranking RPF officers for [crimes against humanity], the Rwandan government responded by imposing new travel restrictions on Rwandans, making it impossible for some witnesses to leave Rwanda and travel to Arusha to testify in court. As a result, the ICTR had to suspend three trials in June 2002 for lack of witnesses.⁹³

In addition to witnesses for oral testimony, ICTR access to documentary evidence is equally dependent on the consent and cooperation of the Rwandan government.⁹⁴ Rwanda was both the first state to call for the creation of a criminal tribunal to prosecute the

about the [Tribunal], it must and does recognize as much...Nevertheless, securing the capture of various fugitives has frequently been politically and legally problematic, and some individuals remain at large.”).

⁹⁰ Jean-Marie Kamatali, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT'L & COMP. L. 89, 97 (2005).

⁹¹ Laurel E. Fletcher & Harvey M. Weinstein, *A world unto itself? The application of international justice in the former Yugoslavia*, in MY NEIGHBOR, MY ENEMY, *supra* note 11, at 41.

⁹² Des Forges & Longman, *supra* note 11, at 55.

⁹³ *Id.*

⁹⁴ Justice Louise Arbour, *The Prosecution of International Crimes: Prospects and Pitfalls*, 1 WASH. U. J.L. & POL'Y 13, 19 (1999).

masterminds of the genocide and the only state to vote against the UN Resolution that brought it into existence:

Although the ICTR was created to satisfy the needs of the people of Rwanda for justice, the government of Rwanda has treated it with hostility. In the immediate aftermath of the genocide, the Rwandan government asked the UN to consider forming a tribunal but then, displeased with some aspects of the final Security Council resolution, cast the sole dissenting vote against the tribunal's formation.⁹⁵

Manzi Bakuramutsa, the RPF envoy to the Security Council, cast the sole vote against the creation of the ICTR.⁹⁶ Rwandan objections focused on the following issues:

[T]he [T]ribunal would not address crimes committed between October 1, 1990, when the war started, and July 17, 1994, instead of only the 1994 calendar year; the [T]ribunal would likely sit outside Rwanda; the [T]ribunal would not have the authority to impose the death penalty; judges from certain states which were involved in the war would be biased; and that those convicted would serve their sentences in countries offering prison facilities, instead of Rwandan jails. The Rwandan delegate concluded that a 'tribunal as ineffective as this would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people.' Rwanda claimed that the absence of the death penalty against those guilty of genocide was the primary reason for its opposition to the [T]ribunal.⁹⁷

⁹⁵ Des Forges & Longman, *supra* note 11, at 54.

⁹⁶ Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 BUFF. HUM. RTS. L. REV. 77, 84 (2000).

⁹⁷ *Id.* at 84-5.

This illustrates how the Rwandan government itself has been one of the ICTR's biggest critics since the very beginning. The RPF-controlled government's fundamental mistrust of, and reluctant cooperation with, the ICTR is logically inconsistent with accusations that the ICTR is simply a court of "victor's justice;" the "victors" in this context being the RPF itself.

The Security Council's decision to override Rwanda's protests seems to reflect a shared belief on the part of the international community that granting the Rwandan government as much control of the ICTR as they demanded would make the goal of objective and impartial trials impossible to achieve.⁹⁸ By placing the court outside of Rwanda, recruiting exclusively non-Rwandan judges, and generally restricting Rwanda's participation in the trials to providing witness testimony and documentary evidence, the Security Council sought to make the ICTR as impartial as possible.⁹⁹ However, these are the same characteristics that give rise to the ICTR's institutional dependence on the political cooperation of independent states. The paradox of impartiality is this matrix of political compromises, without which the ICTR would not be able to operate. Its consequences are unique to the ICTR as a legal institution, even among other international criminal courts.

B. Why the ICTR is Unique among International Courts

Just over a year before the outbreak of genocide in Rwanda, the Security Council approved the creation of the International

⁹⁸ U.N. Secretary-General, Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, ¶ 138, U.N. Doc. S/1994/1125 (Oct. 4, 1994) (expressing the U.N. Secretary-General's recommendation that an international, rather than domestic, tribunal for Rwanda would promote impartiality, expedite extradition and deter genocide in other countries).

⁹⁹ Considering the aforementioned fact that Rwandan conceptions of history tended to be sharply divergent in terms of race, the exclusion of Rwandan judges from the Trial Chambers of the Tribunal was a method of excluding the presumptively partisan prejudices of Rwandan judges in the interest of impartiality. By pursuing objectivity through the exclusion of those the Tribunal is meant to represent, the paradox of impartiality makes any alternatives impossible. See Mamdani, *supra* note 25, at 267.

Criminal Tribunal for the Former Yugoslavia ("ICTY").¹⁰⁰ Since the ICTR and the ICTY share many similarities – including the same Appeals Chamber in the Hague, Netherlands – crucial differences between the two courts are often overlooked.¹⁰¹ Although the ICTR's charter was closely modeled after that of the ICTY, and both courts share the characteristic of geographic remoteness from the territories they exercise jurisdiction over, the political context for the ICTY's work is dramatically from that of the ICTR. This is largely because Rwanda continues to exist as a single nation while Yugoslavia does not.¹⁰² Because the newer International Criminal Court ("ICC") is a permanent institution with universal jurisdiction,¹⁰³ and not a temporary *ad hoc* tribunal whose geographic jurisdiction is limited to one country as the ICTR and the ICTY are, political limitations on the ICC's work are likely to be less restrictive than those that limit the ICTR.¹⁰⁴

An important difference between the ICTR and the ICTY is the ICTR's statutory authorization to apply international treaties and conventions, "regardless of whether they were considered part of customary international law."¹⁰⁵ Despite the significant difference in the two tribunals' sources of law, the ICTR's charter adopts the ICTY's Rules of Procedure and Evidence, "with such changes as" the

¹⁰⁰ Judge Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime & Punishment in the International Arena*, 25 NOVA L. REV. 463, 464 (2001).

¹⁰¹ The Harvard Law Review Association, *Developments in the Law – International Criminal Law: III. Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 1999 (2001).

¹⁰² See, e.g., Milena Sterio, *Implications of the Altmann Decision on Former Yugoslav States*, 20 CONN. J. INT'L L. 39 (2004).

¹⁰³ Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 151 (2006) (Universal jurisdiction is a doctrine that empowers courts to exercise jurisdiction over certain especially heinous crimes, regardless of the location where the crimes were committed. This doctrine is relatively new in international law and usually only invoked in response to a limited number of crimes, generally including piracy, slavery, genocide, crimes against humanity, war crimes, human sex trafficking, nuclear arms smuggling and terrorism).

¹⁰⁴ McDonald, *supra* note 100, at 467.

¹⁰⁵ U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955*, ¶ 12, U.N. Doc. S/1995/134 (February 13, 1995).

judges of the ICTR may “deem necessary.”¹⁰⁶ Thus, although the rules of both courts are substantially similar, the uniqueness of the ICTR’s jurisprudential flexibility in relation to the ICTY, its “sister court” in the Hague, is reflected in the UN Security Council’s assertion that one of its primary reasons for creating the ICTR was its belief that:

in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would...contribute to the process of national reconciliation and to the restoration and maintenance of peace...¹⁰⁷

No such language appears in the ICTY’s Charter.¹⁰⁸ This difference seems to represent an implicit recognition on the part of the UN Security Council that the ICTR’s mandate should include the promotion of peace and reconciliation in Rwanda because the paradox of impartiality would make these goals more difficult to achieve in Rwanda than in the former Yugoslavia.¹⁰⁹

From the outset, then, the ICTR seems to have been envisioned as an institution whose substantive goals would extend into the sociocultural realm of healing mass trauma, well beyond the strictly legal realm of prosecution. Despite the fact that they are essentially immeasurable and subjective goals, the UN Security Council named peace and reconciliation as the intended outcomes of

¹⁰⁶ S.C. Res. 955, art. 14, U.N. Doc. S/RES/955 (Nov. 8, 1994).

¹⁰⁷ *Id.* at preamble.

¹⁰⁸ Des Forges & Longman, *supra* note 11, at 52 (the ICTR Charter “differs from that of the ICTY, where the contributions to peace and reconciliation were discussed in Security Council debates but not specifically included in the resolution that established the [ICTY].”); *see also* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

¹⁰⁹ Waldorf, *supra* note 10, at 1261 (“As a criterion for prosecutorial discretion, national reconciliation is very problematic because it means the prosecutor is engaged in highly speculative and political predictions about what will heal Rwandan society—something well beyond his competence.”).

the ICTR's prosecution of those most responsible for the Rwandan genocide.¹¹⁰

C. *"Victor's Justice" and the Paradox of Impartiality*

Some commentators have noted that the assertion of a causal connection between criminal prosecution on the international level and the promotion of peace and reconciliation on the domestic level is problematic.¹¹¹ While some criticize the ICTR for its "politically motivated" failure to indict any RPF members,¹¹² the cooperation of the RPF itself in facilitating ICTR access to witnesses and evidence has remained reluctant at best and non-existent at worst throughout the Tribunal's existence.¹¹³ The ICTR's dependence on the political cooperation of Rwanda's RPF-controlled government has rendered ICTR prosecution of RPF crimes against humanity practically impossible.¹¹⁴ Despite the apparent validity of accusations against the RPF,¹¹⁵ the nature of the work the ICTR has *not* done – prosecuting

¹¹⁰ Stover & Weinstein, *supra* note 13, at 14 (noting that "international law and its institutions are not designed to focus on the social and psychological processes that guide how people form attachments in groups and communities. The law cannot, nor should it, determine what the elements of trust are that help individuals and communities build social networks that may lead to 'harmony.'").

¹¹¹ See Okechukwu Oko, *The Challenges of International Prosecutions in Africa*, 31 FORDHAM INT'L L.J. 343 (2008); see also Donald L. Hafner & Elizabeth B. L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91 (2007).

¹¹² Mark A. Drumble, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U.L. REV. 1221, 1274 (2000) ("The international community has failed to hold RPF soldiers who committed ethnically driven civilian massacres accountable, despite ongoing efforts to prosecute Hutu war criminals.").

¹¹³ Haskell & Waldorf, *supra* note 10, at 57 (In 2002, during an ICTR investigation of the RPF, "the Rwandan government imposed burdensome travel restrictions that prevented prosecution witnesses from going to Arusha to testify at the ICTR in genocide cases. This move caused the suspension of three ICTR trials for lack of witnesses, lasting several months and effectively blackmailing the Tribunal into dropping investigations into RPF crimes.").

¹¹⁴ See *id.*

¹¹⁵ Des Forges, *supra* note 74, at 692-735 (1999) (The Rwandan Patriotic Army (RPA), the armed wing of the RPF that became Rwanda's national army after its victory, used extensive force to establish its authority over society through massacres

the RPF for war crimes – simply has no bearing on the value of everything it *has* accomplished, particularly in the face of significant institutional setbacks and limitations.

The concept of victor's justice goes back to the Nuremberg and Tokyo tribunals,¹¹⁶ which were created by the Allied powers at the end of World War II to prosecute those most responsible for war crimes and crimes against humanity committed by the leaders of the Axis powers.¹¹⁷ Critics of these earlier tribunals questioned the legitimacy and impartiality of them for the following reasons:

The victorious powers declared what offenses committed by the defeated powers were to be punished and set up *ad hoc* tribunals consisting of judges and prosecutors from their own countries, using their own notions of criminal justice, to ensure that perpetrators would be punished. Political

of civilians, usually portrayed as ‘revenge killings,’ and arbitrary executions”); Waldorf, *supra* note 10, at 1224. (“A [U.N.] appointed Commission of Experts found that the RPF soldiers had perpetrated serious breaches of international humanitarian law and crimes against humanity”); see Haskell & Waldorf, *supra* note 10, at 70 (“The ICTR’s failure to prosecute RPF crimes stands in stark contrast to the [ICTY] and the Special Court for Sierra Leone (SCSL), which have prosecuted perpetrators from all sides of their respective conflicts and successfully targeted high-ranking government officials.”).

¹¹⁶ Catherine Cissé, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *TRANSNAT’L L. & CONTEMP. PROBS.* 103, 105 (1997) (Before the creation of the ICTY and the Tribunal, “the only instances in which the jurisdiction of an international criminal tribunal had been exercised in respect of war crimes were the International Military Tribunal at Nuremberg for German war criminals (1945-1946) and the International Military Tribunal in Tokyo for Japanese war criminals (1946-1948). These Military Tribunals were set up under fundamentally different circumstances to those surrounding the present Tribunals. [The Nuremberg and Tokyo Tribunals] were military courts established by the victorious Allies as a part of a political agreement. The ICTY and [the Tribunal], in contrast, are non-military courts established by the Security Council under Chapter VII of the United Nations Charter, as subsidiary organs of the United Nations.”).

¹¹⁷ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 286, art. 6; Charter of the International Military Tribunal for the Far East, as Amended, April 26, 1946, reprinted in S. Comm. on Foreign Relations, *A Decade of American Foreign Policy Basic Documents, 1941-1949* 433, 434, art. 5 (revised ed. 1985).

decisions governed the choice of which individuals to prosecute...At the same time, offenses committed by the victors' own governments and commands were entirely ignored.¹¹⁸

Considering the military and historical context of the Nuremberg and Tokyo tribunals, the term "victor's justice" makes a certain kind of sense: the victorious nations prosecuted and judged the vanquished. The Rwandan genocide and the creation of the ICTR, however, have been shaped by very different considerations. Instead of being controlled by the victors of the Rwandan civil war, the ICTR has instead been created and controlled by the UN Security Council - the very same entity that had the power to intervene during the genocide but did not:

Both moral and legal considerations inspired the Security Council's resolutions to establish these ad hoc criminal tribunals. First, from a moral perspective, there was a collective feeling of guilt among the international community, resulting from the double failure to either prevent or stop the massacres. This feeling of guilt reinforced the need to have an impartial and internationally administered system of justice which could punish both the instigators and the perpetrators of the crimes.¹¹⁹

Because it is impossible to equate the UN, which refused to intervene in the Rwandan genocide, with the Allies of World War II, who ended the conflict with the use of nuclear weapons on unarmed civilians, cries of victor's justice ring far less true in Arusha than they did at Nuremberg. The ICTR's broad mandate to prosecute Rwandans most responsible for serious violations of international humanitarian law in 1994 makes no distinctions between offenses committed by particular political or ethnic groups; it therefore theoretically includes crimes committed by members of Rwanda's

¹¹⁸ Peter W. Murphy, *Judging War Criminals*, 35 TEX. INT'L L.J. 325, 327 (2000) (book review).

¹¹⁹ Cissé, *supra* note 116, at 105.

current ruling party.¹²⁰ If it were a permanent court, criticisms like the following that characterize the ICTR's failure to prosecute a single RPF member as proof that the ICTR is nothing more than a court of victor's justice, might bear more weight:

Victor's justice is an extreme form of selective prosecution which occurs when only members of the losing side are prosecuted. I am not suggesting the [ICTR] could have, or should have, rendered equal justice. The goal is not parity (i.e., indicating equal numbers of suspects from each side of the conflict), but rather some measure of impartiality.¹²¹

This argument vastly oversimplifies the nature and outcome of the Rwandan massacres.

The mistake of dismissing the prosecutions at the ICTR as little more than politically motivated exercises in victor's justice consists of two equally false assumptions. First, the massacred civilian Tutsi population must be assumed to be essentially synonymous with the RPF: the same assumption that helped the masterminds of the killings use the RPF invasion in 1990 as a pretext for the genocide itself in 1994.¹²² Secondly, the decisions and practices of the ICTR must be assumed to represent and further the interests of the RPF-controlled Rwandan government. As described above, the unreliability of this assumption is revealed by the Rwandan government's varying levels of reluctance and hostility toward the ICTR throughout the years.¹²³

¹²⁰ *Id.* at 50.

¹²¹ Waldorf, *supra* note 10, at 1273.

¹²² Barnett & Finnemore, *supra* note 66, at 137 ("Even though many Rwandan Tutsis viewed the RPF as an alien force and rallied behind the government, [Hutu President] Habyarimana played the ethnic card and branded the Tutsi minority a fifth column.").

¹²³ Haskell & Waldorf, *supra* note 10, at 57

D. The ICTR's Unique Limitations

The ICTR is, by its definition as an *ad hoc* international court, a temporary institution with limited resources that exists subject to, and as the result of, the exclusive discretion of the UN Security Council, a fundamentally political organization.¹²⁴ Former ICTR President Judge Erik Møse has described how the ICTR's operational capacity was also severely limited by the scarcity of resources in Arusha, problems the ICTY, located in the Hague, never had to contend with:

The general infrastructure in Arusha was quite rudimentary. There were few tarmac roads, very unstable electricity and water supplies, and austere living conditions. Telephone and fax lines were few and unreliable. Computers and office equipment had to be imported from abroad, resulting in delays...The main challenge during the first [four years] of the ICTR's history was to create a functional judicial institution under difficult conditions, in an area where there had never previously been any international court.¹²⁵

The delays and difficulties of the ICTR's early days were further compounded by haphazard support from the UN Security Council, the same body that had created it:

Having created the ICTR, the Security Council did little to ensure its successful operation. The tribunal was made an organ of the UN, whose bureaucracy

¹²⁴ Judge Philippe Kirsch, *The International Criminal Court and the Enforcement of International Justice*, 17 PACE INT'L L. REV. 47, 49 (2005) (*Ad hoc* tribunals "have a number of limitations. They are geographically limited. They respond primarily to events in the past. Their establishment involved substantial costs and delays. And last but not least, their creation depends on the political will of the international community of the day.").

¹²⁵ Erik Møse, *The ICTR: Experiences and Challenges*, 12 NEW ENG. J. INT'L & COMP. L. 1, 2 (2005).

was not only heavy and slow-moving but also unfamiliar with the demands of judicial operations. The UN failed initially to give the tribunal a regular appropriation and obliged it to function on the basis of short-term allocations, which meant that it could hire staff on three-month contracts only.¹²⁶

In the early days of the ICTR's operation, the language barrier between Rwandan witnesses and defendants and the ICTR's judges, lawyers and legal officers also served to chronically delay and complicate the proceedings:

Most Rwandan witnesses testify in the national language, Kinyarwanda. During the first trials, there were no interpreters trained in simultaneous interpretation from this language into French and English. The procedure was thus for a witness to make a statement in Kinyarwanda, which was translated consecutively into French, during which time a simultaneous interpreter rendered it into English. This procedure added days onto testimony in trials for which the prosecution and defense together sometimes called well over a hundred witnesses. The ICTR also experiences long delays for the translation of all documents into the necessary languages.¹²⁷

Apart from significant practical difficulties stemming from the lack of resources and support, there was also great legal uncertainty about synthesizing common law and civil law traditions at the ICTR.¹²⁸ In

¹²⁶ Des Forges & Longman, *supra* note 11, at 52.

¹²⁷ Daniel Terris, Cesare P.R. Romano & Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* 75 (2007).

¹²⁸ *See id.* at 126 ("The procedural differences between common and civil law traditions become even more visible in the context of an international criminal court. Civil law judges and attorneys may not be familiar with the cross-examination of witnesses or the notion of the inadmissibility of hearsay evidence. Their common law colleagues may find communication between judges and counsel outside the formal setting of the courtroom to be not only unfamiliar but, to their minds, a

light of these obstacles, it is admirable that the ICTR was able to accomplish anything at all. However, the most significant challenge the ICTR faced was much more abstract than its infrastructural or funding limitations: the problem of adjudicating the guilt of individuals according to a legal concept – genocide – that had never been used for that purpose before.¹²⁹

Although an international consensus on the definition of genocide dates back to the UN General Assembly's adoption of the Convention on the Prevention and Punishment of the Crime of Genocide 1948,¹³⁰ no international court had ever actually convicted anyone for genocide as a legally defined crime until the ICTR issued its first judgment – *Prosecutor v. Akayesu* (“*Akayesu*”) – in 1998.¹³¹ As a result, the ICTR operates in, quite literally, unprecedented legal territory. The task of transforming a half-century-old idea into a legally defined crime required the ICTR to formulate a new jurisprudence of international criminal law at the same time that it applied it to individual cases.¹³² We will now take a look at a few of

breach of ethics.”); *see also* Rep. of the Expert Grp. to Conduct a Review of the Effective Operation and Functioning of the Int'l Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Nov. 22, 1999, U.N. Doc. A/54/634, p. 61, 82.

¹²⁹ Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT'L & COMP. L. 135, 137 (2005) (With the Tribunal's first judgment in *Akayesu*, it “became the first international tribunal to indict, prosecute, and convict an official for genocide, and to hold that rape itself could constitute genocide.”).

¹³⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), adopted by G.A. Res. 260(III)(A), U.N. GAOR, 3rd Sess., at 174, U.N. Doc. A/810 (1948) (defining “genocide” as committing any of the following acts against members of a group with intent to destroy, in whole or in part, that national, ethnical, racial or religious group, as such: (a) Killing; (b) Causing serious bodily or mental harm; (c) Deliberately inflicting conditions of life calculated to bring about the group's physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; and (e) Forcibly transferring children of the group to another group).

¹³¹ David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231, 233-34 (Spring 2002).

¹³² *See* Terris, Romano & Swigart, *supra* note 127, at *xix-xx* (“[I]n their role as interpreters of the law, international judges are *reluctant radicals*. Faced with the challenges of creating new legal institutions, working in an uncertain political

the ICTR's landmark decisions in order to understand the methods and implications of this process.

IV. CULTURE ON TRIAL:

THE ADJUDICATION OF RWANDAN HISTORY ITSELF

A. *The Akayesu Judgment*

On September 2, 1998, the ICTR issued *Akayesu*, its first judgment.¹³³ Mr. Akayesu was the *bourgmestre*, the equivalent of a mayor, of an area of Rwanda called Taba.¹³⁴ As such, he was entrusted "with the performance of executive functions and the maintenance of public order," exerting "exclusive control over the communal police," and other public security forces.¹³⁵ The ICTR Prosecutor's indictment charged that the killings of at least 2,000 Tutsi in Taba during Mr. Akayesu's tenure as *bourgmestre* "were so openly committed and so widespread that, as *bourgmestre*, [Mr. Akayesu] must have known about them."¹³⁶ Significantly, Mr. Akayesu's indictment was amended – *after* the commencement of his trial – to include charges that he facilitated the commission of sexual violence. Although no evidence indicated that he had committed acts of sexual violence personally, the ICTR determined that, "[b]y virtue of his presence during the commission of the sexual violence...and by

environment, and trying to establish the credibility and legitimacy of their courts, international judges have frequently forged new paths in law in situations where there have been no road maps. By and large, however, they are not adventurers by temperament. They are more likely to see themselves as compelled to break new ground by circumstance, rather than seeking opportunities to make their mark by developing new law. These tendencies have led to remarkable advances in international law, but they have also the potential to undermine that stability and legitimacy of the international courts if states begin to feel that the judges have overstepped their bounds.").

¹³³ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) [hereinafter "*Akayesu*"].

¹³⁴ *Id.* at ¶. 4.

¹³⁵ *Id.*

¹³⁶ *Id.* at ¶. 12.

failing to prevent the sexual violence...[Mr. Akayesu] encouraged these activities."¹³⁷

The *Akayesu* judgment began by reviewing the basis of the ICTR's jurisdiction, the charges against Mr. Akayesu, his personal history and the procedural history of the case.¹³⁸ The judgment then provides a detailed overview of the "Historical Context of the Events in Rwanda in 1994."¹³⁹ The inclusion of this historical narrative reflects the *Akayesu* judges' consensus "that, in order to understand the events alleged in the Indictment, it is necessary to say, however briefly, something about the history of Rwanda."¹⁴⁰ Interestingly, the ICTR includes in this historical overview an implicit recognition of the role of colonial administrative law in creating the conditions necessary for the genocide to occur:

In the early 1930s, Belgian authorities introduced a permanent distinction by dividing the population into three groups which they called ethnic groups...In line with the division, it became mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity.¹⁴¹

The *Akayesu* judgment also addresses the question of how to distinguish genocide from crimes against humanity and war crimes

¹³⁷ *Id.* at ¶. 12B; Sean Libby, *[D]effective Control: Problems Arising from the Application of Non-Military Command Responsibility by the International Criminal Tribunal for Rwanda*, 23 EMORY INT'L L. REV. 201, 205 (2009) (command responsibility is a legal doctrine that renders superior "liable for any act committed by a subordinate...if the superior 'knew or had reason to know' that the subordinate would commit the crime and if the superior 'failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.'" It is essentially meant to nullify the "I was just following orders" defense).

¹³⁸ *Id.* at ¶¶. 3-77.

¹³⁹ *Id.* at 47.

¹⁴⁰ *Id.* at ¶ 78.

¹⁴¹ *Id.* at ¶. 83; *see also id.* at ¶. 56 ("one can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture. However, in the context of the period in question, they were, in consonance with a distinction made by the colonizers, considered both by the authorities and themselves as belonging to two distinct ethnic groups; as such, their identity cards mentioned each holder's ethnic group.").

committed during a civil war.¹⁴² Generally speaking, international criminal law recognizes violence based on the ethnicity of the victim as genocide and violence based on the political associations of the victim as a crime against humanity.¹⁴³ After reviewing the relevant evidence presented at trial, the ICTR conclusively determined that the 1994 massacres constituted genocide because they “clearly...had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters.”¹⁴⁴

The ICTR’s decision to begin its first judgment by constructing a narrative exploring the political, cultural and historical origins of the Rwandan genocide reflects the importance of two fundamental considerations. On a practical level, the fact that the ICTR’s “trial judges come from a wide variety of legal cultures” creates an enhanced need for these judges to educate themselves about Rwandan culture and history in order to accurately determine the individual guilt or innocence of a defendant.¹⁴⁵ This preliminary familiarization process is typically unnecessary in domestic courts but holds profound implications for the ICTR’s work and, correspondingly, any evaluation of its work.¹⁴⁶

Apart from the cultural, national and legal diversity among the ICTR’s judges,¹⁴⁷ the process of applying a legal concept without precedent – genocide – to the question of individual guilt required the *Akayesu* court to develop new procedures and doctrines capable

¹⁴² *Id.* at ¶¶112-125.

¹⁴³ David Luban, *Calling Genocide by its Rightful Name: Lemkin’s Word, Darfur, and the UN Report*, 7 CHI. J. INT’L L. 303, 311 (2006).

¹⁴⁴ *Akayesu*, *supra* note 133, at ¶ 125.

¹⁴⁵ Møse, *supra* note 125, at 13.

¹⁴⁶ *See, e.g.,* Des Forges & Longman, *supra* note 11, at 52-53 (“Many prosecutors came from academia or human rights organizations with little or no experience of criminal prosecutions. Similarly, investigators, drawn largely from police forces from around the world, had no experience of investigating crimes of such magnitude. Virtually none of the tribunal’s staff, at least in the early years, knew anything about the history and culture of Rwanda.”).

¹⁴⁷ Terris, Romano & Swigart, *supra* note 127, at 63 (“International courts are without a doubt more heterogeneous than their national counterparts. This is simultaneously their greatest weakness and greatest strength.”).

of achieving well-informed yet impartial justice.¹⁴⁸ This process, in turn, required the *Akayesu* judges to imbue the proceedings with a unique degree of judicial creativity and flexibility in selecting sources of law:

Because of the tension between theory and practice – between the need to follow the law as it is written and the need to interpret law so as to effectively carry out the mission entrusted to them – international judges tend to approach precedent both boldly and gingerly at the same time. They are reluctant radicals.¹⁴⁹

The judicial freedom to select from a diverse array of extra-legal evidentiary sources is a liberty unique to criminal adjudication on the international level.¹⁵⁰ It also bears great significance in terms of the ICTR's ability and willingness to take cultural considerations into account when evaluating the credibility of witnesses:

[I]t is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be 'decoded' in order to be understood correctly...The Chamber has noted this in the proceedings...The Chamber also noted the inexperience of witnesses with maps, film and graphic representations of localities. In the light of this understanding, the Chamber did not draw any adverse conclusions regarding the credibility of

¹⁴⁸ This process reflects the fact that, “[u]nlike national judges, international judges do not inherit courts of law; they need to build them. The credibility and legitimacy of their courts cannot be relied upon, but must be established. International judges are keenly aware that while their decisions can be sweeping and influential, they work in fragile institutions.” *Id.* at 103-04.

¹⁴⁹ *Id.* at 118.

¹⁵⁰ *Akayesu*, *supra* note 133, at ¶ 131 (the judgment also asserts that the judges of the Tribunal are “not restricted under the Statute of the Tribunal to apply any particular legal system and is not bound by any national rules of evidence...”).

witnesses based only on their reticence and their sometimes circuitous responses to questions.¹⁵¹

The Trial Chamber¹⁵² also noted the potentially adverse effect that post-traumatic stress could have on the internal consistency of witness statements:

The Chamber is unable to exclude the possibility that some or all of these witnesses actually suffer from post traumatic or extreme stress disorders, and has therefore carefully perused the testimonies of these witnesses...Inconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of this assumption.¹⁵³

These judicial pronouncements reveal a unique degree of sensitivity toward, and awareness of, the nexus between varying cultural understandings of even basic facts and the Trial Chamber's duty to evaluate the credibility of evidence provided by Rwandan witnesses.

Akayesu also marks the first time in history that sexual violence was judicially recognized as an act constitutive of genocide.¹⁵⁴ The *Akayesu* judgment defined it as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."¹⁵⁵ The ICTR ultimately acquitted Mr. Akayesu of six charges but found him guilty on one charge of genocide, one

¹⁵¹ *Id.* at ¶ 155.

¹⁵² Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, 8 November 1994, Art. 10 (hereinafter, "ICTR Statute") (The Trial Chamber, which includes the various courtrooms and judges' offices, is one of the Tribunal's three main "organs," the other two being the Registry (the Tribunal's administrative branch) and the Office of the Prosecutor (which conducts investigations and prosecutions).

¹⁵³ *Akayesu*, *supra* note 133, at ¶ 143.

¹⁵⁴ Lindsay Peterson, Note, *Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 509, 515 (2008).

¹⁵⁵ *Akayesu*, *supra* note 133, at ¶ 688.

charge of direct and public incitement to genocide and seven charges of crimes against humanity for murder, torture and rape.¹⁵⁶

As the international community's first judgment rendering criminal liability for genocide, the *Akayesu* decision has served as an influential and broadly cited¹⁵⁷ framework for furthering the development of a law to not only punish, but also someday prevent, such crimes. By broadening the scope of admissible evidence through the explicit consideration of cultural and trauma-related psychological factors affecting Rwandan witnesses, the *Akayesu* judgment essentially broadened the scope of criminal law itself.¹⁵⁸ The *Akayesu* judgment also reflects a unique degree of judicial sensitivity toward the experiences of the survivors testifying, reflecting a basic judicial understanding that the nature of such violence is so unspeakably traumatic that a strictly formal adherence to traditional Western legal standards of objectivity and evidentiary admissibility may in fact serve to obscure, not sharpen, the Tribunal's ability to apprehend the true nature of these events.¹⁵⁹

¹⁵⁶ *Id.* at section 8.

¹⁵⁷ Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT'L L. 940, 956 n.74 (2006) (*Akayesu*'s definition of rape has been incorporated into the state criminal codes of California and Illinois: "Incorporating *Akayesu*'s insight, both California and Illinois define gender violence for civil purposes in part to include '[a] physical intrusion or physical invasion of a sexual nature under coercive conditions.'").

¹⁵⁸ Felman, *supra* note 80, at 123-24 (Criminal trials adjudicating mass atrocities reveal "how the unprecedented nature of the injury inflicted on the victims cannot be simply stated in a language that is already at hand. I would argue that the trial struggles to create a new space, a language that is not yet in existence. This new legal language and this new space in which Western rationality as such shifts its horizon and extends its limits are created here perhaps for the first time in history precisely by the victims' firsthand narrative.").

¹⁵⁹ Tony Waters, *Bureaucratizing the Good Samaritan: The Limitations of Humanitarian Relief Operations* 195 (2001) (The horrors of genocide can render efforts to understand genocide literally unimaginable. For example, "[w]hen confronted with evidence of the Holocaust in 1942, Supreme Court Justice Felix Frankfurter said: 'I do not believe you...I do not mean that you are lying, I simply said I cannot believe you.'"); Stover & Weinstein, *supra* note 13 at 4 ("By imposing a 'legal order' on what is often the irrational (power-driven though it may be), the international community seeks to use criminal trials to contain and to deter violence, and to discover the truth about specific events and to punish those responsible. Yet truth, in the eyes of those most affected by collective violence, often lies not in the

B. *The Media Case*

On December 3, 2003, the ICTR convicted three Rwandans for using radio and newspaper media outlets to incite the general Rwandan population to mass murder.¹⁶⁰ *Prosecutor v. Nahimana*, more popularly known as the “Media Case,” provided the ICTR with an opportunity to delve even deeper into the nexus between Rwandan culture and the genocide.¹⁶¹ In delineating political advocacy, which is generally protected by the right to free expression in customary international law,¹⁶² from the charge of “direct and public incitement,” which gives rise to criminal liability under the ICTR’s charter, the *Nahimana* judgment cited this passage from *Akayesu*:

...[T]he Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as ‘direct’ in one country, and not so in another, depending on the audience...The Chamber will therefore consider on a case-by-case basis, whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the

facts themselves but in their moral interpretation, and how facts are interpreted is often manipulated and distorted by the very people who initiated the violence.”).

¹⁶⁰ *Prosecutor v. Nahimana et. al.*, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003), Chapter V.

¹⁶¹ Timothy Gallimore, Ph.D., *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT’L & COMP. L. 239, 247-48 (2008) (Defendants Ferdinand Nahimana and Jean-Bosco Barayagwize controlled and managed the state-controlled RTLM radio station, and defendant Hassan Ngeze founded, owned, and edited the *Kangura* newspaper: “In the so-called ‘Media Case,’ the Tribunal set the principle that those who use the media for inciting the public to commit genocide can be punished for their communication because it amounts to a persecution as a crime against humanity.”).

¹⁶² See G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, art. 1(1), U.N. Doc. A/36/684, at 171 (Nov. 25, 1981). (“Everyone shall have the right to freedom of thought, conscience, and religion...”).

persons for whom the message was intended immediately grasped the implication thereof.¹⁶³

In the Media Case, the ICTR also adopted “the comprehensive review of the historical context [of Rwanda] as described in the *Akayesu* judgment.”¹⁶⁴ Although Mr. Akayesu was held criminally liable for incendiary statements he articulated himself and the Media Case defendants were being charged for facilitating the hate speech of others through the media outlets they controlled, the ICTR nevertheless adopted the subjective incitement standard first laid out in *Akayesu*. This is particularly noteworthy in light of the fact that, since the common law doctrine of *stare decisis* does not exist in international law, “international courts are not bound by precedents, not even their own.”¹⁶⁵ The ICTR’s decision to adopt *Akayesu*’s historical narrative and culturally subjective incitement standard in the Media Case reveals a running thread of jurisprudential emphasis on using popular Rwandan conceptions of meaning as legal standards of proof.¹⁶⁶

This trend of judicial deference toward Rwandan cultural understandings may be viewed as a jurisprudential reaction to the UN Security Council’s decision to establish the ICTR outside of Rwanda, in order to provide “some degree of distance from the events in question” and “strengthen[] the perception of” the ICTR’s

¹⁶³ Nahimana, Case No. ICTR-99-52-T at ¶ 1011 (citing *Akayesu*, Case No. ICTR-96-4-T at ¶ 557-58).

¹⁶⁴ *Id.* at ¶ 106.

¹⁶⁵ Terris, Romano & Swigart, *supra* note 127, at 115.

¹⁶⁶ Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J INT’L & COMP. L. 1, 30 (2005) (noting that the its judgments show that the Tribunal’s “interpretation and implementation of a universal norm – the prohibition against genocide – was informed and assisted by a consideration of the specific cultural context in which a potential genocide occurred. Conceivably, the Tribunal could have adopted a rigid, radical universalist view that only ethnic groups as defined by objective western sociologists would meet the definition under the Genocide Convention. Instead, the Tribunal correctly recognized the fluidity of culture and context, and did justice to the real-world experience of the Rwandan Tutsis.”).

impartiality.¹⁶⁷ Essentially, the ICTR's efforts to transform Rwandan cultural understandings into standards of legal proof represent a unique use of jurisprudence itself to bridge the gap of geographic, cultural and legal distance between the ICTR judges and Rwandans themselves.

The ICTR has also developed other judicial methods of transforming collective understandings of the Rwandan genocide. For example, in 2006 the Appeals Chamber took judicial notice¹⁶⁸ that the commission of genocide against the Tutsis in 1994 is a "fact of common knowledge."¹⁶⁹ Although this decision appears to be intended intended to sharpen the Trial Chambers' focus on the adjudication of individual guilt by cutting broader arguments about whether a genocide occurred at all from the proceedings, it renders the ICTR vulnerable to charges of effectively violating the doctrines of individual responsibility¹⁷⁰ and presumption of innocence.¹⁷¹

¹⁶⁷ Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER FORUM OF WORLD AFF. 21, 44 n.16 (2002).

¹⁶⁸ Definition of "Judicial Notice," LAW.COM LEGAL DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=1065> (last visited March 13, 2012) (Judicial notice is "the authority of a judge to accept as facts certain matters which are of common knowledge...without the need for evidence establishing the fact.").

¹⁶⁹ Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 35 (June 16, 2006).

¹⁷⁰ The concept of individualized, as opposed to collective, guilt is central to the Tribunal's jurisprudence; for example, see Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment, ¶ 35 (Feb. 24, 2005) ("The Chamber emphasizes...that the accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged...accomplices. Thus, pleading accomplice...responsibility does not obviate the Prosecution's obligation to particularize the underlying criminal events for which it seeks to hold the accused responsible.").

¹⁷¹ David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 CORNELL INT'L L.J. 293, 304 n.68 (2003) ("As hybrids of the inquisitorial civil and adversarial common law systems, the [international criminal] tribunals must both opine the law and make detailed factual findings while ensuring that the accused benefits from the presumption of innocence and that the prosecution establishes guilt beyond a reasonable doubt."); see also Kevin Jon Heller, *Note: International Decisions: Prosecutor v. Karemera*, 101 AM. J. INT'L L.. 157 (2007).

Dr. Timothy Gallimore, former Spokesperson for the ICTR's Prosecutor, has noted that the ICTR's decision to take judicial notice of the genocide as an irrefutable historical fact "may vindicate some genocide victims and survivors by its public recognition of their victimization and moral injury," which is exactly "what many victims want most from the legal process."¹⁷² If one takes the view that the ICTR's creation was motivated by a degree of collective guilt for the international community's inaction during the Rwandan genocide, taking judicial notice of the genocide's irrefutability represents an implicit admission that action should have been taken.

The ICTR's decision to build its jurisprudence upon a judicially authored narrative of Rwandan history also illustrates a broader internal tension within the ICTR that underlies much of its work: the difference between adjudicating the individual guilt of defendants and creating an accurate and reliable historical record of what happened in 1994.¹⁷³ The creation of an accurate and impartial historical record that validates the reality and truth of what the genocide survivors experienced is considered by many of those working inside the ICTR to be central to fulfilling its mandate of promoting peace and reconciliation.¹⁷⁴ This emphasis on correlating history and justice for the purpose of promoting reconciliation is a uniquely modern phenomenon that has characterized international criminal tribunals since Nuremberg.¹⁷⁵

¹⁷² Gallimore, *supra* note 161, at 255.

¹⁷³ The most surprising aspect of my interaction with ICTR judges was the fact that most of them personally share the grievances most commonly articulated by the ICTR's critics. One of the most commonly discussed problems ICTR judges mentioned during my time there was the tension between adjudicating the individual guilt of ICTR defendants while simultaneously seeking to create a historical record of mass trauma on a national scale.

¹⁷⁴ This conclusion is drawn from my observations, interviews and experiences while working inside the ICTR.

¹⁷⁵ Felman, *supra* note 80, at 1 ("In the wake of Nuremberg, the law was challenged to address the causes and consequences of historical traumas. In setting up a precedent and a new paradigm of trial, the international community attempted to restore the world's balance by re-establishing the law's monopoly on violence, and by conceiving of justice not simply as punishment but as a marked symbolic exit from the injuries of a traumatic history: as liberation from violence itself.").

C. *The ICTR as a Judicial Author of Rwandan History*

The “history-writing” function of the ICTR is central to the paradox of impartiality,¹⁷⁶ which is why it simultaneously justifies and problematizes the ICTR’s cultural and geographic distance from Rwanda itself. In the sense that constructing an impartial historical narrative about Rwanda’s ethnic divisions requires a certain degree of dispassionate objectivity, the distance seems justified. But the price of this objectivity is a minimization of the role of the same Rwandans in whose name the ICTR was created:

[A]ny criminal proceedings implicate ‘the people’ in whose name they are initiated as a community of viewers...Any court decision, in a way, is a historical decision about the significance, the meaning the community derives from its spectatorial stance.¹⁷⁷

Rwandan participation in ICTR proceedings has essentially been limited to serving as witnesses and defendants, rendering the vast majority of victims completely uninvolved in the ICTR’s work; a small number of Rwandans are given the opportunity to watch, and an even smaller number the opportunity to participate.¹⁷⁸

¹⁷⁶ Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism* 11 *Cardozo L. Rev.* 1211, 1234 (1990) (paraphrasing literary theorist and legal scholar Stanley Fish: “Law must absorb and internalize that which threatens it from the outside, and in particular ethical and political values. But at the same time, law must deny that it is appropriating extra-legal values. In other words, the law cannot simply carve for itself a path that remains beyond ethics and politics. Yet the law cannot admit dependence on the ethical and the political, for that would threaten to deprive law of any distinct identity. To resolve this dilemma, the law simultaneously incorporates ethical and political values and denies that it is doing so.”).

¹⁷⁷ Felman, *supra* note 80, at 81.

¹⁷⁸ See Samantha Power, *Rwanda: The Two Faces of Justice*, *THE NEW YORK REVIEW OF BOOKS*, Jan. 16, 2003, at 47, available at <http://www.nybooks.com/articles/archives/2003/jan/16/rwanda-the-two-faces-of-justice/> (“The UN court is a world away from the people whom international justice claims to serve. The rare Rwandan who tries to visit the UN court must take a bus through four countries to get there...The journey takes two days, and costs around \$40 for the bus ticket and \$20 for a Kenyan transit visa. This is more than most Rwandans earn in a month.”).

The issue of ethnicity requires the ICTR to grapple with a similar paradox, placing it in “the untenable position of having to recognize the importance of ethnic group identity for legal purposes (establishing *mens rea* or motive for genocide) and at the same time trying to minimize ethnicity when establishing individual guilt in order to promote reconciliation.”¹⁷⁹ Because genocide involves the depersonalization of the victim through the conflation of the targeted individual within the targeted group, “the [ICTR’s] recognition of ethnic groups in Rwanda is a necessary element in the legal determination of criminal responsibility for the genocide.”¹⁸⁰ The ICTR has implemented procedures to keep the identities of witnesses confidential.¹⁸¹ However, the centrality of ethnicity in establishing criminal liability for genocide means that, if the ICTR attempted to prosecute these crimes without addressing ethnicity at all, “no one could be convicted for the crimes, and the lack of successful prosecution would only perpetuate the existing impunity.”¹⁸²

V. CONCLUSION

None of this is meant to minimize or invalidate the ways in which many Rwandans feel the ICTR has let them down.¹⁸³ On

¹⁷⁹ Gallimore, *supra* note 161, at 256.

¹⁸⁰ *Id.* at 257.

¹⁸¹ ICTR Statute, art. 21; *see also* Joanna Pozen, *Justice Obscured: The Non-Disclosure of Witnesses’ Identities in ICTR Trials*, 38 N.Y.U. J. INT’L L. & POL. 281, 296 (2006) (A majority of “witnesses seeking protective measures from the Tribunal are Rwandans who reside in Rwanda, although a few live abroad. The Tribunal’s statute requires the [ICTR] to provide measures for the protection of victims and witnesses...Of the witnesses that come to testify at the [Tribunal], a large number invoke this statutory provision and request protection. Granting these requests often conflicts with an accused’s statutory right to a ‘fair and public hearing,’ because some forms of witness protection restrict the defense’s ability to cross-examine. However, the [Tribunal’s] statute provides no guidance for judges on how to resolve this tension between the rights of the accused and the safety of the witness.”).

¹⁸² Gallimore, *supra* note 161, at 257.

¹⁸³ Eugenia Zorbas, *Reconciliation in Post-Genocide Rwanda*, 1 AFR. J. LEGAL STUD. 29, 34 (2004) (“It is nearly impossible to overstate the bitter disappointment and ill will the [Tribunal’s] alleged rampant corruption, bureaucracy, incompetence and above all, its meagre results – ten convictions in nearly ten years – all on a

average, the total cost of prosecuting a single ICTR defendant is \$80 million.¹⁸⁴ Although this may be a trivial amount of money on the scale of international politics, for a nation as impoverished as Rwanda¹⁸⁵ it is a vast sum that could be used to rebuild Rwandan society in more tangible ways.¹⁸⁶ The ICTR has also been criticized for lenient sentencing.¹⁸⁷ Apart from these issues, the most common criticism of the ICTR among Rwandans is that it “provides perpetrators of genocide more rights and amenities than victims”¹⁸⁸ and that the proceedings are too slow and selective.¹⁸⁹

multi-million dollar annual budget, has generated with the RPF government, the Rwandan people and internationally.”).

¹⁸⁴ Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 Ohio N.U. L. Rev. 41, 46 (2005). Apart from the length and complexity of most trials at the Tribunal, the sheer size of the institution is largely responsible for its high cost of operation. See Terris, Romano & Swigart, *supra* note 127 at 161 (“In 2006-2007, the criminal tribunals together commanded approximately 7 percent of the regular budget of the United Nations, providing nearly twenty-two hundred jobs between them...[these courts] are not simply courts where cases are heard. They are also the home of enormous investigative operations (under the auspices of the offices of the prosecutors), they are victim and witness protection organizations, and they operate their own detention facilities.”).

¹⁸⁵ Shelley Thompson, *80 Simple Rules: The Effective and Sustainable 2009 Rwandan Microfinance Regulations*, 38 SYRACUSE J. INT’L L. & COM. 415, 423 (2011) (“The 1994 genocide impoverished much of the population and had a particularly harsh impact on women. A survey from year 2000 estimated that 60% of the population was below the poverty line and 90% was engaged in subsistence agriculture.”).

¹⁸⁶ Des Forges & Longman, *supra* note 11, at 37-8 (“The Rwandan government has criticized the international community for investing more money in the ICTR than in rebuilding the judicial system in Rwanda...A number of legal experts and political analysts have echoed these sentiments, arguing that rebuilding Rwanda’s domestic judicial system should have been given priority over supporting the ICTR.”).

¹⁸⁷ See Sam Szoke-Burke, *Avoiding Belittlement of Human Suffering: A Retributivist Critique of ICTR Sentencing Practices*, J. Int. Criminal Justice (2012), Vol. 10, Issue 03, pp. 561-580; in response to such criticisms, former ICTR President Judge Dennis Byron stated that he believes “the *certainty* of punishment to be a greater deterrent than the *severity* of the punishment.” Interview with Hon. Dennis Byron, former ICTR President, International Criminal Tribunal for Rwanda, in Arusha, Tanzania (May 2007).

¹⁸⁸ Karol C. Boudreaux & Puja Ahluwalia, *Cautiously Optimistic: Economic Liberalization and Reconciliation in Rwanda’s Coffee Sector*, 37 DENV. J. INT’L L. & POL’Y 147, 162 (2009) (“High-ranking suspects at the [Tribunal] enjoy better defense lawyers and judges than low-ranking suspects who are tried in

The ICTR, in negotiating a fragile balance between the provision of defendants' rights and the achievement of reconciliation and peace, is an institution operating at cross-purposes with itself. The paradox of impartiality implicates the troubling legacy of Western law in Rwanda,¹⁹⁰ the contentious relationship between the UN and Rwanda,¹⁹¹ and the unique complexities faced by non-Rwandan judges seeking to both understand and "write" Rwandan history.¹⁹² Many of the ICTR's shortcomings, but by no means all, are unavoidable byproducts of this paradox.¹⁹³ Others are inherent in the limitations of criminal justice itself,¹⁹⁴ which is "not inherently

Rwanda...They also receive a higher quality of health care than victims...many Rwandans believe the [Tribunal] places too much emphasis on responding to the rights of the accused and not enough to victims and survivors, including those who serve as witnesses.").

¹⁸⁹ Yacob Haile-Mariam, *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT'L & COMP. L. REV. 667, 736 (1999) ("The very slow pace of the Tribunal is a source of frustration from the viewpoint of genocide survivors and their relatives. The Rwandan courts, for example, began prosecuting defendants a year after the [Tribunal] and disposed of four hundred cases by the middle of July 1998, while the [Tribunal] had not completed trying even one case by the middle of August 1998. The slow pace has not augured well for reconciliation and is the major gripe Rwanda has with the Tribunal.").

¹⁹⁰ See discussion *supra* Part II.

¹⁹¹ See discussion *supra* Part III.

¹⁹² See discussion *supra* Part IV.

¹⁹³ ERIC STOVER & HARVEY M. WEINSTEIN, *Conclusion: A Common Objective, A Universe of Alternatives*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 335 (2004) (discussing two 2001 incidents caused Rwandan survivor organizations to temporarily prohibit their members from serving as prosecution witnesses at the ICTR: "In the first incident, the survivor organizations condemned the tribunal after a stunning revelation that the court had unknowingly employed a Hutu defense investigator who was a high-level genocide suspect. In the second incident, the survivor organizations accused a panel of judges of unprofessional conduct after laughing during the cross-examination of a Tutsi rape victim. Although these incidents drew little international attention, they became front-page news in Rwanda and continued to be scrutinized by the local media for more than a year.").

¹⁹⁴ *Id.* at 333 ("The reality is that the logic of law can never make sense of the logic of mass atrocity, or how survivors and perpetrators will interpret it. This is especially true in post-conflict situations where survivors believe the international community could have intervened to stop the violence but failed to do so...For many

efficient, nor...completely effective in some instances.”¹⁹⁵ The inherent limitations of criminal law become exponentially more complex when trying to adjudicate individual guilt for a mass trauma on the scale of the Rwandan genocide.¹⁹⁶

It is encouraging that newer international criminal courts have already begun learning from – and correcting – the ICTR’s mistakes in these and other areas.¹⁹⁷ For example, some ICTR witnesses who were victims of sexual violence have described “feeling re-violated by the experience” of being subject to cross-examination.¹⁹⁸ Learning from these experiences, the ICC Statute has codified procedures for treating victims of sexual violence into its Statute¹⁹⁹ and Rules of Procedure and Evidence.²⁰⁰ Although

survivors, tribunal justice, with its complex and lengthy procedures and often low sentences, fails to palliate the injustice of losing family members and neighbors and of witnessing the destruction in their communities. Meanwhile, those who have been labeled perpetrators through the attribution of collective guilt often feel that they have been singled out for retribution based on their ethnicity, without any recognition of their own losses and suffering.”).

¹⁹⁵ David M. Crane, “*Back to the Future*”—*Reflections on the Beginning of the Beginning: International Criminal Law in the Twenty-First Century*, 32 FORDHAM INT’L L.J. 1761, 1769 (2009).

¹⁹⁶ Stover & Weinstein, *supra* note 13 at 335 (“Criminal trials in the wake of mass atrocity are inevitably limited and symbolic: a few war criminals stand for a much larger group of guilty.”).

¹⁹⁷ See Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT’L & COMP. L. 119, 128-9 (2005) (noting that those negotiating the Rome Statute creating the ICC were aware of lessons learned from the Tribunal’s lapses of sensitivity toward sexual violence victims by “incorporating articles relating to gender-sensitive investigations, with provisions on staffing the [ICC] with individuals with relevant, gender-sensitive expertise” as well as designing prosecution strategies formally requiring the ICC Trial Chamber to “be vigilant in controlling the manner of questioning of a victim or witness to avoid harassment or intimidation of a victim of sexual violence crimes.”).

¹⁹⁸ *Id.* at 130.

¹⁹⁹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (17 July 1998) (adopted 17 July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) at arts. 54(1)(b), 68(1) and 68(2).

²⁰⁰ Rep. of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 at rule 88 (2000).

problems like these are deeply troubling, indications that newer and *permanent* institutions like the ICC are taking affirmative steps to mitigate them hold the potential for transforming even the ICTR's failures into a more effective system of international criminal law.²⁰¹

Future international courts should also implement formal mechanisms to educate judges who may be unfamiliar with the domestic history and culture of the countries where these crimes occur. By requiring ICTR judges from foreign jurisdictions to complete an educational program exploring the social, cultural, ethnic, and linguistic history of Rwanda, these judges would be better equipped to evaluate evidence in the context of Rwandan culture. Without the benefit of such a program, many newly appointed ICTR judges are tasked with the responsibility of informally familiarizing themselves with Rwandan culture, while presiding over the trial proceedings. A formal program for helping non-Rwandan judges familiarize themselves with Rwanda *before* conducting their first trials would simultaneously facilitate the conservation of judicial resources, while enhancing the accuracy of the ICTR's judgments.

Ultimately, the best defense of the ICTR's work lies in the fact that almost the entire interim government of the Rwandan genocide era has been placed on trial at the ICTR.²⁰² Despite all of its limitations, mistakes, and failures, this will be the most important part of the ICTR's legacy for the future. Condemnations of world leaders and governments who systematically murder their own citizens now have the force of a new, not yet perfectly effective, but growing body of law to back them up. The expectation that such actions will be met with impunity in the international community is much less realistic now than it was in 1994.

²⁰¹ Oosterveld, *supra* note 197, at 133 ("As a result of lessons learned from the [Tribunal's] history, those involved in the ICC negotiations worked to codify positive approaches to gender-sensitive justice into the Rome Statute, the ICC's Rules of Procedure and Evidence, and the ICC's Elements of Crimes. It is in this way that the [Tribunal's] experiences are reflected in the ICC's policies and procedures...given that the ICC can rely on the lessons of the [Tribunal]...it should experience fewer problems than its predecessor tribunals.").

²⁰² Gallimore, *supra* note 161, at 243.

The personal demands required of those who work at the ICTR are tremendous.²⁰³ Above and beyond the personal demands, however, the professional challenges are immense by any standard. The synthesis of cultural, national and legal traditions these judges have created has breathed life into an idea that was nothing more than a utopian dream a century ago. Although genocide is as old as history itself,²⁰⁴ and we are still far from a system of international law capable of *preventing* genocide, the judges of the ICTR have given the world the next best thing: a law capable of *punishing* genocide.

²⁰³ See Nigel Eltringham, "A War Crimes Community?": *The Legacy of the International Criminal Tribunal for Rwanda Beyond Jurisprudence*, 14 *New Eng. J. Int'l & Comp. L.* 309 (noting that the personal sacrifices Tribunal judges are required to make include: prolonged separation from family; disruption of domestic professional life and career opportunities; and the significant emotional toll of adjudicating atrocities on the scale of genocide).

²⁰⁴ See *Deuteronomy* 20:16-17 (King James) ("But of the cities of these people, which the Lord thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth; but thou shalt utterly destroy them...").

