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”A Mere Pretense of Justice”: Complementarity, Sham Trials, and Victor’s Justice at the Rwanda Tribunal

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Abstract

This Article beings by sketching the background of the recent Rwandan Patriotic Front (”RPF”) trial, focusing on domestic impunity for RPF crimes and strained relations between Rwanda and the International Criminal Tribunal for Rwanda (”ICTR”). It next describes and analyzes the components of the ICTR-Rwanda agreement: the agreement itself, the RPF trial, and the ICTR prosecutor’s assessment of the trial. The Article then explores the larger issues of prosecutorial discretion and independence, complementarily, and victor’s justice, while examining the implications for the International Criminal Court (”ICC”).

TRANSITIONAL JUSTICE: WAR CRIMES TRIBUNALS AND ESTABLISHING THE RULE OF LAW IN POST-CONFLICT COUNTRIES

ARTICLE

"A MERE PRETENSE OF JUSTICE": COMPLEMENTARITY, SHAM TRIALS, AND VICTOR'S JUSTICE AT THE RWANDA TRIBUNAL

Lars Waldorf[*]

"*[T]he desire displayed by states to try their own defendants is often inversely proportional to their ability or real desire to do so. What will happen, then, in the context of [the International Criminal Court] Statute that confers primary jurisdiction on the states?*"
—Claude Jorda[1]

"*This Tribunal must not be seen as victor's justice when the history books are written in fifteen years.*"
—Erik Møse[2]

INTRODUCTION

In 1994, the Rwandan Patriotic Front ("RPF"), the predominantly Tutsi rebel movement that had triggered

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1. Claude Jorda, *The Major Hurdles and Accomplishments of the ICTY: What the ICC Can Learn From Them*, 2 J. INT'L CRIM. JUST. 572, 582 (2004).

2. Interview with Judge Erik Møse, then-President of the International Criminal Tribunal for Rwanda [ICTR], in Arusha, Tanz. (Mar. 17, 2003).

Rwanda's four-year civil war, killed at least 25,000–30,000 Hutu civilians.[3] Those deaths barely registered amidst the half million or more Tutsi civilians slaughtered during the genocide that same year.[4] The historian and human rights activist Alison Des Forges tried to draw attention to those crimes in *Leave None to Tell the Story*, her magisterial account of the Rwandan genocide.[5] Writing in 1999, she criticized the "mere pretense of justice" for the victims, and the international community's indifference.[6]

Ten years later, the prosecutor of the International Criminal Tribunal for Rwanda ("ICTR") announced that he would not indict a single RPF soldier for those crimes.[7] A year earlier, in 2008, he had agreed to let Rwanda conduct its own domestic trial of a case previously investigated by his office on the understanding that he would reassert jurisdiction if the trial was not fair or effective.[8] Rwanda then put four RPF soldiers[9] on trial for the notorious massacre of the Rwandan archbishop, three bishops, and nine other clergy at Gakurazo in June 1994.[10] This was the first—and only—domestic prosecution of RPF soldiers for 1994 war crimes. The trial opened with guilty pleas from two low-ranking soldiers[11] and ended with the acquittals of their

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

4. *Id.* at 15–16. There is a highly politicized debate over the number killed during the genocide. *See, e.g.*, Filip Reyntjens, *Rwanda, Ten Years On: From Genocide to Dictatorship*, 103 AFR. AFF. 177, 178 n.1 (2004).

5. DES FORGES, *supra* note 3, at 692–735.

6. *Id.* at 735.

7. U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (June 4, 2009).

8. U.N. SCOR, 63rd Sess., 5904th mtg. at 11, U.N. Doc. S/PV.5904 (June 4, 2008).

9. Like many guerrilla movements, the Rwandan Patriotic Front ("RPF") had both a political wing (the RPF) and a military wing (the Rwandan Patriotic Army ("RPA")), with the latter controlling the former. When the RPF created a new government after the genocide, it installed a civilian member of the RPF, Pasteur Bizimungu, as the titular president, but the real power lay with then-Major General Paul Kagame, who occupied the vice-presidential and defense minister posts. In 2000, Kagame ousted Bizimungu and assumed the presidency. He "resigned" from the military to run for president in national elections in 2003. As there is little distinction between the RPF and RPA (since renamed) and little (if any) civilian control over the military, I use the terms "RPF" and "RPF soldiers" throughout this article.

10. *See* U.N. SCOR, 63rd Sess., 5904th mtg. at 11, U.N. Doc. S/PV.5904 (June 4, 2008); Felly Kimenyi, *RDF Officers Appear Before Court*, NEW TIMES (Kigali), June 17, 2008, http://www.newtimes.co.rw/index.php?article=7195.

11. *See* Kimenyi, *supra* note 10.

commanding officers.[12] The prosecutor expressed satisfaction with the trial and closed his own investigation.[13]

This episode reflects the current paradigm of international criminal justice—complementarity—which underpins the International Criminal Court ("ICC"). Under the principle of complementarity, national jurisdictions get the first crack at prosecuting genocide, crimes against humanity, and war crimes, with the ICC only operating as a court of last resort for those states that prove unwilling or unable to prosecute. This paradigm accords with the intuition that national courts are often better positioned to do justice than are international courts.[14] Complementarity is thought to have several advantages over the jurisdictional primacy of the ad hoc international tribunals for Rwanda and the former Yugoslavia: it is more deferential to state sovereignty, it promotes the diffusion of international norms at the national level, and it is much less expensive.

To date, the ICC has had no experience monitoring "complementary" national trials. Consequently, much of the discussion of complementarity is highly theorized and highly speculative. This is what makes the agreement between the ICTR and Rwanda, and the resulting domestic trial, so important: they may well be harbingers for how "complementarity" plays out at the ICC.[15] First, they suggest that international tribunals will be unable or reluctant to recognize sham national proceedings

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12. *See* Edwin Musoni, *Gumisiriza Acquitted*, NEW TIMES (Kigali), Oct. 25, 2008.

13. U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (June 4, 2009).

14. *See* Int'l Criminal Court [ICC], Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 2 (Sept. 2003), *available at* http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf. National courts are more likely to obtain witnesses and evidence, be more accessible to victims and affected communities, more efficient, and less costly than international ones. *See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 68–69 (2008); *Paper on Some Policy Issues Before the Office of the Prosecutor*, *supra*. Other scholars go further, arguing that national justice is better when it comes to promoting accountability, reconciliation, victim satisfaction, collective memory, democratic deliberation, and the rule of law. *See, e.g.*, José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 482 (1999).

15. *See* Victor Peskin, *Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan*, 31 HUM. RTS. Q. 655, 660 (2009) (noting that "the actions taken by the chief prosecutors of the ICTY [International Criminal Tribunal of the Former Yugoslavia] and ICTR [International Criminal Tribunal for Rwanda] provide important precedents for their counterpart at the ICC [International Criminal Court]").

designed to shield the accused. Second, they make clear that state cooperation is the Achilles' heel of international justice. Finally, they remind us that international justice is inherently political.

This Article begins by sketching the background of the recent RPF trial, focusing on domestic impunity for RPF crimes and strained relations between Rwanda and the ICTR. It next describes and analyzes the components of the ICTR-Rwanda agreement: the agreement itself, the RPF trial, and the ICTR prosecutor's assessment of the trial. The Article then explores the larger issues of prosecutorial discretion and independence, complementarity, and victor's justice, while examining the implications for the ICC.

I. *BACKGROUND*

A. *RPF Crimes and National Impunity: 1994–2007*

The RPF's mostly Tutsi soldiers committed crimes against humanity and war crimes against mostly Hutu civilians in Rwanda in 1994.[16] A United Nations ("U.N.") appointed Commission of Experts found that the RPF soldiers had "perpetrated serious breaches of international humanitarian law [*i.e.*, war crimes] and crimes against humanity," and it "strongly recommend[ed]"

16. *See* DES FORGES, *supra* note 3, at 701–26. This Article focuses on 1994, as the ICTR's temporal jurisdiction is limited to that single year. However, RPF soldiers also killed Hutu civilians during the civil war, which started with its October 1, 1990 invasion from Uganda and ended in July 1994 with the military defeat of the genocidal regime. *See id.* Furthermore, RPF soldiers killed thousands of Hutu civilians after 1994: during the closing of internally displaced persons camps in 1995, the anti-insurgency campaign in northwest Rwanda in 1997 and 1998, and the wars in the eastern Democratic Republic of Congo. *See, e.g.*, GÉRARD PRUNIER, FROM GENOCIDE TO CONTINENTAL WAR: THE 'CONGOLESE' CONFLICT AND THE CRISIS OF CONTEMPORARY AFRICA 16–23, 37–42, 147–48 (2008). There has been virtually no accountability for any of those crimes. *See* Fed'n Internationale des Ligues des Droits de L'homme [FIDH] [Int'l Fed'n for Human Rights], *Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda*, at 64, Oct. 25, 2002 (providing statistics of RPA soldiers prosecuted for human rights crimes between 1996 and 2000). In mid-2009, a United Nations ("U.N.") "justice mapping exercise" completed a report on crimes against humanity and war crimes committed by Rwanda and other actors in the Democratic Republic of Congo. *See* Jason Stearns & Federico Borello, *Bad Karma: Accountability for Rwandan Crimes in the Congo*, *in* REMAKING RWANDA: STATE BUILDING & HUMAN RIGHTS AFTER MASS VIOLENCE (Scott Straus & Lars Waldorf eds., forthcoming 2011).

prosecution of those crimes.[17] Experts working for the U.N. High Commissioner for Refugees estimated that the RPF killed an estimated 25,000 to 45,000 Hutu civilians from April to August 1994.[18] Amnesty International and Human Rights Watch investigated and publicized the RPF massacres.[19] As Des Forges observed:

> These killings were wide-spread, systematic and involved large numbers of participants and victims. They were too many and too much alike to have been unconnected crimes executed by individual soldiers or low-ranking officers. Given the disciplined nature of the RPF forces and the extent of communication up and down the hierarchy, commanders of this army must have known of and at least tolerated these practices.[20]

There were credible reports that the RPF's military commander, Major General (now President) Paul Kagame, knew about some of these killings but took no action to stop them.[21]

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17. The Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, ¶ 95, U.N. Doc. S/1994/1405 (Dec. 9, 1994).

18. *See* DES FORGES, *supra* note 3, at 726–31. Despite U.N. efforts to suppress these findings, the figures were leaked to the press. *See id.*

19. *See id.* at 702–26; Amnesty Int'l, *Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army, April–August 1994*, AI Index AFR 47/016/1994, Oct. 20, 1994. Filip Reyntjens, a long-time Rwanda expert, has explained why these crimes are not better known:

> Apart from considerations of guilt and political correctness, several factors explain the conspiracy of silence. On the one hand, most massacres by the RPF occurred discreetly, and investigations were difficult: areas where they were committed were declared "military zones" (closed to outsiders), victims' remains were removed or burned, and regions were closed to access and even air traffic. On the other hand, observers had an interest in keeping silent: witnesses of NGOs and international organizations feared expulsion, and Rwandans ran the risk of reprisals against themselves . . . .

Filip Reyntjens, *Rwanda: L'Histoire Secrète (Review)*, AFR. TODAY, Spring 2008, at 141, 142 (citation omitted); *see also* DES FORGES, *supra* note 3, at 731–34. Reyntjens has been barred from Rwanda ever since he documented some RPF massacres in late 1994.

20. DES FORGES, *supra* note 3, at 734–35.

21. *See id.* at 735. Seth Sendashonga, a high-ranking RPF official, who went into exile in 1995 and denounced Kagame over RPF killings, estimated that RPF soldiers killed approximately 60,000 civilians between April 1994 and August 1995. Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda*, at 89, July 2008 *available at* http://www.hrw.org/sites/default/files/reports/rwanda0708webwcover.pdf. Sendashonga was assassinated in Nairobi in 1998. *See* PRUNIER, *supra* note 16, at 365–68; Amnesty Int'l, *Rwanda/Kenya: Inquiry into Assassination of Rwandese Opposition Leader in Exile Urgently Needed*, AI Index AFR 47/19/1998, May 18, 1998.

The RPF-led regime has made very little effort at accountability for these crimes. As the human rights activist André Sibomana ruefully observed, "Impunity is always in the interest of the state, and the current state in Rwanda is no exception."[22] Over the years, President Kagame has countered such criticism in three ways. First, he minimizes both the nature and extent of RPF crimes, acknowledging only "revenge killings" by a small number of rogue soldiers.[23] Second, he claims the Rwandan government has brought those soldiers to justice.[24] Finally, he equates justice for RPF crimes with genocide denial:

> While some rogue RPF elements committed crimes against civilians during the civil war after 1990, and during the anti-genocidal campaign, individuals were punished severely . . . . To try to construct a case of moral equivalency between genocide crimes and isolated crimes committed by rogue RPF members is morally bankrupt and an insult to all Rwandans, especially survivors of the genocide. Objective history illustrates the degeneracy of this emerging revisionism.[25]

President Kagame contends that "'the country's military tribunals have conducted very serious investigations' into the crimes and that 'some of our soldiers were proven guilty, convicted and executed.'"[26] Yet, by the end of 1998, military courts had prosecuted only thirty-two soldiers for twenty-one crimes (involving ninety-two civilian victims) committed in 1994.[27] All were prosecuted for ordinary murder, not war crimes

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22. ANDRE SIBOMANA, HOPE FOR RWANDA: CONVERSATIONS WITH LAURE GUILBERT AND HERVE DEGUINE 107 (1999).

23. *See* DES FORGES, *supra* note 3, at 732–33. As Des Forges pointed out, "Revenge killings by soldiers—or other crimes of passion—as well as the unintentional killing of civilians in combat situations could never account for the thousands of persons killed by the RPF between April and late July 1994." *Id.* at 734.

24. *See* FIDH, *supra* note 16, at 16.

25. President Paul Kagame, *Preface to* AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND xxiii (Phil Clark & Zachary D. Kaufman eds., 2008).

26. FIDH, *supra* note 16, at 16; *see also* Martin Ngoga, *The Institutionalisation of Impunity: A Judicial Perspective on the Rwandan Genocide*, *in* AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND, *supra* note 25, at 331; *Rwanda Denies Rebels Escaped Justice over Genocide*, AFRICA TIMES NEWS, June 3, 2009, http://www.africa-times-news.com/2009/06/rwanda-denies-rebels-escaped-justice-over-genocide (quoting the Minister of Justice).

27. *Law and Reality*, *supra* note 21, at 103. Eleven of these suspects were never brought to trial and another three trials ended without any judgment. *Id.*; *see also* DES

or crimes against humanity—even in an infamous case involving the massacre of thirty civilians.[28] Only two were higher-ranking officers: a lieutenant, who was acquitted; and a major, whose original life sentence was reduced to six years on appeal.[29] The longest sentence imposed was six years and the typical sentence ranged from two to four years.[30] In November 2002, Colonel Andrew Rwigamba, then the chief military prosecutor, told Human Rights Watch that there were no open files on 1994 crimes.[31] In fact, there were no prosecutions of 1994 RPF crimes from late 1998 until mid-2008.[32]

The Rwandan government has also refused to allow civilian courts to try RPF crimes. Initially, Rwanda's community courts (*gacaca*) had subject matter jurisdiction over war crimes.[33] This was removed in 2004[34] after some people in pilot *gacaca* proceedings had demanded justice for RPF crimes. At one *gacaca* session that I attended in 2002, two *gacaca* judges pleaded for the court to investigate the arrest and subsequent disappearance of

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FORGES, *supra* note 3, at 733–34 (finding that six of twenty-one RPF soldiers arrested and charged with killing civilians in November 1994 were convicted and given short sentences); FIDH, *supra* note 16, at 64 (providing statistics of RPA soldiers prosecuted for human rights crimes between 1996 and 2000).

28. Human Rights Watch, *supra* note 21, at 104–07.

29. *Id.*

30. *Id.*

31. Interview with Colonel Andrew Rwigamba, then-Military Prosecutor General (*Auditorat Generale*), in Kigali, Rwanda (Nov. 11, 2002) (on file with author). The Author ran Human Rights Watch's field office in Kigali from early 2002 to early 2004.

32. Press Release, Human Rights Watch, Rwanda Tribunal Should Pursue Justice for RPF Crimes (Dec. 12, 2008), *available at* http://www.hrw.org/en/news/2008/12/12/rwanda-tribunal-should-pursue-justice-rpf-crimes.

33. *See* Organic Law No. 40/2000 art. 1, Official Gazette of the Republic of Rwanda, Mar. 15, 2001. A copy of the original law is electronically available on the National Service of Gacaca Jurisdictions' website at http://www.inkiko-gacaca.gov.rw/pdf/Law.pdf. For critical appraisals of *gacaca*, see Bert Ingelaere, *The Gacaca Courts in Rwanda*, *in* TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 25–59 (Luc Huyse & Mark Salter eds., 2008). *See also* Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 61 (2006); Max Rettig, *Gacaca: Truth, Justice and Reconciliation in Rwanda*, AFR. STUD. REV., Dec. 2008, at 25. For a much more positive assessment, see Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765 (2007).

34. *See* Organic Law No. 16/2004 art. 1, Official Gazette of the Republic of Rwanda, June 19, 2004, *consolidated as amended in* Official Gazette of the Republic of Rwanda, Mar. 1, 2007; *see also* Human Rights Watch, *supra* note 21, at 90. An original copy of the 2004 law is also electronically available on the National Service of Gacaca Jurisdictions' website at http://www.inkiko-gacaca.gov.rw/pdf/newlaw1.pdf.

their family member by RPF soldiers in July 1994.[35] The *gacaca* president and local officials told them not to confuse that with genocide and to take their allegations to the local political authorities or military courts.[36] That was not an isolated incident.[37] Rather remarkably, the government agency in charge of *gacaca* acknowledged in 2004, "There are even those who feel marginalized by *gacaca* because they do not judge the common crimes [such as murder and theft] committed during the war, that is between 1990 and 1994, and even those in 1998 in the north of the country [during the counterinsurgency]."[38]

Finally, the government has been unwilling to entertain nonprosecutorial mechanisms for handling RPF crimes, such as a truth commission or commission of inquiry. Even more problematically, the government made few efforts to vet human rights abusers. The most notorious example is Fred Ibingira, who commanded the troops that massacred an estimated 2,000 to 4,000 Hutu displaced persons at the Kibeho camp in April 1995.[39] Ibingira was sentenced to eighteen months in prison for "failing to give assistance to a person in danger."[40] After being released, he reassumed his position and President Kagame promoted him to General in 2004.[41]

B. *ICTR-Rwanda Relations: 1995–2007*

The Rwandan regime has displayed deep mistrust towards international justice. This is partly due to the low regard in which it holds the international community, particularly the United Nations, for failing to prevent or halt the 1994 genocide. More importantly, however, Rwanda is a de facto one-party state that does not share the liberal legalism underpinning international

35. This was a *gacaca* session in Gitarama Province, Rwanda, in July 2002.

36. *Id.*

37. *See, e.g.*, Rettig, *supra* note 33, at 40.

38. Service National des Juridictions Gacaca [National Service of Gacaca Jurisdictions], *Les Problèmes Constates Dans Le Fonctionnement Des Juridictions Gacaca Qui Ont Terminé Leur 7ème Réunion* [*The Problems Identified in the Functioning of the Gacaca Jurisdictions That Have Completed Their Seventh Meeting*] (2004) (Rwanda) (translation provided by Author) (on file with Author).

39. *See* PRUNIER, *supra* note 16, at 38–42.

40. MINISTRY OF DEFENCE, 2 MILITARY LAW REPORTS 306–07 (1999) (Rwanda).

41. Pres. Order No. 35/01, Official Gazette of the Republic of Rwanda, Oct. 1, 2004, at 17.

justice.[42] "For the RPF, the Arusha tribunal's judicial process is a means to seal its military victory over the forces of genocide."[43] The RPF also used the ICTR to discredit and marginalize Hutu democrats who were not tainted by the genocide.[44] Finally, the regime is committed to ensuring there is no international justice for its crimes against humanity and war crimes in Rwanda and the Democratic Republic of Congo.

Rwanda was the only state to vote against the creation of the ICTR, whose mandate permitted RPF prosecutions.[45] Rwanda has not signed the Rome Statute and it has supported American efforts to weaken the International Criminal Court.[46] Recently, Rwanda has led opposition to universal jurisdiction at the African Union ("A.U.").[47] Perhaps, most telling of all, Rwanda blocked the International Court of Justice ("ICJ") from exercising jurisdiction over the Democratic Republic of Congo's ("DRC") claims that Rwanda had committed genocide in the eastern

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42. As Gary Bass observed, "Liberal governments sometimes pursue war crimes trials; illiberal ones never have." GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIME TRIBUNALS 8 (2000). On Rwanda's illiberalism, see Human Rights Watch, *Preparing for Elections: Tightening Controls in the Name of Unity,* May 2003; Chi Mgbako et al., Front Line, *Rwanda: Disappearances, Arrests, Threats, Intimidation and Co-option of Human Rights Defenders 2001–2004,* at 7–30, 2005, *available at* http://www.frontlinedefenders.org/files/en/FrontLineRwandaReport.pdf; Reyntjens, *supra* note 4, at 177, 180–87 (2004).

43. KINGSLEY CHIEDU MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 137 (2005); *see also* Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 BUFF. HUM. RTS. L. REV. 77, 78 (2000) (contending that "[T]he Rwanda tribunal largely masks the illegitimacy of the Tutsi regime and allows Tutsis a moral plane from which to exact their revenge on the Hutus").

44. *See* THIERRY CRUVELLIER, COURT OF REMORSE: INSIDE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 136-153 (Cheri Voss trans., 2010).

45. VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 161–63 (2008).

46. In 2003, Rwanda signed a so-called article 98 agreement with the United States, pledging that it would never hand over U.S. nationals to the ICC. Agreement Between the Government of the United States of America and the Government of the Republic of Rwanda Regarding the Surrender of Persons to International Tribunals, U.S.-Rwanda, Mar. 4, 2003, Temp. State Dep't No. 03-104, 2003 WL 22309220. Former ICTR prosecutor Carla Del Ponte speculates that Rwanda signed an article 98 agreement in return for U.S. support to block ICTR investigations of RPF crimes. CARLA DEL PONTE, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 231 (2008).

47. *See, e.g.*, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, ¶ 5, OAU Doc. Assembly/AU/Dec. 199(XI) (July 1, 2008).

DRC.[48] Rwanda successfully argued that its reservation to Article IX of the Genocide Convention precluded the ICJ from hearing that case. As Judge Rosalyn Higgins and four other judges wrote in their concurring opinion, "It must be regarded as a very grave matter that a state should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide."[49] It is all the more troubling when that state has built its political and moral legitimacy on stopping genocide.

Rwanda's relations with the ICTR have been fraught from the start. Rwanda objected to the tribunal's location (in Tanzania rather than Rwanda), limited temporal jurisdiction (excluding the lead-up to the genocide from 1990 to 1993), primacy over Rwandan national courts, exclusion of civil parties, and refusal to apply the death penalty.[50] Since then, Rwanda has regularly criticized the ICTR's performance and occasionally suspended state cooperation.[51]

The main point of contention between Rwanda and the ICTR has been over RPF crimes. Although the genocide was clearly the impetus for the ICTR's creation, the U.N. Security Council mandated the tribunal to prosecute not only genocide, but also "other serious violations of international humanitarian law."[52] The Security Council's intention that the ICTR prosecute RPF crimes is also clear from the tribunal's temporal jurisdiction,

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48. *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, 33 (Feb. 3).

49. *Id.* at 71 (joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma).

50. *See* PESKIN, *supra* note 45, at 156–67. For examples of President Kagame's ambivalence and opposition to the ICTR, see JOHN SHATTUCK, FREEDOM ON FIRE: HUMAN RIGHTS WARS AND AMERICA'S RESPONSE 51–76 (2003), and David P. Rawson, *Prosecuting Genocide: Founding the International Tribunal for Rwanda*, 33 OHIO N.U. L. REV. 641, 649 (2007).

51. *See, e.g.*, Ngoga, *supra* note 26, at 328–32. For early confrontations between the ICTR and Rwanda, particularly over Frouald Karamira and Jean-Bosco Barayagwiza, see CRUVELLIER, *supra* note 44, at 9–14, 102–14. *See also* PESKIN, *supra* note 45, at 170–85. Peskin convincingly argues that Rwanda's success in these confrontations "created a tribunal dynamic of acquiescence vis-à-vis the Rwandan government . . . [which,] in turn, emboldened the government to strategically withhold cooperation in order to control the court at key junctures . . . ." PESKIN, *supra* note 45, at 170.

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

which extends to December 31, 1994.[53] Rwanda wanted the cut-off date to be mid-July 1994, when the genocide ended.[54] In addition, the U.N. decided to situate the ICTR outside Rwanda "to ensure not only the reality but also the appearance of complete impartiality and objectivity in the prosecution of persons responsible for crimes committed by *both sides* to the conflict."[55] The Security Council reaffirmed its commitment to this with resolutions in 2003 and 2004 that explicitly called on Rwanda "to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army."[56]

Then-ICTR prosecutor Carla Del Ponte met President Kagame in December 2000 to notify him that she was opening investigations into RPF crimes.[57] At a press conference a few days later, she precipitously announced she might have an indictment ready by the end of December 2001.[58] She stated she had requested President Kagame's cooperation, while acknowledging, "Let's be realistic: without cooperation, I'll get nowhere."[59] A year later, cooperation was still not forthcoming.[60]

The confrontation between Rwanda and the ICTR over RPF crimes that had been building finally came to a head in 2002. In January, the main genocide survivors' organization, *Ibuka* (Kinyarwanda for "Remember"), which had been co-opted by the

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53. *Id.*

54. *See* PESKIN, *supra* note 45, at 162. The ICTR's limited temporal jurisdiction also meant that it was not able to prosecute crimes committed after 1994 in Rwanda and Congo by the RPF and *génocidaires*. *Id.*; *see* Luc Reydams, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, 3 J. INT'L CRIM. JUST. 977, 980 (2005). This contrasts sharply with the ICTY's open-ended jurisdiction, which enabled that Tribunal to prosecute crimes committed in Kosovo.

55. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 5 of the Security Council Resolution 955*, ¶ 40, U.N. Doc., S/1995/134 (Feb. 13, 1995) (emphasis added).

56. S.C. Res. 1534, ¶ 2, U.N. Doc. S/RES/1534 (Mar. 26, 2004); S.C. Res. 1503, ¶ 3, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

57. DEL PONTE, *supra* note 46, at 184. In fact, these investigations had been initiated by Louise Arbour, Del Ponte's predecessor, at the end of her term. CRUVELLIER, *supra* note 44, at 160.

58. DEL PONTE, *supra* note 46, at 185. She claims she made this public statement to prevent President Kagame from "backtrack[ing]" on his pledge of cooperation. *Id.*

59. *Id.*

60. *Id.* at 186–87, 191; *see* MOGHALU, *supra* note 43, at 139 (speculating that Kagame may have faced a coup from hardliners in his military if he had cooperated with Del Ponte).

RPF in 2000,[61] called on genocide survivors to boycott the tribunal.[62] In April, Del Ponte publicly criticized Rwanda for lack of cooperation with the so-called "special investigations" and promised to hand down RPF indictments by the end of the year.[63] When Ibuka's boycott failed to slow the trials, the Rwandan government was forced to show its hand. In June 2002, it imposed burdensome travel restrictions that prevented prosecution witnesses from going to Arusha to testify.[64] This had the desired effect: three trials were adjourned for lack of witnesses.[65] Kigali's action seemed to prove Louise Arbour's prediction: "How could we investigate and prosecute the RPF while we [the prosecutor's investigators] were based in that country? It was never going to happen. They would shut us down."[66] More remarkably, the RPF decided to shut down

61. Antoine Mugesera, a member of the RPF's central committee, was appointed president of Ibuka in 2000, the same year that several Tutsi survivors critical of the RPF's policies were effectively neutralized. *See* Human Rights Watch, *The Search for Security and Human Rights Abuses*, at 10–11 (Apr. 1, 2000), *available at* http://www.hrw.org/legacy/reports/2000/rwanda; Int'l Crisis Group, *Rwanda at the End of the Transition: A Necessary Political Liberalisation*, at 12–13, Africa Report No. 53 (Nov. 13, 2002), *available at* http://www.crisisgroup.org/~/media/files/africa/central-africa/rwanda/rwanda%20at%20the%20end%20of%20the%20transition%20a%20necessary%20political%20liberalisation.ashx; Reyntjens, *supra* note 4, at 181.

62. *See Genocide Survivors Halt Cooperation with UN Tribunal*, U.N. WIRE, January 29, 2002, http://www.unwire.org/unwire/20020129/23361_story.asp; *More Witnesses Boycott UN Tribunal for Rwanda*, HIRONDELLE NEWS AGENCY, April 8, 2002, http://www.hirondellenews.com/content/view/7834/26; *see also* Letter from Antoine Mugesera, President, Ibuka, and Dancilla Mukandoli, President, Avega, to the ICTR Registrar (Mar. 6, 2002), and appendices (on file with author).

63. Chris McGreal, *Genocide Tribunal Ready to Indict First Tutsis: Rwanda is Blocking Investigations of Former Rebels Despite Pledges, Prosecutor Says*, GUARDIAN (London), Apr. 5, 2002, at 16.

64. *See* Erik Møse, *Main Achievements of the ICTR*, 3 INT'L J. CRIM. JUST. 920, 939 (2005).

65. *See* FIDH, *supra* note 16, at 5. Former ICTR President Erik Møse estimates that this cost the Tribunal twenty-one trial days. Møse, *supra* note 63, at 939. Peskin faults the judges for adjourning trials and thereby passing up "a critical opportunity to expose Rwandan non-compliance." PESKIN, *supra* note 45, at 215. Rwanda also refused to provide access to documents needed by the prosecution. In June, survivors' organizations, with government encouragement, staged a demonstration of several thousand protesters in front of the ICTR's Kigali offices. Arnaud Grellier et al., *Kigali-TPIR: Le Bras de Fer* [ICTR: The Showdown], June 28, 2002, http://www.rnw.nl/international-justice/node/31255.

66. CAROL OFF, THE LION, THE FOX AND THE EAGLE: A STORY OF GENERALS AND JUSTICE IN YUGOSLAVIA AND RWANDA 331 (2000).

genocide trials to ensure there would be no RPF trials, "effectively blackmailing" the tribunal.[67]

The prosecutor informed the Security Council in July that Rwanda had prevented witnesses from traveling to the tribunal as a way of pressuring her to halt the special investigations. She stated, "Currently, there is no genuine political will on the part of the Rwandan Authorities to provide assistance in an area of work that they interpret to be political in nature, when, obviously, the prosecutor limits herself to the technical implementation of her judicial mandate."[68]

In response, the Rwandan government "counter-sham[ed]" the tribunal for corruption, incompetence, and maltreatment of witnesses, suggesting that those failings justified Rwanda's noncompliance.[69] "To thwart Del Ponte, the Rwandan government . . . cast the ICTR as yet another betrayal by the UN and the international community."[70] Rwanda also staunchly opposed prosecutions of RPF crimes:

> The Government of Rwanda believes that politically motivated pursuit of members of the RPA by the ICTR is not conducive to stability and national reconciliation in Rwanda. The Prosecutor has confessed to the Government of Rwanda that she has to pursue indictments against the RPA because she is under pressure from some states to do so. It would appear that the proposed indictments of the RPA are merely intended to appease advocates of a so-called 'ethnically balanced justice' and proponents of revisionism.[71]

The prosecutor made another appeal for Security Council action in her annual address in October 2002: "No State can place itself

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67. DEL PONTE, *supra* note 46, at 224.

68. *Id.* at 227. Del Ponte's statement underscores the absurdity of trying to divorce law and politics when it comes to international justice. *See id.*

69. PESKIN, *supra* note 45, at 152.

70. *Id.* Peskin argues that "Del Ponte's greatest mistake was in not doing more to build international support for her investigations or to insulate the prosecutor's office from Rwanda's predictable counter-shaming offensive." *Id.* at 224. While Del Ponte played a difficult hand badly, I am not convinced that she would have had much success in building international support for RPF investigations. There was simply no political will to confront Rwanda over the issue.

71. *Reply of the Government of Rwanda to the Report of the Prosecutor of the International Criminal Tribunal for Rwanda to the Security Council*, at 5, U.N. Doc. S/2002/842 (July 26, 2002).

above its international obligations, and co-operation, even on sensitive issues, must be unconditional."[72]

It took nearly a year for the Security Council to finally weigh in with a tepid reminder that Rwanda had a legal obligation to cooperate with the tribunal.[73] That made it clear that Rwanda had the upper hand.[74] By that point, Del Ponte had already put the special investigations on hold and Rwanda had allowed the flow of prosecution witnesses to resume.[75] The Security Council's failure to respond more forcefully underscored its weak institutional commitment to international justice. As Ralph Zacklin, the U.N. Assistant Secretary General for Legal Affairs, pointed out: "The reality is that the ICTY and the [ICTR] were established more as acts of political contrition, because of egregious failures to swiftly confront the situations in the former Yugoslavia and Rwanda, than as part of a deliberate policy [of] promoting international justice."[76] It is no surprise, then, that the response to Rwanda's contumacious behavior was political rather than principled. Of the Security Council's permanent five, the United States, the United Kingdom, and China have strong economic and political investments in Rwanda,[77] while China and Russia are not strong supporters of international justice.

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72. Press Release, Int'l Criminal Tribunal for the Former Yugo. [ICTY], Address by the Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Mrs. Carla del Ponte, to the United Nations Security Council, ICTY Doc. JJJ/P.I.S./709-e (Oct. 30, 2002), *available at* http://www.icty.org/sid/8056.

73. *See* S.C. Res. 1503, ¶ 3, U.N. Doc. S/RES/1503 (Aug. 28, 2003); DEL PONTE, *supra* note 46, at 229; *see also* Statute for the International Criminal Tribunal for Rwanda art. 28(1), Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute] ("States shall cooperate with the [ICTR] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.").

74. *See* PESKIN, *supra* note 45, at 216–17.

75. Cruvellier and Peskin state that Del Ponte suspended the special investigations. CRUVELLIER, *supra* note 44, at 161; PESKIN, *supra* note 45, at 219. In her memoirs, Del Ponte denies this, stating that the suspension was a rumor spread by the Rwandan government after she withdrew her investigators from Kigali. DEL PONTE, *supra* note 46, at 229. Whether officially suspended or not, the special investigations certainly seemed to be put on ice.

76. Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 542 (2004).

77. *See generally* U.S. AGENCY FOR INT'L DEV., USAID/RWANDA INTEGRATED STRATEGIC PLAN 2004–2009: VOL. 1 (2004), *available at* http://www.usa*id*.gov/rw/our_work/for_partners/usaidrwandaintegratedstrategicplan2004-2009.pdf (outlining U.S. commitment to Rwanda); Dep't for Int'l Dev., Rwanda: Country Assistance Plan 2003–2006 (2004) (U.K.), *available at* http://www.df*id*.gov.uk/pubs/files/cap_rwanda.pdf (laying out U.K. commitment to Rwanda); Bosco Hitimana, *China,*

On May 15, 2003, then-U.S. Ambassador-at-Large for War Crimes Pierre-Richard Prosper tried to broker a deal between Rwanda and the ICTR.[78] That agreement would have given Rwanda the first shot at trying RPF soldiers, while allowing the ICTR to reassert jurisdiction if the proceedings proved to be flawed.[79] Del Ponte argues she never made a verbal agreement, while others claim she did but later balked when it came to signing Prosper's faxed memorial.[80] As Del Ponte recalls:

> The key sentence . . . was this: "The [Office of the Prosecutor] will not seek an indictment or otherwise bring a case before the [tribunal] unless it is determined that the [Rwandan government's] investigation or prosecution was not genuine." This sentence is vague, unskillfully vague. Who is to make this determination? Upon what criteria? What is the definition of genuine? In my opinion, this sentence would have presented Rwanda with an opening to kill the Special Investigation and every other effort the tribunal might take to exercise its primacy and independence.[81]

The collapse of the negotiations sparked efforts to remove Del Ponte as ICTR prosecutor.[82] According to Del Ponte, the United States and the United Kingdom spearheaded her removal at the behest of Rwanda because of her determination to follow

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Rwanda Vow to Boost Trade Relations, EAST AFRICAN BUSINESS WEEK (Kampala), Jan. 19, 2009, *available at* http://allafrica.com/stories/200901191385.html (describing China's commitment to Rwanda).

78. *See* MOGHALU, *supra* note 43, at 144–48.

79. *See id.* For Del Ponte's version of the meeting, see DEL PONTE, *supra* note 46, at 231. It is somewhat ironic that the U.S. Ambassador was pushing the ICC model of complementarity given U.S. opposition to the ICC.

80. *Compare* DEL PONTE, *supra* note 46, at 233, *with* CRUVELLIER, *supra* note 44, at 162. *See also* Pierre Prosper, Remarks at the International Symposium on the International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of Stakeholders, Session 2: The Prosecutions 28 (July 9, 2009) (transcript available at http://www.unictr.org/portals/0/english/news/events/july2009/session2.pdf).

81. DEL PONTE, *supra* note 46, at 234. The "genuine" language here mirrors that found in Article 17 of the ICC Statute. *See* discussion *infra* note 234.

82. DEL PONTE, *supra* note 46, at 234; *see also* Marlise Simons, *Rwanda is Said to Seek New Prosecutor for War Crimes Court*, N.Y. TIMES, July 28, 2003, at A2.

through on RPF prosecutions.[83] Whether correct or not, it certainly had that appearance.[84]

What also hastened Del Ponte's departure was the Security Council's imposition of a "completion strategy" on the ICTR in August 2003.[85] The U.N. and the tribunal's donors had begun to fear that the ad hoc tribunals would become ad infinitum unless they were given a firm deadline to finish their work. As the former U.S. Ambassador-at-Large for War Crimes recalled: "We in the United States and other governments, everyone kept raising that question, 'This is expensive. This is expensive.'"[86] The completion strategy set the deadlines as 2004 for investigations, 2008 for trials, and 2010 for appeals.[87] To meet those deadlines, the Security Council urged the ICTR "to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including

83. DEL PONTE, *supra* note 46, at 234–39; *see also* MOGHALU, *supra* note 43, at 134–36.

84. *See* PESKIN, *supra* note 45, at 220–22. Cruvellier attributes Del Ponte's replacement to her unrealistic plans to prosecute sizable numbers of genocide suspects at a time when the United Kingdom, the United Nations, and the United States were eager to impose a completion strategy. Interview with Thierry Cruvellier, Geneva, Switz. (July 10, 2009); *see also* MOGHALU, *supra* note 43, at 133 (observing that Del Ponte was "initially politically tone-deaf" about the completion strategy).

85. *See* S.C. Res. 1503, S/RES/1503 (Aug. 28, 2003). The ICTY had formulated the basic principles of its completion strategy by mid-2002. *See* Press Release, ICTY, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, ICTY Doc. JDH/P.I.S./690-e (July 26, 2002) (calling for "prosecution and trial of the highest-ranking political, military, paramilitary, and civilian leaders and [the referral of] certain cases to national courts."). For early discussions of the completion strategy, see Laura Bingham, *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 24 BERKELEY J. INT'L L. 687 (2006) (reviewing early discussions of the completion strategy), and Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142 (2005) (assessing the early wisdom of the completion strategies of the ICTR and ICTY).

86. Pierre Prosper, Remarks at the International Symposium on the International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of Stakeholders, Session 5: Debates with Prosecutors 26 (July 11, 2009) (transcript available at http://www.unictr.org/portals/0/english/news/events/july2009/session5.pdf) [hereinafter Debates with Prosecutors]. Writing in 2004, the U.N.'s Assistant Secretary-General for Legal Affairs bluntly stated: "The ad hoc Tribunals have been too costly, too inefficient and too ineffective . . . . [T]hey exemplify an approach that is no longer politically or financially viable." Zacklin, *supra* note 76, at 545.

87. S.C. Res. 1503, *supra* note 85. The deadline for the completion of trials has since been extended to the end of 2010. *See* S.C. Res 1878, ¶¶ 3–6, U.N. Doc. S/RES/1878 (July, 7. 2009).

Rwanda."[88] The resolution also created a separate ICTR prosecutor.[89] This was not simply an effort to remove Del Ponte: there were long-standing and justifiable concerns that she and her predecessors had focused on the Yugoslav cases at the expense of the Rwanda ones. Finally, the Security Council reaffirmed Rwanda's obligation "to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army."[90]

The completion strategy made clear that international criminal justice is inherently political. Del Ponte stated that the strategy "was behind the political pressure that we have acted on."[91] It also underscored the limits of the ICTR's independence. As the ICTR's former deputy prosecutor caustically remarked:

> I don't think what the Tribunals were asked to do was to complete their work. They said: 'Enough is enough. We the politicians say you have to stop sometime.' . . . I think we should get out of the illusion that we're independent in the sense of deciding whether justice has been done or not. We probably are only independent when we are . . . doing the cases. But in the final analysis, the political authority tells us when to start, finances us, and tells us when to stop, and if we don't stop, they cut off the finances and we have nothing to do with it.[92]

Thus, the ICTR prosecutor was caught between the Security Council's politics of completion and Rwanda's politics of (non)cooperation.

When Gambian Judge Hassan Bubacar Jallow took over as prosecutor in 2003, he knew Rwanda had successfully halted the special investigations and had successfully lobbied for his predecessor's ouster.[93] Where Del Ponte was mercurial and attention seeking, Jallow has been reserved and diplomatic. As the tribunal approached its completion date, Jallow kept people guessing about his intentions.[94] When he finally showed his hand

88. S.C. Res. 1503, *supra* note 85.
89. *Id.*
90. *Id.*
91. Carla Del Ponte, Remarks at Debates with Prosecutors, *supra* note 86, at 20.
92. Bernard Muna, Remarks at Debates with Prosecutors, *supra* note 86, at 27–28.
93. Reydams, *supra* note 54, at 978–79.
94. *See id.* at 985–86 (arguing that the prosecutor had already demonstrated bias).

in 2008, it turned out to be the 2003 Pierre-Richard Prosper plan redux.

II. *"AGREEMENT" FOR A DOMESTIC RPF TRIAL*

A. *Impetus for the Deal*

So why did the prosecutor and Rwanda not simply let the clock run out on the possibility of RPF prosecutions? There was certainly no pressure from the U.N. or from the United States and United Kingdom, which are the largest state donors to both the ICTR and Rwanda. Persistent "naming and shaming" from human rights NGOs, particularly Human Rights Watch, had made little headway. What put RPF prosecutions back on the agenda were Rwanda's attempts to transfer genocide suspects from the ICTR and national jurisdictions to stand trial in Rwanda, along with French and Spanish indictments of the RPF.

1. Transfers of Genocide Suspects

As part of its completion strategy, the ICTR has sought to transfer cases involving "smaller fish" to national jurisdictions for investigation and trial. It has had only limited success because some states lack universal jurisdiction statutes, while others have not incorporated genocide into their domestic criminal code.[95] Still other states are reluctant to go to the expense of prosecuting suspects with tangential or non-existent links to that jurisdiction. So far, the only willing Western states have been Belgium, France, and Canada—states with historical links to Rwanda and/or sizable Rwandan émigré communities.[96]

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95. The ICTR prosecutor's attempts to refer the *Bagaragaza* case to Norway, and then the Netherlands, foundered because domestic courts in both states lacked subject matter jurisdiction over genocide. *See* Prosecutor v. Michel Bagaragaza, Case No. ICTR 2005-86-11*bis*, Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11*bis* (F) & (G) (Aug. 17, 2007); Prosecutor v. Michel Bagaragaza, Case No. ICTR 05-86-AR11*bis*, Decision on Rule 11*bis* Appeal (Aug. 30, 2006); *see also* Alhaqi Marong, *The ICTR Transfers Michel Bagaragaza to the Netherlands for Trial*, ASIL INSIGHTS (Am. Soc'y. Int'l L, Wash., D.C.), June 18, 2007, http://www.asil.org/insights070618.cfm.

96. No African states, other than Rwanda, have expressed interest in genocide referrals from the ICTR. Author's notes from speech by Hassan B. Jallow, Commonwealth Secretariat, London, Jun. 25, 2010. *See* Erik Møse, *The ICTR's Completion Strategy—Challenges and Possible Solutions*, 6 J. INT'L CRIMINAL JUSTICE, 667, 673–74 (2008).

Not surprisingly, the state with the keenest interest in taking transfer cases was Rwanda. In an effort to make that happen, the Rwandan government abolished the death penalty,[97] made judicial reforms,[98] created new prison and detention facilities for transferred suspects,[99] and enacted a new law governing transfers.[100] Rwandan officials may also have decided to try an RPF case to demonstrate their justice system was robust enough to handle transfers.[101]

To the Rwandan government's chagrin, the designated trial chambers and appeals chamber ended up rejecting all five of the prosecutor's motions for referral.[102] Although the judges acknowledged significant improvements in Rwanda's justice sector, they held that transferred suspects could not be guaranteed a fair trial, largely because defense witnesses might not testify for fear of being arrested under Rwanda's sweeping law against "genocide ideology."[103] The judges also found that

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97. Organic Law No. 31/2007, Official Gazette of the Republic of Rwanda (special ed.), July 25, 2007. A copy of the law is electronically available at http://www.unhcr.org/refworld/docid/46bada1c2.html.

98. *See generally* Human Rights Watch, *supra* note 21.

99. *See* Willy Mugenzi, *Mpanga Prison Ready for ICTR Transfers, Says Mutaboba*, NEW TIMES (Kigali), Mar. 27, 2007, http://allafrica.com/stories/200703270457.html.

100. Organic Law No. 11/2007, Official Gazette of the Republic of Rwanda (special ed.), Mar. 19, 2007. A copy of the law is electronically available at http://www.adh-geneva.ch/RULAC/pdf_state/Organic-Law-11-2007-Transfer-ICTR-Other-Cases-to-Rwanda.pdf.

101. Possibly, there was a *quid pro quo* in which the Rwandan government agreed to prosecute an RPF case in exchange for the prosecutor's efforts to transfer genocide cases to Rwanda.

102. *See* Prosecutor v. Kayishema, ICTR Case No. ICTR 01-67-R11*bis*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (Dec. 16, 2008); Prosecutor v. Hategekimana, Case No. ICTR 00-55B-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis* (Dec. 4, 2008); Prosecutor v. Gatete, Case No. ICTR 2000-61-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Nov. 17, 2008); Prosecutor v. Kanyarukiga, Case No. ICTR 2002-78-R11*bis*, Decision on Prosecutor's Appeal against Decision on Referral Under Rule 11*bis* (Oct. 30, 2008); Prosecutor v. Munyakazi, Case No. ICTR 97-36-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis* (Oct. 8, 2008); *see also* Phil Clark & Nicola Palmer, *The International Community Fails Rwanda Again* 1 (Oxford Transitional Justice Research Working Paper Series, 2009), *available at* http://www.csls.ox.ac.uk/documents/ClarkandPalmer_Rwanda_Final.pdf (critiquing this group of ICTR decisions).

103. *See, e.g.*, *Kanyarukiga*, Decision on Prosecutor's Appeal Against Decision on Referral Under Rule 11*bis*, ¶¶ 23–35; *see also* Law No. 18/2008, Official Gazette of the Republic of Rwanda, Oct. 15, 2008; Article 19, *Comment on the Law Relating to the Punishment of the Crime of Genocide Ideology of Rwanda*, Sept. 2009, *available at*

transferred suspects were at risk of prolonged solitary confinement if convicted and sentenced to life imprisonment.[104] In the wake of those rulings, Rwanda has carved out an exemption to the "genocide ideology" law for trial testimony, clarified its sentencing law, and made some improvements to witness protection for defense witnesses.[105] The ICTR prosecutor has expressed his intention to file new motions for the referral of eight cases in September 2010.[106]

Rwanda has also sought the extradition of genocide suspects from several European jurisdictions.[107] The United Kingdom arrested four genocide suspects in December 2006 pursuant to

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http://www.article19.org/pdfs/analysis/rwanda-comment-on-the-law-relating-to-the-punishment-of-the-crime-of-genocid.pdf; Lars Waldorf, *Revisiting Hotel Rwanda: Genocide Ideology, Reconciliation, and Rescuers*, 11 J. GENOCIDE RES. 101, 101–25 (2009) (describing how Rwanda's overly broad and vague law on "genocide ideology" has hampered its efforts to get genocide suspects transferred and extradited to Rwanda); Amnesty Int'l, *Easier to Remain Silent* (forthcoming 2010). A copy of the law cited above is also electronically available at http://www.unhcr.org/refworld/docid/4acc9a4e2.html.

104. *See, e.g.*, *Kanyarukiga*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11*bis*, ¶¶ 7, 12.

105. *See* U.N. SCOR, 64th Sess., 6134th mtg. at 12, U.N. Doc. S/PV.6134 (June 4, 2009) ("[T]he Government of Rwanda . . . has enacted [] additional legislation to meet the remaining concerns of the Appeals Chamber in relation to the protection of witnesses and the recording of testimony of witnesses who may be reluctant to travel to Rwanda to testify. Once the law comes into force and the capacity is established for witness protection and video link facilities, my Office will again consider making further applications before the Trial Chambers in the course of this year for the referral of cases of ICTR indictees to Rwanda for trial."). The ICTR prosecutor also described changes made to laws and practices to meet the appeals chamber's concerns over transfers. *See id.* at 31–32; *see also* Organic Law 3/2009, Official Gazette of the Republic of Rwanda (special ed.), May 26, 2009, at 3 (amending Organic Law No. 11/2007 concerning the transfer of cases to Rwanda from the ICTR).

106. Author's notes from speech by Hassan B. Jallow, Commonwealth Secretariat, London (June 25, 2010); *see also* Hassan B. Jallow, Chief Prosecutor, ICTR, Statement to the United Nations Security Council 2 (Dec. 3, 2009), *available at* http://www.unictr.org/tabid/155/default.aspx?id=1035; Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 43–44; Press Release, ICTR, More Prosecution's Case Files Transferred to Rwanda, ICTR Doc. ICTR/INFO-9-2-639.EN (Jun. 8, 2010).

107. *See generally* REDRESS & African Rights Conference on the Extradition of Rwandese Genocide Suspects to Rwanda, July 1, 2008, Brussels, Belgium, *Extraditing Genocide Suspects from Europe to Rwanda: Issues and Challenges* (Sept. 2008), *available at* http://www.redress.org/downloads/country-reports/Extradition_Report_Final_Version_Sept_08.pdf.

Rwandan arrest warrants and a special extradition agreement.[108] The key issue in the extradition proceedings, as in the ICTR referral motions, was whether the suspects would be assured a fair trial in Rwanda. The District Judge sitting in the Westminster Magistrates' Court ruled that the suspects could get a fair trial and ordered their extradition.[109] That ruling was overturned on appeal. The High Court of Justice, following the ICTR decisions, held the suspects "would suffer a real risk of a flagrant denial of justice by reason of their likely inability to adduce the evidence of supporting witnesses."[110] The High Court also went further than the ICTR decisions: it expressed serious doubts about the Rwandan judiciary's impartiality and independence.[111] Courts in France, Germany, and Finland have also refused to extradite genocide suspects to Rwanda, citing fair trial concerns.[112] The one exception so far has been Sweden, which granted an extradition request in 2009.[113]

2. The French and Spanish Indictments

The other source of pressure on Rwanda to try RPF crimes came from the French and Spanish arrest warrants for high-ranking RPF officers. In November 2006, Judge Jean-Louis Bruguière, one of France's most prominent investigating magistrates, accused President Kagame and several top-ranking RPF officers of shooting down former President Juvenal

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108. *See* Mark A. Drumbl, *Prosecution of Genocide v. The Fair Trial Principle: Comments on* Brown and Others v. The Government of Rwanda and the UK Secretary of State for the Home Department, 8 J. INT'L CRIM. JUST. 289, 289–90 (2010).

109. *See* Government of the Republic of Rwanda v. Bajinya & Others (Mag., June 6, 2008), *available at* http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/rwandan4decision.pdf.

110. Brown (Bajinya) & Others v. Government of Rwanda & Others, [2009] EWHC 770 (Admin), [66] (appeal from the City of Westminster Magistrates Court).

111. *Id.* [121].

112. *See id.* [47]; *see also Finland Charges Rwandan Suspect*, BBC NEWS, June 1, 2009, http://news.bbc.co.uk/2/hi/8077441.stm.

113. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2009-05-26 p. 280 (Swed.), *available at* http://www.hogstadomstolen.se/domstolar/hogstadomstolen/avgoranden/2009/2009-05-26%20%c3%96%201082-09%20beslut.pdf; MINISTRY OF JUSTICE, GOVERNMENT DECISION: EXTRADITION TO RWANDA, Doc. JuBC2008/2175/BIRS (July 9, 2009) (Swed.) (on file with Author). The extradition has been suspended pending a review by the European Court of Human Rights. *Sweden Stops Extradition of Rwanda Genocide Suspect*, AFP, July 16, 2009, http://www.google.com/hostednews/afp/article/ALeqM5i-2X4PpngZoIZJiLHB2xoh_bDemQ.

Habyarimana's plane—the act that triggered the genocide, but which successive ICTR prosecutors have refused to pursue.[114] France had jurisdiction over the case because the pilots killed in the crash were both French. Bruguière issued arrest warrants for all the suspects except Kagame, who holds immunity as head of state.[115] He also called on the ICTR to prosecute Kagame.[116] The Rwandan government reacted fiercely; it denounced the indictments as political, reminded the world of France's role in the genocide, expelled the French diplomatic community, and set up a commission that investigated France's role during the genocide. Rwanda also asked the ICJ to find that France had violated its sovereignty and diplomatic immunities.[117] The French indictment is problematic in that it relies heavily on testimony from former RPF soldiers, the most prominent of which has since recanted.[118] Interestingly, the Rwandan government decided to

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114. Prosecutor Jallow recently explained why the ICTR has not investigated the plane crash:

> All the Prosecutors I believe have taken a similar position with regard to the shooting down of the aircraft, and this is that it is not a matter which falls within the mandate of the ICTR. We are mandated to prosecute on the three specific offences: Genocide, war crimes, and crimes against humanity. And that particular incident does not fall or fit within any of those three offences.

Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 12; DEL PONTE, *supra* note 46, at 180 (giving a similar rationale as to why she and Louise Arbour did not prosecute the plane crash); *see also* Peter Robinson & Golriz Ghahraman, *Can Rwandan President Kagame be Held Responsible at the ICTR for the Killing of President Habyarimana?* 6 J. INT'L CRIM. JUST. 981, 994 (2008) (arguing against ICTR prosecution despite concluding it may have been a war crime). *But see* Leila Sadat, *Transjudicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity*, 22 LEIDEN J. INT'L L. 543, 550 (2009) (contending that the shooting down of the plane could be a crime against humanity or complicity in genocide). Sadat also argues that "the ICTR could have served as a more neutral forum to mediate the dispute" over the downing of the plane. *Id.* at 550. However, this ignores the politics of state cooperation: Rwanda simply would not have permitted the ICTR to try that case.

115. *See* Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 17, 2006, Delivrance de mandats d'arrêt internationaux par le Juge Jean-Louis Bruguière [Deliverance of International Arrest Warrants by Judge Jean-Louis Bruguière], Nov. 17, 2006.

116. *See id.* at 61–62.

117. Press Release, Int'l Court of Justice, The Republic of Rwanda Applies to the International Court of Justice in a Dispute with France (Apr. 18, 2007), *available at* http://www.icj-cij.org/presscom/index.php?pr=1909&p1=6&p2=1. Unsurprisingly, France did not consent to International Court of Justice jurisdiction in that case.

118. *Compare* LT. ABDUL JOSHUA RUZIBIZA, RWANDA: L'HISTOIRE SECRÉTE [RWANDA: THE SECRET HISTORY] 237–41 (Édition du Panama 2005) (accusing the RPF of shooting down Habyarimana's plane), *with Key Witness in Kabuye Trial Retracts Testimony*, RADIO

challenge the French indictment head on by offering up one of the accused, Major Rose Kabuye, for trial in France.[119]

While it was relatively easy to dismiss the French arrest warrants as politically motivated given the troubled history between France and Rwanda,[120] it was more difficult to ignore the Spanish warrant. In February 2008, a Spanish investigating judge issued a lengthy indictment against forty senior RPF military officers.[121] While the indictment names President Kagame, it rules out arrest while he remains head of state. The investigation was initially based on the deaths of nine Spaniards but the indictment goes well beyond that to assert universal jurisdiction over a range of crimes (including allegations of genocide) committed against Hutu in Rwanda and the Democratic Republic of Congo between 1990 and 2002.[122]

The Rwandan government lambasted the Spanish indictment:

> Judge Fernando Andreu Merelles has never been to either Rwanda or the Democratic Republic of Congo to conduct investigations; has never interviewed the alleged suspects in the alleged crimes; has never liaised with judicial authorities in either of the two countries. He just sat in Madrid; listened to well-known detractors of Rwanda and based on their falsehoods, which he never tried to crosscheck, just went ahead and issued indictments . . . . Universal jurisdiction is

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FRANCE INT'L., Nov. 19, 2008 (recanting earlier accusations), http://www.rfi.fr/actuen/articles/107/article_2190.asp.

119. Chris McGreal, *Top Aide to Rwandan President Agrees to Stand Trial in France over Genocide Claims: Detained Officer Welcomes Chance to Clear Her Name: Indictment Accused Nine of Killing Hutu Leader*, GUARDIAN (London), Nov. 11, 2008, at 16; *Rwandan Returns for French Trial*, BBC NEWS, Jan. 9, 2009, http://news.bbc.co.uk/2/hi/africa/7819679.stm. It remains to be seen how the trial will progress in light of the recent rapprochement between France and Rwanda. *See Rwanda and France Restore Diplomatic Relations*, BBC NEWS, Nov. 30, 2009, http://news.bbc.co.uk/2/hi/africa/8385887.stm.

120. *See* DANIELA KROSLAK, THE ROLE OF FRANCE IN THE RWANDAN GENOCIDE (2007); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 281–99, 337–41 (2d ed. 1999); ANDREW WALLIS, SILENT ACCOMPLICE: THE UNTOLD STORY OF FRANCE'S ROLE IN THE RWANDAN GENOCIDE (2006).

121. SAN, Feb. 6, 2008, Juzgado Central de instrucción no. 4: Auto [Central Criminal Court No. 4: Preliminary Investigation] [hereinafter Spanish Indictment], *available at* http://www.veritasrwandaforum.org/dosier/resol_auto_esp_06022008.pdf. For a description of the indictment, see Commentary, *The Spanish Indictment of High-Ranking Rwandan Officials*, 6 J. INT'L CRIM. JUST. 1003, 1004–06 (2008), and Human Rights Watch, *supra* note 21, at 92–93 (2008).

122. Spanish Indictment, *supra* note 121, at 2–10, 146–47.

> not a license for any judge or other judicial officers to violate the basic principles of judicial conduct . . . .[123]

The Rwandan Minister of Justice went further, "The fact that Spanish courts have universal jurisdiction to try certain offences committed outside their territory does not give the judge the right to publish a racist, negationist, and fraudulent document to violate another country's sovereignty."[124] He also threatened that Rwanda would sue the Spanish judge as it had done to the French judge.[125] In addition, Rwanda spearheaded a campaign against universal jurisdiction at the African Union.[126] As a result, the African Union's Assembly criticized universal jurisdiction in a 2008 decision: "The political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States . . . ."[127] The Assembly also resolved that A.U. member states would not enforce arrest warrants issued under universal jurisdiction.[128]

These two indictments may well have increased pressure on both the ICTR prosecutor and the Rwandan government to be seen to act on RPF crimes. In particular, the Spanish arrest warrant named Wilson Gumisiriza, one of the two commanding officers in the clergy massacre that had been a primary focus of the ICTR's special investigations. By finally trying Gumisiriza and three other officers for that massacre, the Rwandan government

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123. MINISTRY OF FOREIGN AFFAIRS AND COOPERATION, COMMUNIQUE: RWANDA GOVERNMENT REACTION TO THE SPANISH JUDGE INDICTMENTS (2008) (emphasis omitted), *available at* http://www.rwandaembassy-japan.org/en/themes/rwanda/rwanda_images/whatsnew/Communique.pdf.

124. James Munyaneza, *Govt Dismisses Spanish Judge's Indictments*, NEW TIMES (Kigali), Feb. 9, 2008, http://www.newtimes.co.rw/index.php?issue=13435&article=4069 (quoting the Minister of Justice).

125. Felly Kimenyi, *Rwanda Ponders Suing Spanish Judge Merelles*, NEW TIMES (Kigali), May 1, 2008, http://www.newtimes.co.rw/index.php?issue=13517&article=5992 (quoting the Minister of Justice).

126. *See Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, *supra* note 47, ¶ 1.

127. *Id.* ¶ 5(ii).

128. *Id.* ¶ 5(iv). The difficulties faced by universal jurisdiction in Africa are exemplified by Senegal's reluctance to try former Chadian dictator, Hissène Habré. *See* Reed Brody, *The Prosecution of Hissène Habré: International Accountability, National Impunity*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 278, 278–300 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); Human Rights Watch, The Case Against Hissène Habré, an "African Pinochet," http://www.hrw.org/en/habre-case (last visited Mar. 2, 2010).

bolstered its argument that the French and Spanish arrest warrants were the latest manifestation of Western neo-colonialism toward Africa. It also strengthened Rwanda's case in the Spanish courts as those courts cannot exercise universal jurisdiction where the state involved has effectively investigated and prosecuted the case itself.[129]

B. *ICTR-Rwanda Agreement*

On June 4, 2008, the ICTR prosecutor informed the U.N. Security Council that Rwanda would prosecute the clergy massacre that his office had investigated. He assured the Security Council that the decision was made "on the clear understanding that any such prosecutions in and by Rwanda should be effective, expeditious, fair and open to the public."[130] He also pledged that his office would monitor the Rwandan proceedings and reassert its primacy if the proceedings proved to be unsatisfactory.[131] A week later, four Rwandan officers were arrested.[132] The prosecutor subsequently provided further details about his agreement with Rwanda. He claimed he had sufficient evidence to indict the four suspects and then explained his rationale for allowing Rwanda to try the suspects:

> The Rwandans wanted to be given the opportunity to prosecute the case, and I did agree with that position. Essentially, on the basis that if the Rwandan government can be made to indict and prosecute and effectively and fairly prosecute people who are seen to be as part of its establishment, it has the potential to make a bigger contribution to national reconciliation if the cases can be dealt with effectively at that level.[133]

The prosecutor later likened his decision to his earlier transfer of some 30 investigative files on genocide suspects to Rwanda.[134]

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129. See Commentary, *supra* note 121, at 1008.

130. U.N. SCOR, 63rd Sess., 5904th mtg. at 11, U.N. Doc. S/PV.5904 (June 4, 2008).

131. *Id.*

132. *See* Kennedy Ndahiro, *Four RDF Officers Arrested*, NEW TIMES (Kigali), June 12, 2008, http://www.newtimes.co.rw/index.php?issue=13559&article=7042.

133. *See* Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 13.

134. *See* Letter from Hassan B. Jallow, Chief Prosecutor, ICTR, to Kenneth Roth, Executive Director, Human Rights Watch, OTP/2009/P/084 (June 22, 2009)

From the outset, a domestic trial was a completely inappropriate substitute for ICTR prosecutions. For the previous fourteen years, the RPF-led government had shown a marked unwillingness to prosecute any RPF crimes.[135] Furthermore, a week before the prosecutor's announcement, an ICTR trial chamber ruled that Rwanda could not provide fair trials in high-profile genocide cases—cases that are much less politically sensitive than an RPF trial.[136]

1. The 1994 Clergy Massacre

Of the thirteen investigative files opened by the special investigations,[137] the clergy massacre was the obvious choice for Rwanda to prosecute. First, it was the most notorious RPF massacre as it involved the slaying of an archbishop, three bishops, and nine clergy.[138] Second, its very notoriety and its small scale (fifteen victims in total) made it look unique, and thus harder to contend that it constituted a crime against humanity.[139] The massacres in Butare and Giti, which had also

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[hereinafter June 22, 2009 Letter from Jallow to Roth], *available at* http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response_0.pdf. In June 2010, the Prosecutor referred another twenty-five genocide investigative files to Rwanda. *See* Press Release, ICTR, *supra* note 106. The prosecutor does not require a court order to refer investigations that have not reached the indictment stage. *Cf.* ICTR, *Rules of Procedure and Evidence*, R. 11 *bis* (Feb. 9, 2010) [hereinafter *ICTR Rules*], *available at* http://www.unictr.org/portals/0/english\legal\rop\100209.pdf (requiring an order of the trial chamber for referral of indictments).

135. As Human Rights Watch stated:

> We, too, believe that domestic prosecutions are better at fighting impunity than international trials because they involve the local population in the judicial process and can have a larger impact on affected communities. Yet the Government of Rwanda has a strong incentive not to pursue senior RPF officials who directed crimes in 1994—many of whom may be currently senior government or military officials. Unfortunately, the choice is not between international and domestic justice but between international justice and impunity.

Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Hassan B. Jallow, Chief Prosecutor, ICTR, at 3 (Aug. 14, 2009) [hereinafter Aug. 14, 2009 Letter from Roth to Jallow], *available at* http://www.hrw.org/node/85068.

136. *See* Prosecutor v. Munyakazi, Case No. ICTR 97-36-R11*bis*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (May 28, 2008).

137. The special investigations quickly narrowed the focus to three dossiers. DEL PONTE, *supra* note 46, at 182, 184.

138. DES FORGES, *supra* note 3, at 714.

139. *See* ICTR Statute, *supra* note 73, art. 3 (indicating that crimes against humanity must involve widespread or systematic attacks against civilians); *see also, e.g.*, Prosecutor v.

been the focus for the special investigations,[140] were more clearly part of a widespread or systematic attack on Hutu civilians. This is particularly true of Giti, which is well known for being one of the few places in Rwanda where genocide did *not* occur[141]—though that was not enough to prevent retaliatory massacres by the RPF. Third, a trial would give the Rwandan government an opportunity to put the victims—in this case, the Catholic Church hierarchy—on trial for its role during the genocide.[142] Finally, a trial would help blunt the Spanish proceedings as one of the defendants was already subject to a Spanish arrest warrant.[143]

The basic facts of the massacre have been public for years. From exile, a Rwandan priest published an account on the internet in 1999.[144] That same year, Des Forges described the massacre in *Leave None*:

Bagosora, Case No. ICTR-98-41-T, Judgment and Sentence, ¶ 2165 (Dec. 18, 2008) (same).

140. *See* CRUVELLIER, *supra* note 44, at 161.

141. *See* SCOTT A. STRAUS, THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA 85–87 (2006).

142. The RPF blames the Catholic Church for sowing the seeds of genocide and for actively participating in the genocide. Tom Ndahiro, a former Commissioner of the government's National Human Rights Commission, has espoused this position. *See* Tom Ndahiro, *The Church's Blind Eye to Genocide in Rwanda*, *in* GENOCIDE IN RWANDA: COMPLICITY OF THE CHURCHES? 229 (Carol Rittner et al. eds., 2004). The Rwandan government put Bishop Augustin Misago on trial in 1999. *See* Mgbako et al., *supra* note 42, at 26. Even though he was acquitted, members of the government continue to speak as if the Bishop was guilty. *See id.* at 27. In more recent years, the government has accused various Catholic churches of promoting what it calls genocide ideology. *See id.* at 19–22, 25–26. The tension between the Catholic Church and the RPF quickly resurfaced with this trial:

> After the arrest of the suspects, the current Archbishop of Kigali, Thaddée Ntihinyurwa, told BBC that he feared government interference in the case.
>
> During his monthly press briefing last week in Kigali, the Rwandan President Paul Kagame said he was astonished to hear such a statement from the clergyman, who was himself the object of investigations on his alleged role in the 1994 genocide.

Rwanda/Justice: Court Remand Soldier-Killers of Rwandan Catholic Clergymen, HIRONDELLE NEWS AGENCY (Arusha), Jun. 26, 2008 http://www.hirondellenews.com/content/view/11228/516. For the most balanced accounts of the Catholic Church's role during the genocide, see TIM LONGMAN, CHRISTIANITY AND GENOCIDE IN RWANDA (2009), and SIBOMANA, *supra* note 22, at 121–36.

143. *See* Human Rights Watch, *supra* note 21, at 94.

144. *See* Vénuste Linguyeneza, *Témoignage Abbé Vénuste Linguyeneza Sur L'assassinat des Evêques à Gakurazo* [*Evidence from Vénuste Linguyeneza on the Assassination of Bishops at Gakurazo*], RWANDA TRIBUNE, Dec. 2, 1999, *available at* http://ndagijimana.rmc.fr/336538/temoignage-abbe-venuste-linguyeneza-sur-l-assassinat-des-eveques-a-gakurazo.

> The one priest who survived the attack related that the group of clergy were arrested by the RPF at Kabgayi and moved to [Gakurazo,] Byimana on June 2. Several days later [on June 5] soldiers who were guarding the clergy burst into the room where they were gathered and shot them dead. The priest who managed to flee was later captured by RPF soldiers who agreed to release him only after he accepted their version of events, that is, that the soldiers carried out the killings in reprisal for the slaughter of their own families.[145]

The revenge killings explanation struck some scholars and clergy as implausible because the massacred clergy had saved many Tutsi at Kabgayi.[146] Although Archbishop Vincent Nsengiyumva was a close associate of President Habyarimana, Bishop Thaddée Nsengiyumva was a well-known progressive who had tried to distance the church from the President.[147] Prunier suggests that the clergy were deliberately killed to prevent them from playing a role in mediating an end to the war and genocide—something that would have deprived the RPF of total victory.[148] In her memoirs, Del Ponte also recalled doubting the official line, "I was skeptical. These victims, including the highest-ranking churchmen in Rwanda, were held for four days, long enough for high-ranking commanders of a well-disciplined militia to know of their capture and whereabouts, long enough for the killings to have been pre-meditated or ordered from above."[149] As discussed below, Rwanda's trial of the massacre merely served to reinforce the official narrative.

Even though the clergy massacre was "[t]he most widely known and condemned of executions by RPF soldiers,"[150] the RPF did not prosecute the perpetrators until fourteen years later. In 1999, Des Forges wrote:

> When the RPF officially admitted responsibility for the slayings several days later, it declared that one of the murderers had been killed in flight and that the others were

145. DES FORGES, *supra* note 3, at 714. For another (second-hand) account of the massacre, see RUZIBIZA, *supra* note 118, at 303–09.

146. *See* PRUNIER, *supra* note 120, at 271.

147. *See* DES FORGES, *supra* note 3, at 43–44, 714; PRUNIER, *supra* note 120, at 270–72; SIBOMANA, *supra* note 22, at 74–75.

148. PRUNIER, *supra* note 120, at 271–72. Sibomana found this explanation "more convincing." SIBOMANA, *supra* note 22, at 74–75.

149. DEL PONTE, *supra* note 46, at 178.

150. DES FORGES, *supra* note 3, at 714.

> being sought and would be tried. Apparently none was ever caught and RPF authorities have never made public any proof to substantiate their claim that the slayings were unauthorized reprisal killings.[151]

During the 2008 trial, it became clear that those responsible for the massacre and their commanding officers had been clearly identified by 1998,[152] but that did not prevent them from continuing their military service—and even getting promoted.[153]

2. 2008 Trial and 2009 Appeal

The Rwandan military prosecutor drafted the indictment based on evidence gathered by his office. That indictment was approved by the ICTR prosecutor's office, which contends that it did not share any of its evidence with Rwanda.[154] The military court proceedings, which ran intermittently from June 17 to October 27, 2008, opened with guilty pleas from the two lower-ranking officers, Captain John Butera and retired Captain Dieudonne Rukeba, and ended with the acquittals of the two higher-ranking officers, General Wilson Gumisiriza and Major Wilson Ukwishaka.[155]

At trial, Captains Butera and Rukeba testified that they had agreed to help a fellow soldier, Sergeant Déo Nyagatare, avenge

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151. *Id.* Prunier offered a more scathing assessment:

> The killers were said to have been one, two or three according to different versions of the event. One was shot on the spot by the Bishops' bodyguards (although they "had not been able to prevent the massacre"—they cannot have been very efficient bodyguards since machine-gunning fifteen people takes some time) and the others, if they ever existed, vanished into thin air, in spite of the [Rwandan Patriotic] Front saying they were "actively sought after and would be tried."

PRUNIER, *supra* note 120, at 271 n. 117.

152. The military interviewed several participants and witnesses in 1997 and 1998. Trial Observation Notes by Anonymous, in Kigali, Rwanda (Aug. 19, 2008) (on file with author). This Author promised anonymity to the trial observers.

153. Both sergeants who took part in the killings were later promoted to captain. The commanding officers, a major and a captain, were later promoted to brigadier general and major, respectively. Trial Observation Notes by Anonymous, in Kigali, Rwanda (Aug. 20, 2008) (on file with author).

154. *See* June 22, 2009 Letter from Jallow to Roth, *supra* note 134; Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 13.

155. Le Tribunal Militaire (Kigali) [Military Tribunal], No. RP 0151/08/TM, Oct. 24, 2008 (*Gumisiriza*, Trial Judgment), ¶¶ 13, 196–97 (Rwanda) (on file with Author). These were the defendants' ranks at the time of trial. For their ranks at the time of the massacre, see *supra* note 153.

his Tutsi family members, who were allegedly killed while under the care of the bishops at Kabgayi.[156] Captain Butera explained his participation with reference to the Church's alleged complicity in the genocide, "Everywhere we went, we never failed to find corpses in the churches. We also found people who were in agony in those churches, but we also found clergy who were in their parishes without doing anything to save these people in danger."[157] He claimed to have acted without thinking, "I fired like a crazy person. When our friend asked us for help, I had a shock in my head. And when I remembered all that I had seen in those churches, I lost all control and I fired . . . ."[158] According to Butera and Rukeba's defense, they acted without premeditation in response to provocation (*i.e.*, the clergy's role in the genocide).[159]

The key issue at trial was whether General Gumisiriza and Major Ukwishaka should bear command responsibility for their subordinates' acts.[160] The prosecutor insisted they knew, or should have known, that the clergy were in danger, but failed to take reasonable steps to protect them.[161] The prosecutor pointed to evidence that, when the clergy were being transported to Gakurazo, a crowd of displaced genocide survivors booed them, shouting "See the *Interahamwe* [the genocidal militia]!"[162] Major Ukwishaka admitted hearing this, but said he did not take it seriously because he had no reason to think his own troops would

156. Trial Observation Notes (Aug. 19, 2008), *supra* note 152, at 9–10, 12. They were joined by a fourth soldier, Eugène Kabandana, who was apparently shot while fleeing the massacre. *Gumisiriza*, Trial Judgment, ¶ 22. Deo Nyagatare, who allegedly instigated the massacre, appears to have died some time later.

157. Trial Observation Notes (Aug. 19, 2008), *supra* note 152, at 12.

158. *Id.* at 10.

159. *Id.* at 9–11.

160. The trial was marked by debates over the applicability of international humanitarian law, particularly the Geneva Conventions and the two Additional Protocols. Trial Observation Notes (Aug. 20, 2008), *supra* note 153, at 23–28. This was noteworthy because earlier prosecutions of RPF killings had studiously avoided the law and language of war crimes.

161. *Id.* at 14–16. The ICTR Appeals Chamber has stated that "[t]he 'reason to know' standard is met when the accused had 'some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates.'" Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-A, Judgment, ¶ 791 (Nov. 28, 2007). On command responsibility generally, see ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW 257–71 (2008).

162. Trial Observation Notes (Aug. 20, 2008), *supra* note 153, at 16.

commit vengeance.[163] General Gumisiriza testified he could not have foreseen such a risk to the clergy: "I could not avoid this incident because I could not know what someone who wants to kill thinks especially when he said nothing to me about what he thought of doing. I could not even premeditate that this incident was going to happen given that, above all, we had never known such an incident since the war broke out [in October 1990]."[164] He also stated that he was some ten to fourteen kilometers away when the massacre occurred, that he immediately ordered an investigation, and that he had Major Ukwishaka (temporarily) arrested as part of that investigation.[165] Responding to a question from the presiding judge, he claimed that "Our soldiers had been well trained well in advance on humanitarian law. I also had confidence in them, especially seeing as we had never known a violation of humanitarian law anywhere we had been."[166] Gumisiriza's defense lawyer also stressed the General had not, and could not have, known the clergy were at risk because "killing civilians was not a generalized practice within the [RPF]."[167]

The military prosecutor presented four prosecution witnesses: a soldier and a young woman who were inside the hall when the massacre occurred, and a soldier and clergyman who were outside the hall. The clergyman testified that the murdered clergy came to Gakurazo voluntarily because it had water, hygiene and more security than Ruhango.[168] He also praised Gumisiriza and Ukwishaka for their compassionate investigation of the massacre.[169] The young woman who took the stand was serving a seventeen-year sentence for involvement in the genocide.[170] She testified that she did not see the killers and that the RPF soldiers had given them a sense of security.[171] The two soldiers who testified had been serving under Ukwishaka's command at the time. Their testimony added very little: they

163. *Id.* at 15.
164. *Id.* at 18.
165. *Id.* at 18, 19, 29.
166. *Id.* at 20.
167. *Id.* at 29.
168. Trial Observation Notes by Anonymous, in Kigali, Rwanda 41–42 (Sep. 2, 2008) (on file with author).
169. *Id.* at 41.
170. *Id.* at 44.
171. *Id.*

were unable to identify the killers and did not provide any information related to the issue of Ukwishaka's command responsibility.[172]

The two captains who pled guilty presented eight witnesses to support their defense of provocation. Those witnesses testified about the Catholic Church's complicity in the genocide and about the role allegedly played by some of the murdered clergy.[173] The defense offered no evidence, however, that Sergeant Déo Nyagatare's family had actually been killed at Kabgayi while under the protection of these clergy. The two commanding officers, Gumisiriza and Ukwishaka, testified in their own defense, but did not call any witnesses to corroborate their claims.

Overall, the prosecution case was quite weak. First, the prosecution witnesses might just as well have testified for the defense. Indeed, General Ukwishaka invoked the testimony of the prosecution witnesses in his defense.[174] Second, the prosecutor rarely challenged the defendants' version of events. Third, the prosecutor introduced evidence that the massacre had not been planned in advance. Rather than questioning why the RPF had moved the clergy to the remote hamlet of Gakurazo away from international scrutiny, the prosecutor repeatedly stressed that the clergy themselves had requested the move to Gakurazo for their safety and well-being.[175] Finally, the prosecutor failed to make a convincing case for command responsibility. He could have done so by presenting evidence that RPF commanders were on notice that their soldiers were killing civilians. In fact, he could have argued that this was not the first time that RPF soldiers had deliberately targeted members of the Catholic clergy; in April 1994, they killed a Spanish priest (Joaquín Valmajo) and three Rwandan priests (Joseph Hitimana, Faustin Mulindwa, and Fidéle Mulinda).[176] Not surprisingly, the military prosecutor chose not to go down that particular route.

Consequently, the military court acquitted the two commanding officers. It found they had no reason to suspect

172. *Id.* at 46.

173. Le Tribunal Militaire (Kigali) [Military Tribunal], No. RP 0151/08/TM, Oct. 24, 2008 (*Gumisiriza*, Trial Judgment), ¶¶ 89–117 (Rwanda) (on file with Author).

174. *See id.* ¶ 128.

175. *See id.* ¶¶ 18–19.

176. *See* DES FORGES, *supra* note 3, at 711.

their subordinates might kill the clergy.[177] The court rejected the military prosecutor's claim that the officers should have taken precautions because of the Tutsi refugees' insults against the clergy.[178] The court repeatedly stressed that this massacre was unique:

> The military prosecutor states moreover that the must have known standard is based on the nature of the crime having "widespread occurrence and notoriety" . . . .
>
> . . . Both parties in this trial agree on the fact that there were not other massacres [of this nature] any place where these soldiers had been.
>
> On this point, this case is distinguished from those of Yamashita and Celebici because, in those two cases, the crimes were committed over time and space (were widespread and notorious) so the commander must have known they had been committed (presumption of knowledge).. . . .
>
> . . . [T]hese massacres were committed by surprise and it was the first time that such acts occurred . . . .[179]

Thus, this acquittal, like the military prosecutor's case, rests on the falsehood that RPF soldiers had not already committed similar massacres throughout Rwanda in 1994. In addition, the court focused on the knowledge element and failure to prevent, but said nothing about the failure to punish. The judgment (and lawyers) cited several scholarly articles on command responsibility and ICTY judgments,[180] but there was no reference to ICTR case law.

As for the two subordinates, the court rejected their defense of provocation on the grounds that they had no links to the murdered clergy (specifically, none of their family members had been injured by those clergy).[181] The court found them guilty of murder in violation of Common Article 3 of the Geneva Conventions and the Rwandan Penal Code,[182] but the court found several mitigating factors—their guilty pleas, the lack of

177. *Gumisiriza*, Trial Judgment, ¶¶ 150–64.
178. *Id.* ¶¶ 154, 158, 163.
179. *Id.* ¶¶ 154–56, 159 (translation provided by Author).
180. *Id.* ¶¶ 30, 56–59, 75, 131–32, 136-138, 151, 156–57, 174, 180.
181. *Id.* ¶ 165–66.
182. *Id.* ¶ 167.

premeditation, the absence of prior criminal records, and other circumstances, such as the corpses they had seen in churches—and sentenced them to eight years each.[183]

In late February 2009, a military appeals court upheld the acquittals and reduced the sentences against both confessed soldiers from eight to five years.[184] With respect to command responsibility, the appeals court ruled that "A person can only be punished/sentenced only if there is clear and undoubtedly evidence of notoriety and widespread nature of any kind of crime to be committed; in this case there was no way how the two commanders would have known that their subordinates were going to commit a crime."[185]

3. ICTR Prosecutor's Review

Prosecutor Jallow had promised the Security Council his office would monitor the proceedings so he could reassert jurisdiction if they were not "effective" or "fair."[186] Yet, as Human Rights Watch reported, the prosecutor "sent an observer for only two preliminary detention hearings, one trial day, closing arguments and the verdict. That cursory presence did not constitute diligent monitoring."[187]

Although the appeals judgment was handed down in February 2009, Jallow maintained a studied silence about the trial until questioned by members of the Security Council on June 4, 2009.[188] At that point, he finally stated:

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183. *Id.* ¶ 168–69.

184. De la Haute Cour Militaire [High Military Court], No. RPA 0062/08/HCM, Feb. 25, 2009 (*Gumisiriza*, Appeal Judgment), ¶¶ 89–117 (Rwanda) (on file with Author); *see also* Edwin Musoni, *Gumisiriza Wins Appeal*, NEW TIMES (Kigali) Feb. 26, 2009, http://www.newtimes.co.rw/index.php?issue=13818&article=13710.

185. *Gumisiriza et al.*, Appeal Judgment, ¶ 42.

186. U.N. SCOR, 63rd Sess., 5904th mtg. at 11, U.N. Doc. S/PV.5904 (June 4, 2008).

187. Letter from Kenneth Roth, Executive Director, Human Rights Watch to Hassan B. Jallow, Chief Prosecutor, ICTR (May 26, 2009) [hereinafter May 26, 2009 Letter from Roth to Jallow], *available at* http://www.hrw.org/node/83536. The prosecutor disputed this contention. *See* June 22, 2009 Letter from Jallow to Roth, *supra* note 134; Aug. 14, 2009 Letter from Roth to Jallow, *supra* note 135.

188. *See* U.N. SCOR, 64th Sess., 6134th mtg. at 11–13, U.N. Doc. S/PV.6134 (June 4, 2009). The prosecutor made no mention of the RPF trial during his oral statement. *Id.* The questions were raised by representatives of the United States and Costa Rica. *Id.* at 27–28.

> Regarding the matter of allegations against the Rwandese Patriotic Front (RPF), we of course recognize that this is a matter that falls within our mandate, and we have been investigating those allegations with the result that, last year, we were able to reach an understanding with the Rwandans, who wanted to prosecute the case that we had developed . . . .
>
> . . . [W]e gave the Rwandan prosecuting authorities the opportunity to proceed with that case against four senior military officers for the killings of those clergy and other civilians . . . . The report of my monitors indicates that the standards of fair trial were observed . . . .[189]

Revealingly, Jallow still referred to RPF crimes as "allegations" even after the two captains had confessed and been convicted of participating in the clergy massacre. The prosecutor later elaborated that "the trial had been open, public, free and fair."[190] He contended that the evidence introduced at trial was "consistent with what we have and with the position that we had taken."[191] He noted that the RPF officers were charged with violations of the Geneva Conventions.[192] He then continued, "We should not simply say because people have been acquitted, the trial wasn't fair. I mean, a fair trial clearly has the potential for acquittals and for convictions. So it's not really the outcome which is the critical factor. It's the process . . . ."[193]

Initially, Jallow told the Security Council that the Rwandan proceedings would have to be "effective, expeditious, fair and open,"[194] but in his June 2009 response to the Security Council, he stated only that the trial had been fair without ever mentioning whether it had been effective.[195] The real issue is not about the trial's process or fairness, but rather about its genuineness. A trial can be procedurally fair in that it observes international human rights norms, but still be inadequate. This is reflected in the ICTR statute, which permits the ICTR to try a

189. *Id.* at 33.

190. Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 14.

191. *Id.* at 13.

192. *Id.* at 14.

193. *Id.*

194. U.N. SCOR, 63rd Sess., 5904th mtg. at 11, U.N. Doc. S/PV.5904 (June 4, 2008).

195. U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (June 4, 2009).

suspect already tried domestically for genocide, crimes against humanity, or war crimes if "[t]he national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."[196]

In fact, there are serious doubts about both the fairness and genuineness of this trial. First, Rwanda's military courts are not independent and impartial, and there is little transparency about their functioning and performance. Even the civil courts, where donors focused their rule of law efforts, remain subject to executive influence, particularly in politically sensitive cases.[197] Consequently, the U.K. High Court of Justice expressed serious doubts about the Rwandan judiciary's independence and impartiality.[198] Second, Rwanda did not "diligently prosecute" the clergy massacre. The military prosecutor called only four prosecution witnesses, each of whom gave testimony favorable to the defendants and their version of events. This was hardly surprising; after all, the ICTR chambers and U.K. High Court

196. ICTR Statute, *supra* note 73, art. 9(2)(b).

197. The U.S. State Department raised concerns about judicial independence in its human rights report for 2008:

> [T]he judiciary operated in most cases without government interference; however, there were constraints on judicial independence. Government officials sometimes attempted to influence individual cases, primarily in *gacaca* cases. There were reports that some members of the executive branch considered it appropriate to call judges to discuss ongoing cases privately and to express executive preferences.
>
> During the year the country passed a constitutional amendment that reduces most judicial appointments from life to four or five years, potentially limiting judicial independence.

U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2008 (2009), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm. In its report for 2009, the State Department raised similar concerns while recognizing that "[u]nlike in previous years, there were no reports that members of the executive branch called judges to discuss ongoing cases privately and to express executive preferences." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2009 (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/af/135971.htm. *See also* Human Rights Watch, *supra* note 21, at 44–69; Lars Waldorf, *A Justice 'Trickle-Down': Rwanda's First Postgenocide President on Trial*, *in* PROSECUTING HEADS OF STATE 151, 151–75 (Ellen L. Lutz & Caitlin Reiger eds., 2009) (describing the unfair trial of former President Pasteur Bizimungu and his co-accused). *But see* Sam Rugege, *Judicial Independence in Rwanda*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 411, 423 (2006) (claiming that "Rwanda has a government that respects the principle of the rule of law and that does not interfere in the judicial tasks of the courts").

198. Brown (Bajinya) & Others v. Government of Rwanda & Others, [2009] EWHC 770 (Admin), [119], [121].

found a real likelihood that witnesses in Rwanda would be too fearful to give exculpatory testimony for genocide suspects—something that is much less politically sensitive than accusing RPF soldiers of war crimes. Finally, the two sentences handed down in this case do not reflect the gravity of the crimes committed, though they are consistent with the light sentences given to RPF soldiers convicted of murder.[199]

Human Rights Watch, which monitored the trial, released a damning assessment:

> The trial proved to be a political whitewash and a miscarriage of justice . . . . Both the prosecution and the defense presented the killings as spontaneous reactions by soldiers overcome with grief for their fellow RPF officers who had lost relatives in the genocide. The court heard testimony only from witnesses supporting this version of events . . . .[200]

Human Rights Watch also directly challenged the prosecutor's endorsement of the evidence presented at that trial:

> We question your statement that your office does not possess evidence showing that the Kabgayi killings were a planned military operation. . . .
>
> . . . .
>
> . . . [W]e gave you specific names of senior RPF officers whom we believed were involved in both the ordering and the execution of the killings. Through this evidence, we laid out a compelling argument that calls into question the Rwandan prosecution's theory that the killings were spontaneous acts by low-level soldiers and shows instead that this was an attempt to cover up responsibility for a planned military operation.[201]

When prosecutor Jallow was publicly confronted by Human Rights Watch at a July 2009 conference, he responded: "All you have given us is your . . . own interpretation of the evidence, and it differs from [our] interpretation, and we are not bound by

199. Human Rights Watch, *supra* note 21, 104–09.

200. May 26, 2009 Letter from Roth to Jallow, *supra* note 184.

201. Aug. 14, 2009 Letter from Roth to Jallow, *supra* note 135, at 2–3. For a fuller description of the evidence that was not presented at trial, see Leslie Haskell & Lars Waldorf, *The ICTR's Impunity Gap: Causes and Consequences* (forthcoming) (manuscript at 13–14, on file with author).

your own interpretation."[202] Former prosecutor Del Ponte also disputed Jallow's positive assessment of the trial:

> [T]hey have been acquitted—that is the confirmation that shows that Rwanda did not want to do these cases. For me, it's the proof . . . that they are not able and they are not willing. I heard that myself directly from President Kagame. He told me at that time that they would not do them. This confirms that.[203]

III. *LARGER ISSUES*

A. *Prosecutorial Discretion and Prosecutorial Independence*

The prosecutor exercised his prosecutorial discretion over the clergy massacre at three critical junctures. First, he decided not to indict the four RPF officers. Had he indicted them, then his referral of the case would have required judicial approval.[204] However, a trial chamber had already rejected one of the prosecutor's motions to refer the less sensitive genocide cases.[205] Second, he allowed Rwanda to try the case despite the ICTR's primacy.[206] Finally, he determined the Rwandan trial was fair and thus did not need to take back the case.[207]

The prosecutor has wide discretion whether or not to prosecute. While indictments must be reviewed by a trial chamber,[208] there is no direct mechanism for reviewing a decision not to indict.[209] The only avenue to challenge this is indirectly through a defense of selective prosecution. Several ICTR defendants have tried this, arguing that the prosecutor has only prosecuted one side of the Rwandan conflict and that virtually all the defendants are Hutu. This argument, which

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202. Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 46.

203. Carla Del Ponte, Remarks at Debates with Prosecutors, *supra* note 86, at 22–23 (translation provided by author).

204. *See supra* note 134 and accompanying text.

205. *See supra* note 136 and accompanying text.

206. *See supra* notes 129–34 and accompanying text.

207. *See supra* notes 186–92 and accompanying text.

208. *See* ICTR Statute, *supra* note 73, art. 18(1). The prosecutor does not require judicial authorization in order to open an investigation, as happens at the ICC. Jallow, *supra* note 94, at 147. *Compare* ICTR Statute, *supra* note 73, art. 17, *with* Rome Statute of the International Criminal Court art. 53, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

209. *See* Reydams, *supra* note 54, at 983.

smacks of a *tu quoque* defense, has been uniformly rejected.[210] Early on, the ICTR appeals chamber made clear that the defendant has to do more than allege discriminatory effect; he also must prove an unlawful or improper (*i.e.*, discriminatory) intent with respect to his own prosecution.[211] It is particularly difficult for a defendant to make that showing where there already exists a *prima facie* case against him.[212]

In response to the completion strategy imposed by the Security Council, the ICTR prosecutor published his criteria for exercising prosecutorial discretion in 2004:

> In determining which individuals should be subject to trial before the [ICTR], the Prosecutor will be guided by the need to focus on those who are alleged to have been in positions of leadership and those who, according to the Prosecutor, bear the greatest responsibility for genocide. This concentration on the most senior leaders suspected of being most responsible for the crimes committed within the jurisdiction of the [ICTR] is in conformity with Security Council resolution 1534 (2004). The criteria taken into consideration when making this determination are as follows:
>
> - the alleged status and extent of participation of the individual during the genocide
> - the alleged connection an individual may have with other cases
> - the need to cover the major geographical areas of Rwanda in which crimes were allegedly committed
> - the availability of evidence with regard to the individual concerned
> - the concrete possibility of arresting the individual concerned

210. *See* Jallow, *supra* note 94, at 155.

211. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶¶ 94–96 (June 1, 2001); Prosecutor v. Ntakirutimana, Case Nos. ICTR 96-10-I & ICTR 96-17-T, Judgment and Sentence, ¶¶ 870–71 (Feb. 21, 2003); *see also* Jallow, *supra* note 94, 155–59 (summarizing this case law).

212. *See* Jallow, *supra* note 94, at 160.

- the availability of investigative material for transmission to a State for national prosecution.[213]

What is most striking about these criteria is that they only refer to genocide cases. This is consistent with the Prosecutor's decision to ignore Security Council resolution 1503's call for Rwandan cooperation on RPF crimes.[214]

The prosecutor's criteria have altered over the years.[215] The most significant change came in 2005 when the prosecutor added national reconciliation: "National reconciliation is anticipated to be an important outcome of the prosecution process. Hence, the extent to which the exercise of prosecutorial discretion impacts on this objective—positively or adversely—is a relevant consideration."[216] The prosecutor's reference to national reconciliation is rooted in Security Council Resolution 955, which created the ICTR. That Resolution optimistically proclaimed "the prosecution of persons responsible for serious violations of international humanitarian law . . . would contribute to the process of national reconciliation."[217] However, there is no reference to "national reconciliation" anywhere in the ICTR Statute itself.

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213. President, ICTR, *Completion Strategy of the International Criminal Tribunal for Rwanda*, Letter Dated 30 April 2004 from the President of the Int'l Criminal Tribunal for the Prosecution of Pers. Responsible for Genocide and Other Serious Violations of Int'l Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 Jan. and 31 Dec. 1994 addressed to the President of the Security Council, Annex, ¶ 14, U.N. Doc. S/2004/341 (May 3, 2004). In a 2005 article, the former Chief of Prosecutions at the Special Court for Sierra Leone, who had previously served in the ICTR Prosecutor's office, criticized the ICTR and ICTY Prosecutors for exercising their discretion without sufficient transparency. Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 171–72 (2005).

214. *See supra* note 56 and accompanying text. On one occasion, he incorrectly stated that the Security Council had required him to focus on genocide cases: "The strategy of prosecution as *dictated* by the Security Council is to concentrate on those bearing the greatest responsibility for the genocide, the leaders of the genocide." Hassan B. Jallow, Prosecutor, ICTR, The OTP-ICTR: Ongoing Challenges of Completion 6 (Nov. 1, 2004) (emphasis added); *see also* Reydams, *supra* note 54, at 986.

215. *See* Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 5–6 (listing four criteria: "the status of the offender" during the genocide; "the nature and extent of the [individual's] participation"; "the nature of the offence"; and the "issue of national reconciliation").

216. Jallow, *supra* note 94, at 154.

217. S.C. Res. 955, *supra* note 52, pmbl.

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. Because "national reconciliation" is neither defined nor measured, it can be used to justify any act of prosecutorial discretion, such as the prosecutor's decision to allow Rwanda to try the clergy massacre itself. Furthermore, it is just as likely (if not more so) that this decision to prosecute only one side of the Rwandan conflict will make reconciliation more difficult. As Adama Dieng, the Registrar of the ICTR and former secretary-general of the International Commission of Jurists, has written:

> While the Preambles of the Tribunals and the International Criminal Court refer to peace and the deterrence of further crimes, their most important mandate is the provision of equitable and impartial justice. Deterrence, reconciliation, and the maintenance of peace will be logical consequences of equitable and impartial justice.[218]

The prosecutor also has wide discretion when it comes to letting states try suspects and then assessing those domestic trials. While the ICTR has "concurrent jurisdiction" with national courts, it can exercise its primacy at any stage by requesting national courts to "defer" their proceedings.[219] Only the prosecutor can initiate a request for deferral.[220] He "may" do so if the matter is already under his investigation.[221] The Prosecutor's decision not to request a deferral of Rwanda's clergy massacre trial is not judicially reviewable.

Prosecutorial discretion is intimately linked to prosecutorial independence. The ICTR Statute provides for such independence: the Prosecutor "shall not seek or receive

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218. Adama Dieng, *International Criminal Justice: From Paper to Practice—A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court*, 25 FORDHAM INT'L L.J. 688, 700 (2002).

219. ICTR Statute, *supra* note 73, at art. 8; *ICTR Rules*, *supra* note 134, R. 9–11; *see also* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 362–63 (1997).

220. *ICTR Rules*, *supra* note 134, R. 9.

221. *Id.*

instruction from any government or from any other source."[222] The Prosecutor claims his prosecutorial discretion with respect to the RPF cases was based on only two factors (prosecutorial independence and the sufficiency of the evidence)—marking yet another shift in the criteria.

> But like all the cases we do [*i.e.*, the genocide cases], whatever we decide has to be based on the evidence that is available. . . . That is the basis on which we have to proceed and no other considerations. And we have to proceed also having due regard and respect for the independence of the Office of the Prosecutor. . . . We can't accept any attempts to improperly influence the position of the Office of the Prosecutor in this respect.[223]

Such claims of prosecutorial independence ring hollow given the pressure that Rwanda put on successive prosecutors not to issue indictments for RPF crimes. In that context, the decision not to indict any RPF crimes "challenges the image of independence of the prosecutor."[224]

The RPF trial underscores the main weakness of international criminal justice—its reliance on state cooperation. Having been created under the U.N. Security Council's chapter VII powers,[225] the ICTR is much stronger than the treaty-based ICC. First, it has primacy over national jurisdictions.[226] Second, the ICTR can call on the Security Council to enforce state cooperation, whereas the ICC has to rely on states complying with their treaty obligations (except when, as with Darfur, the Security Council refers the situation). In fact, however, the ICTR was never able to gain Rwanda's cooperation over its RPF investigations—even when it appealed to the Security Council.[227]

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222. ICTR Statute, *supra* note 73, at art. 15(2). In truth, the prosecutor's independence is circumscribed by the Security Council and the trial chambers. *See id.* at arts. 10, 12, 32.

223. Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 12.

224. Côté, *supra* note 213, at 177. Côté had good reason to be critical: as Chief of Prosecutions at the Special Court for Sierra Leone, he prosecuted all sides of the conflict, including powerful members of the post-conflict government. *Id.* at 162.

225. *See* S.C. Res. 955, *supra* note 52.

226. *See* Morris, *supra* note 219, at 364–65.

227. The Security Council has proved ineffectual when it comes to international criminal justice, first with the ICTR's RPF investigations and, more recently, with the ICC's Darfur indictments. *See, e.g.*, Alex de Waal, *Darfur, the Court and Khartoum: The*

The need for international tribunals to secure state cooperation means that international justice is inherently political.[228] As former ICTR and ICTY prosecutor Del Ponte stated, "The legal obligation [for state cooperation] already exists, but in reality, it has not been applied. Thus, we always need politics."[229]

B. *Complementarity*

Lacking Rwanda's cooperation, the ICTR prosecutor decided to throw away his only remaining card: he essentially renounced the ICTR's jurisdictional primacy in favor of the ICC's model of complementarity.[230] Under complementarity, a case (or situation)[231] is admissible to the ICC where a state is "unwilling or unable genuinely to carry out the investigation or

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Politics of State Non-Cooperation, *in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 29–36 (Nicholas Waddell & Phil Clark eds., 2008).

228. *See* PESKIN, *supra* note 45, at 3–24, 235-57. For a legal discussion of state cooperation, see ZAHAR & SLUITER, *supra* note 160, at 456–76.

229. Carla Del Ponte, Remarks at Debates with Prosecutors, *supra* note 86, at 21 (translation provided by Author); *see also* Carla Del Ponte, *Reflections Based on the ICTY's Experience*, *in* INTERNATIONAL CRIMINAL JUSTICE: AW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 129 (Robert Bellelli ed., 2010). Similarly, the former ICTY President wrote in 2004:

> [T]he truth is evident: international courts must accommodate themselves to the political environment, whether we like it or not. The truth must not be denied, as is so poignantly illustrated by the current problems in cooperation between the ICTR and the Kigali Government, and between the ICTY and certain states in the Balkans . . . .

Jorda, *supra* note 1, at 579–80.

230. *See* Rome Statute, *supra* note 208, art. 1. *See generally* Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002) (critiquing the prospects for complementarity at the ICC).

231. The ICC prosecutor's investigation begins with a more general "situation" and progresses to a concrete "case" involving identified suspects. *See* Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation of the Republic of Kenya, Case No. ICC-01/09, ¶ 41 (Mar. 31, 2010) (clarifying that an investigation begins as a "situation" before reaching the status of a "case"). Even though the Statute uses the term "case" in discussing admissibility, Rome Statute, *supra* note 205, art. 17, one pre-trial chamber recently held that admissibility determinations also apply to "situations." *Situation in Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation of the Republic of Kenya, ¶¶ 45–48. On the distinction between situations and cases, see, for example, Rod Rastan, *What is a "Case" for the Purpose of the Rome Statute?* 19 CRIM. L.F. 435 (2008).

prosecution."[232] This "unwillingness" prong has sparked considerable debate over how the ICC should treat non-prosecutorial mechanisms such as Kenya's incipient truth commission[233] and the Acholi reconciliation ceremonies in northern Uganda.[234] To date, there has not been much academic or policy discussions of how the ICC should determine unwillingness in the context of domestic trials,[235] partly because the ICC has yet to face this situation.[236] Yet, as both the ICC Statute and the Gakurazo trial demonstrate, such determinations will be anything but straightforward.

The ICC Statute provides some guidance on what constitutes unwillingness, but leaves room for both judicial interpretation and prosecutorial discretion.[237] The Statute sets forth three tests for determining unwillingness:

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232. Rome Statute, *supra* note 208, art. 17. Yet, as William Schabas has observed, "The term 'complementarity' may be somewhat of a misnomer, because what is established is a relationship between international justice and national justice that is far from 'complementary.' Rather, the two systems function in opposition and to some extent hostility with respect to each other." WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 67 (1st ed. 2001).

233. *See* Lydiah Kemunto Bosire, *Misconceptions I—The ICC and the Truth, Justice and Reconciliation Commission* (Oxford Transitional Justice Research, Working Papers Series No. 15), *available at* http://www.csls.ox.ac.uk/documents/Bosire_.pdf; *see also* SCHABAS, *supra* note 232, at 68–69 (discussing debate over truth commissions during drafting of ICC statute).

234. *See, e.g.*, Tim Allen, *Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda*, *in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 47, 47–54 (Nicholas Waddell & Phil Clark eds., 2008); Marieke Wierda & Michael Otim, *Justice at Juba: International Obligations and Local Demands in Northern Uganda*, *in* COURTING CONFLICT?, *supra*, at 21, 21–28.

235. *See* Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L & COMP. L. 49, 51–52 (2009) (arguing that the Justice and Peace Law demonstrates Colombia's unwillingness to prosecute human rights abusers and calling for ICC involvement); Gregory S. McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 CASE W. RES. J. INT'L L. 325 (2007) (examining complementarity in light of the practice at the Iraqi High Tribunal).

236. This may change if Kenya begins national prosecutions. *See* Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation of the Republic of Kenya, Case No. ICC-01/09, ¶¶ 53–54 (Mar. 31, 2010); Press Conference, ICC, Press Conference by the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo (Nov. 26, 2009), *available at* http://www.icc-cpi.int/nr/rdonlyres/ac13413d-d097-4527-b0ae-60cf6dbb1b68/281313/lmointrostatement26112009_2_2.pdf.

237. *See* Rome Statute, *supra* note 208, arts. 17–18, 53. While article 17's criteria for admissibility are addressed to the Court, the prosecutor is obliged to consider admissibility when deciding whether to initiate an investigation or prosecution. *Id.* arts. 17, 53.

> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken . . . for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . . ;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[238]

The first test will be difficult to meet as it requires a showing of the state's subjective intent in bringing the proceedings. By contrast, the second test is more objective as it looks only to whether there has been an unjustified delay in the proceedings. Although the Statute does not define an "unjustified" delay, the ICC is likely to look to international human rights law on what constitutes a speedy trial.[239] Nevertheless, this test is not much help when it comes to judging domestic proceedings once they are already underway.[240] The most useful test then for uncovering

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238. Rome Statute, *supra* note 208, art. 17(2). For a more detailed and somewhat different interpretation of this provision, see HÉCTOR OLÁSOLO, THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT 150–54 (2005). Article 17(1)(c) refers to article 20(3) which makes an exception to the prohibition against double jeopardy (*ne bis in idem*) for ICC prosecutions where the national proceedings:

> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
>
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Rome Statute, *supra* note 208, art. 20(3).

239. For relevant international case law, see ICC, Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, at 36, ICC Doc. ICC-01/04-01/07-1008-AnxA (Mar. 30, 2003), *available at* http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf.

240. After all, the threat of international proceedings was expected to kick-start domestic proceedings, perhaps after an unjustified delay.

non-genuine (or sham) proceedings is the third, which requires both an objective determination of non-independence (or partiality) and a more subjective finding that the proceedings are "inconsistent with an intent to bring the person concerned to justice." Under all three tests, however, the ICC must look beyond whether the domestic proceedings conform to fair trial standards and examine whether they were "genuine."[241]

The ICC Statute is unclear about whether the Court should look more to process or result in determining whether a specific domestic trial is genuine or not. As two legal scholars rightly note:

> The language of the Rome Statute seems to indicate that a result that shields the accused from justice would be impermissible, yet it makes reference only to the "proceedings" to determine willingness to prosecute. It is therefore difficult to tell if the Court's decision would be based on the process undertaken or the final verdict reached or sentence given.[242]

An expert panel on complementarity, convened by the prosecutor in 2003, insisted that an assessment must be based on "*procedural and institutional factors, not the substantive outcome.*"[243] The panel also pointed out that the prosecutor bears the burden of proof for showing that domestic proceedings are not genuine, and that there should be "a policy of giving the benefit of the doubt to States exercising jurisdiction and assuming that they are acting in good faith."[244]

Fundamentally, it is harder to prove a sham trial (one designed to acquit) than the more common show trial (one designed to convict). Show trials usually fall foul of fair trial standards, whereas sham trials may entail an *excess* of due process

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241. *See* SCHABAS, *supra* note 232, at 67 (noting that the "enigmatic adjective 'genuinely' [in article 17] is left entirely to the appreciation of the court"). For discussions of "genuinely," see *Informal Expert Paper*, *supra* note 239, at 8–9, and El-Zeidy, *supra* note 230, at 900–01.

242. William W. Burke-White & Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation* (Univ. Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 08-13, 2008) (footnotes omitted).

243. *Informal Expert Paper, supra* note 239, at 14.

244. *Id.* at 16–17.

for the accused. The expert panel recognized the difficulty of proving that domestic proceedings are not genuine:

> To demonstrate "unwillingness" may be technically difficult (likely involving inferences and circumstantial evidence) and politically sensitive (amounting to an accusation against the authorities). It is possible that a regime may employ sophisticated schemes to cover up involvement and to whitewash crimes, so information and analytic tools are needed to penetrate such tactics.[245]

Consequently, the panel provided the prosecutor with a four-page list of factors to consider in assessing unwillingness.[246]

Several legal theorists worry that complementarity does not give sufficient deference to national (or local-level) proceedings. For Mark Drumbl, the concern is that the ICC will crowd out alternative, nonprosecutorial mechanisms for truth seeking, justice, and reparations, such as truth commissions.[247] Consequently, he proposes the ICC give "qualified deference" to national and local mechanisms.[248] On the other hand, William Burke-White fears that states are passing the buck for prosecuting international crimes to the ICC.[249] To counter this, he recommends "proactive complementarity": the ICC should "use political leverage to encourage states to undertake their own prosecutions of international crimes."[250]

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245. *Id.* at 14.

246. *Id.* at 28–31.

247. Mark A. Drumbl, Policy Through Complementarity: The Atrocity Trial as Justice (Sept. 15, 2009) (unpublished) (arguing that "complementarity may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but it encourages homogeneity in terms of the process they follow and the punishment they mete out. Complementarity, as operationalized in [ICC] admissibility determinations, promotes the iconic status of the courtroom and the jailhouse as the best practice to promote justice in the aftermath of grave mass violence."); *see also* SCHABAS, *supra* note 232, at 68; *Informal Expert Paper, supra* note 239, at 22–23.

248. Drumbl, *supra* note 247. According to him, "Qualified deference creates a rebuttable presumption in favor of local or national institutions that, unlike complementarity, does not search for procedural symmetry between their process and liberal criminal procedure and, unlike primacy, does not explicitly impose liberal criminal procedure." *Id.*

249. *See* Burke-White, *supra* note 14, at 59.

250. *Id.* at 54. *See generally* Kevin Jon Heller, *The Shadow Side of Complementarity: the Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255 (2008) (arguing that complementarity will encourage national trials that lack due process); Carsten Stahn, *Complementarity: a Tale of Two Notions*, 19 CRIM. L.F. 87 (2008) (contrasting "classical" and "positive" complementarity).

While sharing some of Drumbl and Burke-White's concerns, this Author worries more that the ICC will give too much deference to national proceedings, not too little. The political reality is that the ICC has very little power vis-à-vis states. This weakness partly explains why complementarity has been something of a bust so far. The ICC's architects assumed the court would prod states to do genuine, domestic prosecutions to preclude the court from exercising jurisdiction. They counted on targeted states being jealous guardians of their national sovereignty.[251] However, the ICC prosecutor, Luis Moreno-Ocampo, turned this thinking on its head. He "adopted a policy of inviting voluntary referrals from states to increase the likelihood of important cooperation and support on the ground."[252] The governments of the Central African Republic, the Democratic Republic of Congo, and Uganda proved only too happy to make "self-referrals" to the ICC.[253] Self-referrals offer

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251. *See, e.g.*, ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 164 (2005) (predicting that "States, particularly in relation to offenses by their nationals, are more likely to prefer to investigate at the national level, rather than have an investigation proceeded with in public by an independent international investigator"). States may prefer to conduct national investigations of their own officials or armed forces, but they seem more than willing to let the international community investigate nationals who belong to armed rebel movements.

252. ICC, Office of the Prosecutor, *Report on the Activities Performed During the First Three Years (June 2003–June 2006)*, at 2 (Sept. 12, 2006), *available at* http://www.icc-cpi.int/nr/rdonlyres/d76a5d89-fb64-47a9-9821-725747378ab2/143680/otp_3yearreport20060914_english.pdf; *see also* Peskin, *supra* note 15, at 656–57. This approach seemed to contradict the view the prosecutor espoused on taking office. On that occasion, Chief Prosecutor Moreno-Ocampo stated that "the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success." Luis Moreno-Ocampo, Chief Prosecutor, ICC, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 2 (June 16, 2003), *available at* http://www.icc-cpi.int/nr/rdonlyres/d7572226-264a-4b6b-85e3-2673648b4896/143585/030616_moreno_ocampo_english.pdf. Referrals involve country situations rather than individual cases. *See Report on the Activities Performed During the First Three Years*, *supra*, at 7.

253. Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo, in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA, *supra* note 220, at 37, 37–46; William A. Schabas, *'Complementarity in Practice': Some Uncomplimentary Thoughts*, 19 CRIM. L.F. 5, 16 (2008). Schabas also questions whether self-referral is authorized and compatible with the Rome Statute. *Id.* at 12–18; *see also* William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557, 559 (2005).

states several political advantages: they enhance the states' reputation for international cooperation; they significantly diminish the likelihood that state officials will be indicted by the ICC; they shift the financial and political costs of investigations and prosecutions to the international community; and, most importantly, they marginalize and pressure their political enemies (*i.e.*, rebel leaders) through international arrest warrants.[254]

Partly as a result of these self-referrals, the ICC has had no experience with complementary national trials.[255] The RPF trial provides one scenario for what a complementary proceeding might look like. There, as was meant to happen with the ICC, the threat of an international indictment helped spur a reluctant state to conduct its own national trial.[256] Even if the ICTR prosecutor had fulfilled his promise to evaluate whether Rwanda had "effectively and fairly prosecuted" the case (instead of focusing solely on fairness), he might well have concluded the proceedings were genuine under Article 17(2)(c) of the Rome Statute.[257] On the surface, the proceedings appeared to be "conducted independently and impartially"; that is, the military judges showed no obvious bias in the courtroom or in the judgment.[258] Similarly, the proceedings did not seem evidently

254. *See* Burke-White, *supra* note 14, at 62–63; Antonio Cassesse, *Is the ICC Still Having Teething Problems?* 4 J. INT'L CRIM. JUST. 434, 436 (2006); Peskin, *supra* note 15, at 678; Schabas, *supra* note 253, at 33. Drumbl makes some of these points, albeit more tentatively. Drumbl, *supra* note 247, at 19.

255. Arguably, the national courts in the Democratic Republic of Congo were willing and able to try the three rebel leaders indicted by the ICC prosecutor. As Schabas damningly observes, the Congolese courts would have prosecuted Thomas Lubanga Dyilo for more serious crimes than the ICC is doing. Schabas, *supra* note 253, at 23–25. *But see* Géraldine Mattioli & Anneke van Woudenberg, *Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA, *supra* note 227, at 55, 55–64.

256. Though, as argued above, the Rwandan government was prodded more by other political considerations; namely, its desire for transfers of Rwandan genocide suspects and the French and Spanish arrest warrants against high-ranking RPF political and military figures.

257. Rome Statute, *supra* note 208, art. 17.

258. Perhaps there should be a rebuttable presumption of bias when a military court in a military dictatorship tries members of the military. As Broomhall observes, the risk of sham proceedings "will be particularly great where police, security forces or the military are subject to their own courts . . . ." BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 90 (2004).

"inconsistent with an intent to bring" the two commanding officers to justice: the military prosecutor and court mainly applied the correct legal test for command responsibility and the prosecutor presented (limited and unconvincing) evidence that the commanding officers should have known of the threat posed to the clergy.

To make the argument that the RPF trial was actually a sham, it is necessary to look at evidence outside the proceedings (looking beyond the trial record)—the widespread and notorious nature of RPF massacres and Human Rights Watch's own factual investigation—and challenge the Rwandan military prosecutor's theory of the case. The ICC prosecutor and judges are no more likely to do this than the ICTR prosecutor.[259] Under complementarity, the ICC has an institutional bias to defer to national proceedings by its states parties.[260] It will not want to jeopardize relations with state parties on whose cooperation it depends.[261] In addition, the ICC is not meant to act as a court of

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259. The expert panel's incredibly detailed suggestions for fact-finding and analyzing "unwillingness" will probably prove to be an exercise in wishful thinking because of political and resource constraints. *See* ICC, *supra* note 239, at 11–14, 28–31.

260. The ICC has not deferred to national proceedings in Sudan, which is not a party to the Rome Statute. The Sudanese government established the Special Criminal Court on the Events in Darfur ("SCCED") the day after the ICC prosecutor opened his investigation into Darfur. *See* Decree Establishing the Special Criminal Court on the Events in Darfur (June 7, 2005), *in* Letter dated 18 June 2005 from the Chargé d'affaire a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council, Annex, U.N. Doc. S/2005/403 (June 22, 2005). The SCCED has been widely criticized for failing to provide meaningful justice. *See, e.g.*, Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur*, June 2006, *available at* http://www.hrw.org/backgrounder/ij/sudan0606/sudan0606.pdf; Int'l Comm'n of Jurists, *Sudan: New Report Shows Courts & Investigations Fail to Bring Justice to Victims in Darfur*, Oct. 28, 2007; Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES MAG., Apr. 2, 2006, at 42.

261. *See* ICC, *supra* note 239, at 3 ("Cooperative States should generally benefit from a presumption of bona fides and baseline levels of scrutiny . . . ."). For example, the ICC Statute allows the ICC to assist states with their investigations and prosecutions. Rome Statute, *supra* note 208, art. 93(10). It has been recognized that this requires "caution to avoid being exploited in efforts to legitimize or shield inadequate national efforts from criticism." *Informal Expert Paper, supra* note 239, at 7. Zahar and Sluiter point to the ICTY's enormous reluctance to use Rule 9(ii) to assert primacy over domestic proceedings. ZAHAR & SLUITER, *supra* note 160, at 455. The wording of ICTY Rule 9(ii) is very similar to that of article 17(2)(c) of the ICC Statute: it allows the ICTY prosecutor to request deferral of domestic proceedings where "there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted." ICTY, *Rules of Procedure and Evidence*, R. 9(ii), U.N. Doc. IT/32/Rev.44

appeal for unsuccessful national prosecutions.[262] Thus, the ICC prosecutor and judges will be reluctant to substitute their theory of the case and evidentiary findings for those of domestic actors.[263] Finally, the ICC will be loathe to divert resources from its own investigations and prosecutions to make in-depth assessments of unwillingness.[264] Overall, the ICC, like the ICTR before it, is likely to prove unable or unwilling to recognize sham national proceedings designed to shield perpetrators from justice.

C. *Victor's Justice*

Following his determination that the RPF trial was fair, the prosecutor indicated that he would not issue any indictments for other RPF crimes. In response to questions during his June 2009 Security Council appearance, Jallow stated that "my Office does not have an indictment that is ready in respect of [RPF] allegations at this particular stage."[265] He subsequently offered three rationales for not bringing any RPF prosecutions:

> It's not that the OTP [Office of the Prosecutor] is reluctant to do its work, but its work has to be based on acceptable evidence presented by credible witnesses which offers us a reasonable chance of success. And we also then have to take into account other factors, issues of reconciliation, the fact that . . . there is actually a lot of work which we ought to do

(Dec. 10, 2009). There appears to be only one instance where the ICTY prosecutor invoked Rule 9(ii), but the trial chamber did not rule on that specific point. ZAHAR & SLUITER, *supra* note 160, at 451.

262. *See, e.g.*, ICC, *supra* note 239, at 16 (stating that "[t]he standard for assessing 'genuineness' should reflect appropriate deference to national systems as well as the fact that the ICC is not an international court of appeal, nor is it a human rights body designed to monitor all imperfections of legal systems").

263. Before agreeing on the term "genuinely," the drafters of article 17 rejected the term "effectively" "because of a concern that the ICC might judge a legal system against a perfectionist standard (for example, that the ICC might set aside proceedings because, in the Court's opinion, the prosecution might have chosen a more effective strategy). *Id.* at 8 n.9.

264. *See* El-Zeidy, *supra* note 230, at 899 (predicting that "[t]he nature of the 'unwillingness' and 'inability' tests will in many cases demand greater resources of the prosecutor in preparing the admissibility argument than proving the guilt of the alleged perpetrator"). This is also unwittingly demonstrated by the expert panel's lengthy investigative checklist for uncovering unwillingness. ICC, *supra* note 239, at 28–31.

265. U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (June 4, 2009).

> also on the major crime base [*i.e.*, genocide] which we are still unable to do.[266]

In other words, the prosecutor's office does not have "acceptable evidence" to bring RPF indictments and will not gather more evidence because its priorities are genocide cases. And even if it did acquire "acceptable evidence" in the future, it would turn the case over to the Rwandan government for prosecution in the interests of "national reconciliation" as it did with that of the clergy massacre.

It is now clear the ICTR will not bring any indictments, let alone proceedings, for RPF crimes,[267] and it will remain satisfied with the Rwandan military having prosecuted just one war crimes case.[268] By failing to prosecute *any* RPF crimes, the ICTR has rendered "victor's justice"[269] in the sense that it has only prosecuted the losing side of Rwanda's civil war. To put it more starkly, it has only tried Hutu defendants (with the exception of one European). This sets the ICTR apart from the ICTY and the Special Court for Sierra Leone, which have prosecuted individuals from all sides of those conflicts.[270]

Rwanda offers perhaps the most sympathetic case for "victor's justice" because the victor's crimes are dwarfed by the loser's crimes. As Rwanda's prosecutor general wrote, "it was the RPF that had to contend with the *génocidaires* as Rwanda was

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266. Hassan B. Jallow, Remarks at Debates with Prosecutors, *supra* note 86, at 15.

267. Filip Reyntjens came to this conclusion several years earlier when the December 2004 deadline for ICTR investigations passed without any announcement of RPF indictments. Letter from Filip Reyntjens, Professor, University of Antwerp, to Hassan B. Jallow, ICTR Prosecutor (Jan. 11, 2005) (on file with author). In protest, he withdrew as an expert witness for the prosecution. *Id.*

268. Jallow's claim that the Rwandan military prosecutor has prosecuted "up to two dozen senior military officers," U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (June 4, 2009), is highly disingenuous as none of those prosecutions (apart from the clergy massacre) were for war crimes and most of the murder cases involved low-ranking soldiers. *See supra* notes 28–31 and accompanying text.

269. Thierry Cruvellier provocatively refers to the ICTR as "loser's justice" because it was run by the U.N. and international community, which had lost their credibility in 1994 by failing to stop the genocide. CRUVELLIER, *supra* note 44, at 164-67. Still, it was the Tribunal's very weakness that enabled the RPF to use it for accomplishing victor's justice.

270. For a breakdown of ICTY prosecutions by sides, see Haskell & Waldorf, *supra* note 201, at 17. On the Special Court for Sierra Leone, see, for example, Thierry Cruvellier, Int'l Ctr. for Transitional Justice, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test*, at 24–28, June 2009, *available at* http://ictj.org/static/Publications/ICTJ_SLE_TaylorTrialtoLastingLegacy_pb2009.pdf.

abandoned by the international community, and any crimes the RPF may have committed in doing so paled in comparison to the crimes committed by the *génocidaires*."[271] From that perspective, even-handedness may appear morally dubious insofar as it suggests an equivalency between genocide and RPF crimes. The ICTR prosecutor essentially made this argument in his spirited response to criticism from Human Rights Watch:

> I do not share your views that the Tribunal will be seen to deliver victors [sic] justice unless the members of the RPF are prosecuted at the ICTR. The [ICTR] has understandably focused for many years [on] the genocide as this is the main crime base of its mandate.[272]

Several prominent legal scholars have also challenged the notion of victor's justice. William Schabas dismisses it as "an empty slogan, based upon unproven hypotheses and a lot of conjecture."[273] Mark Drumbl also questions "whether victor's justice necessarily taints the legitimacy of law."[274]

Here, I want to take up Schabas' challenge to engage in "much closer scrutiny of the idea that [victor's justice] is causing some great harm."[275] Let me state at the outset what I mean by the term. Victor's justice is an extreme form of selective prosecution which occurs when only members of the losing side are prosecuted.[276] I am not suggesting the ICTR could have, or should have, rendered equal justice. The goal is not parity (*i.e.*, indicting equal numbers of suspects from each side of the conflict), but rather some measure of impartiality. In other

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271. Ngoga, *supra* note 26, at 331. This bears a marked resemblance to Kenneth Anderson's argument that the right to administer universal justice must be morally earned: "You didn't intervene—but you still have the right to conduct a trial? On what moral basis, pray? Your prudence or your cowardice?" Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUROPEAN J. OF INT'L L. 331, 338–39 (2009).

272. June 22, 2009 Letter from Jallow to Roth, *supra* note 134 at 3.

273. PhD Studies in Human Rights, http://humanrightsdoctorate.blogspot.com/ (Aug. 16, 2009, 06:48); *see also* William A. Schabas, Remarks at Debates with Prosecutors, *supra* note 86, at 26.

274. Mark A. Drumbl, *Book Review*, 20 CRIM. L.F. 495, 498 (2009) (reviewing PESKIN, *supra* note 45) (internal citations omitted).

275. Remarks of William A. Schabas, Remarks at Debates with Prosecutors, *supra* note 86, at 26. Given space constraints, I can only briefly sketch a response to Schabas; a fuller argument can be found in Haskell & Waldorf, *supra* note 201, at 19–27.

276. Both victors' tribunals (such as the Nuremberg tribunal) and nonvictors' tribunals (such as the ICTR) can produce victor's justice.

words, if the ICTR had prosecuted just one RPF soldier (even a low-ranking one), then it could be criticized for unfairness, but not for victor's justice.

Victor's justice at the ICTR does harm to victims as well as to international norms and institutions.[277] Victor's justice unjustly discriminates among victims. As Des Forges wrote in her last Human Rights Watch report:

> To insist on the right to justice for all victims, as did the [1994] UN Commission of Experts, is not to deny the genocide, nor does such an insistence equate war crimes with genocide; it simply asserts that all victims, regardless of their affiliation, regardless of the nature of the crime committed against them, and regardless of the affiliation of the perpetrator, must have equal opportunity to seek redress for the wrongs done them.[278]

Des Forges' statement is grounded in fundamental human rights tenets—dignity, equality, and universality—and reflects recent developments in human rights norms, such as the U.N. principles on justice and reparations for victims of gross human rights violations.[279] If there is no hierarchy of suffering—if, that is, victims of RPF crimes suffer just as much as victims of the genocide—then no group of victims are more deserving of justice than another.[280]

Even if there is an equality of suffering among victims, there may still be a hierarchy of harm from the international community's perspective.[281] This is reflected in the usual

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277. For other arguments, see Haskell & Waldorf, *supra* note 201, at 19–27.

278. Human Rights Watch, *supra* note 21, at 90.

279. *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, G.A. Res. 60/147, Annex, U.N. Doc. A/RES/60/147/Annex (Mar. 21, 2006); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/Res/40/34/Annex (Nov. 29, 1985).

280. Of course, the political reality is that "[s]ome victims count more than others," BASS, *supra* note 42, at 278. But that does not negate the moral argument that all victims should count equally.

281. As Schabas states:

> Of course there is a sense in which all such crimes are equivalent. The victims of these atrocities—and I am not gainsaying that Dresden and the RPF reprisals were not atrocities—suffer every bit as much. For that matter, it is hardly the concern of a victim whether they suffer as a result of genocide or a

taxonomy of international crimes that places genocide (the "crime of crimes") at the apex. As one legal scholar explained, "genocide poses more harm than crimes against humanity or war crimes because of the explicit intent to destroy a group, the discrimination animating the perpetrator's action, and the implicit element of collective action inherent in the commission of the crime."[282] International case law seems divided on this score. The ICTR jurisprudence is simply inconsistent,[283] while the ICTY Appeals Chamber has ruled that "there is in law no distinction between the seriousness of a crime against humanity and that of a war crime."[284] Assuming for argument's sake that this hierarchy does exist, it still does not determine the comparative gravity when specific crimes are at issue.[285] Is one instance of incitement to genocide really more grave than the murder (as a war crime) of thirteen clergy and two other civilians? The ICTR prosecutor essentially implied that genocide crimes are always more grave than war crimes when he defended his decision not to indict any RPF war crimes.

Second, victor's justice harms the legitimacy of international tribunals and international criminal law because their (post-Nuremberg) justification rests, in part, on claims that they are more impartial (*i.e.*, more cosmopolitan) than national tribunals and domestic criminal law. International tribunals applying international criminal law should more closely approximate the rule of law (liberal legalism)—with its emphasis on procedural

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garden-variety murder. But obviously other concerns are afoot when we are dealing with international criminal justice.

PhD Studies in Human Rights, http://humanrightsdoctorate.blogspot.com/ (Aug. 16, 2009, 06:48)

282. Alliston Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 483 (2001).

283. *Compare* Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 981 (Jan. 27, 2000) (opining that "genocide constitutes the 'crime of crimes'"), *and* Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Judgment, ¶ 53 (July 9, 2004) (same), *with* Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Judgment, ¶ 590 (May 26, 2003) (insisting that "there is no hierarchy of crimes under the Statute").

284. Prosecutor v. Tadić, Case No. IT-94-1-A & IT-94-1-A *bis*, Judgment in Sentencing Appeals, ¶ 69 (Jan. 26, 2000). *But see* Schabas, *supra* note 253, at 26 (arguing that international criminal law does create a hierarchy of crimes).

285. In assessing gravity, prosecutors and judges need to look to specific contexts rather than abstract hierarchies. *See* Danner, *supra* note 282, at 463 n.196, 477–78 (providing possible methods of assessing gravity of crimes and arguing that crimes should be viewed differently based on the context in which it was committed, respectively).

fairness and equality before the law—than domestic courts applying domestic criminal law. By failing to do this, international tribunals undermine the expressive justification for international criminal law and hence weaken the diffusion of liberal legalist norms.[286] This is what makes the ICC prosecutor's one-sided prosecutions against non-state actors in the Central African Republic, the Democratic Republic of Congo, and Uganda so worrying.[287]

CONCLUSION

Rwanda—a small, weak state—has skillfully played the ICTR to enhance both its international and national ambitions at the expense of the international community.[288] This demonstrates just how easy it is for states to hijack international criminal justice mechanisms and turn them into a continuation of (civil) war by other means. Rwanda's neighbors have learned this lesson only too well. The Central African Republic, the Democratic Republic

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286. Drumbl argues that "the most plausible aspiration of international criminal law" is "an expressive, norm-generating social constructivism" rather than "concrete deterrence [or] hard retribution." Drumbl, *supra* note 274, at 498. Yet, it is hard to reconcile this eminently sensible position with his claim that:

> indiscriminately prosecuting all sides to a conflict is no guarantor of legitimacy either. When the SCSL [Special Court of Sierra Leone] Appeals Chamber ruled that "fighting for a just cause" could not serve as a mitigating factor in sentencing in the [Civil Defence Forces] case, it may have upheld the neutrality of the law but it also contradicted the way many Sierra Leoneans perceive the aggregated gravity of the violence.

Id. This seems to conflate institutional legitimacy with popular opinion. In addition, it unfairly characterizes impartial prosecutions as "indiscriminately prosecuting all sides." *Id.* Finally, it is worth pointing out that the key debate between the majority and the dissenting judge (a Sierra Leone national) in the Civil Defence Forces ("CDF") appeal case was over sentencing mitigation—not over whether the CDF should have been prosecuted in the first place. *See* Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgment, ¶¶ 513–35 (May 28, 2008); *see also* Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test*, *supra* note 270, at 24–28 (discussing the CDF trial and mitigating factors).

287. The exception so far has been the prosecutor's indictments against several parties to the Darfur conflict, including Sudan's president and several rebel leaders. *See* ICC, Situation in Darfur, Sudan, http://www.icc-cpi.int/menus/icc/situations+and+cases/situations/situation+icc+0205/. This different (and far more impartial) approach is due to the fact that the Darfur situation was a referral from the U.N. Security Council, rather than a self-referral from a state party.

288. This undercuts the overly simplistic, realist argument that international criminal trials "are used by strong nations to assert their international ambitions at the expense of weak nations." Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 147 (2005).

of Congo, and Uganda have used self-referrals to the International Criminal Court to enhance their international prestige while ensuring that victor's justice is imposed on their enemies.[289] The ICC prosecutor, desperate for state cooperation, has been only too eager to oblige. If and when the time comes for the ICC to "judge" complementary national trials, Rwanda's trial of the clergy massacre strongly suggests that the ICC will be unwilling or unable to recognize sham domestic national proceedings designed to shield the accused, not least because the ICC is even more reliant on state cooperation than the ICTR.

Given his dependence on states, what is an international prosecutor to do? Rwanda had made clear it was never going to cooperate with an RPF prosecution by handing over suspects or evidence to the Tribunal. It had also shown it could shut down the Tribunal's genocide trials by stopping the flow of witnesses and not face any meaningful international censure. At that point, the ICTR prosecutor should have publicly stated that without Security Council pressure to force Rwandan cooperation, the Tribunal would produce victor's justice. That would have placed the onus back where it really belonged—on the international community that had created the Tribunal's mandate in the first place. Instead, the prosecutor allowed Rwanda to hold a domestic trial for the clergy massacre and then proclaimed it satisfactory. He chose to acquiesce in a pretense of justice rather than recognize an absence of justice. That choice not only tarnishes the Tribunal's real accomplishments, it also sets a terrible precedent for the future of international justice.

289. *See supra* note 253 and accompanying text. Again, this punctures Posner's realist argument that "international criminal tribunals will similarly look like efforts by the governments that influence the prosecutor and judges—whether the Security Council (in ad hoc cases) or the members of the ICC—to harass or embarrass states with contrary foreign policy objectives." Posner, *supra* note 288, at 149.