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BALANCING LIVES: INDIVIDUAL ACCOUNTABILITY AND THE DEATH PENALTY AS PUNISHMENT FOR GENOCIDE (LESSONS FROM RWANDA)

*Melynda J. Price**

INTRODUCTION

How can you balance the thousands and hundreds of thousands killed with the cooperation of the accused? We believe this crime merits nothing less than life imprisonment.

—Response of Deputy Prosecutor Bernard Muna to the calls for a lesser sentence for former Prime Minister Kambanda¹

Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned, and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence. This situation is not conducive to national reconciliation in Rwanda.

—One of the reasons offered by the Rwandan Representative to the Security Council for voting against the resolution to establish the International Criminal Tribunal for Rwanda.²

Violent conflict among Hutus and Tutsis, the two major ethnic groups of Rwanda, was not new in April 1994. There had been numerous acts of

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¹ *Lawyers Ask for Leniency for Ex-PM of Rwanda*, TORONTO STAR, Sept. 4, 1998, at A12.

² U.N. SCOR, 49th Sess., 3453d mtg. at 16, U.N. Doc. S/PV.3453 (Nov. 8, 1994) [hereinafter Provisional Verbatim Record].

violence—from both sides—since the Hutus seized power in 1959 in one of the independence movements that swept through Africa during that period. A “bloody stalemate” between the Hutu government and Tutsi Rebels³ in 1992 led to the negotiation of the Arusha Accords, which provided for a joint Hutu-Tutsi government.⁴ Seeing waning electoral support for a Hutu-dominated government, then-President Juvénal Habyarimana appealed to past ethnic cleavages and solidified Hutu support against a common enemy: the Tutsis. The international community was alerted to the impending events when Major General Romero Dallaire, the commander of the U.N. peacekeeping forces, “sent a cable to the United Nations Headquarters that the Hutu hardliners were laying the groundwork for a systematic campaign to kill Tutsis.”⁵ The Hutus carried out that campaign with little resistance from the international community.⁶ The United Nations, thwarted by the unwillingness of Member States to commit troops to stop the massacre of Tutsis in Rwanda, “adopted the position that if it could not stop the atrocities, at least it could take steps to eventually bring the perpetrators to justice.”⁷ Overcoming debates on the location of the Tribunal, procedural and structural issues, the objections of the Rwandan government, and other obstacles, the United Nations passed the International Criminal Tribunal for Rwanda (ICTR) statute on November 8,

³ See U.S. Inst. of Peace, *Rwanda: Accountability for War Crimes and Genocide*, Jan. 1995, <http://www.usip.org/pubs/specialreports/early/rwanda1>. The Rwandan Patriotic Front (RPF) was comprised of exiled Tutsis. *Id.* The RPF made repeated attempts to invade Rwanda from neighboring countries. *Id.* Each failed attempt was followed by the massacre of thousands of Tutsis within Rwanda. *Id.*

⁴ The Permanent Representative of the United Republic of Tanzania, *Letter Dated 23 December 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations, at 1, addressed to the Secretary-General*, at 1, U.N. Doc. A/48/824-S/26915 (Dec. 23, 1993). The accords called for an immediate cease-fire, the integration of armed forces, multi-party elections, the rights of all refugees to repatriate, and U.N. peacekeeping forces. *Id.*

⁵ VIRGINIA MORRIS & MICHAEL SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 53 (1998) (citing Colum Lynch, *UN Leaders Had Notice of Massacre*, BOSTON GLOBE, Nov. 27, 1996, at A1). The cable included details of Hutu militias and weapons stockpiles. *Id.*

⁶ See The Secretary-General, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, at 30, delivered to the Security Council, U.N. Doc. S/1999/1257 (Dec. 16, 1999) [hereinafter *Independent Inquiry*]. The United Nations has admitted culpability on the part of the Secretary-General, the Secretariat, the Security Council, United Nations Assistance Mission for Rwanda (UNAMIR), and its broader membership for the Rwandan genocide by failing to prevent the atrocities that took place. *Id.*

⁷ MORRIS & SCHARF, *supra* note 5, at 61 (quoting *Genocidal Slaughter Claims as Many as 1 Million*, 31 U.N. CHRONICLE 4, 12 (Dec. 1994)). See also Human Rights Watch, *Rwanda/Zaire: Reaffirming with Impunity*, May 1995, <http://www.hrw.org/reports/1995/Rwanda1.htm>.

1994, by a vote of thirteen in favor, one abstention (China), and one against (Rwanda).⁸

Contrary to the Rwandan penal code, the statute authorizing the ICTR does not allow for the imposition of the death penalty.⁹ This inconsistency is important because Rwanda supported the establishment of a tribunal and participated in the drafting of the statute. In the end, Rwanda voted against the resolution establishing the ICTR, pointing specifically to the absence of the death penalty as one of the main reasons for its disapproval, as well as the resulting political implications of the discrepancies in sentencing among those tried in the ICTR and those tried in Rwanda's domestic criminal courts.¹⁰ The discrepancy between the Rwandan penal code and the ICTR statutes allows architects of the atrocities to escape the death penalty while those with lower ranks, who are being tried in Rwandan courts, can be sentenced to death.¹¹ The appropriateness of the death penalty as a form of punishment is the subject of a great deal of controversy in the international human rights community. Most of the western world—with the notable exception of the United States—and the continent of Africa has moved toward abolishing capital punishment, either *de jure* or *de facto*.

The potential inconsistency between domestic punishment policy and acceptable modes of punishment in the international community raises several important questions for the meaning of individual accountability in international law. Should those convicted of human rights violations, such as genocide, be put to death for their crimes? Does this inconsistency reflect conflicting views on one type of punishment—the death penalty—among international and domestic legal communities or a more profound conflict over the appropriate prosecution of participants in genocide? Can other societies, under the auspices of international law, impose their views of justice onto the people of Rwanda who in theory support the death penalty? Lastly, is it also an injustice for those being tried for the same acts to receive such drastically

⁸ See Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, at 16, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

⁹ See *id.* art. 23. Sentencing under the ICTR Statute is limited to imprisonment and orders concerning the disposition of unlawfully appropriated property. *Id.* The length of prison sentences is determined by the "general practice regarding prison sentences in the courts of Rwanda." *Id.*

¹⁰ Provisional Verbatim Record, *supra* note 2.

¹¹ James McKinley, Jr., *As Crowds Vent Their Rage, Rwanda Publicly Executes 22*, N.Y. TIMES, Apr. 25, 1998, at A1. Twenty-two people were executed before a crowd of tens of thousands in a soccer stadium in Kigali. *Id.*

different punishments? The most basic understanding of fairness suggests this is an injustice.

The purpose of this Article is not to answer the question of whether the death penalty is an appropriate punishment for genocide.¹² One could safely argue that there is an emerging norm in international law against the death penalty, but individual countries have maintained their right to use the death penalty and continue to do so in code and in practice.¹³ This Article, using Rwanda as a case study, evaluates the real outcomes of such discrepancies in punishment at the domestic and international level, and the ability of both approaches to bring justice to the victims of genocide. Both domestic and international statutes articulate similar goals in prosecuting the perpetrators of genocide—eradicating a culture of impunity, and restoring law and order. This Article argues that the existence of conflicts over the propriety of the death penalty and the resulting punishment discrepancies provide continued opportunities for development of domestic and international responses to genocide.

Part I summarizes the events in Rwanda that led to the establishment of the Tribunal and discusses the resulting statutes of the ICTR and the domestic criminal statutes of Rwanda. This section also discusses the additional legal and political issues that have arisen from the discrepancy in punishment regimes. Part II offers two case studies to illustrate the types of actors and the extent of participation in the genocide tried under each regime. This section also outlines the goals of punishment articulated in each statute and how well these case studies reflect those goals. Part III questions the appropriateness of death as punishment for individual participation in international crimes. On

¹² For a clearly articulated discussion of this question, see Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT'L L. 747 (2005).

¹³ The norm of a prohibition against the death penalty is "emerging" because there is still debate over whether the opposition to the death penalty in the international community is a norm. For examples of those who argue or suggest that the prohibition on the death penalty is an international norm, see WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3d ed. 2002). See also Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 TUL. L. REV. 251, 254 (1998); Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273 (1993); Michelle McKee, Note, *Tinkering With the Machinery of Death: Understanding Why the United States' Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153 (2000). For examples of scholars who argue or acknowledge that a prohibition on the death penalty has not reached an international norm, see Ohlin, *supra* note 12; William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. f (1987).

the one hand, a majority of nations have moved toward the abolition of the death penalty; however, under Rwandan domestic laws, the death penalty remains a codified and utilized component of the penal code. There is sufficient political will in the international community to bar its use in international tribunals, but abolition has not yet reached the level of international norm. At the core of international law is a necessity for consensus, which promotes higher levels of compliance. Since Nuremberg, there is consensus that genocide is a crime, but the appropriate form of punishment is highly contested. There is also discussion of the employment of pre-colonial methods of adjudication as a way of expediting trials and providing real opportunities for reconciliation on the ground in Rwanda. The Article concludes with a discussion of the prospects for resolution of the punishment paradox in genocide prosecution created by opposing policies on punishment in domestic and international law. The resolution of this paradox may be too late to prevent the negative political consequences of differences in punishment in the Rwandan genocide, but the looming presence of genocide and possible tribunals in other parts of Africa, most specifically in the Sudan, continues to make analysis of this tension between international and domestic law on the death penalty important. The final section outlines concrete lessons that both the international community and domestic authorities can learn from the adjudication of the Rwandan genocide and apply to other prosecutions of participants in genocide.

I. THE GENOCIDE AND THE RESULTING STATUTE

A. *The Genocide*

Over 800,000 men, women, and children were slaughtered in Rwanda over a 100-day period from April to July 1994.¹⁴ This particular episode of violence was triggered by the death of President Juvénal Habyarimana in a plane crash and resulting rumors that the opposition Rwanda Patriotic Front (RPF) shot the plane down, even though "evidence suggests that the Hutu hardliners might actually have been responsible."¹⁵ Within hours of the crash,

¹⁴ *Independent Inquiry*, *supra* note 6, at 1. To demonstrate the extent of the killing and violence in Rwanda, the representative of Rwanda to the Security Council explained, "in a country the size of the United States this would be equivalent to the loss of over 37 million Americans in under three months." Provisional Verbatim Record, *supra* note 2, at 16.

¹⁵ MORRIS & SCHARF, *supra* note 5, at 53 (citing Philip Gourevitch, *After the Genocide*, NEW YORKER, Dec. 18, 1995, at 87).

civilian Tutsis and moderate Hutu civilians and politicians were hunted and killed.¹⁶ The Presidential Guard, the Rwandan armed forces, and the *interahamwe* militia began systematically killing Tutsis in Kigali.¹⁷ They went from house to house, executing every person present—men, women, and children. Many Tutsis sought refuge in churches, hospitals, schools, and with international aid groups, such as the Red Cross. They were murdered wherever they were found.¹⁸

The *interahamwe*'s main goal was the murder of Rwanda's Tutsi population, but killing was not their only activity. Numerous Tutsi women were also victims of assorted forms of sexual violence.¹⁹ From Kigali, the armed militias spread throughout the countryside, committing acts of violence and sexual torture from village to village.²⁰ The intimate nature of the violence in Rwanda makes the issue of prosecution and punishment extremely important.²¹ In a situation where genocide is perpetrated by neighbors—or in

¹⁶ See U.S. Inst. of Peace, *supra* note 3. The violence was fomented by broadcasts on Radio Rwanda, the Rwandan national radio station, and urged on even stronger by the private Radio des Mille Collines, which encouraged any Hutus within hearing range to murder more Tutsis. Paul Watson, *Testament to Genocide*, TORONTO STAR, July 23, 1994, at B1. Not only radio announcers, but also artists have been accused of using their talents to fuel the violence. Simon Bikindi, a famous Rwandan singer, has been tried in the ICTR for "using his songs to incite extremists to kill Tutsis." The civilian death squads used Bikindi's music to mobilize youth to join their killing machine. *Genocide Trial of Rwandan Musician Opens at UN Court*, BBC MONITORING, Sept. 19, 2006.

¹⁷ U.S. Inst. of Peace, *supra* note 3. In Kinyarwanda, the Rwandan national language, *interahamwe* means "those who attack together." *Id.* The *interahamwe* militia was formed in 1992 after a speech by Léon Mugesera, an officer in President Habyarimana's government, in which he encouraged Hutus "to kill Tutsis and to dump their bodies in the rivers of Rwanda." The Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, ¶ 63, delivered to the President of the Security Council, U.N. Doc. S/1994/1405 (Dec. 9, 1994) [hereinafter *Final Report*]. The three-week long programs "involved the indoctrination of groups of 300 men in ethnic hatred against the Tutsi minority. The programs also propagated information on methods of mass murder." *Id.* ¶ 65.

¹⁸ *Final Report*, *supra* note 17, ¶ 70.

¹⁹ See Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath*, Sept. 1996, <http://www.hrw.org/reports/1996/Rwanda.htm>. The intensity of the killings in Rwanda has tended to overshadow other acts of violence like rape, which is acted out almost exclusively on the bodies of women. See *id.* The number of women raped in Rwanda continues to be unclear, but it is estimated that tens of thousands of women were subject to widespread sexual violence during the 1994 genocide. See *id.*

²⁰ MORRIS & SCHARF, *supra* note 5, at 53.

²¹ The intimate nature of the violence has been captured in several recent films on the genocide, such as the Academy Award-nominated film *Hotel Rwanda*. HOTEL RWANDA (MGM 2005). These films have also portrayed the different approaches to accountability taken both domestically and by the international community. In the film, *Sometimes In April*, the filmmakers portray the testimony of a Rwandan genocide victim against his brother in the ICTR and the testimony of genocide victims against neighbors in traditional courts (*gacaca*). SOMETIMES IN APRIL (HBO Home Video 2005). Other fictional accounts, like the J.T. Rogers play *The Overwhelming*, have provided vivid accounts of the extent and intimacy of the violence during this period in Rwanda. Additionally, foreign media has attempted in recent years to shed light on the

some instances, by family members—the current international trend of removing and prosecuting those at the highest levels of planning and organization may not satiate all the calls for justice or support the end goal of re-establishing the rule of law.

According to one account of the ICTR, “the responsibility for the Rwandan genocide is shared in varying degrees by three categories of individuals: (1) the planners, (2) the ‘military’ superiors and subordinates and (3) the unwilling accomplices.”²² The first group, the planners, consisted of high-level government officials or other influential persons who encouraged or instigated violence.²³ The second group included those military personnel who actually supervised the killing.²⁴ The third group, unwilling accomplices, includes those who killed under the supervision of the previous two categories and who made up the majority of the *interahamwe*.²⁵ This group has been described by the human rights organization African Rights as follows:

events of the Rwandan genocide and the failure of the international community to intervene. See *UN Must Act on Burma*, CANBERRA TIMES (Austl.), Sept. 4, 2007, at A10 (discussing the moral failure of the United Nations to intervene in the Rwandan genocide); Lucy Bannerman, *Four in Court on Genocide Charges*, TIMES (London), Dec. 30, 2006, at 27; John Swain, *Rwanda Suspects on UN Genocide Panel*, AUSTRALIAN, Oct. 16, 2006, at 13; Amelia French, *Women Break Their Silence Over the Rape of Rwanda*, INDEPENDENT (London), Nov. 10, 1997, at 7; Paul Cullen, *President Criticises UN Failure on Human Rights*, IRISH TIMES, Mar. 3, 1997, at 5.

²² MORRIS & SCHARF, *supra* note 5, at 55.

²³ *Id.* This group included Agathe Habyarimana (the wife of the President), Jean Kambanda (the Prime Minister), Agnes Ntamabyariro (the Minister of Justice), and Augustine Bizimana (the Minister of Defense). The owners and operators of the National Radio, Radio Mille Colline, several members of President Habyarimana's family, and a variety of other officials in the Habyarimana government are also counted in this group. *Id.* at 55–57.

²⁴ *Id.* at 57.

²⁵ *Id.* at 58. There is great debate over the actual level of coercion within this group. Compare AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR, AND DEFIANCE 570 (1994) (“Using propaganda, bullying, the promise of looting and outright force, many ordinary people were made into members of the *interahamwe*, and were compelled to kill.”), with Jackson Nyamuya Maogoto, *International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory*, 13 BOND L. REV. 190, 202 (2001) (Austl.) (“What induced so many individuals to participate was not coercion, but rather genuine support of the idea that the Tutsi had to be eliminated, together with the pursuit of solidarity with others in attaining this goal.”). It cannot really be resolved until more and better adjudication of the detainees in Rwanda provide greater information for substantial analysis. See Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 585 (1998). This group appears similar to the *Einsatzgruppen*, the group of non-soldiers (arguably) who committed many of the murders outside of the concentration camps in Nazi Germany. The *Einsatzgruppen* are blamed for the majority of the murders of the *Rroma* (Gypsies), killed by the *Einsatzgruppen* outside of the concentration camps. For similar explanations of how “ordinary” Germans participated in genocide, see DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1997).

The *interahamwe* were sent to rural areas not just to kill, but also to force the local people to kill. Often, people were compelled to kill their neighbors or members of their own families. The extremists' aim was for the entire Hutu populace to participate in the killing.²⁶

Estimates are that half of the Rwandan Hutu population participated in the genocide,²⁷ which makes the job of accountability and reconciliation very complicated.

B. *The Statutes*

The Security Council established the ICTR "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994."²⁸ In Rwanda, the statutory basis for genocide prosecution at the national level is the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990.²⁹ Both the ICTR statute and the Rwandan Organic Law cover the same basic crimes: genocide, crimes against humanity, and offenses collateral to genocide. The statutes are also similar in that they both require the creation of entirely new court systems—the Tribunal and the Rwandan court system.³⁰ Rwanda's court system was completely destroyed by the genocide.³¹ The statutes and resulting prosecutorial systems differ on several important issues: the temporal reach, the categories of defendants they prosecute, the scope and quality of the prosecution, and the punishment permissible.

The Tribunal covers only crimes that occurred between April and July 1994, which includes the events just prior to the death of Habyarimana until the RPF defeated the government forces in July. The Rwandan government

²⁶ AFRICAN RIGHTS, *supra* note 25, at v.

²⁷ MORRIS & SCHARF, *supra* note 5, at 58.

²⁸ S.C. Res. 955, ¶ 12, U.N. Doc. S/INF/50 (Nov. 8, 1996).

²⁹ *Organizations of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990*, Organic Law No. 08/96 (Aug. 30, 1996), in OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA (Sept. 1, 1996) [hereinafter Organic Law].

³⁰ Compare *id.* with S.C. Res. 955, *supra* note 28.

³¹ William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solution to Impossible Problems*, 7 CRIM. L. F. 523, 533 (1997). Prior to genocide, "the Rwandan legal system has never been more than a corrupt caricature of justice." *Id.* at 531.

objected to the ICTR's limitation to such a short span of time.³² The Organic Law covers a ten-year period reaching back to the point in 1990 when rural Tutsis were attacked as a part of the Habyarimana regime's punishment for a failed RPF invasion.³³ The Organic Law ends with the date of the RPF consolidation of power.³⁴ Despite the Rwandan government's willingness to greatly expand the reach of the domestic trials, there are several notable exclusions. The law excludes: (1) the massacres of Tutsis in the 1960s, (2) the torture and imprisonment of Hutus who opposed the government during the Habyarimana Regime, and (3) those crimes committed by the RPF after it consolidated power.³⁵

In addition to differences in temporal reach, the two courts prosecute different categories of defendants. In keeping with the statute, ICTR prosecutions have largely focused on high-level government officials, leaving the rank-and-file participants in the genocide to be tried in Rwandan courts.³⁶ Under the Organic Law, there are four categories of offenders who may be found culpable:

- Category 1: Planners, organizers, instigators, supervisors, and leaders of the crime of genocide or crimes against humanity; notorious murderers; persons who committed acts of sexual torture
- Category 2: Perpetrators, conspirators, or accomplices of intentional homicide or serious assaults against the person causing death
- Category 3: Persons guilty of other serious assaults against the person
- Category 4: Persons who committed offenses against property

Category 1 offenders can receive the death penalty.³⁷

³² See Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L. L. 501, 505 (1996).

³³ Drumbl, *supra* note 25, at 580.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *id.* at 625.

³⁷ *Id.* at 581-82. Four years later, only 300 suspects had been prosecuted through these courts. *Id.* at 630.

Due to scarce resources in Rwanda, there is also a drastic difference in the number of defendants and the quality of the adjudication process available to the defendants in each court system. The ICTR has completed twenty-four cases, is in the process of trying twenty-eight persons, and has an additional six suspects awaiting trial in a U.N. Detention Facility outside of Arusha, Tanzania.³⁸ Current estimates are that there are 66,000 people accused of genocide imprisoned in Rwanda.³⁹ The Organic Law gives specific timelines for filing charges and appearing before a judge.⁴⁰ These deadlines have come and gone for most of the detained suspects. Because arrests were largely based on denunciation, observers believe that there are large numbers of innocent people being detained.⁴¹ The long periods of detention with no movement toward prosecution encourages the belief among detainees that they are in custody as part of a continued conflict between Hutus and Tutsis.⁴²

The differences in the two laws result from a broader disagreement over the need for, and the propriety of, the death penalty. The ICTR statute allows a maximum penalty of life in prison; Rwandan law allows the death penalty.⁴³ The Rwandan representative to the Security Council articulates the goals of prosecution as “build[ing] a state law and arriv[ing] at true national reconciliation” and “eradicating the culture of impunity which has characterized [Rwandan] society since 1959.”⁴⁴ The Rwandan representative argued that the death penalty was a necessary tool to reach this goal.⁴⁵ When Rwanda objected at the U.N. hearings to the absence of a provision for death in the ICTR statute, the representative from New Zealand best articulated the U.N. position: “For over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable—and a dreadful step backwards to introduce here [at the ICTR].”⁴⁶ Such statements reflect the sentiments of the majority of the

³⁸ See United Nations, International Criminal Tribunal for Rwanda, <http://www.icttr.org> (last visited Jan. 16, 2008).

³⁹ International Centre for Prison Studies, Prison Brief for Rwanda, http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/africa_records.php?code=39 (last visited Jan. 16, 2008).

⁴⁰ Organic Law, *supra* note 29.

⁴¹ Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1228 (2000).

⁴² *Id.* at 1288–89.

⁴³ See ICTR Statute, *supra* note 8; Organic Law, *supra* note 29. For the Security Council debate on the establishment of the ICTR and the issue of capital punishment, see Provisional Verbatim Record, *supra* note 2.

⁴⁴ Provisional Verbatim Record, *supra* note 2.

⁴⁵ *Id.*

⁴⁶ *Id.*

international community and the willingness of the international community to assert its position even in the face of support for the death penalty from those who were the victims of the genocide. As of 2007, a majority of nations have abolished the death penalty, *de jure* or *de facto*.⁴⁷ Even the United States, which continues to utilize the death penalty, has referenced international sentiments in recent prohibitions on the use of the death penalty for minors.⁴⁸

Since the adoption of the International Convention on Civil and Political Rights (ICCPR) in 1966, the majority of U.N. Member States have recognized the individual's interest in her own life and her right not to be arbitrarily deprived of life.⁴⁹ The ICCPR did not abolish the death penalty, but it exemplifies an international trend toward abolition.⁵⁰ As early as 1983, the Council of Europe amended its convention to abolish the death penalty.⁵¹ In 1989, the U.N. General Assembly adopted the Second Optional Protocol to the ICCPR, which is explicit in its aim of abolishing the death penalty.⁵² Twenty-five states on the African continent are classified as abolitionist.⁵³ Of the countries that retain the death penalty, most of the executions take place in China, Iran, Saudi Arabia, and the United States.⁵⁴ The United States, a signatory to the ICCPR, has defended its use of the death penalty despite

⁴⁷ See Abolitionist and Retentionist Countries, Death Penalty Information Center, Mar. 13, 2007, <http://www.deathpenaltyinfo.org/article.pho?scid=30&did=140>. Currently, 128 countries have abolished the death penalty, and sixty-nine countries have retained the death penalty. *Id.*

⁴⁸ *Roper v. Simmons*, 543 U.S. 551, 575–78 (2003). In *Roper v. Simmons*, the Supreme Court discussed the international prohibition of the execution of minors as one justification for prohibiting the practice in the United States and held the practice to be unconstitutional. *Id.* Among other sources, the Court referenced international law to justify its opinion. *Id.* However, not every member of the Court has supported the reference to international law. In a different dispute, Chief Justice Rehnquist and Justices Scalia and Thomas stated that the majority erred in giving “weight [to] foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion,” arguing that the only relevant evidence in deciding constitutional questions are the actual laws or the application of those laws. See *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

⁴⁹ D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 638 (5th ed. 1998). The only countries abstaining were the several members of the then-Soviet Block, Saudi Arabia, and South Africa. *Id.* at 636.

⁵⁰ *Id.* at 638–39.

⁵¹ Eur. Consult. Ass., *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Europ. T. S. No. 114 (1983).

⁵² Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/Res/44/128 (1989).

⁵³ William A. Schabas, *African Perspectives on the Abolition of the Death Penalty*, in THE INTERNATIONAL SOURCE BOOK ON CAPITAL PUNISHMENT 31, 31 (William A. Schabas et al. eds., 1997).

⁵⁴ See Death Penalty Info. Center, The Death Penalty: An International Perspective, <http://www.deathpenaltyinfo.org/article.php?did=127&scid=30#interexec> (last visited Sept. 28, 2007).

criticism that it violates the object and purpose of the treaty.⁵⁵ Some scholars have countered this argument by suggesting that the continued use of the death penalty is not sufficient to say that the United States is violating the object and purpose of the treaty.⁵⁶ The United States only had to reserve on the issue of the death penalty for juveniles, which was barred under the ICCPR.⁵⁷ This reservation is no longer required with the 2005 Supreme Court decision in *Roper v. Simmons*, which held the execution of minors under age 18 to be unconstitutional.⁵⁸ Scholars who defend the continued use of the death penalty but for this category of defendants argue that the United States takes a different interpretation of the treaty's object and purpose.⁵⁹ Rwanda on the other hand has not made a similar attempt to defend its departure from its own history or international trends. This failure, among other things, has led to criticism that the use of the death penalty in the Rwandan prosecutions is essentially retaliation for the 1994 genocide.⁶⁰

II. DIFFERENCES IN DEFENDANTS IN THE TWO COURTS: THE *INTERAHAMWE* AND JEAN KAMBANDA

A. *The Interahamwe*

"Rise up Rwanda, you are supported by the *Interahamwe*, those who join together for a common cause."⁶¹ This song that once called citizens together for a common good is now synonymous with murder and incredible brutality. *Interahamwe* translates as "those who work together" and refers to the "system of communal labor in Rwanda where village men joined forces to repair roads and cut firewood."⁶² Prior to the death of President Habyarimana, which precipitated the most recent ethnic killing, the *interahamwe* was the youth

⁵⁵ Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 436–37 (2000).

⁵⁶ See *id.* at 403.

⁵⁷ *Id.*

⁵⁸ *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

⁵⁹ See Bradley & Goldsmith, *supra* note 55, at 433–35.

⁶⁰ Drumbl, *supra* note 25, at 607. Philip Gourevitch rejects conflation of the war with the genocide. See Gourevitch, *supra* note 15, at 98–99. Gourevitch concludes that "[a]lthough the genocide coincided with the war, its organization and implementation were quite distinct from the war effort. In fact, the mobilization for the final extermination campaign swung into full gear only when Hutu Power was confronted by the threat of peace." *Id.*

⁶¹ Robert Block, *The Young Who Kill Without a Qualm*, INDEPENDENT (London), July 10, 1994, at 11.

⁶² Paul Salopek, *Guerrillas Haunt Jungles of Congo*, CHI. TRIB., Oct. 18, 1999, at N1.

wing of the ruling Hutu party.⁶³ According to a former member now in a Kigali prison, "We were just young people, not militias. Originally we were not together for fighting but thinking."⁶⁴

In the early 1990s, Hutus radicalized a once-benign program into an armed militia "imbued with a vitriolic anti-Tutsi ideology as the government's war against the rebels [RPF] escalated."⁶⁵ The intimate method of killing, which for the *interahamwe* was typically the use of machetes, required significant manpower and direct action.⁶⁶ Many individuals participated in the killings at a hands-on level.⁶⁷ The *interahamwe*, who drew from all strata of Rwandan society, viewed their Tutsi neighbors, colleagues, and, in some cases, relatives (due to the high level of intermarriage between the two groups) as the enemy.⁶⁸ Others—like Robert Kajuga, the president of the Hutu militia—placed the blame with the RPF and viewed the actions as self-defense.⁶⁹

In addition to views of *interahamwe* actions as self-defense, Kigali jails are rampant with stories of coercion and innocence.⁷⁰ Again, because most of the domestic arrests were based on denunciation, the number of innocent among those imprisoned is thought to be very high.⁷¹ Despite years of imprisonment, few are willing to confess. Some admit to being members of the *interahamwe*, but not participating in the violence—a sort of "guilt by association."⁷²

⁶³ Block, *supra* note 61.

⁶⁴ *Id.*

⁶⁵ Salopek, *supra* note 62; Chris McGreal, *Life Sentence for Rwanda Genocide Leader*, GUARDIAN (London), Dec. 7, 1999, at 14.

⁶⁶ Block, *supra* note 61.

⁶⁷ Drumbl, *supra* note 41, at 1238.

⁶⁸ There is some debate as to whether or not the Hutus and Tutsis are actually two distinct ethnic groups because they share a common language, history, and religion, as well as similar diet, music, art, and culture. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 48 (1998). The similarities between the Hutus and the Tutsis challenge traditional understandings of the nature of ethnic violence and may signal a need to refine current definitions of genocide. *Id.* at 210–11.

⁶⁹ Lindsey Hindus, *Hutu Warlord Defends Child Killing*, OBSERVER (London), July 3, 1994, at 15. Kajuga, the seminary-educated son of an Anglican minister, was the national president and founder of the *interahamwe* in 1990. *Id.* He exemplifies the difficulty of creating a representative profile of the *interahamwe*. *Id.*

⁷⁰ Drumbl, *supra* note 25, at 607.

⁷¹ See GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF GENOCIDE* 323 (1995). "Denunciation of Hutus as former *interahamwe* were common, just to get somebody out of the way and appropriate his house or land." *Id.* This method of arrest has led to false accusations. *Id.* Due to the level of chaos in the Rwandan criminal justice system, there is no way to know how many such accusations have occurred and whether they will be remedied. *Id.*

⁷² *Id.*

Variations of this kind of guilt due to status rather than guilt due to action, coupled with the minimal infrastructure, only prolong the process of justice in Rwanda.

Execution of the innocent has become a major component of the capital punishment debate in the United States and a major source of criticism by the international community of the continued use of death as punishment.⁷³ Though it is sometimes difficult to differentiate legitimate claims of innocence from those seeking to avoid accountability for their role in the genocide, this kind of uncertainty has reinvigorated opposition to the death penalty both within and outside of the United States.⁷⁴ The reliance on denunciations as the main evidence for conviction also makes the use of capital punishment troublesome.⁷⁵ When one adds to the mix the failure to provide adequate legal representation or other legal structures to those being detained in Rwandan prisons, most of the major objections to the use of capital punishment are realized in the Rwandan domestic courts.

The result of the low number of convictions in Rwanda's domestic courts is that the number of death sentences carried out is small relative to the number of people detained.⁷⁶ But with the trials continuing and the process increasingly politicized, it is not clear what role further convictions and sentences will play in the attempts to counter the culture of impunity that existed prior to the 1994 genocide and possibly still exists today. The commentaries to the Rwandan Organic Law outline the goals of punishment in Rwandan law as follows: "to punish the guilty, serve as a dissuasive example, protect the people and rehabilitate the accused."⁷⁷ The trials that have taken place so far do not bode well for the attainment of the larger goals ascribed to penalties under both international law and the domestic law of Rwanda.

⁷³ Though there is something unfair about mapping the cultural and legal traditions of one country onto another, research on the death penalty in the United States has shown how deciphering the legal and popular meaning of innocence can be influenced by existing social cleavages (i.e., ethnicity). Melynda J. Price, *Litigating Salvation: Race, Religion and Innocence in the Karla Faye Tucker and Gary Graham Cases*, 15 S. CAL. REV. L. & SOC. JUSTICE 267 (2006).

⁷⁴ See *id.* at 282-83.

⁷⁵ See PRUNIER, *supra* note 71, at 323.

⁷⁶ See Robert F. Van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & POL'Y SYMP. 203, 212 (1999).

⁷⁷ INTERNATIONAL CENTRE FOR THE STUDY AND THE PROMOTION OF HUMAN RIGHTS AND INFORMATION, *THE GENOCIDE AND THE CRIMES AGAINST HUMANITY IN RWANDA LAW*, COMMENTARY 27-28, 42 (1997).

Rwandans are frustrated with the slow pace of trials.⁷⁸ Individual accountability is also about justice for the victims. The meager attempts at trials in Rwanda have done little to provide solace or compensation for those who were injured or lost loved ones.⁷⁹ This frustration is further fueled by claims of reprisals against witnesses by *interahamwe* inside and outside of Rwanda.⁸⁰ The current formation of the *interahamwe* is unclear, but they “are far more than just a ghost from Rwanda’s bloody past.”⁸¹ The occurrence of the debate in the midst of continued armed conflict between Hutu rebels and the RPF makes it extremely difficult to know what the impact of such trials has been or what the future impact of imposing death sentences will be on the rule of law in Rwanda.

Even if one were able to remedy the structural problems rampant in the domestic prosecutions in Rwanda, there remains the issue of the discrepancy between the sentences that could be imposed on these individuals as opposed to those who orchestrated the genocide. Are these individuals more culpable? Their crimes are arguably not any more severe than those being tried before the ICTR. The definition of genocide in Rwandan law is the same as that in international law.⁸² The acceptance of this definition of genocide should produce equal treatment of those on trial in Rwanda and those before the ICTR.

B. Jean Kambanda

In April 1994, Jean Kambanda was the Prime Minister of Rwanda. In September 1998, he became the first head of state to be prosecuted in an international proceeding for the crime of genocide and sentenced to life in

⁷⁸ Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT’L L.J. 163, 181 (2000).

⁷⁹ See generally Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251 (2007).

⁸⁰ As of 1999, “[o]ver 300 survivors of the genocide who were scheduled to testify in criminal proceedings have been murdered.” Van Lierop, *supra* note 76, at 220.

⁸¹ Salopek, *supra* note 62. There was estimated to have been 5,000 *interahamwe* prior to the genocide. Their ranks swelled as the violence of the genocide escalated. Those who are not detained have been forced into the jungles of the Congo, causing significant problems in an already protracted conflict in that country. *Id.* See also Van Lierop, *supra* note 76, at 231 (noting that “[t]he political fallout from the 1994 genocide in Rwanda has been a major catalyst in the upheaval now wrenching apart the Congo and threatening to cause more upheaval in neighboring countries as well”).

⁸² Drumbl, *supra* note 25, at 577.

prison.⁸³ Kambanda confessed to “conspiring with other government leaders to direct massacres, set up a network of roadblocks to trap Tutsis, arm the population and militias and allow local authorities to oversee killing,” and “incit[ing] the population to kill Tutsis and their sympathizers.”⁸⁴ As the first high-level official even to admit to the massacres of 1994, Kambanda’s confession was extremely important to the ICTR’s progress and the domestic trials for genocide in Rwanda, as well as for its historical precedent in international law.⁸⁵

Kambanda was prosecuted for more than his position as prime minister at the time of the genocide. He openly encouraged Hutus to root out and murder Tutsis on Rwandan radio, the major form of communication in the country.⁸⁶ Kambanda is said to have “witnessed systematic killings, [known] or should have known that massacres were taking place, failed to use the powers of his office to protect his countrymen, and [done] nothing to stop government officials and army officers who were under his authority from organizing and directing the slaughter.”⁸⁷ He is also accused of having “ordered roads to be blocked, knowing that this would trap fleeing refugees and result in their certain death or injury.”⁸⁸ Kambanda signed and issued directives legalizing the death squads that roamed the hills of Rwanda during the genocide.⁸⁹

⁸³ Marlise Simons, *War Crimes Court Rejects Rwandan’s Appeal of Life Sentence*, N.Y. TIMES, Oct. 20, 2000, at A10. Saddam Hussein was also a head of state tried for genocide, but in an Iraqi national court rather than an international forum. Edward Wong, *Hussein Charged with Genocide in 50,000 Deaths*, N.Y. TIMES, Apr. 5, 2006, at A1.

⁸⁴ Stephen Buckley, *Ex-Leader in Rwanda Admits to Genocide*, WASH. POST, May 2, 1998, at A1.

⁸⁵ See Ann M. Simmons, *Ex-Rwandan Premier Admits Genocide Role*, L.A. TIMES, May 2, 1998, at A1. Kambanda provided some ninety hours of videotaped evidence, which will be used against twenty-three “high-profile, but lower-ranking defendants” before the Tribunal. *Id.* Denial of the events that occurred was the anticipated foundation for the defenses of other defendants before the ICTR, as well as a substantial portion of those being detained in Rwanda. *Id.* Rakiya Omar, Director of African Rights, suggested that Kambanda’s plea was “likely to create a panic among the suspects both in Rwanda and at the tribunal because their whole philosophy, their ideology—to deny that there was a genocide—is no longer valid.” Stephen Buckley, *A Top Hutu Pleads Guilty to Genocide*, INT’L HERALD TRIB., May 2, 1998, at News 1. The Rwandan genocide prosecutions have been the most expansive in trying media personalities and operators for the incitement of genocide. See Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahima*, 21 AM. U. INT’L L. REV. 557 (2006).

⁸⁶ Simmons, *supra* note 85.

⁸⁷ John M. Goshko, *Rwandan Given Life Term for Genocide*, WASH. POST, Sept. 5, 1998, at A1.

⁸⁸ Simmons, *supra* note 85.

⁸⁹ James C. McKinley, *Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in ‘94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at A4.

Some have viewed Kambanda's reluctant plea as a pivotal moment in the functioning of the ICTR.⁹⁰ The fact that Kambanda acknowledged the murders detracted from the ability of others charged with crimes stemming from the same violence to deny participation.⁹¹ Kambanda's confession was entered almost four years after the genocide in Rwanda.⁹² Kambanda's story changed substantially from his arrest in Kenya in 1997 to the time of his conviction.⁹³ In 1994, Kambanda and other high-level officials claimed that "the massacres were a spontaneous reaction, an unpredictable and uncontrollable tribal killing in response to the murder of President Habyarimana."⁹⁴ If the purpose of the trials in the Tribunal and in Rwanda is to stem the culture of impunity in Rwanda, the incremental progress represented by the Kambanda confession offers little hope of achieving that purpose. Since Kambanda's confession was not accompanied by any reduction in his sentence, there was some concern about it being an impediment to securing confessions from others before the Tribunal, which makes the Tribunal's work more difficult.⁹⁵

Kambanda appealed his conviction, primarily contesting the sentence, which he claimed disregarded the mitigating circumstances.⁹⁶ The ICTR has goals similar, in terms of punishment, to Rwandan domestic law. The goals of

⁹⁰ James C. McKinley, *Ex-Rwandan Prime Minister Gets Life Term for Genocide*, INT'L HERALD TRIB., Sept. 5, 1998, at News 6. Kambanda suggested that "as prime minister, he had to take the rap." James C. McKinley, *Ex-Premier Admits He Led Massacres in Rwanda in 1994*, N.Y. TIMES, May 2, 1998, at A1 [hereinafter *Ex-Premier*]. The ICTR has primacy over Rwandan domestic law, so Kambanda could not be retried in Rwanda. ICTR Statute, *supra* note 8, art. 8.

⁹¹ See Simmons, *supra* note 85.

⁹² *Id.*

⁹³ The following is Kambanda's account prior to his arrest of the happenings in Rwanda:

My government didn't plan or execute these massacres. I should be the first to know as head of my government. If there is any member of my government suspected of planning the massacres, he should be investigated, and if the facts are there he should be tried. But I don't like the idea of anyone saying my government planned or executed massacres.

Chris McGreal, *From Reluctant Premier to Mass Murderer*, OBSERVER (London), Sept. 6, 1998, at 26.

⁹⁴ Chris McGreal, *Blood on Their Hands*, OBSERVER (London), Dec. 3, 1994, at T40.

⁹⁵ See Goshko, *supra* note 87. During the sentencing phase of the trial, the Prime Minister's attorney argued for leniency in light of the confession and pledged future cooperation as a witness against other officials in cases before the Tribunal. Chief Judge Laity Kama of Senegal summarized the reasons for the Tribunal's rejection of leniency: "Jean Kambanda abused his authority and the trust of the population. Nor has he expressed any contrition, regret or sympathy for the victims of Rwanda even when given the opportunity." Buckley, *supra* note 85. See also Simmons, *supra* note 85; *UN Court Hands Down First Sentence for Genocide*, CHIC. TRIB., Sept. 6, 1998, at C17; *Ex-Premier*, *supra* note 90, at A1. The reluctance to participate in confession procedures was also observed in Rwanda. A comprehensive study of the prisoners in Rwanda found that few prisoners knew of anyone whose sentence had been reduced after confession and were therefore unwilling to do so themselves. See Drumbel, *supra* note 41, at 1281.

⁹⁶ Simons, *supra* note 83.

the Tribunal, as articulated by the court in *Kambanda*, are to "prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and restore peace."⁹⁷ Are Kambanda's actions appreciably different from those of the *interahamwe*? His hands did not wield a machete during the genocide, but they are arguably no less bloody.

The role of Kambanda relative to that of the *interahamwe* raises two questions. First, could he have stopped the violence in April 1994 if he had tried? It may not have been possible. The exact details of his rise to power are unclear, but it was not by referendum. He was an attractive candidate for the job because he was a member of the extremist party and a high-level official prior to death of Habyarimana.⁹⁸ But conscription into office does not explain his enthusiastic participation in the violence that followed. The participation of someone of Kambanda's status raises the question of whether heads of state are always complicit when crimes of such monumental proportions occur within their borders. Genocide is defined by both the quantity of people murdered, as well as the qualitative nature of the crime.⁹⁹

The facts of Kambanda's case make the question of his complicity easy, but it does not sit well as precedent if this heightened level of knowledge and participation is the standard for further prosecutions of heads of state. The Tribunal notes the violation of trust inherent in the relationship between the head of state and the citizenry.¹⁰⁰ It is this element of trust that makes Kambanda arguably more culpable than the *interahamwe*. Through the concept of command responsibility, international law has recognized this additional level of complicity at least since World War II.¹⁰¹ Yet, Kambanda's life will

⁹⁷ Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 26 (Sept. 4, 1998).

⁹⁸ See Simmons, *supra* note 85.

⁹⁹ Under the ICTR statute, genocide is defined as: "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group":

- (a) Killing members of the group
- (b) Causing serious bodily or mental harm to members of the group
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- (d) Imposing measures intended to prevent births within the group
- (e) Forcibly transferring children of the group to another group

ICTR Statute, *supra* note 8, art. 2.

¹⁰⁰ Kambanda, Case No. ICTR 97-23-S, ¶ 44.

¹⁰¹ In the case of General Iwane Matsui, the ranking officer who perpetrated the "Rape of Nanking," the court states clearly that a commander or any other actor in a supervisory position will be held criminally liable for his failure to ensure that his troops act within the law. Linda A. Malone, *Beyond Bosnia and In Re*

be spared. Kambanda's punishment is distinct even from those who are not sentenced to death in Rwanda. First, the conditions of imprisonment in Kigali still suggest that Kambanda enjoys a better fate than they.¹⁰² Under international law, Kambanda is serving his sentence in a prison that meets the international humanitarian rules for confinement—conditions which many international observers say have not been met in Rwanda.¹⁰³ The second issue is one of parity or proportionality. If one does not view Kambanda as having greater culpability, the discrepancies between the punishment of Kambanda and the *interahamwe* raises an important question about the fairness of two defendants who have been found guilty of the same crime receiving two different sentences.

The distinction is the overwhelming objection to the death penalty from powerful nations in the United Nations. The power of those U.N. Member States that oppose the death penalty is so strong that the United States, which continues to practice the death penalty, pointed directly to the political

Kasinga: *A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence*, 14 B. U. INT'L L.J. 319, 321 (1996). Unlike Matsui, Kambanda was not regular military. The argument for Kambanda's complicity based on command responsibility is that once he legalized the *interahamwe*, he essentially made himself the commander of those groups. There is also evidence that he controlled their actions prior to assuming the role of Prime Minister. The wholesale adoption of the concept of command responsibility in international law has been questioned on whether it is in line with the fundamental principle of just desserts. See, e.g., Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001).

¹⁰² See Phil Clark, *When the Killers Go Home*, DISSENT, Summer 2005, at 14. In 1994, the RPF arrested nearly 120,000 Hutus and imprisoned them in a facility built to house 40,000 people. Few were formally charged and all were held in conditions that violated all international humanitarian rules for confinement. They were "underfed, drinking dirty water, [and] crammed into tiny rooms where they slept on top of one another in latticework formation." *Id.*

¹⁰³ Simons, *supra* note 83. Kambanda is currently serving his sentence in a prison in Mali. Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69, 115 n.231 (2006). The United Nations made an agreement with Mali to enforce the punishment handed down by the ICTR. Agreement Between the Government of the Republic of Mali and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, Feb. 12, 1999, 2122 U.N.T.S. 243. The agreement requires the government of the requested state to meet the "Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners." *Id.* at 243. The United Nations made a similar agreement with Benin. See Agreement Between the Government of the Republic of Benin and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, Aug. 26, 1999, 2122 U.N.T.S. 231. There are no such requirements for the treatment of those detained in Rwanda's prisons. As recently as May 2006, claims of adults and children being held in "deplorable conditions" in makeshift prisons have been reported. Human Rights Watch, *Rwanda: Hundreds Illegally Detained in Former Warehouse*, May 15, 2006, <http://hrw.org/english/docs/2006/05/12/rwanda13369.htm>.

impossibility of establishing the ICTR if it had a death penalty.¹⁰⁴ The kind of political intrusion that would be required to say that the death penalty should be prohibited in Rwanda represents one of the fears of states wary of too much power in the hands of international bodies. This makes a discussion about the death penalty, even under the deplorable conditions that it will be imposed in Rwanda, extremely difficult. The resolution of this question has led to the current punishment paradox in the adjudication of the genocide in Rwanda and potentially in other states where the policy on the death penalty is contrary to the majority of the international community.

III. IS DEATH THE APPROPRIATE FORM OF PUNISHMENT FOR INDIVIDUAL PARTICIPATION IN CRIMINAL VIOLATIONS OF HUMAN RIGHTS?

The idea that imposing the death penalty supports reconciliation or any of the other goals of accountability in human rights law would have greater credence had Rwanda actively carried out state-sanctioned executions prior to 1994. The Rwandan Penal Code provided for capital punishment, but there are several factors that suggest Rwanda had moved away from imposing the death penalty. First, until the post-genocide period, Rwanda had not imposed the death penalty since 1982, even though there were numerous instances of extra-legal violence.¹⁰⁵ Second, President Habyarimana, whose death sparked the events of April 1994, had commuted all existing death sentences in 1992.¹⁰⁶ Additionally, as part of the 1993 Arusha Peace Accords, the Rwandan government agreed to ratify the Second Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (ICCPR), although ratification was never completed.¹⁰⁷ The RPF, which currently controls the Rwandan government, called for the abolition of the death penalty as part of its platform.¹⁰⁸ Lastly, at the time the ICTR was

¹⁰⁴ Provisional Verbatim Record, *supra* note 2, at 17. Madeline Albright, the U.S. ambassador and the President of the Security Council at the time the resolution was passed, offered the following statement: "While we understand their [Rwanda's] concerns regarding several key issues—indeed on the death penalty we might even agree—it was simply not possible to meet those concerns and still maintain broad support in the Council." *Id.*

¹⁰⁵ William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 766 (1997).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* The Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty prohibits the execution of anyone in a state within the jurisdiction of the treaty. HARRIS, *supra* note 49, at 646.

¹⁰⁸ Schabas, *supra* note 53, at 47.

established, Rwanda was considered to be a de facto abolitionist state by the United Nations.¹⁰⁹

Although the Tutsi-led government claims otherwise, the imposition of the death penalty for genocide appears to be an effort to legitimize the same violence done extra-legally by the Hutus prior to 1994. The absence of basic due process or any resemblance of fairness further supports this view. The current Rwandan government proclaims that it is not looking for revenge, but this statement is hard to reconcile with the reality of the situation of those being detained in Kigali.¹¹⁰ Even in countries that support the death penalty, assembling inmates on a soccer field for a public execution is outside of the bounds of legitimate state action. The Rwandan government has taken steps to retreat from such shows of violence; to demonstrate its commitment to the rule of law, it has arrested more than 1,000 of its own soldiers.¹¹¹ These efforts, married with the deficient conditions of the Rwandan justice system, are insufficient to support the use of the death penalty for the crime of genocide in this state.

IV. THE ICTR AND TRIALS IN RWANDA AS AFRICA'S NUREMBERG AND EICHMANN

If the ICCPR and its subsequent documents are the measure, then there is at least an international majority that views the death penalty as a human rights issue and believes the employment of such punishment should be highly scrutinized and severely limited.¹¹² With the exception of Eichmann, the East German Nazi Trial, and a few other trials from World War II, there had been no executions of those found guilty of the crime of genocide other than those that have taken place in Rwanda and possibly the recent execution of Saddam Hussein.¹¹³ Arguably, Hussein's execution could be indicative of a new wave of domestic trials of those charged with human rights abuses.¹¹⁴ In his

¹⁰⁹ The Secretary-General, *Report of the Secretary General on Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, at 6, delivered to the Economic and Social Council, U.N. Doc. E/1995/78 (Mar. 9, 1995).

¹¹⁰ Simmons, *supra* note 85.

¹¹¹ Van Lierop, *supra* note 76, at 216. Soldiers, including officers, have been arrested for revenge killings and other more common crimes. Like the rest of those being detained, the soldier may or may not be charged and may languish in prison in Rwanda. *Id.*

¹¹² Provisional Verbatim Record, *supra* note 2, at 15.

¹¹³ See Maggie Farley, *His U.N. Honeymoon is Short-lived*, L. A. TIMES, Jan. 3, 2007, at A4.

¹¹⁴ See *id.*

comments after Hussein's execution, the new UN Secretary General Ban Ki Moon reiterated the ongoing tension between domestic and international humanitarian law on the death penalty, but unlike his predecessors he did not take a hard line against its use in this instance.¹¹⁵ No one knows whether this is a one-time execution of a convicted despot or a choice more states will make to deal with past abuses. Eichmann and Nuremberg may still be the most ready example(s) of the conflicting positions domestic and international law have taken in their view/implementation of punishment. Rwanda appears to follow a similar pattern, but diverges in ways that make it particularly instructive for events unfolding on the African continent.

In her account of the Eichmann trial, Hannah Arendt argues that there was so little opposition to Eichmann's hanging because those who opposed the death penalty, though valid in their opposition, knew "that this was not a very promising case on which to fight."¹¹⁶ Arendt's acknowledgment of the existence of opposition to this form of punishment at least breaks through the façade of consensus about the imposition of the death penalty in cases where defendants are guilty of the most heinous crimes.¹¹⁷

Nuremberg clearly establishes the crime of genocide as a violation of international law—a crime against the international community and not simply against individuals or individual states.¹¹⁸ One of the major criticisms of Nuremberg was the issue of selective prosecution, or the failure to bring all those guilty of genocide to trial.¹¹⁹ The government of Israel sought to correct this problem by locating and extraditing several high-profile Nazi criminals to Israel to be prosecuted.¹²⁰ The fairness of prosecution without the participation of other states was questioned both during and after the Eichmann trial in Israel, as well as similar trials of Nazis under domestic genocide laws in other countries.¹²¹ Punishment for those found guilty in domestic courts varied, but

¹¹⁵ *Id.* Ban's comments on Saddam Hussein's execution were among his first as the new U.N. Secretary General. *Id.* Ban stated, "the issue of capital punishment is for every member state to decide," but "at the same time, [he] hoped that the international member states would pay due regard to all aspects of humanitarian law." *Id.* Ban is also from a state—South Korea—where the death penalty is legal, so this may be why he is unwilling to go as far in opposing the death penalty as other who have held the job. *Id.* It is not yet clear what tone Ban will take on the death penalty in his new role. See Colum Lynch, *New U.N. Chief Defends the Death Penalty for Hussein*, WASH. POST, Jan. 3, 2007, at A15.

¹¹⁶ HANNAH ARENDT, *A REPORT ON THE BANALITY OF EVIL: EICHMANN IN JERUSALEM* 252 (1994).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 255.

¹¹⁹ *Id.* at 6–7.

¹²⁰ *Id.*

¹²¹ *Id.* at 258–59.

the differences were not statutorily prescribed as in the ICTR and the Rwandan Organic Law.

One could analogize the genocide trials taking place in Rwanda as multiple versions of the trial of Eichmann and the ICTR as a current Nuremberg. Arendt distinguishes Eichmann's trial in Jerusalem from Nuremberg and others by the central role the Jewish people played in judging Eichmann.¹²² There is a strong argument that the Rwandans generally, and Tutsis specifically, deserve the opportunity to impose a local sense of justice onto those who committed atrocities. The refrain of "never again", adopted from the Holocaust, is rampant in discussion about prosecution and punishment.¹²³ In the Security Council debates, the Rwandan representative used this very rhetoric in opposition to a statute that would not allow for the death penalty.¹²⁴ The representative consistently compared the suffering of the Tutsis to that of Jews during WWII.¹²⁵ Arendt viewed Nuremberg as a tribunal "established for war criminals whose crimes could not be localized," similar to the current codification of genocide and crimes against humanity in international law.¹²⁶ She viewed the crimes of those tried at Nuremberg as being crimes without geographic boundaries.

Alternatively, Rwanda seems like the best case for local punishment if the predominant requirement for an international tribunal is that the crimes cross state boundaries. The Rwandan genocide was largely confined within its borders, though residual violence and fleeing *interahamwe* have been viewed as responsible for crimes in neighboring countries. If one sets aside Eichmann's death sentence to look solely at the process of the trial, Eichmann stands as an example that this kind of trial can take place without abrogating the defendant's due process rights and right to fairness.

There are several reasons why this analogy fails. The first is that unlike Israel at the time of Eichmann's trial, Rwanda does not have the same history of the rule of law.¹²⁷ Even if there were a longstanding history of the rule of law, the judiciary was specifically targeted in the genocide, which placed strain on the remaining court system.¹²⁸ If the international community agreed that

¹²² *Id.* at 6–7.

¹²³ Provisional Verbatim Record, *supra* note 2.

¹²⁴ *Id.* at 13.

¹²⁵ *Id.*

¹²⁶ ARENDT, *supra* note 116, at 258.

¹²⁷ Schabas, *supra* note 31, at 531.

¹²⁸ *Id.* at 533.

the death penalty was acceptable, then it must also agree that implementation requires a heightened level of due process protection and the authority of a legitimate state. The reality of conditions in Rwanda is the strongest argument against implementing the death penalty there for perpetrators of genocide.

A. *The Role of Punishment*

The sociological understanding of the role of punishment has evolved. Emile Durkheim is credited with being the first to see punishment as more than just a response to crime.¹²⁹ Durkheim has been read to construe punishment as not only defining what is criminal, but also as having "positive social effects such as reinforcing solidarity by symbolically displaying the collective sentiments."¹³⁰ Punishment then becomes a "system of signs" by which the moral values of the society are communicated.¹³¹ The ICTR and the Rwandan courts both have a stated goal of countering the culture of impunity that existed in Rwanda in 1994.¹³² Executions may placate the need for justice or retribution among the survivors of the genocide, but what they reflect about the collective sentiments of the Rwandan people is problematic if the ultimate goal is true resolution of the problems that fomented the violence.

The willingness of the Security Council to give its prosecution primacy over the Rwandan national courts may mean greater internationalization of the crime of genocide. It is stronger support for the position that genocide is truly a transnational crime against all humanity. If this is true, then the punishment paradox in the instant case may also signal a need for a more structured theory of the purpose and role of punishment in the international arena. The ad hoc nature of the current Tribunal requires a constant renegotiation of the kind of punishments to be employed.¹³³ The establishment of the International Criminal Court (ICC), which will develop its own common law understanding of punishment, may correct some of this. However, the ICC would do little to correct the possible asymmetries in punishment that may occur if countries decide to prosecute perpetrators of genocide domestically, which international law strongly encourages. These asymmetries are bound to persist until there is

¹²⁹ See, e.g., EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* (1964); Emile Durkheim, *Two Laws of Penal Evolution*, 2 *ECON. & SOC'Y* 285 (1973).

¹³⁰ ADRIAN HOWE, *PUNISH AND CRITIQUE: TOWARDS A FEMINIST ANALYSIS OF PENALTY* 6 (1994).

¹³¹ David Garland, *Durkheim's Theory of Punishment: A Critique*, in *THE POWER TO PUNISH; CONTEMPORARY PENALTY AND SOCIAL ANALYSIS* 58-59 (David Garland & Peter Young eds., 1983).

¹³² Provisional Verbatim Record, *supra* note 2.

¹³³ See *id.* The existence of multiple ad hoc tribunals, with discussion about the punishment found in each, demonstrates that punishments must be renegotiated when another tribunal is set up. *Id.*

greater resolution on the issue of whether the death penalty should be used at any level, at any time. The execution of Saddam Hussein and the failure of the leader of the primary international organization—the United Nations—to take a clear position on the death penalty exemplify the confusion that exists over the death penalty in practice.

One could argue that the genocide in Rwanda, where killing is localized and results from the ethnic conflict among the citizens of a single state, may be simply communicating the pathologies of that society: therefore the forms of punishment employed domestically do not need to mirror the values of the international community. In a statement to the Security Council prior to voting against the formation of the ICTR, Mr. Bakuramutsa, the Rwandan representative asserted:

The Rwandese who were taught that it was acceptable to kill as long as the victim was from a different ethnic group or from an opposition party, cannot arrive at national reconciliation unless they learn new values. The national reconciliation of the Rwandese can be achieved only if equitable justice is established and if the survivors are assured that what has happened will never happen again.¹³⁴

The question is how this lesson can be taught and who makes this decision. In Rwanda, the answer to the question is still evolving. With other conflicts such as the one in Sudan, and possibly more prosecutions in Iraq, the possibility exists of more tribunals in the future. Also looming is the process of identifying mechanisms for punishment that will reconcile the interests of both the international community and the victims of the atrocities.

B. Maybe it Takes a Village to Stop Genocide: Traditional Courts as a Solution to Delays in Justice for Rwandan Genocide Victims

One of the solutions to the call for justice in Rwanda is the use of new methods of justice and reconciliation in the form of traditional courts. There has been strong support for employing the *gacaca*—a tribal system of dispute resolution—as a way of speeding the process of the large number of detainees who have strained the already meager resources of the Rwandan government.¹³⁵ The *gacaca* “operates at a grass-roots level, with local

¹³⁴ *Id.* at 14.

¹³⁵ Alana Erin Tiemessen, *After Arusha: Gacaca Justice in Post-genocide Rwanda*, 8 AFR. STUD. Q. 57, 58 (2004).

communities settling differences through the election of sages and leaders who endeavor to bring the parties together in the pursuit of communal justice.”¹³⁶

Gacaca is sometimes referred to as “judgment on the grass.”¹³⁷ The hearings are presided over by *inyangamugayo* (“wise men” in Kinyarwanda), “refer[ring] to people untainted by the 1994 massacres.”¹³⁸ There are approximately 10,000 *gacaca* courts in Rwanda.¹³⁹ There are nine judges on each panel with over 150,000 *gacaca* judges in Rwanda.¹⁴⁰ It is estimated that regular courts would take 100 years to try all those arrested or accused of participation in the genocide; the *gacaca* system could do it in eight.¹⁴¹ *Gacaca*, which is an attempt at restorative justice, “is founded on the principle that the community should reintegrate the individuals whom it punishes.”¹⁴² The focus on a system of justice that positively restores participants of genocide to civil society runs counter to the punitive focus of the international mechanism for dealing with genocide. Human rights groups and other international organizations have recognized the inventiveness of this method of adjudicating crimes of genocide.¹⁴³

However, there are those who are concerned that this return to “people’s justice” will not afford defendants the procedural protection of a conventional criminal trial.¹⁴⁴ *Gacaca* is only available to those defendants charged with crimes in Categories 3 and 4 of the Rwandan Organic Law (those charged with theft and assault, as well as some charged with murder and manslaughter).¹⁴⁵ The implementation of the *gacaca* system ignores the potential benefits of state prosecution. According to Jose Alvarez, “properly conducted” criminal trials can “provoke socially desirable, if contentious, conversations in the hope that through honest discourse the guilty will eventually come to recognize that

¹³⁶ Mark A. Drumbl, *Sclerosis: Retributive Justice and the Rwandan Genocide*, 2 PUNISHMENT & SOC’Y 288, 291–92 (2000).

¹³⁷ Tiemessen, *supra* note 135, at 60.

¹³⁸ Fawzia Sheikh, *Trial and Error*, NEW INTERNATIONALIST, Dec. 2005, at 15.

¹³⁹ Tiemessen, *supra* note 135.

¹⁴⁰ Sheikh, *supra* note 138, at 17. More than 1000 of these judges have resigned between 2002 and 2005 because they were later accused of genocide. *Id.*

¹⁴¹ *Id.*

¹⁴² Clark, *supra* note 102, at 14.

¹⁴³ See Sheikh, *supra* note 138.

¹⁴⁴ Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT’L L. & POL. 355, 385 n.86 (2002).

¹⁴⁵ Drumbl, *supra* note 41, at 1264. For further discussion of the domestic Rwandan genocide statutes, see Drumbl, *supra* note 25.

brutal killings are not morally ambiguous.”¹⁴⁶ However, *gacaca*, in the eyes of its supporters, initiates the process of release for the thousands who have been detained since the 1994 violence from conditions of confinement that have led to additional human rights violations.¹⁴⁷

Rwanda’s ability to afford defendants properly conducted criminal trials seems questionable. This resource problem has led to the reincarnation of the *gacaca* system.¹⁴⁸ *Gacaca* may be a way to provoke the reparative discourse that Alvarez contemplates without sapping the minimal resources of the Rwandan government, as would properly implemented criminal trials. However, *gacaca* was not originally developed to handle the complexity of genocide situations.¹⁴⁹ It has yet to be seen whether this system can adequately protect the civil rights of defendants.¹⁵⁰ It might be quite effective when perpetrators are accused of property crimes. A *gacaca* court in a district in Eastern Rwanda sentenced 102 people guilty of crimes during the 1994 genocide to rebuild houses destroyed in the violence.¹⁵¹ The program to which these defendants were sentenced allows *genocidaires* to participate in work beneficial to the community while receiving “lessons on unity and reconciliation” in camps, which leads eventually to reintegration.¹⁵²

Another benefit of *gacaca* is its return of the justice process directly to the people who were harmed. Defendants are tried in the villages where their crimes were committed and everyone can participate.¹⁵³ This kind of re-

¹⁴⁶ Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 406 (1999).

¹⁴⁷ See Daly, *supra* note 144, at 369–70.

¹⁴⁸ See *id.* at 369.

¹⁴⁹ See Drumbi, *supra* note 41, at 1265. *Gacaca* traditionally has been used to “adjudicate small property disputes and petty theft.” *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Over 100 Rwandans Charged with Genocide to Build Houses for Survivors*, BBC MONITORING, July 20, 2006 [hereinafter *Rwandans Charged*].

¹⁵² *Id.* The release of detainees has also negatively affected some victims of the genocide who feel “re-traumatized” by the return of *genocidaires* to villages. See Clark, *supra* note 102, at 17. According to one survivor:

It is frightening for us survivors to see these people back here. Can we trust them not to repeat what they did to us before? They might not have received enough lessons from the government [in solidarity camps] For most of us survivors, the release was a mockery. Haven’t we suffered enough already?

Id. at 18. The Rwandan government has trained a small number of counselors to help victims who continue to find the performance of everyday activities difficult, but they are little relief for the overwhelming need for psychological services. *Id.* at 17.

¹⁵³ Daly, *supra* note 144, at 376.

integration is extremely important in Rwanda, where there is an increased level of familiarity between perpetrator and victim and any peace would require that they live in close proximity.¹⁵⁴ Because the crimes of Category 1 defendants—the planners, organizers, instigators, supervisors, and leaders of genocide or crimes against humanity; notorious murderers; and persons who committed acts of sexual torture—are not processed through *gacaca*, the death penalty is not available.¹⁵⁵ This may not always be the case. In early 2006, the Rwandan government announced that it may allow Category 1 defendants to be tried in *gacaca* courts.¹⁵⁶ The *gacaca* system, which signaled progress on the part of the Rwandan government to expedite the domestic adjudication of low-level participants in the genocide, may confirm the international community's worst fears about the death penalty if these courts, which offer little to no procedural protections, begin handing out death sentences.

The African proverb “it takes a village” may be exactly what Rwanda needs to satisfy the victim's need for justice and to achieve the reintegration of those who participated in the genocide (for all but those identified in Category 1 of the Rwandan Organic Law). Though *gacaca* courts have been slow to begin their work for various reasons, they are seen in Rwanda as a mechanism to mitigate what many Rwandans have viewed as the ICTR's lack of justice.¹⁵⁷ The distance of the Tribunal from Rwanda—both geographically and in terms of its impact on the ground—has done little in terms of reconciliation, which is the ultimate goal of punishment for genocide under both regimes.¹⁵⁸ *Gacaca* is purported to be a “populist response to a populist genocide.”¹⁵⁹ But if these courts are allowed to try Category 1 defendants and sentence them to death, *gacaca* may not be the answer to this community's crisis.

¹⁵⁴ *Id.*

¹⁵⁵ *Rwandans Charged*, *supra* note 151.

¹⁵⁶ Paul Willis, *No Lawyer But Rwanda's Village Courts Could Pass Death Sentence*, SUNDAY TELEGRAPH (London), Apr. 9, 2006, at 26.

¹⁵⁷ Alvarez, *supra* note 146, at 418.

¹⁵⁸ See David Crane, *Terrorists, Warlords, and Thugs*, 21 AM. U. INT'L L. REV. 505, 512 (2006). In his evaluation of the war crimes tribunals for the violence in Sierra Leone's civil war, Crane argues that “a tribunal is most effective when it is located in the region of the conflict.” *Id.*

¹⁵⁹ Daly, *supra* note 144, at 381. Prosecutors in other tribunals have emphasized the importance of incorporating local culture into the international response to human rights abuses as well. In his reflections on the Sierra Leone prosecutions, Crane argues that “consideration of regional cultures establishes confidence in the rule of law. The people have to understand that the justice we are seeking is the justice that will aid them in restoring their societies to a proper balance.” Crane, *supra* note 158, at 513.

There are several important critiques of *gacaca* that go beyond the lack of procedural safeguards.¹⁶⁰ The first and most obvious problem is that the participants in the process may not be truthful.¹⁶¹ There is also significant concern about fear preventing witnesses from testifying.¹⁶² In the case of rape, it is not just fear of the public shame associated with sexual violence, but also fear of physical retribution for testifying in the proceedings.¹⁶³ Those who oppose these courts fear that they will reignite the ethnic violence that led to their formation “by creating renewed confrontations between neighbors, by opening up the wounds of the past, by eliciting abuses by powerful people, and by excluding many crimes *de facto*.”¹⁶⁴ The concern about renewed ethnic tension stems from the concern that the proceedings of the *gacaca* will be viewed as “victor’s justice,” where guilt will be based on ethnic membership.¹⁶⁵ Irénée Bugingo of the Institute of Research on Dialogue and Peace in Kigali asserts that there is already a clear belief among the mostly Hutu refugee population that “*gacaca* is not going to succeed because it is trying only Hutus.”¹⁶⁶ There is concern that the current government has unclean hands, which renders it unsuitable for, and uninterested in, the task of bringing the truth to light; this could further complicate the efforts to utilize *gacaca* as an alternative to traditional forms of prosecution.¹⁶⁷

One of the Rwandan criticisms of the ICTR was that “the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectation of the Rwandese people and of the victims of genocide in particular.”¹⁶⁸ The political environment surrounding the establishment of the ICTR tends to support this view, but these are two distinct issues. Establishing a tribunal like the ICTR requires a consensus among several states, which requires compromise. The expectations of the people of Rwanda is an issue separate from the commitments of the U.N. Member States to certain principles of governance

¹⁶⁰ See Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 227 (2003).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Sheikh, *supra* note 138, at 16. There have been numerous cases of threats against witnesses and several trials for the murder of witnesses. *Id.*

¹⁶⁴ Uvin & Mironko, *supra* note 160, at 227.

¹⁶⁵ Tiemessen, *supra* note 135, at 68.

¹⁶⁶ Sheikh, *supra* note 138, at 16.

¹⁶⁷ Constance Morrill, *Show Business and 'Lawfare' in Rwanda: Twelve Years After the Genocide*, DISSENT, Summer 2006, at 15.

¹⁶⁸ Provisional Verbatim Record, *supra* note 2, at 15.

and law. If *gacaca* is successful, it may be able to allay concerns over a lack of justice for victims of the genocide and those who have been unfairly detained in Rwandan prisons. Only time will tell if "the village" is an appropriate place to adjudicate crimes of genocide, which have come to be understood as crimes against humanity and crimes that extend across the borders of the nation-state.

V. THE PUNISHMENT PARADOX IN THE RWANDAN GENOCIDE

As of this writing, there is still armed conflict in Rwanda. The national government has yet to gain control of portions of the country. Many of the detainees view their actions as part of this continued conflict.¹⁶⁹ When asked why they are in prison, they will allude to their actions in "the war."¹⁷⁰ Many do not express remorse or view their actions as wrong.¹⁷¹ After executing thousands, the government has still failed to counter the culture of impunity that led to the violence of 1994 or the violence that preceded it. Until there is a clear peace, it is difficult to know the impact of such trials and whether reconciliation is possible.

It is not clear that the trials either domestically in Rwanda or in the ICTR have had any deterrent effects.¹⁷² This is not just a problem for Rwanda.¹⁷³ Consistent in the discourse about criminal sanctions for human rights violations is the need to set examples. Judge Kama has said, "Kambanda's sentence will serve as a message to the entire international community, particularly those who will be tempted to commit such crimes in the future."¹⁷⁴ As the emphasis in human rights law re-orient its focus to the individual, conflicts about the appropriateness of the sanctions that can be imposed are bound to arise. The macro-effects of economic sanctions, which are borne by entire countries, are less likely to raise such issues because the penalties are, at least theoretically, dispersed more widely throughout the population. The death penalty, which must be focused on the individual, who is vested with a highly articulated set of rights under international law and most domestic legal

¹⁶⁹ Drumbl, *supra* note 25, at 607.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L. L. 7, 9 (2001). Deterrence is an extremely difficult concept to measure. *Id.*

¹⁷³ See *id.* Other research has found that both the ICTR and the International Criminal Tribunal for Yugoslavia contributed significantly to the process of restoring peace in both societies. *Id.*

¹⁷⁴ Simmons, *supra* note 85, at A4.

regimes, complicates the decision to impose such sanctions. The death penalty is also accompanied by complicated and conflicting data on whether it has any deterrent effects.

Countries where the death penalty is still practiced generally accept that the death penalty has no deterrence value.¹⁷⁵ To say that the shift is toward individual accountability does little to define the appropriate sanctions. The kind of punishment required to hold individuals accountable for such heinous crimes is still up for discussion. The Rwandan government has interpreted individual accountability to mean death to those who are guilty of certain levels of participation in genocide.¹⁷⁶ Under current international law, Rwanda is well within its rights to allow for the death penalty,¹⁷⁷ but until significant improvements occur in the policing of due process rights, it remains out of step with other aspects of criminal prosecution prescribed by international law.

VI. POSSIBILITIES FOR RECONCILING DIFFERING VIEWS OF PUNISHMENT AT INTERNATIONAL AND DOMESTIC LEVELS (LESSONS FROM RWANDA)

Although it is not crystal clear that there is an international norm against the death penalty,¹⁷⁸ the ICCPR and associated documents suggest a strong preference against its use.¹⁷⁹ The inability to reach a resolution leaves open the possibility for what is happening in Rwanda, as well as what has happened in Iraq.¹⁸⁰ Preservation by influential countries of the death penalty distracts from situations like Rwanda where due process violations make the imposition of the death penalty under those circumstances highly questionable. Until the abolitionist perspective gains greater support, different views on punishment will continue to cause paradoxes where international and domestic laws share

¹⁷⁵ For an example of the debate over the deterrent effects of capital punishment in the United States, see Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. L. & SOC. SCI. 151 (2005). See also Hugo A. Bedau, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW AND POLITICS OF CAPITAL PUNISHMENT* (1987) (finding no difference in the deterrence effects of the death penalty and life imprisonment); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-life Tradeoffs*, 58 STAN. L. REV. 703, 713 (2005).

¹⁷⁶ See Carroll, *supra* note 78, at 177.

¹⁷⁷ See Bentele, *supra* note 13, at 297–98.

¹⁷⁸ *Id.*

¹⁷⁹ See Bradley & Goldsmith, *supra* note 55, at 430.

¹⁸⁰ Though there was much criticism of how Saddam Hussein was executed, both leaders who opposed and those who supported the death penalty reiterated the right of Iraq as a “sovereign” nation and the victims of Hussein’s violent rule to determine his fate. Sheryl Gay Stolberg, *Despite Misgivings, White House Says Little Against Hangings*, N.Y. TIMES, Jan. 4, 2007 at A8. See also Andrew Woodcock, *Blair Says Execution Wrong, PM to Break Silence on Saddam Taunts*, THE LIVERPOOL DAILY POST, Jan. 8, 2007, at News 19.

jurisdiction. This section of the Article discusses how the handling of the Rwandan genocide at both levels of prosecution may be instructive in instances where these punishment discrepancies exist. The lessons of Rwanda must be understood because this scenario could reoccur soon.

A good candidate for a repetition of this punishment disparity is future prosecutions in the case of the ongoing "ethnic cleansing" in Darfur.¹⁸¹ Similar to Rwanda, Sudanese violence is perpetrated by combined government forces and an ethnic militia called the *Janjaweed*.¹⁸² Some estimate tens of thousands of civilians have been killed in Darfur since 2003, and more than two million Darfurians have been displaced by the violence.¹⁸³ The U.N. commission charged with investigating the violence found that "most attacks were deliberately and indiscriminately directed against civilians."¹⁸⁴ In addition to the wholesale killing of civilians, the Sudanese military and the *Janjaweed* militia have engaged in "torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur."¹⁸⁵

There is some disagreement as to whether the events in Darfur constitute genocide,¹⁸⁶ but a discussion has already begun suggesting the possibility of prosecutions for the actions of the Sudanese government and the *Janjaweed*.¹⁸⁷ If the events in Darfur are later determined to be genocide, what is now only a suggestion will definitely become prosecutions of state actors and members of the *Janjaweed* militia at both the domestic and international levels. As of 2003, Sudan was considered a retentionist state, meaning that it permits executions for murder.¹⁸⁸ Sudan, more than Rwanda, will challenge the overwhelming disapproval of the death penalty among the majority of U.N.

¹⁸¹ See, e.g., Human Rights Watch, *Q & A: Crisis in Darfur*, May 24, 2004, <http://www.hrw.org/english/docs/2004/05/05/darfur8536.htm>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ CNN.com, U.N. Report: Darfur Not Genocide, <http://edition.cnn.com/2005/WORLD/africa/01/31/sudan.report>.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.*

¹⁸⁷ See, e.g., Justin Wagner, *The Systematic Use of Rape as a Tool of War in Darfur: A Blueprint for International War Crimes Prosecutions*, 37 GEO. J. INT'L L. 193, 218 (2005). See also Nadia A. Deans, *Tragedy of Humanity: The Issue of Intervention in the Darfur Crisis*, 19 EMORY INT'L L. REV. 1653, 1688 (2005); S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

¹⁸⁸ Amnesty Int'l, *The Death Penalty: List of Abolitionist and Retentionist Countries* (1 Jan. 2003), Apr. 2003, http://www.amnesty.org/en/alfresco_asset/5f2c1104-a365-11dc-9d08-f145a814502b/act500032003en.pdf.

Member States because Sudan currently executes minors under age 18 and meets few of the minimal procedural requirements outlined by the International Convention on Civil and Political Rights.¹⁸⁹ Sudan likely will not be the last place where there is a difference in international and domestic views on punishment.

A. Forcing a Change in Domestic Policy: The Case for the International Community Holding the Line on the Death Penalty

As preparations begin for potentially transferring the remaining prisoners at the ICTR to Rwanda, the willingness of the Rwandan government to abolish the death penalty seems to indicate that the call for the death penalty in the immediate post-genocide period was connected more to retaliation than to a commitment to justice.¹⁹⁰ The decision to abolish the death penalty is based on the desire to have access to the leaders of the Rwandan genocide.¹⁹¹ The U.N. Security Council has agreed that the ICTR will finish prosecuting by 2008 and will finish all appeals by 2010.¹⁹² Not all who are currently in ICTR custody can be tried within this time frame.¹⁹³ The ICTR negotiated with courts in countries that have “abolished the death penalty and have modern prisons that are up to international standards.”¹⁹⁴ Rwanda was one of only two countries that expressed a desire to receive cases of accused genocide perpetrators, but the ICTR said that Rwanda must guarantee that no one would be sentenced to death.¹⁹⁵ This is a success for the international community.

The existence of the death penalty in Rwanda has led to additional legal and political issues in the prosecution of participants in the Rwandan genocide. ICTR detainees and their lawyers argued that the transfer to Rwanda “was tantamount to a death sentence and a violation of the U.N. Security Council

¹⁸⁹ Human Rights Watch, *Sudan: Detainees Suffer Arbitrary Arrest, Execution*, Sept. 7, 2005, <http://hrw.org/english/docs/2005/09/07/sudan11693.htm>.

¹⁹⁰ Aimable Twahirwa, *Rwanda: Country to Scrap Death Penalty in Hunt for Genocide Suspects*, E. AFR., Sept. 5, 2006, available at <http://allafrica.com/stories/200609050216.html> [hereinafter *Rwanda to Scrap Death Penalty*]. The motivation for the change in policy is extradition of the “masterminds” of the genocide from European countries who have refused the transfers because of Rwanda’s death penalty statute. *Id.*

¹⁹¹ See Aimable Twahirwa, *Rwanda: Public Wants Revenge; Government Will Settle for Justice*, INTER PRESS SERVICE, Aug. 31, 2006.

¹⁹² *Rwanda: ICTR Detainees Protest on the First Day of Rwanda Officials’ Visit*, HIRONDELLE NEWS AGENCY, Sept. 20, 2004 [hereinafter *ICTR Detainees Protest*].

¹⁹³ See Twahirwa, *supra* note 191.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

statutes which created the tribunal.”¹⁹⁶ This has prompted other countries to volunteer to host the detainees.¹⁹⁷ There have also been disputes between the Rwandan government and the Tribunal over prosecutions. Each body has alleged corruption, intimidation of witnesses, and inefficiencies on the part of the other.¹⁹⁸ The issue of transferring ICTR detainees to Rwanda forces the United Nations to confront one of the primary reasons the Rwandan representative voted against the original statute: differing views on the appropriate punishment for those convicted of genocide.

The conflict over extradition is not without controversy in Rwanda. The decision by the Rwandan government to abolish the death penalty has been applauded in the international community, but heavily criticized by groups representing survivors of the genocide. Francis Ngarambe, president of Ibuka¹⁹⁹ (a genocide survivor group), argues that “those who carried out the genocide should be executed in order to forever eradicate the culture of impunity that has always marred Rwanda.”²⁰⁰ The view that the death penalty is the only way to prevent renewed violence is held by many in Rwanda, but others believe the best way to prevent further violence is to follow international norms.²⁰¹ Though it is difficult to find polling data on the particular question, Rwandan officials maintain that the majority of Rwandan citizens support retaining the death penalty.²⁰² The debate raises interesting questions about the internationalization of domestic genocide and whose sense of justice should prevail.

¹⁹⁶ *ICTR Detainees Protest*, *supra* note 192.

¹⁹⁷ *Id.* Detainees are currently imprisoned in Mali; several other countries, including France, have offered to take some of the detainees. *Id.*

¹⁹⁸ Hans Nichols, *Search for Justice Stalls in Rwanda: Government at Odds With the U.N. Court*, WASH. TIMES, Jan. 2, 2003, at A8. The ICTR accused the Rwandan government of “thwarting justice” for failing to provide the appropriate visas for witnesses traveling to testify. The Rwandan government has consistently attacked the legitimacy of the Tribunal on the grounds of “inefficiency, corruption, nepotism, lack of protection of witnesses, harassment of witnesses, employing *genocidaires* as members of the defense team, mismanagement [and] the slow pace of the trials.” *Id.* This is only one example of a series of skirmishes between the two. In 1999, the Rwandan government refused to extend a visa to Carla Del Ponte, who was then Chief Prosecutor for the Tribunal. *See id.* The Rwandan government’s criticism may be unwarranted on many of the issues except for the pace of the prosecutions in the ICTR. As of 2006, only twenty-eight people had been tried. Of those, twenty-five have been convicted of crimes against humanity and sentenced to life imprisonment. *Rwanda to Scrap Death Penalty*, *supra* note 190.

¹⁹⁹ *Ibuka* means “remember” in Kinyarwanda. *Rwanda to Scrap Death Penalty*, *supra* note 190.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Twahirwa, *supra* note 191.

Though the path to this outcome has been circuitous, if the Rwandan government abolishes the death penalty, it will have come in line with the Second Optional Protocol to the ICCPR. One lesson from the punishment disparities may be that the international community can transform the legal policies of states by maintaining its commitment to particular punishment regimes. Genocide creates an opportunity to infuse broken communities with a new view of justice and the rule of law.

B. Forcing Inventive Solutions to Adjudicating Genocide: The Case for Employing Traditional or Local Solutions

The novelty and uniqueness of *gacaca* in Rwandan history may mean that this is not a possible solution in other genocidal situations. The slow pace of the ICTR and its intention to begin returning detainees to Rwanda demonstrate the limits of international solutions to domestic incidents of genocide. The close proximity of the victims to the perpetrators of genocide in Rwanda may also require alternative approaches to reconciliation and punishment for the sake of the long-term goals (e.g., preventing further violence, returning the rule of law, and reconciliation). *Gacaca*, even with its critics, will be the primary experience of justice for the victims of genocide in Rwanda. Though this remedy may not be exportable, it demonstrates the potential power of looking to local/traditional solutions to adjudicating genocide.

Employing local/traditional solutions should not necessarily be in lieu of international prosecution, but it may offer the kind of immediate, visible justice that helps to rebuild the social and political networks decimated by genocide.²⁰³ Even if these systems of justice run parallel to international programs, they may support the long-term goals of returning the rule of law to the countries where genocide has occurred. Tribunals, which are typically removed from the country where the underlying events took place, may not be able to deliver justice as expediently to the victims as local forums. Delays in international and/or domestic prosecutions, even if unavoidable to ensure fair and sufficient legal process, may actually work against creating stability. The inability of the current Rwandan government to disentangle itself from the ethnic conflict that has plagued this small nation is due in some part to the perceived lack of fair prosecutions and justice.

²⁰³ See Theodor Meron, *Reflections of the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L. L. 551, 560 (2006). The support of the ICTR prosecutions by the Rwandan government, except when it attempted to probe alleged crimes by Tutsis, emphasizes how the work of criminal tribunals is impacted by "national-political considerations." *Id.* at 561.

However, *gacaca*'s legacy may be to encourage the continued exploration of remedies for genocide. As much as genocide is characterized by violence of one group against another, it is also defined by the geo-political conditions of the place where it occurs. Despite the development of permanent international legal institutions, there may never be a single best solution to prosecuting participants or reconciling post-genocide societies. In Rwanda, there seems to be an attempt to draw on tools beyond those that have been utilized in the past. We must wait to see if they are successful.

CONCLUSION

It is unclear whether justice for the Rwandan genocide victims has been achieved if those most directly affected are dissatisfied with the punishment meted out to perpetrators. One of the overarching purposes of criminal law is to make those found guilty accountable for their actions, but in doing so international law has been willing to place greater limits on punishment than some domestic statutes. As long as the death penalty continues to be a part of domestic criminal codes, the discrepancies in the prosecutions of the Rwandan genocide will reoccur. The larger purpose of this Article is to explore not only the practical issues, but also the philosophical concerns raised by different punishment regimes for perpetrators accused of similar or the same crimes. There have been many criticisms levied at both the domestic and international prosecutions in the Rwandan genocide, but each has been instructive in its own way of the amount of influence victims of genocide can have in shaping international law and the way international norms can influence domestic legal changes.

The 2006 announcement by the Rwandan government of its intention to pass legislation abolishing the death penalty to facilitate the transfer of the remaining ICTR detainees to Rwandan courts is a very real example of international legal norms being incorporated into domestic law. International observers still point to the lack of procedural safeguards in Rwanda as a major roadblock to fair legal proceedings for the remaining detainees. However, this change in policy on the death penalty is at least suggestive of a movement toward more progressive legal practices that incorporate some international norms. The growth of international law, especially human rights law, has been driven fundamentally by the call for greater respect for, and recognition of, individual integrity. The abolition of the death penalty by the Rwandan legislature for practical reasons does not forestall the possibility of these

policies aiding in the long-term eradication of impunity—the goals of both the ICTR and the Rwandan Organic Law.

As international legal structures continue to develop in their handling of genocide, it is important to recognize that innovations can occur on the domestic level as well. Whether traditional adjudicative procedures like *gacaca* can be exported to other locales where genocide occurs remains in question. Even if it does not appear in future responses to genocide, the lesson to be learned from this process is that traditional processes for allowing victims to articulate publicly how they have been harmed and provide a scheme for punishing those who have caused that harm should be used where possible. The complete breakdown of law and order that results in genocide does not mean that all previous legal and quasi-legal mechanisms are broken. The kind of societal repair attempted by the ICTR and the Rwandan Organic Law may be best promoted by utilizing familiar traditional procedures.

The difficulty of evaluating the implications of the various prosecution regimes employed in the Rwandan genocide is the inability to isolate or disconnect each incident from those in the past or from continuing legal and historical developments. For instance, what will be the impact of the execution of Saddam Hussein for human rights abuses by the Iraqi government and the rather weak stance taken by the new Secretary-General of the United Nations as compared to previous heads of that organization? Each prosecution of genocide participants is impacted by the cumulative lessons of all those that occurred prior. The debate over the death penalty in the Rwandan genocide reveals the lack of domestic or international consensus on punishment and the unclear position of genocide victims in the determination of justice in these various forums. As the flaws of man continue to provide us with incidents of genocide, reconciling the punishment discrepancies that have characterized past prosecutions will continue to be important.

POSTSCRIPT

On July 25, 2007, the Rwandan government officially abolished the death penalty with the publication of a new law in the Official Gazette.²⁰⁴ The law states simply and clearly, “[t]he death penalty is hereby abolished.”²⁰⁵ The law

²⁰⁴ *Organic Law Relating to the Abolition of the Death Penalty*, Organic Law No. 31/2007, in OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA (July 25, 2007).

²⁰⁵ *Id.* art. 2.

orders the substitution of “life imprisonment or life imprisonment with special provisions” for “death penalty” in Rwandan Organic Law.²⁰⁶ Additionally, the law retroactively converted all existing death sentences to “life imprisonment or life imprisonment with special provisions.”²⁰⁷ This portion of the law abolishes the death penalty for those prosecuted for, or accused of, genocide. The new law also prohibits extradition of criminal defendants in Rwanda to countries where the death penalty is lawful, unless the “applying State produces formal guarantees that death penalty will not be executed.”²⁰⁸ Each of these provisions addresses directly the concerns of the international legal community that have prevented the transfer of the remaining defendants to Rwanda despite the formal conclusion of the ICTR proceedings. The opening of the door for the return of these last defendants, who were high-level participants in the genocide, may provide the kind of visible justice that will prevent the repetition of violence. For now, Rwandans and the international community will have to wait to see if the current government will adhere to the new law and if this step indicates an effort on the part of the Rwandan government to improve the quality of the proceedings for all those accused of participation in the genocide. Some might read this as a sign of the potential to create symmetry in domestic and international punishments for genocide. However, as long as some domestic laws continue to allow for the death penalty, the international community will continue to grapple with the punishment paradox in genocide prosecutions.

²⁰⁶ *Id.* art. 3.

²⁰⁷ *Id.* art. 6.

²⁰⁸ *Id.* art. 8.