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Did The Plenary Have the Power to Adopt Rule 11bis?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE 8: DID THE PLENARY HAVE THE POWER TO ADOPT RULE 11*bis*?

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I. Introduction and Summary of Conclusions*

A. Issues

This memorandum addresses the authority by which Rule 11*bis* was adopted to the International Criminal Tribunal for Rwanda's Rules of Procedure and Evidence at the 12th Plenary Session on July 5-6, 2002. To accommodate the U.N. Security Council's expectations of implementing a final strategy to complete all new indictments by 2004 and trials by 2008, with a targeted end to the Tribunal's activities by 2010, both the International Criminal Tribunal for Rwanda ("ICTR")and the International Criminal Tribunal for the former Yugoslavia ("ICTY") have adopted various rules to expedite the process toward completion. The Plenaries of both Tribunals adopted some version of the rule to outline the authority to transfer indictees to other jurisdictions for prosecution.[1] In doing so, the adoption of Rule 11*bis* was controversial because it implicated various sections of the Tribunals' Statutes and raised issues of due process rights for those indictees being transferred.

B. Summary of Conclusions

(1) The Plenary's Authority to Adopt Rule 11*bis* Resides in its Powers Granted it Under the ICTR Rules of Procedure and Evidence and the ICTR Statute.

* Rule 11*bis* allows the Trial Chamber to suspend an indictment and to transfer a detainee for proceedings before national courts. Did the plenary have the power to adopt it? Consider the Statute of the ICTR, a similar procedure in the ICTY, Security Council Resolution 1503, and the General Assembly's comments in December 2003 when it approved the budget of the ICTR for the 2004 and 2005 biennium.

[1] See Rule 11*bis* as adopted in the ICTR and ICTY's Rules of Procedure and Evidence for a comparison of the text. [Reproduced in the accompanying notebook at Tabs 1 and 2, respectively.]

The ICTR Statute and the Rules of Procedure and Evidence designate that the Plenary has the authority to modify and amend the Rules of Procedure and Evidence so long as they do not prejudice the interests of the accused that are within the jurisdiction of the Tribunal. Thus, if the Tribunal can protect the indictees currently within its jurisdiction from adverse repercussions of being transferred, Rule 11*bis* will be well within bounds of the Plenary's authority.

(2) The Plenary Has an Obligation to Abide by the Security Council's Request to Finalize its Work per the Terms Set Forth in Security Council Resolutions.

The Security Council, having made clear that it expected the activities of the Tribunal be completed by 2010, is keen to have those indictments suitable for transfer to national jurisdictions transferred. As such, the adoption of Rule 11*bis* provided a means toward the Tribunal's goal to clear its existing docket in conformance with the Council's request to focus only on high-ranking officials.

(3) Adoption of Rule 11*bis* Creates Due Process Considerations in Transferring Detainees Currently in the ICTR's Custody.

The Plenary's adoption of Rule 11*bis* calls for a new analysis of the due process rights of those detainees that have been in custody for so many years awaiting trial and the likely possibility for further delay of their cases once they are transferred to national jurisdictions, particularly for those that are to be transferred to Rwanda. Given the backlog of cases currently on the docket in the Rwandan genocide special chambers, it is unlikely that Rwandan courts will put those cases before those currently awaiting investigation and trial without the ICTR explicitly negotiating with those national jurisdictions to do so. To avoid the expiration of the Tribunal's mandate before the

complete processing of the transferred cases through national judicial systems, the Tribunal would have to negotiate the terms by which the transfer will occur such as requesting that national jurisdictions give priority to the cases of those transferred detainees so that the proper oversight function required by the Tribunal's Statute for transferred cases is not violated.

(4) In the Interest of Justice, Allowing the Tribunal to Continue its Work Toward a Natural Completion of its Mandate is the Best Means to Preserve the Legacy of the Tribunal.

The Tribunal provides the best means of achieving the independent and impartial recording and redress of the Rwandan genocides. While the national courts have a significant function, those in Rwanda have shown that management of their enormous case load overrides the interest of careful consideration of the charges against each detainee or the administration of uniformity in handing down judgments. As such, the purpose of the Tribunal is even more compelling in that it provides a complete and uniform treatment of the crimes that were committed in Rwanda.

II. Factual Background

The International Criminal Tribunal for Rwanda ("ICTR") was established by the United Nations Security Council pursuant to the United Nations Charter[2] to "contribute to the process of national reconciliation and to the restoration and

[2] 1 VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 42 (1995). [Reproduced in the accompanying notebook at Tab 18.]. *See also*, U.N. CHARTER, art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."). [Reproduced in the accompanying notebook at Tab 6].

maintenance of peace."[3] Acting under Chapter VII of the U.N. Charter, the Security Council adopted Resolution 955 along with a draft Statute that would govern the ICTR.[4] Because the International Criminal Tribunal for the former Yugoslavia ("ICTY") and ICTR were established by the UN "as a matter of international law, the Tribunal[s'] orders are, at least in legal theory, mandatory on U.N. members, all of whom have an obligation to cooperate fully with the International Tribunal."[5]

In establishing the ICTY, the Secretary-General acknowledged that the Tribunal "must 'perform its functions independently of political considerations' and cannot 'be subject to the authority or control of the Security Council with regard to its judicial functions."[6] Still, the very existence of the Tribunals depends on continued support and funding by the Security Council as is evident from the annual reports that the Presidents must present to the Council as required by each Tribunal's Statute.[7] Furthermore, the Security Council retains the authority to decide when to terminate the mandate of the Tribunals once the threat to international peace and security ceases.[8]

On August 28, 2003, the Security Council adopted resolution 1503 which created a separate Office of the Prosecutor for the ICTR as well as reaffirming the Council's

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[3] U.N. Doc. S/RES/955 (1994). [Reproduced in the accompanying notebook at Tab 11.].

[4] *Id.*

[5] U.N. Doc. S/RES/808 (1993). [Reproduced in the accompanying notebook at Tab 12.].

[6] 1 MORRIS AND SCHARF 46 (1995). [Reproduced in the accompanying notebook at Tab 18.].

[7] ICTR Statute, Art. 32 [Reproduced in the accompanying notebook at Tab 3]; ICTY Statute, Art. 34 [Reproduced in the accompanying notebook at Tab 4.].

[8] 1 MORRIS AND SCHARF 47 (1995). [Reproduced in the accompanying notebook at Tab 18.].

endorsement of completing all trials of first instance in both Tribunals by 2008 and all remaining activity by 2010.[9] Prior to the adoption of Resolution 1503, the Security Council had consistently attempted to steer the Tribunals' focus away from the prosecution of mid-level and lower-ranked actors that had been indicted and to focus on only the indictments of higher-ranked suspects. In adopting Resolution 1329 in 2000, the Council reiterated its interest in streamlining the work of the Tribunals by agreeing to the election of additional ad litem judges while recalling the interest in transferring minor actors who had indictments pending prosecution at the Tribunals to be transferred to national courts.[10] The Security Council's stated intent in concluding the work of the Tribunals by 2010 has created an overhaul of the Tribunals' work and dominates the policies adopted at both Tribunals.[11] At Paragraph 4 of Security Council Resolution 1534, the Council calls on the Tribunals to review their case loads "with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions…"[12]

[9] U.N. Doc. S/RES/1503 (2003). Prior to this resolution, both the ICTY and the ICTR shared one Office of the Prosecutor, that which was established for the ICTY. [Reproduced in the accompanying notebook at Tab 9.].

[10] U.N. Doc. S/RES/1329 (2000). [Reproduced in the accompanying notebook at Tab 10.].

[11] The efforts being made at the Tribunals to conform to the Completion Strategy are enumerated in the latest annual reports of the Tribunals. See the Ninth Annual Report of the International Criminal Tribunal for the former Yugoslavia[Reproduced in the accompanying notebook at Tab 46.]; Tenth Annual Report of the International Criminal Tribunal for the former Yugoslavia [Reproduced in the accompanying notebook at Tab 45.]; Eighth Annual Report of the International Criminal Tribunal for Rwanda, that discuss the efforts being made to meet the Completion Strategy. [Reproduced in the accompanying notebook at Tab 44.].

[12] U.N. Doc. S/RES/1534 (2004). [Reproduced in the accompanying notebook at Tab 8.].

Toward that effort, the Plenaries of the ICTY and ICTR have taken the advice provided by the Security Council to adopt rules and procedures that although may be seen as straining the outer bounds of the powers afforded them by their Statutes, the amendments further the purpose of the Tribunals' Completion Strategy.[13] On March 26, 2004, the Security Council made its intentions clear in formalizing its requests to the Tribunals to implement clear strategies to meet the expiration of their respective mandates by 2010.[14]

III. Legal Discussion

A. The Authority of the Plenary to Adopt Rule 11*bis*

The Security Council's adoption of Resolution 1503 (2004) is a clear indication of the goals that the Security Council has in mind for the ad hoc Tribunals. In reaffirming all the stated goals of Resolution 1503 of concentrating all efforts at the Tribunals on clearing court dockets completely by 2010 and not initiating any new indictments past the year 2004, the Council has laid out its expectations of significant progress in the implementation of the Completion Strategy, requiring biannual reports on its progress.[15] Rule 11*bis* will play an integral role in meeting the goals set out by the Security Council. The Plenary is granted the authority to adopt and amend rules that would assist in furthering the efforts of the Tribunal.

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[13] *Id*. Such as the Plenaries' adoption of rule 11*bis*, among others. [Reproduced in the accompanying notebook at Tabs 47, 46, and 45, respectively].

[14] U.N. Doc. S/RES/1534 (2004).

[15] *Id.*

The Statutes could not have exhaustively discussed all potential issues that the Tribunals would face, but the Tribunals' Rules of Procedure and Evidence provide an additional framework within which the authority of the Tribunal is defined. The Plenary has the authority to adopt Rule 11*bis* under the powers granted to the Tribunal under its Statute. Various Articles of the ICTR Statute lend support to the Plenary's authority beginning with Article 14 which allows the Plenary to amend the Rules of Procedure and Evidence as they see fit.[16] Additionally, the Plenary's adoption of Rule 11*bis* is also an exercise of the its concurrent jurisdiction and ultimate supremacy over national courts as outlined in Article 8 of the ICTR Statute. Under Rule 6 of the ICTR's Rules of Procedure and Evidence, the Plenary may adopt amendments to the Rules if agreed to by ten or more judges.[17] In order to meet the Security Council's demand that it complete its mandate by 2010, the ICTR's adoption of Rule 11*bis* was within the authority proscribed to it.

The judges have also used three means to expand the authority of the Tribunal beyond those specified in the Statute and in the Rules: 1) by claiming that the Tribunal did not need statutory authority in adopting a rule; 2) by arguing that the Statute may be interpreted to have extended the authority to the Tribunal by implication; and 3) if the Tribunal had express or tacit Security Council approval.[18]

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[16] ICTR Statute, Art. 14. [Reproduced in the accompanying notebook at Tab 3.]

[17] ICTR Rules, Rule 6. [Reproduced in accompanying notebooks at Tab 1].

[18] Gregory P. Lombardi, *Legitimacy and the Expanding Power of the ICTY*, 37 NEW ENG. L. REV. 887, 888 (2003). [Reproduced in the accompanying notebook at Tab 32].

An example of the first form was found in the divergent interpretations found by the Trial Chambers and Appeals Chamber at the ICTY in *Prosecutor v. Tadic*.[19] In finding Tadic's attorney in contempt, the Appellate Chamber found that its authority to rule on contempt stemmed from its inherent jurisdiction to safeguard the progress in its work and to protect its judicial functions.[20] Thus although not statutorily proscribed, the Chambers held that the expansion of its authority is valid based on the explicit purpose of the Tribunal.[21]

To illustrate the second route by which the Tribunal has expanded its authority, namely that rules may be adopted as the need arises to further the interests of justice, the *Tadic* ruling in allowing for interlocutory appeals is but one example. No where in the Statute is it mandated that defendants have a right to interlocutory appeal, but the Appellate Chamber adopted it in any case stating that it is in furtherance of fairness.[22] The Plenary has adopted rules that are not reflected in the Statute and are not even found to be implicitly authorized by the Statute. Still, these decisions have not been

[19] See Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, par. 6 (10 Aug. 1995) [Reproduced in the accompanying notebook at Tab 15.] and Prosecutor v. Tadic, Case No. IT-94-1-AR72, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, par. 1 (2 Oct. 1995). [Reproduced in the accompanying notebook at Tab 16.].

[20] Lombardi, 891. [Reproduced in the accompanying notebook at Tab 32].

[21] Lombardi describes the Appellate Chamber's conclusions, stating: Observing that the ICTY statute is "general in nature," the Chamber concluded that to avoid potentially "lengthy, emotional and expensive" trials the Security Council "surely expected that [the Statute] would be supplemented where advisable, by the rules which the Judges were mandated to adopt." [quoting *Prosecutor v. Tadic*, Case No.: IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, paras. 4-6.] [Reproduced in the accompanying notebook at Tab 32].

[22] *Id*. at footnote 25, discussing the evolution of the rules relating to interlocutory appeals.

scrutinized extensively to date and have generally been accepted as furthering the interest of the Tribunal.

Adoption of Rule 11*bis* reflects the third way by which the Tribunals have justified their authority, namely through the Security Council's sanction. Considering that nowhere in the Statute is the Tribunal given the authority to adopt such a rule to grant to the international Tribunal to transfer cases to jurisdictions where the crime was committed or alternatively to where the accused was arrested.[23] The adoption of the new rule was a reaction to the request made by the Security Council to create a completion strategy and was accepted by Security Council when presented by ICTY President Claude Jorda.[24]

The Ninth Annual Report of the ICTY notes that there was much debate over Rule 11*bis* and discussion on the need to revise it.[25] The Plenary, having exhausted its discussion without resolution, decided to transfer the issue to the Rules Committee

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[23] ICTR Rules, Rule 11bis. [Reproduced in the accompanying notebook at Tab 1].

[24] Following President Jorda's address, the President of the Security Council issued this statement:

The Council recognises, as it has done on other occasions (for example in its resolution 1329 (2000) of 30 November 2000), that the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary leaders suspected of being responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, rather than on minor actors.

The Security Council therefore endorses the report's broad strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions as likely to be in practice the best way of allowing the ICTY to achieve its current objective of completing all trial activities at first instance by 2008".

Address to the Security Council by President Claude Jorda, 26 July 2002 JDH/P.I.S./690-e accessed at: http://www.un.org/icty/pressreal/p690-e.htm [last visited 18 February 2004]. [Reproduced in the accompanying notebook at Tab 46].

[25] Ninth Annual Report of the ICTY at par. 42. [Reproduced in the accompanying notebook at Tab 47].

where the issue was debated further. Again, the judges were unable to make a final conclusion on how to revise the rule and decided to defer the issue to the Security Council for comments and review.[26] The Security Council has not reviewed the adoption of Rule 11*bis* but has consistently made explicit requests that some detainees be transferred from the ICTR to national jurisdictions. Security Council Resolution 1534 (2004) was the official declaration of the Council's intent to emphasize its interest in terminating the ad hoc Tribunals as well as clarifying its expectations on the methods by which the Tribunals were to do so. Prior to the adoption of Resolution 1534, the Security Council had only made references to the transfer of detainees by "recalling and reaffirming" the need to focus on the prosecution of the most senior leaders. The Council's intent was again expressed in its adoption of Resolution 1503, but was explicitly delineated in Resolution 1534 in which the Council requested update reports on each Tribunal's progress in its Completion Strategy.[27] Additionally, the General Assembly expressed its expectation of moving forward with the transfer of lower-ranked detainees at the ICTR in its passage of Resolution 253 as part of the 2004-2005 biennium budget for the ICTR. In that Resolution, the General Assembly "…invite[d] the Security Council to request the Secretary-General to make initial preparations, including establish the rules of procedure, for the transfer of cases to national

[26] *Id*.

[27] See preambulatory clauses to U.N. Doc. S/Res/1503 (2003), stating: "Urging the ICTR to formalize a detailed strategy, modeled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010…" [Reproduced in the accompanying notebook at Tab 9.].

jurisdictions; Requests the Secretary-General to report to the General Assembly at its fifty-ninth sessions on proposals for the resources necessary to aid in the transfer of cases to national jurisdictions…."[28]

While the Tribunal is obliged to adopt the policies of the Security Council, particularly given their effect on the ICTR's mandate, the independent and impartial character of the Tribunal is undermined when the work of the Tribunal is perceived to be at the whim of the Security Council. The fact that the ICTR is independent for only as long as the Security Council finds it is necessary in furthering international peace and security reflects the conclusion that the Tribunals remain subsidiary organs to the body that created them.[29] As such, they have to make every effort to meet the expectations set forth by the Security Council, which includes the adoption of procedures not explicitly authorized within the Tribunal's jurisdiction, but which continue to further the evolving interests and goals of the Security Council.

B. <u>The ICTR's Focus on Prosecuting the Highest Ranking Officials</u>

According to the Eighth annual report of the ICTR, forty suspects who are currently in the Tribunal's custody have been identified for transfer to national jurisdictions. Fifteen are in countries outside Rwanda that have adopted the principle of

[28] U.N.G.A. Res. 253, 58th Sess., 79th plenary mtg., U.N. Doc. A/58/253 (2003). [Reproduced in the accompanying notebook at Tab 14.].

[29] According to Morris & Scharf: "…while the Rwanda Tribunal is completely independent in the performance of its judicial functions, the duration of this ad hoc subsidiary organ is to be determined at some future date by the Security Council in the light of the reasons for which the Tribunal was established and in the context of broader efforts to address the situation in Rwanda." 1 MORRIS AND SCHARF 107 (1998). [Reproduced in the accompanying notebook at Tab 17.].

universal jurisdiction and could be tried in those respective court systems.[30] The twenty-five remaining who have been identified as middle-ranked and lower-ranked officials "could be transferred to the Rwandan authorities, provided that the death penalty is not imposed."[31]

Originally, Rwanda supported the establishment of a Tribunal because: 1) as international crimes, genocide and crimes against humanity an international Tribunal would account for the universality of these crimes; 2) a Tribunal would be perceived neutral "to dispel any suspicions of vengeful justice;" 3) to halt the impunity which existed within Rwandan culture; 4) to facilitate the prosecution of criminals who may have escaped during the war and sought refuge in foreign states; and 5) "to remove the onus of guilt from the nation as a whole and to place it on the individual criminal."[32] Yet once the Security Council adopted the framework for the ICTR, Rwanda dissented on various grounds, including the fact that the seat of the court would be outside Rwanda and that the new Tribunal would share the ICTY's Office of the Prosecutor and most significantly, that the Tribunal would try the most highly-ranked officials.

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[30] 1 MORRIS AND SCHARF 257 (1998):

> "International law does not impose a corresponding limitation [on personal jurisdiction] to state with respect to the prosecution and punishment of crimes under international law, such as genocide, crimes against humanity or war crimes. The national courts of every State are competent to prosecute and punish the perpetrators of such crimes without regard to the nationality of the perpetrator or the victim." [Reproduced in the accompanying notebook at Tab 17.].

[31] Eighth Annual Report of the ICTR to GA/SC, para. 10. [Reproduced in the accompanying notebook at Tab 44.].

[32] Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L L. & COM. REG. 551, 564-566 (2000). [Reproduced in the accompanying notebook at Tab 40.].

Rwanda felt that in order to provide for healing and reconciliation while ending the culture of impunity that had led to the massacres in the first place it would need to try some of the masterminds and planners of the atrocities at home.[33]

There was no way for the Tribunal to take on the entire case load and that was not the intention. The ICTR's focus has been to narrow its attention on detaining and trying those individuals who were among the leadership at the time of the genocides—among them are the former Prime Minister Jean Kambanda, the Minister of Defense, the Minister of Transportation, the Prefet, and Burgemester.[34] At the rate of massacre which ensued in Rwanda, which led to 500,000 to 1 million people killed in fewer than 100 days, tens of thousands of people were implicated.[35] Still, the Security Council noted that the national judicial system in Rwanda did not have the means to take on the burdens of trying all those culpable of genocide, stating in Resolution 955, "the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects.[36] Yet implicit in the Security Council's statement was the expectation that Rwanda would take on the burden of trying the vast majority of those accused of genocide.

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[33] See Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999). [Reproduced in the accompanying notebook at Tab 19].

[34] Bernard Muna, et al. *The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L. L. REV. 1469, 1473 (1998). [Reproduced in the accompanying notebook at Tab 37.].

[35] Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 357 (1997). [Reproduced in the accompanying notebook at Tab 36.].

[36] Morris & Scharf, *supra* note 28 at 310. [Reproduced in the accompanying notebook at Tab 17.].

While the ICTR and Rwandan national courts share concurrent jurisdiction, the Tribunal has superceding jurisdiction and may rescind a transfer if the court is not found to be competent, fair and impartial.[37] The former government leaders seemingly have the best of all circumstance as detainees at the ICTR: better physical facilities, stronger defense representation with their due process rights fully guaranteed by an impartial court. This is a far cry from the Rwandan judicial system that was already weak prior to the war and effectively disabled by the civil strife.[38]

While the ICTR models its efforts on the precepts of the International Covenant on Civil and Political Rights (ICCPR) in preserving the right of the accused, the Rwandan government's interpretation of Article 14 (3)(d) of the covenant is that defense counsel is required only in cases where the accused faced the death penalty as punishment.[39] Article 20 of the ICTR Statute outlines the rights of the accused. Those rights include that of being equal before the court,[40] to have a fair and public trial,[41] "to have adequate time and facilities for the preparation" of their defense and to communicate with counsel of their own choosing,[42] to be tried without "undue delay," among others.[43]

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[37] ICTR Statute, Art. 8 (1) and (2). [Reproduced at Tab 3.].

[38] 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 (1998). [Reproduced in the accompanying notebook at Tab 28.].

[39] Amnesty International, *Rwanda: The Troubled Course of Justice*, 26 April 2000, AI Index AFR 47/010/2000 at http://web.amnesty.org/library/Index/ENGAFR470102000?open&of=ENG-RWA (last visited March 20, 2004). [Reproduced in the accompanying notebook at Tab 21.].

[40] ICTR Statute, Art. 20 (1). Reproduced in the accompanying notebook at Tab 3.].

[41] *Id.* at Art. 20 (2).

[42] *Id.* at Art. 20 (4)(b).

In contrast, Amnesty International's assessment of the Rwandan judicial system found that, "[t]he government has repeatedly maintained that the obligation to provide legal assistance was not absolute and could be derogated with respect to genocide."[44] If a suspect is accused of a crime such as genocide it is of highest priority that the suspect is given his full range of rights and is informed of his plea options and their effects by competent counsel.

Without taking into consideration these factors, the language of Resolution 1503 states that adoption of the completion strategy to phase out the Tribunal "in no way alter[s] the obligation of Rwanda…to investigate those accused whose cases would not be tried by the ICTR…and take appropriate action with respect to indictment and prosecution, while bearing in mind the primacy of…ICTR over national courts."[45] Furthermore, while Resolutions 1534 (2004) and 1503 (2003) specifically calls for the donor community to support the High Representative to Bosnia and Herzegovina in creating a special chamber within the state court of Bosnia and Herzegovina to adjudicate allegations of serious violations of international humanitarian law, no similar chamber has been proposed for Rwanda.[46] Unlike the ICTY's establishment of the Special Chambers in Bosnia-Herzegovina, which has been set up to try war crimes specifically and will be staffed with international judges and attorneys alongside

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[43] *Id.* Article 20 (4)(c).

[44] Amnesty International (2000), *supra* note 38 at 15.

[45] U.N. Doc. S/RES/1503 (2003). [Reproduced in the accompanying notebook at Tab 9.].

[46] *Id.* Also see, U.N. Doc. S/RES/1534 (2004). [Reproduced in the accompanying notebook at Tab 8.].

Bosnian jurists. The expectation is that eventually the local staff will take over the entire workings of the Special Chambers in Bosnia-Herzegovina. The difference in approaches is likely related to the fact that Bosnia-Herzegovina has made efforts to cooperate with the ICTY, while the Rwandan government has been more erratic, with the Transitional National Assembly in Rwanda rejecting draft legislation that would allow for the recruitment of temporary foreign judges.[47]

Meanwhile, the work of the special genocide chambers established in Rwanda has no involvement or collaboration with the work of the Tribunal.[48] The quality of the legal proceedings that the Rwandan courts are expected to take on have not been addressed in the Security Council's interest to move forward with the completion strategy, but it remains a profound obstacle in terminating the work of the Tribunal. The ICTR was to be an example of the impartial deliberation and meting out of punishment for the genocides in Rwanda. Rule 6 (C) of the ICTR Rules states that although amendments enter into force immediately, they "shall not operate to prejudice the rights of the accused in any pending case." Since "accused" is defined within the ICTR and ICTY Rules as "a person against whom one or more counts in an indictment have been confirmed," all the indictees are within the purview of Rule 6 (C). Thus, if the adoption of Rule 11*bis* is found to be prejudicial to those indictees set to be transferred,

[47] Amnesty International, *Rwanda: Gacaca: A Question of Justice* 12-13, 17 December 2002, AI Index AFR 47/007/2002 at http://web.amnesty.org/library/Index/ENGAFR470072002?open&of=ENG-RWA (last visited March 20, 2004). [Reproduced in the accompanying notebook at Tab 20.].

[48] *Id.* at 14.

proper arrangements and negotiations would have to take place to ensure the inviolability of the indictees' rights upon their transfer.

C. <u>The Rwandan Judicial System Cannot Manage its Existing Case Load</u>

ICTR Deputy Prosecutor Muna has stated: "You administer justice according to your own means. Human justice is never perfect no matter what we may pretend or what we may think." [49] This maxim states the stark truth that there are bound to be differences in the administration of justice due to the means available and the disparity of circumstances between the ICTR and the trials conducted within Rwanda. Yet when the differences in the protections of due process are as glaring as those between the Tribunal and the local Rwandan courts, a balanced consideration must be adopted to avoid the injustice that transferring an indictee from one to the other would create.

Article 19 of the ICTR Statute states: "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused…"[50] If the ICTR selects the detainees that it intends to transfer, the terms of the transfer must meet the obligations set out under the Tribunal's Statute to provide the indictees with fair and expeditious trials. Given the backlog in the Rwandan courts, the lack of resources, the likelihood that these indictees may have to relinquish their current defense counsel

[49] Bernard Muna, et al. *The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L. L. REV. 1469, 1482 (1998). [Reproduced in the accompanying notebook at Tab 37.].

[50] ICTR Statute, Art. 19.

and rely on those available to them in Rwanda, the possibility of meeting these requirements is limited.

The Rwandan judicial system was decimated following the war. Magistrates and jurists were targets in the Rwandan wars, many that were not killed or implicated in the genocides fled out of Rwanda, compounding the situation by the loss of experienced magistrates.[51] Among the principal reason for the establishment of the ICTR was to provide a venue within which to prosecute the crimes committed during the genocides while creating a record of the atrocities and providing means for national reconciliation.[52] The Tribunal would provide a forum where the facts would be documented and the perpetrators punished, independent of what the state of affairs in Rwanda were like.

In Rwanda, estimates show that at the current rate of review of cases and the number of defendants (who number over 100,000 people), it will take 150 years to try all of them.[53] Rwanda adopted legislation to deal with the thousands of murder cases that

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[51] *Id.*

[52] The Secretary-General's letter of 1 October 1994, U.N. Doc. S/1994/1125, on the establishment of the ICTR: "Expressing once again it's [sic] grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda, determining that this situation continues to constitute a threat to international peace and security, determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace, Believing that the establishment of an international Tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed." Secretary-General's letter of 1 October 1994, U.N. Doc. S/1994/1125 (1994).

[53] Amnesty International, *Rwanda: Gacaca: A Question of Justice*, p.1, 17 December 2002, AI Index AFR 47/007/2002 at http://web.amnesty.org/library/Index/ENGAFR470072002?open&of=ENG-RWA (last

would need to be tried, titled "The Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990." [54] Under this law, the detainees were categorized into four groups. Category One, which retained the death penalty as punishment, included the masterminds, leaders and organizers of the genocide and perpetrators of heinous crimes or sexual torture. The second category was reserved for any others accused of homicide. Category Three includes perpetrators of grave assaults that did not result in death to the victim and Category Four would cover those who committed property

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visited March 20, 2004). [Reproduced in the accompanying notebook at Tab 20]. See also Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 357 (1997) (discussing the lack of accurate numbers as to the number of detainees held in Rwanda) [Reproduced in the accompanying notebook at Tab 36.].

[54] See "The Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990," reprinted in 2 VIRGINIA MORRIS AND MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 369 (1998). [Reproduced in the accompanying notebook at Tab 5]:

"Category 1:

a) persons whose criminal acts or those whose acts place them among planners, organizers, supervisors and leaders of the crime of genocide or of a crime against humanity;

b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organizations, or militia and who perpetrated or fostered such crimes;

c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;

d) Persons who committed acts of sexual violence.

Category 2: Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death.

Category 3 : Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.

Category 4: Persons who committed offences against property."

crimes.[55] For crimes that fall within categories two through four, the accused were expected to make a full confession, with a detailed description of their offenses as well as naming all their accomplices and to also apologize to the victims and the victims' families in exchange for lower prison sentences and/or sentences to community service.[56] By the year 2000, 20,000 detainees had confessed their crimes under the 1996 Organic Law.[57] In May 2003, the Rwandan government released close to 23,000 individuals in custody for war crimes after they met the plea arrangements set forth in the 1996 Organic Law.[58] March 2004 brought another announcement from Rwandan authorities that some 30,000 individuals detained for genocide would be released by the end of June while they await their trials by "gacaca," the traditional community courts that will allow the suspects neighbors and local judges to try them.

While the purpose of adopting the 1996 Organic Law was to reduce the congestion of the nascent Rwandan courts, in practice the review of these confessions was slow and only one-fourth of the confessions were being verified at any given time.[59] The motivation of the Rwandan government in releasing so many suspects to the jurisdictions of the less formal gacaca proceedings was to ease the burden on the

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[55] Madeline H. Morris, *Justice in the Wake of Genocide: The Case of Rwanda*, 3 ILSA J. Int'l & Comp. L. 689, 691 (1997). [Reproduced in the accompanying notebook at Tab 35].

[56] Amnesty International (2002), supra note 46 at 18. [Reproduced in the accompanying notebook at Tab 20].

[57] *Id*.

[58] Rodrique Ngowi, *Rwanda to Free 30,000 Genocide Suspects* (March 27, 2004) AP WIRES. [Reproduced in the accompanying notebook at Tab 38].

overcrowded prisons.[60] After close to ten years in the dismal conditions of Rwanda's jails, it was feared that some factually innocent detainees were pleading guilty for fear of a worse outcome at trial or to avoid the common extensive delays that they would be subjected to before trial.[61] It is likely that the implementation of Rule 11*bis* creates similar circumstance for those detainees currently at the ICTR. Some might choose to plea bargain rather than face an unknown but most certainly less desirable fate of being prosecuted by a Rwandan court and serving a long sentence in a Rwandan prison. Unfortunately, the lure of the plea bargain thwarts the recording of the atrocities in that no lasting record is made of the details of the actual crime committed.

The resources of the ICTR are far more than those in Rwanda while the case load of the Tribunal is miniscule compared to the more than 100,000 suspects detained in Rwanda awaiting trial. According to the honorable judge Navanethem Pillay, "the ICTR paid the defense counsel in the Rwanda Tribunal a total of $1 million" over a nine month period in 1998.[62] Such generous funding affects the legal representation in the quality and breadth of the witnesses that can testify and the totality of representation of the defense's case. The need for equality of arms, that is meeting the needs of the

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[59] Amnesty International (2002), *supra* note 46 at 18. [Reproduced in the accompanying notebook at Tab 20.].

[60] Rodrique Ngowi, Rwanda to Free 30,000 Genocide Suspects (March 27, 2004) AP Wires. [Reproduced in the accompanying notebook at Tab 38].

[61] Morris (1997), *supra* note 53 at 692. [Reproduced in the accompanying notebook at Tab 35]. See also Amnesty International (2002) at 39 for an account of the conditions surrounding forced false confessions. [Reproduced in the accompanying notebook at Tab 20.].

[62] Bernard Muna, et al. at 1469. [Reproduced in the accompanying notebook at Tab 37.].

defense counsel to properly represent their client, is lost in the Rwandan national court system. Approximately forty percent of the detainees in Rwanda are represented by counsel.[63] The vast majority of these advocates are not attorneys by formal education but rather laymen that received six months of legal training and then were sent out to represent individual before the Tribunals of First Instance.[64]

D. <u>Sentencing Issues in Relation to Local Rwandan Courts</u>

There remain two issues with regard to the transfers and the possible sentencing mechanisms that will be enforced. First, Rwanda retains the death penalty for those individuals that are deemed within category 1 of the 1996 Organic Law. Second, even if the Tribunal negotiates the transfer of its indictees to be outside the Organic Law, there remains the issue as to whether it is fair to force the Rwandan courts to be partial to the sentencing of ICTR transfers and whether a sentence of life imprisonment can also be circumscribed under the ICTR's understanding or whether Rwanda would retain its right to impose its harsher definition of life imprisonment. Lastly, the Tribunals have been under pressure to dole out sentences, but little attention has been given the future of those sentences. Sentencing is a significant part of the remnants that the Tribunals will leave behind, yet has been overlooked for the most part.

> Issues relating to pardon, commutation, and parole are to be directed to the Tribunal President, who in consultation with the judges, is to render a decision. This provision presupposes that these bodies—or some relic of these bodies—

[63] Amnesty International (2002), *supra* note 46 at 15. [Reproduced in the accompanying notebook at Tab 20.].

[64] *Id.*

> will be in existence at the time of such pardon, commutation, and/or parole decisions become necessary. Depending on the host-state and domestic parole regulations, the length of incarceration will vary. Prisoners receiving life sentences surely will outlive the existence of these Tribunals. Nevertheless, no formal consideration has been given to this issue.[65]

If the Tribunal is to make a complete exit, it will need to negotiate the terms by which the sentences are to be directed if any of the above actions are taken.

The indictees from the ICTR may have been lower-ranked but their crimes are likely of the sort that are categorized under category two of the Organic law and thus would allow for a sentence of the death penalty. The exclusion of a death penalty provision was among the reasons that Rwanda voted against the establishment of the ICTR and may very well be a sticking point if the Tribunal attempts to negotiate this option.[66] Even if the Rwandan Courts agree to forego the death penalty for cases that are transferred to them from the ICTR, it is likely that the length of imprisonment will be far greater under the Rwandan definition of "life imprisonment."

The Tribunal was established as a mechanism to restore peace and security in the region, but was not given the responsibility of reconstructing the domestic justice

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[65] Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321, 389 (1999).

[66] ICTR Statute, Art. 23: "The penalty imposed by the trial chamber shall be limited to imprisonment". [Reproduced in the accompanying notebook at Tab 3]. Rwanda cast the single no vote in the establishment of the ICTR. Res. 955. Rwanda happened to have one of the rotating seats on the council when the issue was presented. Rwanda voted against the establishment of the ICTR for various reasons, including the bar on the death penalty, the seat of the court would not be in Rwanda and the ICTR was to share prosecutorial function with the ICTY's Office of the Prosecutor as well as limiting the temporal jurisdiction committed only the year 1994. See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 353-357 (1997). [Reproduced in the accompanying notebook at Tab 36.].

system or assisting local courts in the prosecution of war crimes.[67] As such, there is little room for the national courts to emulate or to adopt the policies of the ICTR. As a practical matter, the national courts simply cannot afford the means by which to carry them out, the sheer number of people detained in Rwanda attest to this fact. The national courts have opted to facilitate the process by allowing the detainees to plea bargain under the terms provided in the 1996 Organic Law.[68] Still, observers of the Rwandan court system acknowledge that the system has not totally failed. The fact that there have not been any executions of those being tried since 1998 attests to that fact.[69]

E. Rule 11*bis* as an Exercise of Concurrent Jurisdiction

Adoption of Rule 11*bis* may be seen as the ICTR's exercise of its supremacy right under Statute Article 8(2) which states that although the national courts and the ICTR have concurrent jurisdiction, the ICTR "shall have primacy over the national courts of all states." Article 8 of the ICTR Statute states that "at any state of the procedure, the ITR may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda."

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[67] David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26-Fall Fletcher F. World Aff. 7, 16 (2002). [Reproduced in the accompanying notebook at Tab 41.].

[68] Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1 (2002). [Reproduced in the accompanying notebook at Tab 26.].

[69] See Christina 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 (2000). [Reproduced in the accompanying notebook at Tab 25.].

With concurrent jurisdiction and thousands of prisoners already in custody, when these ICTR indictees make it up on the docket the ICTR may be shut down and that will leave no oversight for national courts. And Rule 11*bis* provisions (F) and (G) will have no application.[70] This is particularly troubling given the lack of due process safeguards for detainees in Rwandan jails.[71]

A Trial Chamber may review cases tagged for referral to authorities of a state i) in whose territory the crime was committed; or ii) in which the accused was arrested and refer the case to trial within that state. There will be no reviewing body for the indictments sent down to the national court that may still be awaiting trial or perhaps have reached the appellate court. Under ICTY Statute Article 10, Section 2(b) & ICTR Statute Article 9 2(b), the Tribunal may take over a case if the national court proceedings "were not impartial or independent, were designed to shield the accuses from international criminal responsibility, or the case was not diligently prosecuted." Once the completion strategy is met, all such cases that remain open will be left without

[70] Rule 11*bis* (F) and (G) state:
(F) At any time after an order has been issued pursuant to this rule and before the accused is found guilty or acquitted by a national court, the Trial Chamber may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

(G) Where an order issued pursuant to this rule is revoked by the Trial Chamber, the Chamber may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused. [Reproduced in the accompanying notebook at Tab 1].

[71] Madeline H. Morris (1997), *supra* note 34 at 360. [Reproduced in the accompanying notebook at Tab 36.].

a reviewing body, violating the basic rights reserved for those detainees under the ICTR's mandate.

The Statutes assume that the Tribunal reserves reviewing authority over the proceedings of the national courts. It is important that this element be maintained as long as there are indictments awaiting review by national courts. Otherwise granting national courts with such a broad mandate for war crimes, genocide and crimes against humanity may run afoul of customary law in not over expanding the jurisdictions of the state courts over these crimes.

The Statute also assumes that national courts have to be competent, effective and fair. Under the ICCPR, indictees have a right to due process and fair and speedy trials.[72] Such prospects are limited in Rwanda and neighboring states. Thousands of defendants are awaiting trial in Rwanda. The judicial appointments in Rwanda have been accused of being politicized and defense counsel are often threatened have been known to be targeted.[73]

The international Tribunals have both suffered from negative perceptions in the countries for which they were established. Being so removed from the locus where the crimes took place and not engaging any local jurists or collaborating with local courts, "the Tribunal's long-term impact on the systems of justice in the area of conflict has

[72] ICCPR, Art. 14. [Reproduced in the accompanying notebook at Tab 7.].

[73] Human Rights First, *Prosecuting Genocide in Rwanda* (1997) at http://www.humanrightsfirst.org/pubs/descriptions/rwanda.htm (last visited March 20, 2004). [Reproduced in the accompanying notebook at Tab 31.].

been minimal."[74] But assisting national jurisdictions with re-establishing and strengthening their judicial systems is not within the mandate of the Tribunals.[75] But any effort to restore peace and security will require the bolstering of local judicial systems. "[M]ore people rely on the protection and viability of their own local law and institutions than on international law or the U.N. The Rwandan people have a greater interest and stake in empowering their local courts and other institutions than in protecting the credibility of the Security Council."[76]

Some similar court to the Bosnia & Herzegovina Special Chamber must be established in each potential national court that might foresee trying war criminals. The Security Council never meant the Tribunals to be the exclusive for prosecutions arising out of such conflicts (as evinced by the concurrent jurisdiction Articles of the Statutes). The ICC, although it may have had a role in providing oversight, does not have retroactive jurisdiction and thus could not preside over the ICTR or ICTY.

F. <u>The International Tribunals Provide the Best Oversight Function</u>

Security Council Resolution 1534 at paragraph 3 calls on the ad hoc Tribunals to "plan and act" in accordance with the dates set forth in resolution 1503 to implement the Completion Strategy and emphasized that the Council would "review the situation, and in the light of the assessments received under the foregoing paragraph to ensure

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[74] David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia, Unforeseen Successes and Foreseeable Shortcomings*, 26-FALL FLETCHER F. WORLD AFF. 7, 8 (2002). [Reproduced in the accompanying notebook at Tab 41.].

[75] *Id.* at 12-13.

[76] Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 402 (1999). [Reproduced in the accompanying notebook at Tab 19.].

that the time frames set out in the Completion Strategies and endorsed by resolution 1503 (2003) can be met…"[77] Rather than terminate the mandate, perhaps with the conclusion of the trials, a reviewing body may still be preserved on a smaller scale.[78] Consideration of this option considers the fundamental need for the ICTR to meet the purpose of its mandate toward its natural conclusion and not adherence to a specific date of termination.

Even with concurrent jurisdiction of the national courts, there are fundamental advantages to having the international Tribunals in place. The Tribunal allows for accounting of the universality of the crimes committed. Genocide committed on the massive scale that occurred in Rwanda violates the basic inalienable and universal human rights. As such, to terminate the Tribunal's mandate before they have completed all their functions as set out in the Statute would be shortcutting the basis upon the Tribunal was established in the first place. Justice takes time to be settled and having taken on the responsibility of prosecuting the war criminals of the Rwandan genocide, the Tribunal should be allowed to complete its stated purpose.

Secondly, the Tribunal is more independent of national political waves and thus even if a state decides to not cooperate, the Tribunal can carry forth the duties it has set. There are no guarantees that national courts will cooperate. The purpose of establishing the Tribunal in Tanzania (over Rwanda's objections) was to free the Tribunal of the

[77] U.N. Doc. S/RES/1503 (2004).

[78] Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321 (1999). [Reproduced in the accompanying notebook at Tab 39.].

continued political influences with which the Rwandan government must deal. Rwandan judicial courts have been marred with the image that the appointment of judges were biased, that confessions were obtained under coercion and sometimes torture. In contrast, the presumption of innocence and the humane living conditions within the Tribunal were perceived by many Rwandans as soft justice for the most culpable criminals, but Rwandans still viewed the work of the Tribunal as impartial. As a neutral body created after the atrocities committed and thus ideas of vengeful justice may be dispelled.