

2001

International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory

Jackson Nyamuya Maogoto
jacksonmaogoto@aol.com

Follow this and additional works at: <http://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory

Abstract

[extract] To delve more deeply into the ICTR's handicap in addressing the human rights situation in Rwanda through the international penal process, this Article makes use of a distinction of looking at human, social or for that matter world affairs: the actor-orientated and structure-orientated perspectives. They can be seen as two ways of reflecting, and reflecting on, social affairs and legal tradition, each of them focusing on different aspects. The legal paradigm (especially criminal law) is biased in favour of the actor-oriented perspective due to its simplistic concreteness, identification of the evil actor, apprehension and prosecution. This Article sets out to consider how far the ICTR has fulfilled its objectives, which transcend the prosecution and conviction of guilty persons. The contention is that the ICTR still has not made the most of its opportunity to facilitate change. The Article explains some of the reasons why the ICTR has not fulfilled this opportunity.

Keywords

Rwanda, International Criminal Tribunal for Rwanda, ICTR, criminal law

INTERNATIONAL JUSTICE FOR RWANDA MISSING THE POINT: QUESTIONING THE RELEVANCE OF CLASSICAL CRIMINAL LAW THEORY

*By Jackson Nyamuya Maogoto**

[The traditional approach to criminal justice faces the challenge of balancing multiple goals, usually expressed as deterrence, incapacitation, rehabilitation, and retribution which focus on crime control. A restorative approach seems needed in all societies that have suffered massive and collective victimisation, and must be kept in mind in Rwanda by the International Criminal Tribunal for Rwanda (ICTR) as it implements its overall strategy. The ICTR's almost exclusive focus on concrete entities; the individual (actor-orientated perspective) as a building block of the genocidal reality, distorts and obscures the ethno-centric social reality (structure-orientated perspective) that converted tens of thousands of Hutus into a mass of killers, turning on their friends, neighbours and colleagues. The main focus for the punishment of war criminals must remain at the national level, although the existence of an international tribunal legitimises the criminalisation of internal atrocities. The ugliness of internal strife and the political reality of the ethnic hatred cannot be isolated into an international courtroom for resolution.]

Introduction

The end of the Cold War, which paralysed the United Nations from its inception, was a cause for celebration and hope. Following the historic Security Council Summit Meeting of January 1992, the then Secretary-General of the United Nations, Boutros Boutros-Ghali, spoke of a growing conviction 'among nations large and small, that an opportunity has been regained to achieve the great objectives of the *UN Charter* - a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, "social progress and better standards of life in larger freedom".¹ Even as this optimistic mission statement was being made, the Balkans had erupted into a theatre of war and Rwanda's genocidal conflagration was in the making. Organisation and planning was certainly at

* Jackson Nyamuya Maogoto, LLB (Hons), Moi University, 1999. PhD candidate at the University of Melbourne majoring in international criminal and humanitarian law.

1 *Report of the Secretary General on the Work of the Organisation*, UN GAOR, 47th Sess, para 3, UN Doc A/47/277, S/24111 (1992).

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

work in Rwanda, where an estimated one million people from a total population of 7.5 million were slaughtered in less than three months.²

The horror of civil war in the Balkans generated a particular urgency in the West to do something to mask the appearance of disorder and moral collapse on its periphery. With the United States as lead lobbyist and financier,³ two ad hoc international criminal tribunals were established, ostensibly to restore order to the former Yugoslavia⁴ and as an afterthought, to Rwanda.⁵ Hailed by UN leadership as moral progress,⁶ these institutions were to merge our humanitarian instincts with a purported administrative capacity to control deviant behaviour. Virtually overnight, the capacity of the international community to punish in a

2 See *The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighbouring States*, UN SCOR, 49th Sess, 3453rd mtg, at 14, UN Doc S/PV.3453 (1994).

3 See Office of the Press Secretary, The White House, *US Efforts to Promote Human Rights and Democracy*, Pub No 11769 (1997) 2.

4 See UN SCOR, 48th Sess, 3217th mtg at 2, UN Doc S/RES/827 (1993).

5 See UN SCOR, 49th Sess, 3453d mtg at 2, UN Doc S/RES/955 (1994). For those unacquainted with the Nuremberg precedent for international criminal tribunals, the late professor Telford Taylor, a chief prosecutor at Nuremberg, has written a definitive account. See Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992). The mass of literature written on the legal issues surrounding the international court for the former Yugoslavia, Rwanda, and a permanent international criminal court dissuades me from rehashing the legal debate. For a sample of literature on the subject, see generally Payam Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) 90 *American Journal of International Law* 501; Rupa Bhattacharyya, 'Establishing a Rule-of-Law International Criminal Justice System' (1996) 31 *Texas International Law Journal* 57; Karl Arthur Hochkammer, 'The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law' (1995) 28 *Vanderbilt Journal of Transnational Law* 119; Paul D Marquardt, 'Law Without Borders: The Constitutionality of an International Criminal Court' (1995) 33 *Columbia Journal of Transnational Law* 73 (1995); Timothy L H McCormack, 'Selective Reaction to Atrocity War Crimes and the Development of International Criminal Law' (1997) 60 *Alberta Law Review* 681; Madeline H Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' (1997) 7 *Duke Journal of Comparative and International Law* 349; Lyal S Sunga, 'The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda' (1995) 16 *Human Rights Law Journal* 121; Mariann Meier Wang, 'The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact' (1995) 27 *Columbia Human Rights Law Review* 177.

6 See Kofi Annan, 'Advocating for an International Criminal Court' (1997) 21 *Fordham International Law Journal* 363,365 ('These tribunals have made significant progress and are setting an important precedent.').

presumptively non-discriminatory and salubrious manner grew exponentially, with scant philosophical reflection or historical depth.⁷

The International Criminal Tribunal for Rwanda (ICTR) grew out of the response of the UN human rights system to the Rwandan tragedy. Parallel to the efforts within the UN human rights system, the government of Rwanda that came to power by toppling the genocidal regime⁸ made a request to the UN Security Council for assistance to bring those responsible for the genocide to justice.⁹ Based on its concern that the serious and extensive human rights violations in Rwanda would disrupt international peace and security,¹⁰ the Security Council invoked its Chapter VII authority under the *UN Charter* and established the ICTR.¹¹

The Security Council's resolution establishing the ICTR articulates a set of decisions, assumptions, wishes, and objectives.¹² States serving on the Security Council participated in the debate creating the ICTR. Remarkably, though voting for the most part in favour of the resolution creating the ICTR, the States articulated various objectives, or perhaps more importantly perspectives, which in many ways could be construed to be in conflict with each other.¹³ Primarily, the States that voted in favour of the creation of the ICTR indicated that the root of

7 Carrie Gustafson, 'International Criminal Courts: Some Dissident Views On The Continuation Of War By Penal Means' (1998) 21 *Houston Journal of International Law* 51, 53.

8 The Rwandan Patriotic Front took power in July 1994. For an overview, see Gerard Prunier, *The Great Lakes Crisis*, (1997) 96 *Current History* 193.

9 Letter Dated 28 September 1994 from the Permanent Representative of Rwanda Addressed to the President of the Security Council, UNSCOR, 49th Sess, UN Doc S/1994/1115, at 4 (1994).

10 Serious human rights violations implicate Chapter VII jurisdiction. See Louis Rene Beres, 'Iraqi Crimes During and After the Gulf War: The Imperative Response of International Law' (1993) 15 *Loyola of Los Angeles International and Comparative Law Journal* 325; Barbara M Tocker, 'Intervention in the Yugoslav Civil War: The United Nations' Right to Create an International Criminal Tribunal' (1994) 12 *Dickinson Journal of International Law* 527.

11 The ICTR, with jurisdiction over human rights crimes committed from 1 January 1994, through 31 December 1994, is based in Arusha, Tanzania. It is one of the two ad hoc tribunals established by the UN to bring human rights criminals to justice. The ICTR's complete name is International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994. See SC Res 955. The other ad hoc tribunal has jurisdiction over crimes committed in the former Yugoslavia. See SC Res 827, UN SCOR, 48th Sess, 3217th mtg, at 1, UN Doc S/Res/827 (1993). See also Larry D Johnson, 'The International Tribunal for Rwanda' (1996) 67 *Revue Internationale de Droit Penal* 211; Sunga, above n 5.

12 SC Res 955.

13 For the views of the various States, see UN SCOR, 49th Sess, 3453d mtg, UN Doc S/PV.3453 (1994) 2-10.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

the problem was *individual violations* of international criminal law. Only one State that voted for the resolution did not equate ipso facto ICTR actions with justice. That State considered the ICTR only one of the many tasks at hand for the international community. The ICTR was merely a vehicle of justice, 'but it is hardly designed as a vehicle for reconciliation....Reconciliation is a much more complicated process' (Czech Republic).¹⁴ Interestingly, Rwanda, which voted against the resolution, spoke of the problem in terms of a *culture of impunity*.¹⁵ The Rwandan delegate used words with implications different from those linked to individual wrongdoing. The UN paid little to no heed to the subtle, but extremely different way in which the problem was characterised and the implications this would have on the type of tool needed to deal with that problem.¹⁶

The potential contribution of the ICTR to national reconciliation in Rwanda depends on understanding the root causes of the 1994 genocide. It is obvious that an essential ingredient of this tragedy was historical rivalry and ethnic fear between Hutu and Tutsi.¹⁷ But this ingredient, though necessary, was not sufficient. It was necessary to transform these tensions into systematic mass violence, a feat which could only be achieved through careful planning and execution under the direction of political elites. It is imperative that the ICTR clarify goals lest, in the words of Michael Reisman, 'we fall victim to a judicial romanticism in which we imagine that merely by creating entities we call "courts" we have solved major problems'.¹⁸ Of course, the aim of achieving justice, which has no empirical referent, is clearly not an adequate response. In discharging its

14 Ibid 7.

15 Ibid 14.

16 The ICTR's sister tribunal in Yugoslavia, the ICTFY, was clearer about what it believed to be its objectives by interpreting its mandate from the Security Council. They are, to bring to justice those responsible; - to contribute to ensuring that such violations are halted and effectively redressed by acting as a powerful deterrent to all parties against continued participation in inhuman acts.'

- to gradually promote an end to armed hostilities;

- to be a tool for promoting reconciliation by working to attribute acts to individuals and thereby provide justice to individual victims to diminish group hatred and the need for revenge. See The Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, in *ICTFY Year Book* (1994) 81, 86-87, UN Sales No E.95.III.P.2. The UN Legal Counsel Carl August Fleischhauer stated that the tribunal was set up with three aims: ending war crimes, bringing perpetrators to justice, and breaking the cycle of ethnic violence and retribution. See Andrew Kelly, 'Yugoslavia War Crimes Tribunal Starts Work' *Chicago Sun-Times*, 18 November 1993, 52.

17 For an excellent overview of the historical roots of the rivalry between Hutu and Tutsi, see Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (1995) 9-40.

18 W Michael Reisman, 'Institutions and Practices for Restoring and Maintaining Public Order' (1995) 6 *Duke Journal of Comparative and International Law*, 175.

burden, the ICTR should keep in mind Holmes's admonition against blind guesses.¹⁹

While courts are needed to enforce law, courts, however, do not and cannot make human rights real. The achievement of human rights is a much more complex process than the establishment of a court. While the Rwanda tribunal responds to the lawyer's gradualist approach to institutional and normative development of international criminal law, thus far it has failed to successfully address the basic purposes for which it was established, to end impunity and deter potential offenders. It has been hampered by conceptual considerations.

To delve more deeply into the ICTR's handicap in addressing the human right's situation in Rwanda through the international penal process, this Article makes use of a distinction of looking at human, social or for that matter world affairs: the actor-orientated and structure-orientated perspectives.²⁰ They can be seen as two ways of reflecting, and reflecting on, social affairs and legal tradition, each of them focusing on different aspects. The legal paradigm (especially criminal law) is biased in favour of the actor-oriented perspective due to its simplistic concreteness, identification of the evil actor, apprehension and prosecution. This Article sets out to consider how far the ICTR has fulfilled its objectives, which transcend the prosecution and conviction of guilty persons. The contention is that the ICTR still has not made the most of its opportunity to facilitate change. The Article explains some of the reasons why the ICTR has not fulfilled this opportunity.

Part II of the Article provides a tour d' horizon of Rwanda's history, aimed at bringing to light the constructed ethnicity and the infusion of ethno-centric hatred. Part III of the Article discusses why the Court needs to focus on a structure-oriented perspective to complement its current overemphasis on an actor-oriented perspective in the ongoing effort to achieve respect for a human rights culture in Rwanda in order to maximise its social impact in Rwanda. This is particularly so, given the opinions voiced by many Hutu refugees that no atrocities occurred at all, or that any atrocities that did occur were brought on by the Tutsis themselves.

Part IV of the Article discusses the inappropriateness of the classical criminal law paradigms adopted by the ICTR in its judicial operations, pointing that the objectives that come with this paradigms do not have much relevance to the Rwandese situation. Part IV explores the restorative dimension of justice as a possible viable instrumentality in achieving the ICTR's objectives.

19 See Oliver Wendell Holmes, 'The Path of the Law After One Hundred Years' (1997) 110 *Harvard Law Review* 989, 1002 (republishing Holmes's March 25, 1897 speech on its centennial). 'What have we better than a blind guess to show that the criminal law in its present form does more good than harm?' Ibid.

20 Johan Galtung, *Human Rights in Another key* (1994) 26-49.

Constructing Ethnicity: A Tour d'Horizon of Rwanda's History

The genocide of 1994 was anything but a surprise for the international community. It was the culmination of many years of cynical indifference and wilful blindness to the plight of the Rwandan people. In the words of the Rwandan representative to the Security Council: 'Since 1959 Rwanda has repeatedly experienced collective massacres, which, as early as 1964, were described by Pope Paul VI and two Nobel Prize winners - Bertrand Russell and Jean-Paul Sartre - as the most atrocious acts of genocide this century after that of the Jews during the Second World War. But whenever such tragedies occurred the world kept silent and acted as though it did not understand that there was a grave problem of the violation of human rights.'²¹ Thus in 1994, the international community became a spectator to an archetypal genocide, the attempted extermination of an entire people. The tragedy which befell Rwanda in 1994 deserves a special place in the bloodstained pages of history.²² The Rwandan genocide merits distinction primarily because of its shocking efficiency, its scale and its proportional dimensions among the victim population.²³

Prior to the genocide, the population of Rwanda consisted of an estimated 85% Hutu, 14% Tutsi, and 1 % Twa and other.²⁴ As far back as the 15th century, the Rwanda-Burundi area was ruled by monarchic clans. Prior to the colonial era, political tensions in Rwanda were not particularly accentuated along ethnic lines. The Hutu and Tutsi together comprise the Banyarwanda ('people of Rwandan extraction'),²⁵ and speak the same language, Kinyarwanda, without differences in dialect or vocabulary.²⁶ Historically, both groups were socially fluid, with intra-

21 UN Doc S/PV.3453 (1994), above n 13, 13-14.

22 The UN Special Rapporteur observed in 1994: 'The Rwandese have indeed been the victims of a number of massacres in the past, notably in 1959, 1963, 1966, 1973, 1990, 1991, 1992 and 1993. However, those being perpetrated at present are unprecedented in the history of the country and even in that of the entire African continent. They have taken on an extent unequalled in space and in time.' *Report of the Situation of Human Rights in Rwanda Submitted by Mr R Degni-Séqui, Special Rapporteur of the Commission on Human Rights*, UN ESCOR Commission on Human Rights, 51st Sess, Prov Agenda Item 12, para 24, UN Doc E/CN.4/1995/7 (1994) para 20.

23 Ibid. The number of persons killed throughout the territory is to be numbered in the hundreds of thousands, estimates ranging from 200,000 to 500,000. In fact, even the latter figure is probably less than the reality. Some observers think that the figure is close to a million. It is not sure that the exact number of victims will ever be known.

24 The indigenous Twa minority was the first people to populate the area of Rwanda as far back as 2,000 BC. Around 3,000 years later, a migration of Hutu to the area began. People of Tutsi extraction began to migrate to the area around 1500 AD. Traditionally, the Hutu have been agrarian and sedentary whereas the Tutsi have been cattle-owners and nomadic.

25 See Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (rev ed 1997) 400.

26 Ibid 400-07 (providing glossary of Rwandan terms).

societal divisions operating more along clan lines than 'ethnic' lines.²⁷ As Gourevitch notes, Hutu and Tutsi 'intermarried, and lived intermingled, without territorial distinctions, on the same hills, sharing the same social and political culture'.²⁸

As the nineteenth century drew to an end, Germany began to assert indirect colonial rule over Rwanda and Burundi with only a very small presence through the tactic of 'divide and rule'. The reinforcement and manipulation of the ruling elites in Rwanda formed an important element of Germany's colonial policy from 1897 to 1916.²⁹ During the First World War, Germany lost control over the area to Belgium, which then ruled Rwanda from 1916 to 1962. Belgium administered Rwanda under the League of Nations mandates system, pursuant to Article 22 of the *League Covenant*, and then, following dissolution of the League of Nations on 18 April 1946, as a United Nations Trust Territory. As Germany had done, Belgium reinforced the centuries-old Tutsi monarchy in Rwanda through a system of patron-client control, favouring the minority Tutsi people as the ruling class, partly on the grounds that the Tutsi people originated from the Nile River region, were somehow 'more European' in character than the Hutu people, and therefore, were supposedly superior as well.³⁰

The Belgians believed the apparent physical distinctions between the Hutus and Tutsis represented anthropological differences related to group ancestry.³¹ From this grew the constructed nature of ethnicity in Rwanda. The construction was consolidated by the introduction in 1933 of mandatory 'ethnic' identity cards,' which each Rwandan was obliged to carry.³² These cards made the lines between Tutsi and Hutu official and impenetrable³³ and established the distinction

27 Ibid 15, 370.

28 Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (1998) 47.

29 See generally Alain Destehexhe, *Rwanda and Genocide in the Twentieth Century*(1995) 39-47 (Alison Marschner trans).

30 See eg Pierre Ryckmans, *Dorniner Pour Servir* (1931) at 26: 'The Batutsi were meant to reign. Their fine presence is in itself enough to give them a great prestige vis-à-vis the inferior races which surround...It is not surprising that those good Bahutu, less intelligent, more simple, more spontaneous, more trusting, have let themselves be enslaved without ever daring to revolt' as quoted in Gerard Prunier, *The Rwanda Crisis 1959-1994: History of a Genocide* (1995) 9.

31 See Alison Des Forges, Human Rights Watch, "'Leave None to Tell the Story": Genocide in Rwanda' (1999) 16.

32 See Gourevitch, above n 28, 56-57; Human Rights Watch, *Playing the 'Communal Card': Communal Violence and Human Violence* (1995) 1-2 (describing system of identity cards).

33 Destehexhe, above n 29 (detailing imposition of identity categories and concluding that identity cards were basic instrument of genocide). In the early days of colonialism, the Belgians favoured the Tutsi, elevating them to important positions within the colonial state. Closer to the time of independence, the Belgians promoted

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

between Hutu and Tutsi as a cornerstone of Belgian colonial rule. Colonial introduction of ethnic identity cards, patronage based on ethnic group membership, and the European fascination with the anthropological origins of Hutu and Tutsi led to what Chabal and Daloz call the 'invention of ethnicity'.³⁴ By this they do not mean that '[ethnic] affiliations did not exist prior to colonial rule but simply that they were reconstructed during that period according to the vagaries of the interaction between colonial rule and African accommodation'.³⁵

After the Second World War ended, Rwandan Hutus pushed for democratic reforms, a goal supported by the Belgian Government. Tutsis not only opposed Belgium's proposed democratic reforms, which threatened to undermine Tutsi positions of privilege and power, but also intensified a drive for national independence from Belgium. In November 1959, the heightened resentment between the two groups took the form of open hostilities. Several hundred Tutsis were massacred, which in turn sparked a mass exodus of thousands of Tutsis from Rwanda, mostly to Uganda and Zaire.

In 1961, the Rwandan monarchy, which had existed for centuries, was abolished by overwhelming popular demand through national referendum and replaced by a republican form of Government. On 26 October 1961, Gregoire Kayibanda, leader of Parmehutu (Party for the Emancipation of the Hutu people), was formally elected President of the newly formed Parliament of the Republic of Rwanda, and maintained political control until 1973. On 1 July 1962, Rwanda achieved independence. Hutu and Tutsi, fairly benign constructs until Rwandan independence, quickly changed (and were changed) to define political cleavages and foster enmity. In the early 1960's, violence was never absent from the scene. Particularly large-scale massacres were perpetrated in 1963 and 1966, mainly against Tutsis.

In July 1973, Juvenal Habyarimana, a Hutu from the north of Rwanda, seized control of the Government, and in 1975, formed the National Revolutionary Movement for Development. The Hutu government of Juvenal Habyarimana, which ruled Rwanda from 1973, exploited and politicised the interethnic tensions that had been simmering since Rwandan independence in 1960.³⁶ Although Habyarimana promised to create a fair balance between the Hutu and Tutsi groups, he banned all opposition political parties except his own, and in 1978, changed the Constitution to make Rwanda officially a one-party State.

Motivated to regain their former position of prestige in the country, and concerned to aid their brothers and sisters in Rwanda from the recurrent violence

Hutu to important positions, ostensibly to prepare the nation for the majority-based democratic society that would emerge after independence.

34 Patrick Chabal & Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (1999) 57.

35 Ibid.

36 See Des Forges, above n 31, 3-5.

perpetrated against them, Tutsi paramilitary forces coalesced into the Rwandese Patriotic Front (RPF). The RPF launched small-scale incursions from neighbouring countries into Rwandese territory in order to force Habyarimana towards power-sharing. On 1 October 1990, the insurgent RPF crossed the Ugandan border and carried out several military operations in the north of Rwanda. Out of revenge, Hutu groups killed some 300 Tutsis in the following weeks.³⁷ By 1992, over 350,000 persons had fled the violence in the northern regions of Rwanda, becoming displaced in the interior of Rwanda.

By 1993, it must have been clear to the Habyarimana Government that the Rwandese Patriotic Front had become an insurgency movement capable of destabilising Rwanda and that it would be prudent to explore the possibilities of a cease-fire. On the other side, RPF commanders were obliged to negotiate with the Government in order to translate small-scale military victories into longer lasting political success. Negotiations between the Government of Rwanda and the Rwandese Patriotic Front commenced at Arusha, Tanzania, on 10 August 1992. The main issues to be addressed at the Arusha peace negotiations were: the need for multi-party elections and power-sharing in Rwanda; the fostering of peace and respect for the rule of law; and, an end to the RPF insurgency. These negotiations did not bear fruit immediately.

While the Arusha Accords were considered by many as the first sign of effective power-sharing, they also bolstered the accusations made by extremist Hutu elements that the Habyarimana regime was merely a puppet of foreign Tutsi interests who threatened to regain direct control over the Government. In the final months of 1993, these extremist Hutu elements began to plan the elimination of the Tutsi people by training groups of 300 persons (the *Interahamwe*), in methods of systematic slaughter.

In early April 1994, President Habyarimana flew to Dar-es-Salaam to attend a meeting with President Ali Hassan Mwinyi of Tanzania, Kenyan Vice-President George Saitoti, Burundian President Cyprien Ntuyamira, and President Yoweri Museveni of Uganda, concerning the maintenance of peace and security in the region. On 6 April, following the meeting, the President of Rwanda returned by jet to Kigali accompanied by the President of Burundi who intended to continue on to Bujumbura. As the presidential aircraft circled Kigali airport to land, it was shot down. All those aboard, including Juvenal Habyarimana and Cyprien Ntuyamira, several ministers and their entourages, died in the crash.

The downing of the aircraft triggered massacres throughout the country. Within thirty to forty minutes of the aircraft crash, roadblocks were set up in Kigali by Hutu militia, at which identity cards were checked, Tutsis singled out, and

37 See generally Francois Misser, *Vers un Nouveau Rwanda?* (1995) for a series of interviews conducted with the Vice-President and Minister of Defence of the Government of Rwanda, Major-General Paul Kagame.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

murdered on the spot. The immense slaughter plunged Rwanda into total chaos. United Nations inactivity and acquiescence to the genocide is damning. There were credible reports that the United Nations peacekeeping force in Rwanda (UNAMIR), which had been present to facilitate the peace negotiations between the Hutu government and the RPF, apparently knew that genocide might take place but the UN took no preventive action.³⁸

The massacres continued, perpetrated mainly by extremist Hutu militia associated with Habyarimana's political party, the Coalition for the Defence of the Republic, members of the Presidential Guard and regular army forces of the then Government of Rwanda. The slaughter required extensive administrative and logistical planning, evidenced by the chillingly calculated and thorough way in which it was carried out, and by the fact that most of the victims – between 500,000 and 1 million mainly Tutsi persons as well as politically moderate Hutu leaders and their families³⁹ - were killed over the relatively short period from 6 April through the first three weeks of May 1994. This death toll amounts to roughly ten percent of the Rwandan national population.⁴⁰ Notwithstanding the 'low-tech' nature of the massacres, (Victims were butchered with machetes (panga), sticks, tools, and large clubs studded with nails (masu))⁴¹ '[t]he dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki'.⁴² In this sense, the genocide was well organised, coordinated, and administered; it was anything but spontaneous and random.⁴³

Immediately preceding and during the Rwandan genocide, the political instrumentalisation of ethnicity was so focused and so pointed that Hutu were led to believe - and many actually believed - that they were doing good by killing

38 Human Rights Watch, *World Report 1995* (1994) 41. See generally Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and Genocide: Lessons From the Rwanda Experience*, Vols IV (March 1996). This is collaborated by *Report of the Independent Inquiry Into Rwanda Report*, below n 91.

39 See Report on the Situation of Human Rights in Rwanda, above n 22 at para 24.

40 See Gourevitch, above n 28, 4 ('Decimation means the killing of every tenth person in a population, and in the spring and early summer of 1994 a program of massacres decimated the Republic of Rwanda').

41 See Morris, above n 5, 350.

42 Gourevitch, above n 28, 4. 'That's three hundred and thirty-three and a third murders an hour - or five and a half lives terminated every minute.' Ibid 133. Of course, to these numbers have to be added the 'uncounted legions who were maimed but did not die of their wounds, and the systematic and serial rape of Tutsi women,' id, in order to fully grasp the numbers of aggressive participants and victims in the genocide

43 Most of the individuals responsible for carrying out violations of human rights and humanitarian law fled the country amongst the over 2 million that sought refuge in the neighbouring countries of Burundi, Zaire and Tanzania, for fear of possible Tutsi reprisals and revenge attacks. Numerous criminal suspects fled to Francophone West African countries, as well as to Kenya, and as far away as Belgium, Canada, France, Switzerland and the United States.

Tutsi. The genocide was not about ethnic identity operating as a constitutive element of Rwandans' personal identity. Rather, the genocide was about ethnicity operating coercively as the unwavering, singular expression of good or evil, of 'us' and 'them'.⁴⁴

Shortly after the Hutu extremists launched the genocide, the RPF undertook a military offensive, moving from Uganda into northern Rwanda. By mid-July 1994, under the leadership of Paul Kagame, the RPF was able to halt the genocide, force the retreat of the former Government of Rwanda and associated militia from Kigali, and assert effective control over the rest of Rwandese territory.

The Article now turns to an examination of the actor-orientated and structure-orientated perspectives by setting out the disjunction between the actor and structure by the ICTR in its conceptual operations. The view that the ICTR is dealing with an *event* rather than a *state of affairs* is particularly misleading and distorts the overall vision and dialectics necessary for the ICTR to contribute to the establishment of human rights culture in Rwanda.

A Crippling Flaw: The Disjunction Between Actor and Structure

Prosecuting a case in violation of the rules just to obtain a conviction may not necessarily alleviate the human rights situation. Assumptions about the system's role in achieving that society's objectives underlie each State's justice system.⁴⁵ Some are based on a Hobbesian notion,⁴⁶ while others are based on a social contract ideal.⁴⁷ Each country's penal system is unique with differing values and differing ideas as to how to realise those values.⁴⁸ Given the conceptualisation and operation of the ICTR falls to the UN, a complex tapestry of legal systems is implicated. Thus, there are different assumptions attempting to coexist about human behaviour and the penal system's role in regulating, modifying, or augmenting values.

44 Mark A Drumbl, 'Punishment, Postgenocide: From Guilt To Shame To Civis In Rwanda' (2000) *New York University Law Review* 1221, 1294.

45 See Antonio Gramsci, *Selections from the Prison Notebooks* (1971). Gramsci is specifically relevant for Rwanda, given the extreme level of social conformism that characterised pre-Genocide Rwanda. Gramsci argues that retribution or any other punishment objective that does not account for the reintegration of offenders back into society tends to reinforce social conformism, which is normally useful to the ruling group's interest.

46 See CB MacPherson (ed), *Thomas Hobbes, Leviathan* (1985).

47 See, eg, Tom R Tyler, *Why People Obey the Law* (1990).

48 See UN Crime Prevention and Criminal Justice Division, *The United Nations and Crime Prevention - Seeking Security and Justice for All* (1996) 3-4. Some States may not have enough information or the capacity to realise the underlying objectives of the law.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

The first prosecutor of the ICTR held views that are generally similar to those of many within the prosecutorial profession. He believed the fear of detection, financial penalties, and indignities of guilt were at the centre of criminal justice. Like most prosecutors, he placed the judicial response at the top of the hierarchy. 'Yet as all criminal lawyers will agree, detection and punishment are the only means by which to curb criminal conduct.'⁴⁹ Being that the ICTR prosecution office is largely focused with what to do with the evil actors, the answer is necessarily threefold; converting them to better intentions, weakening them by depriving them of capability and/or making them more passive in general. The rude reality though is that the trials and convictions of 53 indictees⁵⁰ on the ICTR's list of shame will not have some kind of legal domino effect on the acts and intents on the rest of the perpetrators numbering tens of thousands, many of whom are active in guerrilla-style military incursions against the Tutsi-dominated government in power.

Obviously the mass murders in Rwanda did not arise spontaneously. They were instigated by persons in positions of power who sought to gain personal advantages through violent and hideous means. Unless these persons are held accountable for their crimes against humanity, the reconciliation necessary for the reconstruction of this torn society may not be possible. By assigning guilt to the leader-instigators, the tribunal may also lift the burden of collective guilt that settles on the Hutus, whose leaders directed or ordered such terrible violence. The assignment of guilt by a neutral tribunal also may enable the international community to differentiate between victims and aggressors. However the international justice process must not erase the fact that the interethnic conflict while not genetically inbred, is firmly embedded in the socio-cultural structure and subconscious of the Rwandese society and thus addressing this structural defects is part of the process of deterrence.

Sole focus on the ICTR indictees is unrealistic and demonstrates that the Tribunal is unclear about why the Court exists and how the Court could make its modest contribution for the betterment of human rights in the region.⁵¹ There is an abundance of the 'evil' ones, those who have already through their acts proved that they are evil, as well as those who may be suspected of harbouring evil intentions. The causes of the Rwandese tragedy rest with them, expressed in their acts or threats or general inclination to engage in evil acts but the fact is that the international penal process will only try a minuscule fraction of the whole group of

49 Justice Richard Goldstone, 'Conference Luncheon Address: Prosecuting International Crimes: An Inside View' (1997) 7 *Transnational Law and Contemporary Problems* 1, 2.

50 See, 'Press Briefing by the Spokesman for the ICTR', 19 October 2000, Doc. ICTR/INFO-9-13-018. This can also be accessed at the following URL: <<http://www.icttr.org/ENGLISH/pressbrief191000.html>>.

51 Todd Howland and William Calathes, 'The UN's International Tribunal, Is It Justice or Jingoism for Rwanda' (1998) 39 *Virginia Journal of International Law* 135, 148.

perpetrators, the indictees.⁵² So many people were killed principally because there were so many killers. Significant numbers of Rwandans perpetrated the bloodbath. 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. This belief that one was doing right by killing might explain why so many of the killings were so brutal.⁵³ It may be that there was little courage in Rwanda simply because most people were not actually opposed to the genocide.⁵⁴ To the contrary, many people may have believed that killing the Tutsi was a civic duty - in other words, nothing less than the right thing to do.⁵⁵ The indirect or direct participation of so many people in the Rwandan genocide blurs the line between guilt and innocence. An even larger number of people acquiesced in the face of genocide. In Rwanda, the killings were committed publicly and were known to all.⁵⁶ They 'did not take place at out-of-the-way sites...[but] throughout the country: in virtually every village and in almost every urban neighbourhood'.⁵⁷

Not surprising, the ICTR's existence and presence in Eastern Africa has done little to deter extremist Hutus in neighbouring countries from waging bloody guerrilla-style excursions into Rwanda. Thousands of unarmed civilians have been killed across the border, in the Democratic Republic of the Congo (DRC), in an armed conflict involving several governments, including Rwanda, as well as various armed opposition groups, including Rwandese *interahamwe* militia and soldiers of the former Rwandese armed forces. The Rwandese government continues to offer support to the rebel Congolese Rally for democracy (RCD) part of the deal being permission to conduct military operations in Congolese territory against Hutu extremists. The overzealous Rwandese government troops have not

52 One Africanist estimates that the number of Rwandans directly involved in the acts of killing amounted to between 75,000 and 150,000. Villia Jefremovas, 'Acts of Human Kindness: Tutsi, Hutu, and the Genocide' (1995) 23 *Issue* 28.

53 For case studies of such incidents, see Human Rights Watch/Africa et al, *Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath* (1996) 42-68; see also Prunier, above n 27, 255-57 (describing types of brutal acts committed).

54 Although some Tutsi were 'saved' through Hutu intervention, many of these 'saved' Tutsi were not spared because of intellectual or structural opposition to genocide, but rather because of idiosyncratic convenience. See Gourevitch, above n 28, 130 (stating that: Many people who participated in the killing - as public officials, as soldiers or militia members, or as ordinary citizen butchers - also protected some Tutsis, whether out of personal sympathy or for financial or sexual profit. It was not uncommon for a man or a woman who regularly went forth to kill to keep a few favourite Tutsis hidden in his or her home).

55 For a description of slaughter as civic duty in Butare prefecture, see Des Forges, above n 31, 515.

56 Ibid, 770 (discussing broad advertisement of killings).

57 Aryeh Neier, 'Rethinking Truth, Justice, and Guilt After Bosnia and Rwanda' in Carla Hesse & Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (1999), 48.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

been averse to conducting ruthless military operations around refugee camps⁵⁸ reinforcing its apparent commitment to consolidating a national ethnocracy. The same zeal is reflected by the Hutu extremists keen to wrestle back the reins of power from the Tutsi dominated government. Arguably their main grievance is not the brand of politics or style of governance of the government of the day, but rather, the ethnic composition which they see has destroying Hutu ethnic hegemony spanning over three decades (since independence in 1961).

In order to perform the genocide, the Hutu leaders over the years succeeded in organising a campaign that redefined the Tutsis (the victim group) as worthless, outside the web of mutual obligations, a threat to the Hutu hegemony, and in the run-up to the 1994 genocidal conflagration, as subhuman. Even after such a campaign of vilification and dehumanisation⁵⁹ the actual performance of the mass killing required a good deal of coercion and centralized control that converted a large segment of the Hutu populace into a band of mass killers and thus criminals. While much has been said about the pragmatic dimension of punishing mass human rights violations through prosecutions as a preventive measure no paradigm as yet been set out in relation to the task of post-conflict peace-building which entails a psychological dimension of justice and reconciliation.

The ICTR's almost exclusive focus on concrete entities; the individual as a building block of the genocidal reality, distorts and obscures the structural reality that converted tens of thousands of Hutus into a mass of killers, turning on their friends, neighbours and colleagues.⁶⁰ The 1994 genocide followed three earlier rounds of massacres targeting Tutsis in 1959, 1963 and 1966.⁶¹ The 1994 bloodbath was preceded by a macabre dress rehearsal in 1992.⁶² With

58 Amnesty International, *Amnesty International Report: 2000* (2000). It can be accessed online at the following URL <<http://www.web.amnesty.org/web/ar2000.nsf/>>.

59 The renowned African scholar, Ali A Mazrui, noted that 'violations of human rights are preceded by a process of psychic sub humanisation' by which the violator 'sub humanises his victim in his own imagination,' although 'residual humanity is often necessary to give meaning to the sin of inter-human cruelty'. Such dehumanisation, he explained, is the 'reverse of the psychology of love' because no human being can love a non-human object 'unless the object undergoes psychic humanization in the imagination of the lover'. When someone loves her dog 'it is because the dog has been, in some sense, anthropomorphized,' and when someone loves his 'motherland' it is because his imagination 'has invoked a metaphor of human kinship' with the territory. The psychology of hate, on the other hand, requires 'a partial reduction of humanity'. Since it is difficult to hate an inanimate object or animal, the most fertile soil for hatred is that 'intermediate area of sub-humanity' or 'tendency on the part of the hater to reduce the humanity of the person hated'. Ali A Mazrui, 'Human Rights and the Moving Frontier of World Culture', *Philosophical Foundations of Human Rights* (1986) 243.

60 Jefremovas, above n 52.

61 Above n 22.

62 On 1 October 1990, the insurgent RPF crossed the Ugandan border and carried out several military operations in the north of Rwanda. Out of revenge, Hutu groups killed

preparations complete, in 1994 the government was able to manipulate the structure founded on sharp, ethno-centric rift by fuelling the hatred through national radio (Radio Television Libre des Mille Collines) broadcasts that dehumanised the Tutsis as *'inyenzi'* (cockroaches),⁶³ facilitating the creation of an effective killing machine that stretched from the city suburbs to remote farms in the village.

This process of dehumanisation was a contrivance of populist leaders which feed on the primitive impulse to denigrate the Tutsis as a means of self-affirmation. Before ordinary Hutu could participate in the slaughter of defenceless children, the Tutsi had to be portrayed as an inherently bloodthirsty and cruel people out to break the Hutu hegemony through violence and thus, it was necessary to launch preventive measures, which incidentally took the form of preventive violence. The Hutus were spurred on by exhortations appealing to them as a collectivity to preserve their ethnic hegemony by eliminating all sympathisers and supporters of the RPF whose military successes had forced the government onto the negotiation table.

For many, the ICTR will establish individual guilt and thereby move suspicion and blame from the group to the individual. It is a laudable goal, but a complex one in the circumstance. For crimes to be crimes there must be an individual act. These crimes may or may not be part of a criminal enterprise. When a crime is part of a criminal enterprise, the nature of the relation between the individual, crime, and society profoundly changes.⁶⁴ Any penal response to a criminal enterprise must understand the entire crime and its relation to society to begin to address it effectively through the justice system.⁶⁵

some 300 Tutsis in the following weeks. By 1992, over 350,000 persons had fled the violence in the northern regions of Rwanda, becoming displaced in the interior of Rwanda.

63 The term *'inyenzi'* is Kinyarwanda for cockroach. The widespread use of the term in radio broadcasts was initially to denounce supporters and sympathisers of the Rwanda Patriotic Front (overwhelmingly Tutsis and moderate Hutus). In time it conferred the de facto meaning of 'persons to be killed'. Within the context of the Civil War of 1994, the term *'inyenzi'* became synonymous with the term 'Tutsi'. See the Ruggiu Judgment, *The Prosecutor v Georges Ruggiu*, ICTR-97-32 at para 44.

64 When people engage in crime as a series or pattern of illegal acts which result in an uneven or incomplete meting out of punishment, some implicit or explicit accommodation must be made within any criminal justice system. This process of compromising law enforcement involves a wide range of considerations with direct impact on the organisational pattern and structure, which can be traced to the nature of law itself. See Charles H McCaghy and Stephen A Cenkovich, *Crime in American Society* (1987).

65 Criminal enterprise behaviour is a type of behaviour that invariably arises as a natural social phenomenon in nearly every society. It is a social epidemic that takes different forms at different times across these societies, but because its etiology so differs from that of individual criminal behaviour, its effect on society and its demand of a response from the justice system is markedly different as well. Crime as part of a

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

Within the ICTR's framework of thinking, the genocidal acts by extremist Hutus are seen as an *event*, not a *state of affairs*; something that was is and probably will continue to lurk in the sub-consciousness of the extremists. It may be a slowly or quickly changing state of affairs, depending on the circumstances, key among which is the process of the extremists reclaiming back political and military authority in Rwanda. The war in Rwanda is unfinished; there was not even a temporary respite after the genocide, before the Hutu-Tutsi struggle for the control of the State resumed. There is little doubt in this context that the ICTR is seen by Hutus, as international punishment by the victors, Tutsis with the blessing and support of the United Nations.⁶⁶ Tutsis may themselves see the Tribunal and the genocide trials they are conducting in Rwanda as their opportunity for revenge.⁶⁷ For that reason, the ICTR, since it is not part of an overall political settlement of the Hutu-Tutsi struggle for political power, is virtually irrelevant to the future of Rwanda.⁶⁸

criminal enterprise almost always results in selective and discriminatory enforcement of laws. The use of discretion in dealing with these offences by a criminal justice system offers an opportunity for criminal forces to strongly influence the justice process itself. In a sense, a functional 'tolerance policy' by law enforcement bureaucracies may develop and often does. When responding to crime as part of a criminal enterprise, social control bureaucracies are confronted with the vexing problem of enforcing laws about which little, sporadic, or inconsistent social consensus among society's many groups may be discerned. See Joseph R Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (1963). The community's ruling elite inevitably finds itself in an odd position, a position which potentially can severely challenge its authority as a justice insurer. The ruling elite must select which values within the community it must advance and then either selectively enforce laws and punishments, or attempt to obliterate a portion or all of the class of violators. Irrespective of this problem, if a justice system is to respond in an effective way to organised, crimes it must seek, quite naturally, to develop its coalition of support in order to expand not only its budgetary/personnel resources and their enforcement power, but its will to pass and enforce laws proscribing the offensive behaviours. See Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (1963).

66 Credibility of the Rwanda Tribunal is unlikely to materialise among Hutus because they are its main targets. The prosecution of Tutsis is essential for the tribunal's legitimacy. In the case of the Yugoslav Tribunal, the prosecution of Bosnians and Croats - and not just Serbs - would enhance that tribunal's legitimacy in the eyes of perpetrators across the board.

67 Akhavan, above n 5, 508. It is interesting to note that the RPF government wanted the Rwanda Tribunal situated in Rwanda so that it would teach the 'Rwandese people a lesson, to fight against the impunity to which it had become accustomed ... and to promote national reconciliation'. But this is only possible if the tribunal enjoys some credibility with the perpetrators.

68 Abbe David Lowell, 'Nuremberg in Rwanda: Not Enough' *Legal Times*, 3 April 1995, 23-25.

What the ICTR (and the international community) hopes to achieve, it cannot with the current prioritisation of objectives. The ICTR hopes to bring about a discontinuous jump, by breaking the vicious cycle of human rights violations through an international presence that is little felt in Rwanda itself. The deep-seated animosity between these two segments of the Rwandese population will not dispel easily by a few years of international justice. The animosity and hatred was cultivated, reinforced and manipulated for over six decades by the colonial powers, then well nurtured by the Hutu leaders who ascended to power after independence. It has taken close to a century to achieve a well-entrenched social structure pegged on ethnic stratification, founded on deep-seated hatred.⁶⁹ This is not to say that the effort at prosecution is an exercise in futility. Obviously there are actors around, otherwise the structure would not operate. Individual guilt, leading to prosecution is important, but it should not detract from the flaws in the Rwandese social structure. The actor-oriented perspective draws its strength from its simplistic concreteness; its ability at capturing concrete actors; the individuals. But only a segment of an actor is in the structure, and only a part of the structure shows up in any one particular actor. While the ICTR's indictees may have been architects of the genocide, they simply tapped into the huge reservoir of ethnocentric hate that had been entrenched in the sub-consciousness of Hutu's converting a great deal of them into pathological killers.

Having a positive impact on a complex socio-political process is not the same as successfully prosecuting a person for a criminal violation of human rights law in accord with the law. Only by seeking to address the causal factors of the genocide will the ICTR translate its prosecutorial victories into victory for human rights in Rwanda. The ICTR should provide an institutional framework that will contribute to the extremely complex process of moving a society from one characterised by massive human rights violations to one built upon the respect of human rights law. A key oversight in the ICTR's prosecutorial strategy is it does not seek to address the accumulation of collectively organised evil within the Rwandese society, entrenched over a period of almost one century.⁷⁰

Having reviewed the ICTR's focus on the actor and his/her disjunction from the structure, the Article now turns to consider classical criminal law theories on which the ICTR is premised and their inadequacy. The failure of these criminal law theories in addressing the Rwandese situation is a necessary consequence of the ICTR's disjunction of the actor and structure.

69 See Part II of the Article.

70 See generally Destexhe, above n 29; Ryckmans, above n 30; Prunier, above n 30.

The ICTR: Hooded by Classical Criminal Law Theories

The recognised punishment objectives of a court system fall within the generally accepted spectrum of deterrence, rehabilitation, retribution, and incapacitation.⁷¹ The international penal process at the ICTR seems focused on deterrent, retributive and incapacitative aspects of the criminal process with little pragmatic effort to incorporate rehabilitative and restorative aspects into its overall strategy.

Virtually all theories of criminal justice can be characterized as either retributive or deterrent (utilitarian).⁷² For utilitarians punishment is justified to the extent it produces a socially desirable consequence, ordinarily general deterrence.⁷³ In contrast, consequences are irrelevant for retributionists. Rather they consider it simply morally fitting that criminal offenders are punished.⁷⁴ Described by Robert Solomon, 'the desire for retribution is the desire for vengeance(,)...getting even, putting the world back in balance'.⁷⁵

In terms of contributing to the development of a world understanding of human rights and the need to respect them, the Tribunal, via the media, has made a specific educative contribution to justice work.⁷⁶ The contribution of publicising evil acts, although worthy, alone falls far short of meeting a comprehensive punishment objective for a court system. An increase in international awareness of the Rwandan atrocities probably does not equate to generally deterring the ethno-centric philosophy of hate deep down in the sub-consciousness of the armed Hutu militia and ex-government soldiers conducting bloody military excursions in and around Rwanda.

71 One scholar from a human rights perspective has attempted to look at some of these punishment objectives as they relate to sentencing options for the ICTR. See William A Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' 7 *Duke Journal of Comparative and International Law* 461.

72 See John Rawls, 'Two Concepts of Rules' in Robert M Baird & Stuart E Rosenbaum (eds), *Philosophy of Punishment* (1988), 38; Willem de Haan, *The Politics of Redress: Crime, Punishment and Penal Abolition* (1990), 103, noting that all theories of punishment are based on retribution and deterrence.

73 See JB Cederblom, 'Introduction' in JB Cederblom & William L Blizek (eds) *Justice and Punishment* (1977) 3.

74 See Walter Berns, 'The Morality of Anger' in *Philosophy of Punishment*, above n 72, 85 (stating that we punish criminals principally to pay them back).

75 Robert C Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract* (1990) 41.

76 Creating a human rights culture is a complex process in which education and public awareness play a critical role. See Kader Asmal, 'Democracy and Human Rights: Developing a South African Human Rights Culture' (1992) 27 *New England Law Review* 28.

The Deterrence Theory

Whether the offence is tax evasion or genocide, deterrence theory presupposes a rational, utility-maximizing actor. Persons commit crimes, so the theory goes, when the expected value of doing so exceeds the cost of punishment. To reduce crime, society need only raise the price by imposing harsh penalties. In the real world, James Gilligan identifies 'only' four problems with this model: 'It is totally incorrect, hopelessly naive, dangerously misleading, and based on complete and utter ignorance of what violent people are actually like.'⁷⁷

Much of the Tutsi minority, historically dominant, lives with the phobia of its physical elimination, while the Hutu majority demands proper political representation. The 1994 genocide in Rwanda has heightened the fears of the minority, leading Tutsi extremist elements to undertake ruthless actions against Hutu populations. Hutu extremists, in turn, are reinforced and supported from outside the country by some of the perpetrators of the Rwandese genocide. In such an environment, the voices of moderation are being drowned out, silenced or eliminated altogether.⁷⁸ An international justice process that fails to deter individuals with reason enough to value their lives and freedom can only be regarded as meaningless.

Killings in Rwanda rose in the period after its founding.⁷⁹ Although currently the number of killings inside Rwanda has decreased compared to 1998, killings of unarmed civilians and 'disappearances' were still reported throughout 1999 and 2000. As government troops regained control of the northwest, the armed conflict abated and the level of violence decreased. However, the situation remained tense and the peace fragile. In many respects, the armed conflict during which thousands of civilians had been killed in Rwanda in 1998 continued over the border in the Democratic Republic of Congo (DRC). The presence of armed groups continued to be reported sporadically in Rwanda near the DRC border and the Rwandese Patriotic Army (RPA) (formerly the rebel RPF) carried out military operations in this area.⁸⁰

The complexity of the Rwandan situation and the operations of the ICTR would frustrate those who advocate punishment as deterrence. Societies engulfed by mass political violence are not particularly conducive to rational behaviour or fears of eventual apprehension. How can we expect individuals to make a rational choice calculus when they are surrounded by hysteria, social chaos, panic,

77 James Gilligan, *Violence: Our Deadly Epidemic and Its Causes* (1996), 94-95.

78 *Report of the Secretary-General on the Situation in Burundi*, UN SCOR, 51st Sess, para 3, UN Doc S/1996/116 (1996).

79 The genocidal militia continued the killing. The territory in which it is operating and the numbers of victims have rose steadily in 1997. In response, killing by Rwandan government forces also increased. See US Department of State, *Rwanda Country Report on Human Rights Practices* (1997).

80 Amnesty International Report, above n 58.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

coercion, prejudice, and a government that is exhorting mass violence?⁸¹ Layered on top of the irrational context in which mass violence operates is the reality that an individual's decision to act violently may not be perceived as a legal or even a moral wrong. When taken together, these two factors support the conclusion that choices to participate in mass violence well may be only slightly, if at all, deterred by the prospect of eventual prosecution - especially if undertaken by some distant international tribunal. If those committing the barbarities do not expect to lose power to the victims (or to third parties such as international authorities), they may not take the threat of penal sanction very seriously.⁸²

Punishments in Rwanda, even if they are imposed to any real extent by the ICTR, will be meted out slowly, given limited resources.⁸³ The fact that cases are handled in a slow and circuitous manner contravenes the axiom that for deterrence to work punishments must be meted out with swiftness and certainty.⁸⁴ It is unrealistic to presuppose that a new institution operating in the Rwandan genocidal context could act efficiently enough for the desired deterrent impact to be realised. Approximately 125,000 individuals - roughly ten percent of the adult male Hutu population - are incarcerated in Rwandan jails designed to hold 15,000.⁸⁵ At the present rate of national trials, it would take hundreds of years to adjudge all of

81 Yet the ICTR and the ICTY seek to achieve this goal of utilitarian deterrence. See Schabas, above n 71, 461, 498 (stating that: [R]eferring implicitly to the notion of deterrence, the Security Council affirmed its conviction that the work of the two tribunals 'will contribute to ensuring that such violations are halted'. The effective prosecution and punishment of offenders is therefore intended to deter others from committing the same crimes, and perhaps to convince those already engaged in such behaviour that they should stop. (footnote omitted) (quoting Statute of the ICTY). The judgments of the ICTR reveal the importance the tribunal accords to deterrence. See *Prosecutor v Rutaganda*, Case No ICTR-96-3, P 475 (International Criminal Tribunal for Rwanda 6 December 1999) <<http://www.ictr.org/>> (stating that: [T]he penalties imposed on accused persons found guilty by the Tribunal must be directed,...at deterrence, namely to dissuade for ever [sic], others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.); accord *Prosecutor v Musema*, Case No ICTR-96-13-T, P 986 (International Criminal Tribunal for Rwanda 27 January 2000) <<http://www.ictr.org/>> (same).

82 See Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998), 50. ('Individuals who commit atrocities on the scale of genocide are unlikely to behave as 'rational actors,' deterred by the risk of punishment.')

83 Howland and Calathes above, n 51, 151.

84 JH Burns and HLA Hart (eds) *Jeremy Bentham, An Introduction to the Principles of Morals and Legislation* (1970); Graeme R Newman, *Just and Painful* (1983).

85 See Integrated Reg'l Info Network for Cent & E Afr (IRIN-CEA), United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), Update No 509 (24 September 1998) <<http://www.reliefweb.int/IRIN/index.phtml>>; Drumbl, above n 44, 571; Morris, above n 5, 352.

these detainees.⁸⁶ The ICTR is not of much help either in reducing the number of detainees, after spending over 200 million dollars; it has indicted 53 individuals and heard only nine cases.⁸⁷

Seemingly, the ICTR's presence is not having the intended sobering effect on the Hutu extremists. This would be largely because the general stance of the international community is to view the genocide in terms of a *sudden event*, the evil act of the evil actor, and thus the international penal process is seen as a remedy. But the evil act rests within a large part of the population, something permanent, the permanent evil intent among extremists in both groups wrought by a volatile social structure pegged on deep-seated animosity that has spawned a strong culture of hatred and ethnic rift.

While the creation of the ICTR may have a lasting effect on the application of humanitarian law to both international and domestic conflicts and accomplish what its first Prosecutor Goldstone stated, as the significant task of and human rights squarely on the international agenda,⁸⁸ the Tribunal will not make a significant contribution if it fails to generate substantial appreciation on the part of Hutus of the extreme criminality of acts of the mass killings, or with regard to the Tutsis, the fact that reciprocal counter-measures whether low intensity or not, amount to crimes based on the same legal standards that the Hutus face.

It is not enough that the international penal process classifies the behaviour as wrong, extremely distasteful and the acts as international crimes. But until the Hutus (and extremists among the Tutsis who may have a vision of grand vengeance) are capable of doing so, they will not abstain from the act, risk of bad conscience or the risk of the State or international community applying normal standards built into national law and international treaties. Thus the extremists see their post-genocidal intention and actions in another direction, killing yes, but not with the intent of wiping out the other group, but with the intention of avenging their own personal losses, and furthering themselves and their ethnic hegemony through erosion and attrition of the other group in numbers. As Drumbl notes:

One reason trials in Rwanda have not been very successful in promoting a national historical narrative of the genocide is that they have failed to produce a sense of individual responsibility or blameworthiness among

86 See James C McKinley, Jr, 'Massacre Trials in Rwanda Have Courts on Overload', *New York Times*, 2 November, 1997, § 1, 3.

87 See International Criminal Tribunal for Rwanda (visited 16 September 2000) <<http://www.ictt.org>>; see also See John Prendergast & David Smock, US Inst of Peace, Postgenocidal Reconstruction: Building Peace in Rwanda and Burundi (1999) <<http://www.usip.org/oc/sr/sr990915/sr9990915.html>>.

88 Christian Tyler, 'Bloodhound in Pursuit of the Dogs of War: Christian Tyler Meets Richard Goldstone, Chief Prosecutor of the UN War Crimes Tribunal', *Financial Times*, 2 March, 1996.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

prisoners. The overwhelming majority of the prisoners we interviewed do not believe they did anything 'wrong,' or that anything really 'wrong' happened in the summer of 1994 in Rwanda. Many detainees see themselves as prisoners of war, simply ending up on the losing side. In fact, the prisoners do not even call the events of April to July 1994 the 'genocide,' but, instead, refer to these events as 'the war'.⁸⁹

The Retributive Theory

The liberal vision of reducing crime by attacking its social causes was essentially supplanted in the late 1970s by retributive schemes requiring that criminals get their 'just desserts'.⁹⁰ These retributive schemes reflect the belief that it is morally fitting that offenders be made to suffer.⁹¹ The ICTR is imbued with like sentiment and the characteristic self-righteous tenor of those striving to secure the 'deserved' punishment of others. This is not surprising, a look at Security Council proceedings regarding the aims of the ICTR unearths a majoritarian view by participating States favouring the 'just desserts' discourse.⁹²

Before its renaissance, retribution was widely considered a dead letter, particularly among liberal theorists like H. L. A. Hart.⁹³ In the words of Hannah Arendt, '[w]e refuse, and consider as barbaric, the propositions 'that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal'.⁹⁴ There is perhaps no greater canard than the idea that punitive justice provides needed therapy for individuals; that nothing can assuage anger or restore dignity like punishment. The emphasis on victimhood, blame, and powerlessness may actually undermine recovery from violent crime.

Retributionists believe that if offenders are not punished for their crimes, then other people will not respect the criminal law and not obey it. For this school of thought, the focus is on the development of strategies for administering the courts,

89 Drumbl, above n 44, 607. Conflating the genocide with the war against the RPA contains faulty reasoning. See Gourevitch, above n 28, 98-99 ('[A]lthough the genocide coincided with the war, its organization and implementation were quite distinct from the war effort.').

90 See Andrew Rutherford, *Criminal Justice and the Pursuit of Decency* (1993), 15-16.

91 See John Rawls, 'Two Concepts of Rules' in *Philosophy of Punishment*, above n 72, 37-38.

92 See UN Doc S/PV 3453 (1994) above n 18.

93 See HLA Hart, 'Prolegomenon to the Principles of Punishment' in *Philosophy of Punishment*, above n 72, 15 (stating that 'a cloud of doubt has settled over the keystone of 'retributive' theory'). See also John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990) at 2; Igor Primoratz, *Justifying Legal Punishment* (1989) 71.

94 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963) 254.

the police and the prisons more effectively.⁹⁵ Retribution attracts people that want a quick fix crime solution. Its usefulness as a tool for building a strong culture of justice in developing nations is therefore limited. Retribution merely shifts the revenge over from the individual to the State.⁹⁶

Around 125,000 people have been detained in prisons and detention centres across Rwanda, most accused of participation in the 1994 genocide. Many are being held without charge or trial for prolonged periods in conditions amounting to cruel, inhuman and degrading treatment. Arbitrary arrests have been reported. Detainees in local detention centres and in military custody are ill-treated. At least 1,420 people were tried for participation in the 1994 genocide. In 1999 at least 180 were sentenced to death. A number of detainees who were released were re-arrested, including several who had been tried and acquitted.⁹⁷ This only serves to reinforce the hard feelings between the two groups, as it appears to be some kind of victors justice, that may even turn the pacific sentiments held by moderate Hutus into bitterness. Specifically referring to the Rwandan proceedings, Minow concludes that '[r]ather than ending the cycles of revenge, the trials themselves were revenge'.⁹⁸ No doubt the Hutu extremists will be itching for a chance to pay back the Tutsis in their own coin in the future.

The willingness to punish the unusual is a basic criminal law philosophy. But if an actor commits an act that can be seen as 'normal' in the precise sense that the other actors in the same position would commit the same acts in the same situation, the justice process is then seen as motivated by vengeance. Mass violence constitutes what Carlos Santiago Nino, citing Kant, calls 'radical evil'.⁹⁹ 'Radical evil' amounts to violence in situations where acting violently is simply not deviant. Nino observes that 'the kind of collective behaviour that leads to radical evil would not have materialized unless carried out with a high degree of conviction on the part of those who participated in it'.¹⁰⁰ When this conviction is broadly shared, it loses its deviance no matter how pronounced its ugliness. Thus the extremists may see the international penal process as the consequence of their loss of political and military authority in Rwanda and not so much, as a process aimed specifically at their push to homogenise Rwanda and the resulting atrocities. On the hand, the Tutsis are more focused on the national trials that will send the guilty to the gallows, not some ritzy international trial that will send the guilty to Europe.

95 See, eg, Peter J Benekos, 'Public Policy and Sentencing Reform: The Politics of Corrections' *Federal Probation*, March 1992, 4-5.

96 Howland and Calathes, above n 51, 153.

97 Amnesty International Report, above n 58.

98 Minow, above n 82, 124.

99 Carlos Santiago Nino, *Radical Evil on Trial* (1996) vii ('[R]adical evil' [refers to] offences against human dignity so widespread, persistent, and organized that normal moral assessment seems inappropriate.').

100 Nino, *ibid* ix.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

The ICTR has 53 indictees, 45 of who are in custody¹⁰¹ and the Rwandese prisons have some 125,000 individuals in custody over the genocide. The fact though is that between 75,000 to 150,000 possible defendants spread throughout Rwanda and in neighbouring countries as refugees will never see the inside of a courtroom.¹⁰² What about them? Do they get the message that their actions were wrong and atrocious? For some yes, for most unlikely. Journalist Philip Gourevitch asks and then eerily concludes: '[W]hat if...murder and rape become the rule?'¹⁰³ 'During the genocide, the work of the killers was not regarded as a crime in Rwanda; it was effectively the law of the land....'¹⁰⁴ The ICTR relies on the actor-oriented approach in which it is easy to see who should be apprehended, arraigned into court, adjudicated and eventually punished.¹⁰⁵ This objective tends not to build dynamism and dialectics into the ICTR's vision on not only prosecuting the guilty, but also addressing impunity. The ICTR seeks to depict and regulate an *event* where certain acts are proscribed. The rest is left open.

What the ICTR ultimately seeks through incarceration is an authoritative expression of moral condemnation. Suffering is to be inflicted on the genocide architects so as to demonstrate the international community's abhorrence of the destruction of life. H L A Hart, among others, assailed such expressive justice, describing it as 'uncomfortably close to human sacrifice as an expression of religious worship'.¹⁰⁶ Reprobation and denunciation are important aspects of social ordering, but remote, atomised penal institutions are a dubious means to this end. As Drumbl notes:

The social engineering contemplated by retributive criminal justice does little to address the structural sources of the mythology of ethnic superiority in a society such as Rwanda's. Trials create a bipolar leitmotiv of the postgenocidal society, which is binarily deconstructed into the 'guilty' and the 'innocent'. This deconstruction runs the risk of oversimplifying history by negating the importance of collective wrongdoing, acquiescent complicity, and the embeddedness of 'radical evil'. By treating genocidal violence as an individualised, pathological, and deviant transgression of social propriety, the criminal justice system may do the dualist postgenocidal society a disservice by blanketing and perpetuating the structural nature of this violence to the detriment of survivors and future generations. Blaming occurrences of radical evil entirely on the existence of some evil people obscures the fact that so

101 This figure is as of 31 October 2000. Of the 45 in custody, 41 are held at the ICTR's detention facility at Arusha, and three others are awaiting transfer from other parts of the world. See ICTR Press Briefing, above n 50.

102 Jefremovas, above n 52.

103 Gourevitch, above n 28, 34.

104 Ibid 123.

105 The mathematics of the process are ridiculous when you consider the number of indictees to the overall figure of possible defendants.

106 Dan M Kahan, What Do Alternative Sanctions Mean? (1996) 63 *University of Chicago Law Review* 591, 596 (1996) (quoting HLA Hart, *Law, Liberty, And Morality* (1963) 65-66.

many people, to varying degrees of complicity, are required for 'radical evil' to operate publicly on a macro level.¹⁰⁷

The Article now turns to an exploration of the restorative dimension of justice and its potential to offer a more viable and pragmatic paradigm to the ICTR as it pursues its objectives. The restorative paradigm's strength derives from its appreciation of both the actor and structure within which the actor operates.

Rediscovering the Restorative Dimension of Justice

In criminological theory, the restorative justice paradigm is often preferred as the principal alternative to retributive justice.¹⁰⁸ Criminologists Joe Hudson and Burt Galaway posit three elements as fundamental to restorative justice:

First, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves, and only secondarily as a violation against the state [or the international community]. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders, and their communities in order to find solutions to the conflict.¹⁰⁹

Concrete objectives and compassion must characterise justice in Rwanda based on human rights and a restorative perspective. This process should explicitly engage all relevant players by bringing about peace on all levels and joining ends to means. In other words, the justice system should be engaged in peace making. The radical nature of peace making is clear. There must be a transformation of the human being and an understanding that there can be no peace without justice. As currently conceived and understood the ICTR's objectives provide little guidance. A serious analysis of its various objectives by sifting out those which are unrealistic can achieve greater clarity. If the ICTR thinks it must achieve all of the objectives alone, it would be bound for failure.¹¹⁰

A particularly questionable position of the ICTR is its equation of punishment and justice. Gandhi recognized that criminal punishment signifies the antithesis of

107 Drumbl, above, n 44, 1324-1325.

108 Joe Hudson & Burt Galaway, An Introduction to Restorative Justice in Nick Larsen & Brian Burtch (eds) *Law in Society* (1999) 332, 333.

109 Hudson & Galaway, *ibid*; see also Minow, above n 82, 91 ('Unlike punishment, which imposes a penalty or injury for a violation, restorative justice seeks to repair the injustice, to make up for it, and to effect corrective changes in the record, in relationships, and in future behaviour.').

110 See Melissa Gordon, 'Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda' (1995) 1 *ILSA Journal of International and Comparative Law* 217, 234 (discussing how the ICTR is ill-conceived and success is virtually impossible, given the enormity of the task at hand).

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

justice.¹¹¹ He disdained peace attained through punitive measures, and dismissed an international police force as 'a concession to human weakness, not by any means an emblem of peace'.¹¹² Gandhi recognized that institutionally inflicted punishment constitutes violence that no amount of justification can make intrinsically good or indicative of virtue. To equate prosecutions with justice in a position of collective criminal responsibility is illiberal.

The ICTR seems to overlook the fact that it is not only prosecution of its indictees that is central to the question of solving the Rwandese situation. There has to be an effort to identify that there are other units, individuals or groups that should be the target of efforts to restore order to the badly fractured society. Backing a remedy designed to socialise individuals, the ICTR envisions a society disintegrated into an amoral Hobbesian war of all against all, rather than into rival moral communities. Deftly noted by Dennis Wrong, for group-level conflict to occur, the individual group members must already 'have been socialised to...correctly gauge the expectations of others, internalise at least some norms, and possess selves sensitive to the appraisal of others'.¹¹³ The familiar lack of remorse shown for acts that if committed against a member of one's own group would draw heavy censure, signals a disjunction between groups' values and norms.

The ICTR's seeming view that applying individual level justice will promote social order will not and cannot work if it is the only tool envisaged. Individual level punishments can only affect a permanent change if the cause of the deviant behaviour resides solely with the individual.¹¹⁴ In Rwanda, however, it is impossible to conclude that the causes of deviance reside with the individual. As the ICTR is focusing its attention on individual deviants, it is presenting the world, and the Rwandans, with the image of a person who needs correcting through punishment instead of a social system, structurally stratified by ethnic rift that needs reorganisation. The Tribunal while an important instrument by which those responsible for the genocide are distinguished from moderate Hutus, should nonetheless be alive to the destabilising effect being posed by Hutu extremists, many of who are not in custody, and are unlikely to ever face prosecution.

111 See Raghavan Iyer (ed), *The Moral and Political Writings of Mahatma Gandhi* (1986) Vol 2, 498. ('Peace must be just. In order to be that, it must be neither punitive nor vindictive.').

112 Ibid.

113 Dennis H Wrong, *The Problem of Order: What Unites and Divides Society* (1994) 182. For instance, in both Nazi Germany and Rwanda in the 1990s, a strong tradition of obedience to authority prevailed. See Gail M Gerhart, Recent Books on International Relations: Africa, Foreign Aff, May-June 1996, at 156; Michael Thompson-Noel, 'Home Truths About Genocide - Murderous Disputes in Faraway Places Bring Out the Honest Pessimist' *Financial Times* (London), 13 January 1996, xvi.

114 Graeme R Newman, *The Punishment Response* (1978).

While the prosecution of former leaders is an essential ingredient for reconciliation at the political level, there has to be a corresponding transformation of values among the Rwandan people who have been subjected to decades of incitement to ethnic hatred and violence, whether as victim or as obedient perpetrator. The Tutsi must absolve the Hutu of indefinite collective responsibility for the genocide while also having a legitimate means of vindicating their suffering through a 'collective catharsis'. The ICTR in concert with the Rwanda national trials can play a decisive role in this respect. Structures cannot be juridical persons with intentions and capabilities. They cannot distinguish between right and wrong. While structures cannot be put on trial, they can be changed through rehabilitation, by focusing on them as the primary root of the problem as well as the 53 indictees of the tribunal. Possibly the ICTR can lay ground for a new paradigm combining the actor-oriented and structure-oriented perspectives, promoting an international law that truly permeates the human populace, not stopping at the gates of the State but bridging the gap between collective and individual actors better than it has done so far. The key condition for such change is consciousness, and more sensitivity to the actor-structure relationship. Alongside trials, public inquiries must be made to reveal the weaknesses of the structure and help ensure that the Rwanda situation is not simply a change of guard, one ethnic hegemony for another.

Kent Roach presents the notion of accountability as operating on three levels: literal accountability ('a process in which individuals are forced to account for their actions'); organizational accountability ('a process where organizations are called to account for events and policy failures'); and social accountability ('a complex process that depends on social recognition of the problem being investigated and subsequent demands by the interested public that individuals, organisations and society account for their response to the problem').¹¹⁵ Roach's review of public inquiries¹¹⁶ reveals that their unique institutional features allow them to hold organisations and society accountable in ways that courts cannot.¹¹⁷

115 Kent Roach, 'Canadian Public Inquiries and Accountability' in Philip C Stenning (ed) *Accountability for Criminal Justice: Selected Essays* (1995) 268, 269-70.

116 Roach explored the effectiveness of three Canadian public inquiries in promoting accountability. These three inquiries related to (1) illegal activities by members of the Royal Canadian Mounted Police (the McDonald Commission), (2) the wrongful conviction of Donald Marshall, Jr, and (3) aboriginal justice in the province of Manitoba. See *ibid* 269. The Manitoba Aboriginal justice inquiry was 'more concerned with promoting social accountability for the treatment of Aboriginal people and viewed even individual misconduct as a symptom of larger social and political problems'. *Ibid* 289. The "social function" of the Manitoba inquiry was crucial'. *Ibid* 288 (citation omitted). In the end, however, there was a definite trickle-down effect, as social accountability may encourage 'people [to] begin to question their own attitudes and behaviour and those of others'. *Ibid* 288.

117 Roach, see *ibid* 273 ('[M]ost courts continue to put individuals, not organizations, on trial. They stress individual responsibility for wrongs and not the structural shortcomings of institutions, even if only organizational reform can prevent similar wrongs in the future.').

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

Attention should be paid to how reconciliation can be facilitated in today's Rwanda. Adopting a restorative approach may be part of the answer. The restorative school of criminal justice demonstrates the importance of behavioural, material, emotional, and cognitive outcomes for victims, offenders, and societal members.¹¹⁸ Success in sanctioning is measured by the degree of reparation for the victims and their participation, or better yet their ownership, in the process. It also includes the recognition of the offenders of wrongdoing and their level of empathy with victims. It is further measured by the development of a shared perspective in society that offenders have been denounced and held accountable in a fair process. The Rwandese courts may appear to lack credibility with the group of perpetrators being prosecuted by an overwhelmingly Tutsi government, being overwhelmingly Hutu. Ethnic stratification is replayed as basically, the Tutsis are prosecuting the Hutus, the victors are entombing their victory through judicial process. It may very well be the case that the Rwandan national trials may be enhanced by closer, formal cooperation between the national and international process, to alleviate the credibility problem.

While the Rwandan courts have received mixed, and to a degree improving, reviews, many of the first trials have been considered a disaster from a due process perspective. Most of the more than 125,000 detainees have been arbitrarily arrested and have been detained for long periods without trial.¹¹⁹ To many in Rwanda, this process negatively colours their impression of the Rwandan government and its ability to fairly treat those accused of genocide. The Rwandan trials will not help achieve reconciliation if they are considered unfair or if they are removed from the population.¹²⁰ Rwanda itself warned when advocating for the creation of a tribunal with international participation of 'victor's justice' if it organised the trials on its own.¹²¹

In the absence of a working strategy between the international and national processes, the ICTR continues to deal with *individual criminals* and not with a *culture of impunity*. After all, the majority in the Security Council believed neutrality and independence of the ICTR was more important than a connection to the social process in Rwanda. For the Rwandese it has become evident that independent justice means a justice that Rwanda will have no influence over,

118 See Benedict S Alper and Lawrence T Nichols, *Beyond the Courtroom* (1981).

119 For an interesting history of the Rwandan government's attempt to respond to the genocide and mass killings with its justice system, see William Schabas, 'Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problem' (1996) 7 *Criminal Law Forum* 523.

120 Although the understanding of a community's perception of law and legal process is underdeveloped, especially in a place like Rwanda, fairness and morality are important. See, eg, Paul H Robinson and John M Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (1995).

121 Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, above n 13.

including the creation of a prosecutorial strategy.¹²² The structural distance of the ICTR from the Rwandan social process makes it very difficult for the ICTR's work to be relevant and even more unlikely that its work will address the root causes of the genocide.

It would seem the case in Rwanda, that lasting reconciliation requires assigning individual responsibility for the atrocities, while it is imperative that trials of those accused take place, clearly, the most resonant of such trials will be those in Rwanda, organised and accomplished by the Rwandan people, so that individual responsibility is an internal, rather than an external designation.¹²³ It follows that the high profile of the ICTR, should not overshadow and steal the 'thunder' from the national trials. It would seem though that is what precisely has happened, the ICTR has just about all the 'big fish' while the rest have been left to the Rwandese national courts.

The major reason why the international and national justice systems may fail to respond adequately to the Rwandese situation is that they seem to inadequately think about the crimes by defining them only as law breaking. The concentration is solely on the resulting adversarial relationship between government (or Tribunal) and the criminal offender. This existing pattern of thinking fails to address, or even recognise, the other dimensions involved. A human rights crime is not merely an offence against the State. Likewise, justice is more than punishment and incapacitation. There are larger issues at play, notably the issue of standards and norms. Despite the public nature of the genocidal violence, there is very little generally accepted truth in Rwanda as to what exactly happened from April to July 1994.¹²⁴ In this regard, a truth commission could help establish an historical narrative of what happened as well as why it happened; ¹²⁵ after this record is established, Rwandan society then could be better positioned to render a moral evaluation of the genocide.¹²⁶

122 Some commentators have noted this disconnection from the internal political process. See Mariann Meier Wang, 'The International Tribunal for Rwanda: Opportunities for Impact' 27 *Columbia Human Rights Law Review* 177, 203 (1995).

123 The war crimes trials taking place in Ethiopia provide an example of a process that may bring about such internal recognition. See Stuart H Deming, 'War Crimes and International Criminal Law' (1995) 28 *Akron Law Review* 421, 424 (1995); 'Ethiopia Ex-Rulers Go on Trial', *New York Times*, 14 December 1994, A8.

124 But see Neier, above n 57, 43 (suggesting that because of public nature of violence, truth process in Rwanda would fail to make important contribution). Neier is correct in pointing out that the fact that the genocide was committed so publicly means many people knew about it. But reports from Rwanda reveal that there is little, if any, shared understanding as to the wrongfulness of the violence. There is an important difference between the genocide generally being known and the wrong of the genocide meaningfully being acknowledged.

125 See Jose Zalaquett, Comments at Harvard Law School Human Rights Program, above n 15 (concluding that truth commissions 'are most useful where broad sectors of society do not ... acknowledge critical facts'). Jose Zalaquett, 'Balancing Ethical

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

In a deeply divided society, arguably the only type of society likely to produce the types of crimes for which the ICTR was established, criminal prosecutions do not necessarily have a conciliatory effect. Rather, they manifest and exacerbate division if seen as some sort of panacea. This follows in part because those who would occupy the dock are inevitably and widely seen as symbolic representatives of their group.¹²⁷ The association is even greater in cases involving 'big fish'. As the prosecution declared at the opening of the Adolf Eichmann trial, 'It is not an individual that is in the dock(.)...but anti-Semitism throughout history'.¹²⁸ Given its metaphorical significance, one can hardly expect the ICTR to ameliorate collective guilt. On the contrary, it may actually revive and inflame antagonistic sentiment.¹²⁹

The overall purpose of restorative justice is the reintegration of victims and offenders who have resolved their conflicts into safe communities.¹³⁰ This purpose can only be achieved when multiple parties (victims, offenders, communities, governments) pursue multiple goals (redress, fairness, healing, and rehabilitation). There have been killings of a number of unarmed civilians, some by members of the Rwandese security forces, others by armed opposition groups (the *interahamwe* militia), others by unidentified assailants. Members of local defence forces have been responsible for killings and other abuses, especially in the northwest of Rwanda, sometimes in conjunction with Rwanda Patriotic Army

Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425, 1431.

126 So far, there has never been a truth commission in Rwanda with powers to compel testimony, order reparations, or promote offender reintegration. There have been investigations and inquiries, but these have not involved directly Rwandans in an organized, institutional process. This is not surprising since the purpose of these investigations was not to forge reconciliation or allocate reparations. In 1994, a commission of experts, established pursuant to Security Council Resolution 935, prepared a preliminary report on violations of international humanitarian law in Rwanda. See Letter from Boutros Boutros-Ghali, Secretary-General, United Nations, to the President of the Security Council, *Annex: Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935* (1994), UN Doc S/1994/1405 (Dec 9, 1994). The report of this commission of experts was a first step in the formation of the ICTR. The United Nations High Commissioner for Human Rights established a 'special investigations unit ... to gather evidence that might otherwise have been lost or destroyed'. *Report of the High Commissioner for Human Rights on the Activities of the Human Rights Field Operation in Rwanda Submitted Pursuant to General Assembly Resolution 50/200*, p 15, at 5, UN Doc E/CN.4/1996/111 (1996).

127 See Charles Simic, 'Unfashionable Victims' *London Review of Books*, 31 July 1997 at 12 (stating that Radovan Karadzic and Ratko Mladic 'are taken as embodiments of the soul of their people').

128 Arendt, above n 94, 16.

129 See Tina Rosenberg, 'Defending the Indefensible', *New York Times Magazine*, 19 April 1998 at 46, 56 (remarking on the 'near-universal belief among Serbs that the tribunal is an anti-Serb instrument').

130 See Daniel Van Ness and Karen Heetderks Strong, *Restoring Justice* (1997).

(RPA) soldiers.¹³¹ This certainly reinforces the need to pursue multiple goals within the framework of objectives of the international justice system otherwise, the international community will have to find an alternative way to address human rights abuses by an overzealous Tutsi-dominated army, clearly having personal and official business weaved into a single tapestry. The more holistic perspective of restorative justice may actually help a society manage multiple goals because it identifies restoration - not deterrence, incapacitation, rehabilitation, or retribution - as the overarching goal of criminal justice. A restorative approach seems needed in all societies that have suffered massive and collective victimisation, and must be kept in mind in Rwanda by the ICTR as it maps out and implements its strategy.¹³²

There is scant evidence of analysis devoted to identifying the intended beneficiary and target audience of international prosecutions. The omission bolsters suspicions voiced by a Rwandan delegate to the United Nations that the ICTR exists to appease the conscience of the international community, not to provide enduring value to the ravaged community.¹³³ The subject and object of humanitarian efforts in the wake of human rights disasters must be the community directly affected by and implicated in the events. If the intended beneficiary of international prosecutions is the amorphous 'international community', the ICTR has to identify and examine the implications that follow from this premise. The mere occurrence of serious human rights violations is itself indicative of the inadequacy of international recourse and remedies to ameliorate the security dilemma so prevalent in post- modern civil war.

The ugliness of the genocidal conflagration and the political reality of the ethnic hatred cannot be isolated into an international courtroom for resolution. The ICTR will make more sense if it was part of a comprehensive domestic and international process of punishment, reconstruction, and reconciliation. The Rwandese have a greater understanding of what is necessary to ensure that prosecutions meet the nation's most important objectives. They are the people in struggle and cooperation, in association and disassociation. A complementary twin approach by the national and international penal process through some synchronic formula may hit at the structure by challenging it through judicial activity. This may contribute to the Rwandese seeing their divided socio-political structure as one of the primary sources of their tragedy and try and withdraw or change it.

131 Amnesty International Report, above n 58. For a positive development, see Tim Wanyonyi, 'Peace May Be Crucial But So Is Justice to All', *Daily Nation* (Kenya), 4 January 2001, Commentary, noting the UN Prosecutor's announcement that the members of the RPA (formerly the rebel RPF) will be investigated for alleged killings during the genocide period when the RPF launches a major military offensive that brought the Tutsis to power.

132 Howland and Calathes, above n 51, 156.

133 See 'UN Establishes Rwanda Genocide Tribunal', Reuters North American Wire, 8 November 1994, available in LEXIS, Nexis Library, World News File.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

A presupposition of the ICTR is that formal mechanisms are integral to uphold group life and to stem deviant behaviour.¹³⁴ Reminiscent of pre-sociological thought, this view overlooks the 'complex network of social ties which spontaneously creates a normative order that exists independently of (legal institutions)'.¹³⁵ Cooperation and understanding by the Rwandese society is a sine qua non of long term ethnocentric hate control and societal restructuring. Although the Tutsis are now in control they cannot hold it without the goodwill of the Hutu segment.¹³⁶ For lasting peace, Nelson Mandela proclaimed, 'we do not rely on laws, we rely purely on persuasion'.¹³⁷ Where society depends instead on law, Gandhi concluded that 'law ceases to be law, and society ceases to be society'.¹³⁸

The inter-ethnic hatred in Rwanda is a 'deep-culture', a socio-cultural code embedded in the collective subconscious of the group entities, defining for that collective that it is normal/natural to adopt a 'no-holds-barred' approach to gaining ethnical supremacy and preserving the resulting ethnic hegemony. Being

134 Kofi Annan, Secretary General of the United Nations, stated that all peoples of the world should have basic human rights and that the basis of law ensures those rights. Annan, above n 6, 363. He thus advocates a formal court to administer that law. See *ibid*, 365.

135 Wrong, above n 113, 170. 'It is the social process in group life that creates and upholds the rules, not the rules that create and uphold group life.' *Ibid* 49; see generally Robert J Sampson et al, 'Neighbourhoods and Violent Crime: A Multilevel Study of Collective Efficacy', *Science*, 15 August 1997 at 918-19, 923 (finding that 'collective efficacy,' meaning informal social control, cohesion, and trust, remains a significant predictor of violent crime).

136 Starting in 1999, the Rwandese government implemented a national policy which required many people to abandon their homes in order to be housed in new 'villages' or settlements known locally as *imidugudu*. In the northwestern préfectures of Gisenyi and Ruhengeri, in particular, families were forced to move, sometimes under threat and intimidation. Some were made to destroy their old homes but were not provided with assistance to construct new ones. The policy was officially designed to improve security and ensure greater facilities and infrastructure, but by the end of 1999 living conditions for hundreds of thousands — especially in the northwest — remained very poor. Amnesty International Report, above n 58. Such structural strategies are definitely wrong, at least the aggressive and abrasive stance by the government. In implementation. Arbitrary arrests and detentions were reported. Unsubstantiated accusations of participation in the genocide were frequently used as a way of settling scores or to prevent property owners from reclaiming illegally occupied property. Now this falls in the structure-oriented perspective. It catches types of evil, repression (political) and exploitation (economic). The evils here are clear but without presupposing evil actors. See Ignatius Jesudasan, SJ, *A Gandhian Theology of Liberation* (1987) 287 (referring to Gandhi's insight into the need for any long-term government to have the consent of the governed).

137 Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (1997) 261.

138 VS Hegde, 'The Practice of Law and Gandhi' in *New Dimensions and Perspectives in Gandhism*, VT Patil (ed) (1989) 424.

subconscious, there is not much individual awareness of deeply rooted international legal standards steering the rest of the world, the result of almost a century of brainwashing. With a deep structure of hatred and animosity rooted in a culture, the ICTR is running against something very solid indeed. A signal challenge to the ICTR is the core precept of Satyagraha, that the ends pre-exist in the means. In Gandhi's words, 'the belief that there is no connection between the means and the end is a great mistake.... The means may be likened to a seed, the end to a tree; and there is just the same inviolable connection between the means and the end as there is between the seed and the tree.'¹³⁹

Conclusion

If the ideal is to facilitate positive social change in Rwanda that brings about reconciliation and the respect for human rights, a system based on ill-thought-out symbolic justice or attainable mass retribution must be re-oriented with a more thought-out and creative strategy regarding the structure and operation of the ICTR. An actor-oriented perspective alone cannot prevent future human rights violations in Rwanda. It is unable to react adequately to social evils built into the social structure of the Rwandese society. The experience of the past six years shows that the vicious cycle of violence, though somewhat muted, is very much alive.¹⁴⁰

It can be argued that by increasing awareness the ICTR has contributed to the global respect of human rights through its 53 indictments and a few trials. Unfortunately, the process of reconciliation and the creation of human rights culture in Rwanda cannot be achieved simply by trying those who are responsible for shocking crimes. The ICTR must pay greater attention to the effects and limitations of justice symbolism and to political developments in order to effectively influence the troubled pacification process in Rwanda. This may be beyond the capacity of the current ICTR, but it should not be.¹⁴¹

A particularly misguided claim of the ICTR is that criminal prosecutions are productive of 'the truth'. As Madeleine Albright declared during the UN Security Council meeting to establish the Yugoslav Tribunal, '[t]he only victor that will prevail in this endeavour will be the truth'.¹⁴² Nothing so belies this as the paucity of information about the 1994 genocide in Rwanda, generated by hundreds of

139 Dennis Dalton, *Mahatma Gandhi: Non-violent Power in Action* (1993) 9.

140 A leader of one of the opposition groups composed mainly of Hutu extremists in an interview stated that the struggle will never end equating the laying down of arms before their demands are met which *inter alia* include the return to the 1992 Constitution as amounting to an acceptance of guilt to some crime. See, 'Rebel Leader Says He Is Not In Arusha to Negotiate', *Internews*, 24 July 2000. It can be accessed online at the following URL <<http://www.africanews.org/rwanda/stories>>.

141 Howland and Calathes, above n 51, 166.

142 Michael Stewart, *Atonement and Move Forward*, *London Review of Books*, 11 December 1997, 12.

THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF
EXECUTIVE INDEPENDENCE IN NEW ZEALAND

criminal prosecutions, relative to the wealth of information about apartheid South Africa, compiled through non-prosecutorial means.¹⁴³ The trials' reductionist, bipolar logic and inherent barriers to the truth conceal and distort history. As noted by Hannah Arendt: Justice demands that the accused be prosecuted,...and that all the other questions of seemingly greater import - of 'How could it happen?' and 'Why did it happen?,' of 'Why the Jews?' and 'Why the Germans?,' of 'What was the role of other nations?'...- be left in abeyance.¹⁴⁴

Both the Rwandan court process and the ICTR's efforts are flawed, but incremental positive change can be obtained. It is time to improve the efforts of the ICTR and the Rwandan government before they reinforce, as oppose to combat, impunity. Joint projects are needed.¹⁴⁵ Policy changes based on cooperation and discussions about how to achieve restorative justice are needed to enhance the efforts of the ICTR and the Rwandan government. For their part, the Hutu must be disabused of their racist notions about the Tutsi which have been instilled into their minds by extremist leaders through indoctrination and misinformation.¹⁴⁶ Most importantly, they must become aware of the whole truth of what transpired in 1994 so that they will not fall victim to the deception and historical revisionism of Hutu extremists.

The UN and the international community should not be lulled into thinking that justice will come to Rwanda with an 'effective' ICTR, which has succeeded in securing custody of 45 indictees out of the total number of 53. The genocide in Rwanda was in fact the product of years of human rights violations.¹⁴⁷ An intense, creative, and sustained intervention involving the Rwandan government, civil society actors, UN entities, international financial institutions, and bilateral funding agencies will, therefore, be needed to address the full spectrum of human rights. While the ICTR can make a contribution to this process, it can do so only if a process exists and the ICTR has a rational plan for contributing to it.

143 See Alan Zarembo, *Judgment Day: In Rwanda* at 70-71 (noting that imprisoned Tutsi rebels in Rwanda 'dispute their crimes' and 'deny that the genocide ever happened').

144 Arendt, above n 94, 3.

145 Possible projects might include: one that addresses the fact that neither the ICTR nor the Rwandan government has a complete information collection and management system - a system needed to understand the big picture and to develop a coherent prosecutorial strategy; one that examines ways that the ICTR might allow for civil damage awards. Both projects could be good starting points for a discussion regarding a new collaborative arrangement.

146 The Hutu commonly refer to the Tutsi as the '*inyenzi*' or cockroach, which must be crushed. See above n 63.

147 For example, the lack of sufficient access to quality public education created some of the conditions whereby leaders could manipulate large portions of the population; these leaders promoted the lack of tolerance and institutionalised difference between societal groups.