

Victims' Justice? Reflections on an Internship at the ICTR

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Here's an exercise: imagine that you are on the executive committee of a political party. Consider what you'd do if the youth wing of that party (such as Teen Age Republicans¹) began brutally killing people. Assume that these killings are only against one ethnicity, a privileged minority. Then imagine that youth wings of all the other political parties start using the name of your youth wing and join in the killing. You meet with the leaders of the youth group and order them to stop the killing. They stop, but only for a few hours before beginning again with new zeal. The killings become so rampant that there is no centralized authority and no structure to order a stop to the killings. The youth groups now coalesce with military groups and together they expand the killings to include anyone protecting their targets and anyone opposing the killings. What could you do, knowing that there was no way to stop the killing and that any attempt would risk your life and those of your family members, friends, and colleagues?

Now imagine that you survive these atrocities only to lose the country to invading rebels. You are exiled, arrested, and spend five years before a trial is begun. Over the next two years, the prosecutors amend the indictment and restart the trial twice. You have now been in jail for ten years and your trial is expected to finish, at earliest, in two more years. Now consider that you're being tried under theories of responsibility that did not exist at the times of the killing. Due to the breadth of these theories, you will almost certainly be convicted, and the same international community who dragged its feet when it could have helped to stop the killing, says (through these theories of responsibility) that you could have done more. This is the life of Joseph Nzirorera.²

I. Background

A. History

Rwanda has 3 major ethnicities: the Hutu, the Tutsi, and the Twa.³ The Hutu are the overwhelming majority comprising roughly 85% of the population, with the Tutsi and Twa make up roughly 14% and 1%, respectively.⁴ Despite being a minority, the Tutsis held political power

¹ <http://www.teenagerepublicans.org>

² Interview with Joseph Nzirorera, Prisoner at the ICTR (June 19, 2007).

³ Encyclopedia Britannica Online, Rwanda: Ethnic Composition (2008), <http://www.britannica.com/eb/article-40761/Rwanda> (last visited Jan. 28, 2008).

⁴ U.S. Department of State, Background Note: Rwanda (2007), available at <http://www.state.gov/r/pa/ei/bgn/2861.htm>.

in the form of a monarchy for several centuries before and even during the European colonial period.⁵ The Tutsis oppressed the Hutus and “reduced the Hutu to virtual serfdom” by not providing them with a voice in the government and by withholding opportunities for socio-economic advancement.⁶ Tensions between the Hutus and Tutsis grew during the early 20th century and came to a head between 1959 and 1964.⁷ These tensions culminated in a UN referendum by which the monarchy was abolished and the PARMEHUTU (Party of the Hutu Emancipation Movement) gained power with an overwhelming victory.⁸ Under Hutu rule, the oppression was reversed and by 1964, over 150,000 Tutsis were displaced to neighboring countries.⁹ Over the next thirty years, the exiled Tutsis organized themselves and began preparing for a revolution.¹⁰

In 1973, Major General Juvénal Habyarimana, a Hutu, became president.¹¹ He abolished all political activity (including political parties) and dissolved the legislature.¹² In 1975, Habyarimana established the National Revolutionary Movement for Development (“MRND”),¹³ a party whose primary goal was unity.¹⁴ For the next seventeen years, Rwanda existed as a single-party system.¹⁵ Initially, ethnic tensions diminished¹⁶ as President Habyarimana appointed many Tutsis to high-level positions in his government.¹⁷ However, the exiled Tutsis formed the Rwandan Patriotic Front (“RPF”) and on October 1, 1990, the RPF began attacking the Rwandan army from their base in Uganda.¹⁸

Conflicts continued until a ceasefire was signed on July 31, 1992.¹⁹ Part of the ceasefire agreement created a timetable for returning to a multi-party system where political parties (including the RPF) would share power on a proportional basis.²⁰ The Rwandan people immediately took to the multi-party system by supporting five major political parties, including the MRND and RPF.²¹ Each of these parties also created a youth wing to help with campaigning, most notably the Interahamwe of the MRND.²² In April 1992, these five parties agreed to the form of a transitional government.²³ Before the agreement could come into effect, there were many disagreements about the details, mainly because several of the parties split into

⁵ *Id.*

⁶ *Id.*; Interview with Joseph Nzirorera, Prisoner at the ICTR (June 19, 2007), in which Nzirorera told me that the “Hutus were treated like slaves under Tutsi rule.”

⁷ *Id.*; Encyclopedia Britannica Online, Rwanda: History (2008), <http://www.britannica.com/eb/article-214507/Rwanda> (last visited Jan. 28, 2008).

⁸ *Id.*; U.S. Department of State, *supra* note 4.

⁹ Encyclopedia Britannica Online, *supra* note 7.

¹⁰ U.S. Department of State, *supra* note 4.

¹¹ Encyclopedia Britannica Online, *supra* note 7.

¹² U.S. Department of State, *supra* note 4.

¹³ *Id.*

¹⁴ *Id.*; Interview with Joseph Nzirorera, Prisoner at the ICTR (June 19, 2007).

¹⁵ U.S. Department of State, *supra* note 4.

¹⁶ Interview with Joseph Nzirorera, Prisoner at the ICTR (June 19, 2007).

¹⁷ *Id.*

¹⁸ U.S. Department of State, *supra* note 4; Encyclopedia Britannica Online, *supra* note 7.

¹⁹ U.S. Department of State, *supra* note 4.

²⁰ *Id.*; Encyclopedia Britannica Online, *supra* note 7.

²¹ Interview with Joseph Nzirorera, Prisoner at the ICTR (June 19, 2007).

²² *Id.*

²³ *Id.*

moderate and extremist factions and each of these factions claimed the right to the legislative seats and powers for the entire party granted by the ceasefire agreement.²⁴

On the night of April 6, 1994, President Habyarimana was returning from Tanzania when his plane was shot down.²⁵ Also on board were the Rwandan army's chief of staff and President Ntaryamira of Burundi (another Hutu).²⁶ The general assumption is that extremist Hutus killed the president because he was an obstacle to the extermination of the Tutsis.²⁷ Others, however, believe that the RPF shot down the plane to throw the Rwandan army into disarray in order to complete a total victory over the whole of Rwanda.²⁸ Unfortunately, no conclusive evidence on this subject has yet come to light.

Regardless of who shot down the plane or why, military and youth groups (such as the Interahamwe) began killing Tutsi government leaders.²⁹ The killings quickly spread to all Tutsis, moderate Hutus, or Hutus protecting Tutsis.³⁰ The RPF agreed to maintain the ceasefire for one day while the United Nations Assistance Mission for Rwanda (UNAMIR) tried to stop the killings.³¹ Once it became clear that UNAMIR could not stop the killing, the RPF moved across Rwanda's northern border from Uganda³² and over the course of three months, the RPF swept in a sickle-shaped movement across the east then to the southern and western areas of Rwanda.³³ Eventually, the RPF surrounded the capital, Kigali, and the only other remaining government army stronghold was in the far northwestern region.³⁴ As the RPF advanced, the government army became frenzied and the killings of Tutsis intensified.³⁵ The militias and the youth groups (all calling themselves "Interahamwe" by now, regardless of their original group³⁶) also escalated their killings.³⁷ It is commonly asserted that many members of the RPF also committed genocide and war crimes in reprisal for the anti-Tutsi genocide.³⁸ One-hundred days later, when the killing was over and the RPF controlled the whole of Rwanda, 800,000 Rwandans were dead,³⁹ 1,750,000 were refugees,⁴⁰ and the survivors (not to mention the

²⁴ *Id.*; Roméo Dallaire & Brent Beardsley, *Shake Hands with the Devil* 134 (2003).

²⁵ U.S. Department of State, *supra* note 4; Encyclopedia Britannica Online, *supra* note 7; Dallaire, *supra* note 24 at 221.

²⁶ Encyclopedia Britannica Online, *supra* note 7.; Dallaire, *supra* note 24, at 223-224.

²⁷ Encyclopedia Britannica Online, *supra* note 7.

²⁸ BBC News, *Rwanda Takes French Radio Off Air*, Nov. 27, 2006, <http://news.bbc.co.uk/1/hi/world/africa/6188550.stm> (last visited Jan. 28, 2008).

²⁹ Dallaire, *supra* note 24, at 231-233.

³⁰ *Id.* at 232, 253-54.

³¹ *Id.* at 247.

³² *Id.* at 269.

³³ *Id.* at 287-88.

³⁴ *Id.* at xxviii, 356, 378.

³⁵ *Id.* at 277.

³⁶ Interview with Joseph Nzirorera, Prisoner at the ICTR (June 19, 2007).

³⁷ Roméo Dallaire & Brent Beardsley, *Shake Hands with the Devil*, 277 (2003).

³⁸ United Nations Office for the Coordination of Humanitarian Affairs, *Rwanda: Prosecutor Reviews Alleged RPF Genocide Crimes*, (Feb. 23, 2006) available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/DPAS-6MAF46?OpenDocument>; Dallaire, *supra* note 24, at 378.

³⁹ Linda E. Carter, "Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda", 14 *New Eng. J. Int'l & Comp. L.* 41, 41-42 (Fall 2007).

⁴⁰ Refugees International, *Remembering Rwanda: RI Looks Back at Genocide and Failure to Intervene*, Mar. 19, 2004, <http://www.refugeesinternational.org/content/article/detail/1570> (last visited Jan. 28, 2008).

international community) wanted someone to hold accountable.⁴¹ Towards that end, the UN set up the International Criminal Tribunal for Rwanda (“ICTR” or simply “the tribunal”) in November of 1994.⁴²

B. Judicial Structure

In Rwanda, alleged criminals are classified into different categories based on the severity of the crimes with which they are accused.⁴³ Specifically, category 1 includes the organizers and supervisors of the genocide, those who killed with “zeal” or “excessive wickedness” as well as rapists.⁴⁴ Category 2 includes “authors, co-authors, [and] accomplices of deliberate homicides” as well as those who committed attacks without the intent to kill.⁴⁵ Category 3 is reserved for those who committed offenses against property only.⁴⁶ Categories 2 and 3 are sent to gacaca, a unique set of local courts without many normal formalities such as lawyers, pleadings, typical rules of evidence, etc.⁴⁷ Most of the accused from category 1 are sent to the standard national court system in Rwanda.⁴⁸ Only the upper echelon of leaders and instigators (roughly 70 total⁴⁹) were sent to the tribunal.⁵⁰ While the differences in structures, procedure, and jurisprudence between these three systems (which try people for the same basic crimes) would provide for an interesting discussion, I will focus this article solely on the tribunal.⁵¹

C. The Tribunal’s Jurisprudence

The statute of the United Nations International Criminal Tribunal for Rwanda was established on November 8, 1994 by the UN Security Council within a few months after the end of the genocide.⁵² The statute defines punishable crimes and provides multiple forms of liability.⁵³ Article 2 defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”⁵⁴ and the punishable acts are specifically listed, one of which is “killing members of the group.”⁵⁵ Conspiracy to commit,

⁴¹ See, e.g., U.N. Security Council Resolution 955 (Nov. 8, 1994).

⁴² *Id.*

⁴³ National Service of Gacaca Jurisdictions, Context or Historical Background of Gacaca Courts, <http://www.inkiko-gacaca.gov.rw/En/Generaties.htm> (last visited Jan. 28, 2008); see also Carter, supra note 39.

⁴⁴ *Id.*; see also Carter, supra note 39.

⁴⁵ *Id.*; see also Carter, supra note 39. Note that there were originally four categories but categories 2 and 3 were merged.

⁴⁶ National Service of Gacaca Jurisdictions, supra note 43.

⁴⁷ Carter, supra note 43, at 50-51.

⁴⁸ *Id.*

⁴⁹ United Nations International Criminal Tribunal for Rwanda, Status of Cases, available at <http://69.94.11.53/ENGLISH/cases/status.htm>.

⁵⁰ Carter, supra note 43, at 50-51.

⁵¹ It is also important to note that the International Criminal Tribunal for the Former Yugoslavia and the Rwandan tribunal share the same Appeals Chamber, whose decisions are binding on both tribunals. See, e.g., <http://www.un.org/icty/pressreal/p621-e.htm>.

⁵² U.N. Security Council Resolution 955, Nov. 8, 1994.

⁵³ Statute of the International Criminal Tribunal for Rwanda (hereinafter “ICTR”), available at <http://69.94.11.53/ENGLISH/basicdocs/statute.html>.

⁵⁴ *Id.*, art. 2(2).

⁵⁵ *Id.*, art. 2(2)(a).

incitement to commit, and attempting to commit genocide are also punishable.⁵⁶ Article 6 provides for individual responsibility⁵⁷ and command responsibility⁵⁸ while explicitly disallowing defenses of executing orders from a superior⁵⁹ and of acting in the capacity of a government official.⁶⁰ The elements of command responsibility are: (1) there existed a superior-subordinate relationship between the superior and the perpetrator of the crime; (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.⁶¹ It is not necessary that the accused held a military position to be liable; a position as a civilian superior can be sufficient.⁶²

Another form of liability is joint criminal enterprise (JCE). Although it is not explicitly created by the statute, the Appeals Chamber recognized the theory under the Individual Criminal Responsibility Article of the tribunal's statute.⁶³ Under this theory, one may be held liable for the illegal actions of another if both parties (with or without more parties) formed an agreement to effect the illegal purpose.⁶⁴ The systemic form is utilized when there is an organized criminal system (such as concentration camps) and "requires personal knowledge of the organized system and intent to further the criminal purpose of the system."⁶⁵

Once an accused is found to be a member of a JCE, that accused may also be held accountable for acts which may not have been directly connected to the purpose of the enterprise but which were a "natural and foreseeable consequence" of the common purpose.⁶⁶ In this case, the "accused must know that such a crime might be perpetrated and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise."⁶⁷ It is not necessary that the principal perpetrator of a crime be a member of the JCE so long as the perpetrator acted in accordance with the common purpose of the JCE.⁶⁸ Where the principal perpetrator is not a member of the JCE, it must be established that the crime can be imputed to a member and that this member acted in accordance with the common plan.⁶⁹ There is no

⁵⁶ *Id.*, art. 2(3).

⁵⁷ *Id.*, art. 6(1).

⁵⁸ *Id.*, art. 6(3).

⁵⁹ *Id.*, art. 6(4).

⁶⁰ *Id.*, art. 6(2).

⁶¹ *Prosecutor v. Blagojevic & Jokic*, No. IT-02-60-T, Judgement (Jan. 17, 2005) at ¶ 790; *Prosecutor v. Kordic & Cerkez*, No. IT-65-14/2-A, Judgement (Dec. 17, 2004) at ¶ 827; *Prosecutor v. Halilovic*, No. IT-01-48-T, Judgement (Nov. 16, 2005) at ¶ 56; *Prosecutor v. Limaj et al.*, No. IT-03-66-T, Judgement (Nov. 30, 2005) at ¶ 520; *Prosecutor v. Oric*, No. IT-03-68-T, Judgement (June 30, 2006) at ¶ 294.

⁶² *Prosecutor v. Delalic*, No. IT-96-21-A, Judgement (Feb. 20, 2001) at ¶¶ 195-196; *Prosecutor v. Prlic et al.*, No. IT-04-74-PT, Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction (Sept. 26, 2005) at ¶ 19; *Prosecutor v. Oric*, No. IT-03-68-T, Judgement (June 30, 2006) at ¶ 308; *Prosecutor v. Aleskosovski*, No. IT-95-14/1-T, Judgement (Mar. 24, 2000) at ¶ 70.

⁶³ *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgment (Feb. 28, 2005) at ¶ 79. Note that the *Kvočka* court's holding is based on Article 7(1) of the Yugoslavian tribunal's statute; the equivalent article in the Rwandan tribunal is Article 6(1).

⁶⁴ *Id.* at ¶ 82.

⁶⁵ *Id.*

⁶⁶ *Id.* at ¶ 83 & 86.

⁶⁷ *Id.* at ¶ 83.

⁶⁸ *Prosecutor v. Brdjanin*, No. IT-99-36-A, Judgment (Apr. 3, 2007) at ¶ 413.

⁶⁹ *Id.* at ¶ 430.

requirement that the accused have an agreement with the principal perpetrator in order to be liable under JCE.⁷⁰ However, the perpetrator's crime must have formed part of the criminal purpose of the JCE.⁷¹ JCE is differentiated from aiding and abetting in that one must share the common intent for JCE while to be an aider and abettor, one must merely have knowledge of the perpetrators' intent and lend them support which had a significant effect on the perpetration of the crime.⁷²

II. Individual Perspectives

At this point, I would like to disclose my two biases. First, I arrived in Africa assuming that the prosecution had compiled evidence, strong and irrefutable enough to convict each accused, long before issuing the indictments. This first bias was quickly overturned by my experience of listening to the trial and reading past transcripts. My second bias is that I worked on the defense team for Joseph Nzirorera in the case of *Karemera, et al.* during my externship at the ICTR.⁷³ The remainder of this paper is based heavily on my perceptions as well as those of two other interns (Tara Long, who also worked on the Nzirorera defense team, and Jay Porter, from the judges' chambers) and Michael Kalisa, a Rwandan attorney who worked for the Registry.

In order to analyze the successfulness of the tribunal, we must consider the objectives which the tribunal seeks meet. A few potential goals are truth (creating an accurate historical record of the genocide), justice (punishing the actual wrongdoers), and reconciliation of the ethnic groups.

A. The Statute

It's hard for me to believe that the tribunal's goal is truth, justice, or reconciliation because several factors indicate that the defendants are railroaded despite the statement in the tribunal's statute which provides that "the accused shall be innocent until proven guilty."⁷⁴ For example, the full title of the tribunal is "The 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 Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."⁷⁵ The title itself implies that the accused are already convicted. Furthermore, the tribunal's jurisprudence provides for such a broad range of theories of liability (specifically JCE) that it is nearly impossible to escape punishment.

⁷⁰ *Id.* at ¶ 415.

⁷¹ *Id.* at ¶ 418.

⁷² *Prosecutor v. Krnojelac*, No. IT-97-25, Judgement (Sept. 17, 2003) at ¶ 122.

⁷³ In early 1994, Joseph Nzirorera was Secretary General of the MRND and by July 1994, he had become President of the Rwandan Parliament. It is in these capacities that he is allegedly responsible for the genocide. http://www.trial-ch.org/en/trial-watch/profile/db/facts/joseph_nzirorera_208.html; Interview with Joseph Nzirorera, Prisoner at the ICTR (June 19, 2007).

⁷⁴ Art. 20(3) of the ICTR Statute, available at [http:// 69.94.11.53/ENGLISH/basicdocs/statute.html](http://69.94.11.53/ENGLISH/basicdocs/statute.html).

⁷⁵ Preamble of the ICTR Statute, available at [http:// 69.94.11.53/ENGLISH/basicdocs/statute.html](http://69.94.11.53/ENGLISH/basicdocs/statute.html) (change in capitalization pattern in the original).

Although the tribunal creates jurisdiction for anyone committing genocide or other war crimes in Rwanda in 1994, to date, no member of the RPF has been indicted by the tribunal. On a similar note, one of the accused, Jean-Bosco Barayagwiza, was arrested and held for seven months without being charged.⁷⁶ The Appeals Chamber held that this violated the accused's right to be promptly charged.⁷⁷ The Rwandan government was upset by this decision and suspended cooperation with the tribunal.⁷⁸ Because an overwhelming majority of the witnesses travel from Rwanda, this would have effectively prevented the tribunal from continuing its prosecutions.⁷⁹ Under this pressure, the Appeals Chamber quickly changed field and reversed its previous decision by allowing Barayagwiza's prosecution to proceed despite the violation of his right.⁸⁰

There are further inadequacies in the statute. For example, consider that the statute does not provide for the treatment of acquitted persons. On the last day of my internship at the tribunal in July 2007, my supervisor, Peter Robinson, arranged for our team to have lunch with Andre Ntagerura, the first former minister to be acquitted by the tribunal⁸¹ and one of only five people acquitted by the tribunal to date.⁸² He was arrested on March 27, 1996,⁸³ and acquitted by the trial chamber on February 25, 2004,⁸⁴ which was upheld by the appeals chamber on July 7, 2006.⁸⁵ Since his release in early 2004, Mr. Ntagerura has been living in a UN-protected safe house near the tribunal with other acquitted people. For his own security, he normally does not go anywhere except his house and the tribunal, and primarily travels between these two locations by guarded UN transport. While at the tribunal, he spends most of his time in the library using the internet. He has only seen his wife twice since his arrest in early 1996. His home country of Rwanda wants him to return only so that they can retry him for genocide. Predictably, Rwanda will not issue him a passport, and because he has no passport, no other country will allow him entry. Although Mr. Ntagerura lives in Arusha, Tanzania, he is truly country-less. Had the drafters of the statute considered the possibility of an acquittal, they may have drafted a solution to this situation.

B. The Witnesses

⁷⁶ ICTR, Decision: *Jean Bosco Barayagwiza v. The Prosecutor*, available at <http://69.94.11.53/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm> at ¶ 100.

⁷⁷ *Id.*

⁷⁸ Christopher Wren, "U.N. Tribunal Wrong to Free Top Suspect, Rwanda Says," NY Times, Nov. 12, 1999 at A11, available at <http://query.nytimes.com/gst/fullpage.html?res=9407E5D9163DF931A25752C1A96F958260>.

⁷⁹ *Id.*

⁸⁰ ICTR, Decision: *Jean Bosco Barayagwiza v. The Prosecutor* at ¶ 71, available at <http://69.94.11.53/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm>.

⁸¹ BBC News, Rwanda Genocide Court Frees Pair, Feb. 8, 2006, <http://news.bbc.co.uk/2/hi/africa/4693640.stm> (last visited Jan. 28, 2008).

⁸² ICTR Homepage, <http://69.94.11.53/default.htm>. For reference, twenty-seven people have been convicted (appeals process completed), two more have been convicted but are currently appealing, the trials of twenty-eight are still in process, the trials of six people have not yet begun, sixteen others are still at large, and the indictments of two others were withdrawn.

⁸³ ICTR, *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, available at <http://69.94.11.53/ENGLISH/cases/Imanishimwe/judgement/judgment-en.pdf> at ¶ 6.

⁸⁴ *Id.*

⁸⁵ ICTR, *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Case No. ICTR-99-46-A, available at <http://69.94.11.53/ENGLISH/cases/Ntagerura/judgement/060707.pdf>.

During my internship, I noticed a pattern emerge in the prosecution's witnesses. Each witness would use a pseudonym for their protection as allowed under the rules,⁸⁶ and the prosecution would then lead the witness through a detailed account of what the witness claimed to have seen first hand. This would usually be compelling evidence against the accused persons, but most witnesses significantly changed their stories once the cross-examination began. These witnesses would claim that they did not actually witness the accused acting as the witness had just described but, rather, they heard from a friend or family member that the accused was performing said act. Many would also have previously testified in another proceeding with contradictory statements. In fact, during Tara Long's internship on the Nzirorera team, one witness admitted on the stand that he had been untruthful in previous trials,⁸⁷ and that if he remained consistent in this trial, that he would be lying and that his conscience prevented him from continuing this deception.⁸⁸ Long observed that because an overwhelming majority of the evidence used to convict is provided in witness testimony, the prosecution's evidence is weak and unreliable; "they need more proof" for a fair conviction.⁸⁹ With regards to a goal of creating an accurate historical record, only one side of the story is being told by the witnesses, and it is difficult to rebut their accusations, because of their anonymity.⁹⁰ To be fair, I did observe one witness who testified under his own name, but he also admitted on the stand that he had no personal knowledge of any culpable acts committed by the three defendants in the case.⁹¹ In sum, the practice of allowing anonymous witnesses, although well-intentioned, all but completely removes deterrence from making false statements, and this is not beneficial to the goals of truth, justice, or reconciliation.⁹²

C. Other Factors

Although I may be biased, there are people more objective than I am who share my views. For example, Jay Porter, an intern from the judges' chambers, observed

"The deck is stacked against the accused at the [tribunal]... On several occasions, the court has exhibited an apparent bias toward the prosecution. The budget for the Office of the Prosecutor is several times the allocated budget for the Defense Office. The prosecution enjoys cooperation from the Rwandan government while defense investigators often complain of challenges while in Rwanda searching for evidence. Witnesses have come and openly expressed their intent in court to prosecute the defendants, while the defense is often left to rebut accusations with [the testimony of] close friends and family members because of the potential consequences of testifying on

⁸⁶ ICTR Rule of Procedure and Evidence 75(A).

⁸⁷ Trial Transcript from July 6, 2006 at 24 (on file with author). *See also* ICTR, Minutes of Proceedings: *Karemera et al.*, available at <http://69.94.11.53/ENGLISH/cases/Karemera/minutes/2006/78-060706.pdf> at ¶ 1(g).

⁸⁸ Trial Transcript from 06 July 2006 beginning at pg. 24. *See also* <http://69.94.11.53/ENGLISH/cases/Karemera/minutes/2006/78-060706.pdf> at ¶ 1(g).

⁸⁹ Interview with Tara Long (Oct. 10, 2007).

⁹⁰ *Id.*

⁹¹ Jean Bosco Twahirwa, who I commend for using his own name, testified from 25 June 2007 through 2 July 2007 (Trial Days 118-122). Minutes from these trial sessions can be found at <http://69.94.11.53/ENGLISH/cases/Karemera/minutes/index.htm>.

⁹² For an in-depth analysis of this point, *see* Joanna Pozen, "Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials", 38 N.Y.U. J. Int'l L. & Pol. 281 (Fall/Winter 2005-06).

behalf of the accused... The defendants had an uphill battle. They were deprived of tools that may have allowed them to bring truth before the court. I find this outrageous. What an irony to think that the international community may be actively pursuing a similar cause as the *genocidaire*: removing individuals from society who have not committed a justifying crime. After all, if by machete or by a seven- year internationally coordinated proceeding, what is the difference if they both result in the individual being stripped of his life and liberty? Granted, comparing the commission of genocide to life imprisonment is not entirely fair, but can we really call one crime and the other justice if both are merely controlled by political whims?... I cannot honestly say that I believe the ICTR is 100% interested in truth. Nor can I honestly say that any international tribunal has been set up without political motives that underlie its mission to administer justice and inherently tip the balance of fair proceedings in favor of prosecution.”⁹³

Specifically considering the goal of reconciliation, Rwanda set up a National Unity and Reconciliation Commission which strives for “a peaceful, united and prosperous nation.”⁹⁴ One observer noted that

“Rwandans want, above all, to find out exactly where and how those close to them died. Without this knowledge, it is hard to move on. Genocide memorials have been erected throughout the country in the solemn style of our Vietnam Veterans Memorial, only the slates are largely blank, listing hundreds of names of the known dead but leaving space for tens of thousands of others who perished and whose names are unknown. The need to learn the names of the dead is greater than the need to punish.”⁹⁵

There is conflicting evidence of whether reconciliation is actually taking place. For example, Michael Kalisa, a Rwandan lawyer at the tribunal, told me that everybody knows their own ethnicity as well as that of their neighbors and friends, but many times it is difficult to ascertain the ethnicity of stranger.⁹⁶ This can be attributed to the proliferation of interethnic relationships.⁹⁷ Kalisa went on to tell me that although this subject is still somewhat on the forefront, discussion of ethnicity is diminishing, and he predicts that his grandchildren will probably not know their ethnicity.⁹⁸ However, many Rwandans still see a sharp divide between the Hutus and the Tutsi.⁹⁹

III. Conclusion

I wish to make clear that what happened in Rwanda was horrible. The international community should work to ensure that this type of slaughter never happens again. I do not make

⁹³ Barry Scholl, “I Could Defend a War Criminal: A Quinney College Student Reflects on his Experiences as a Legal Intern at the International Criminal Tribunal for Rwanda,” Aug. 27, 2007, <http://old2.law.utah.edu/NEWS/displayArticle.asp?newsID=34>.

⁹⁴ National Unity and Reconciliation Commission, <http://www.nurc.gov.rw/index.php?MisViv>.

⁹⁵ Sarel Kandell Kromer, “The Rwandan Reconciliation,” Wash. Post, Oct 15, 2005, at B2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/15/AR2005101500108.html>.

⁹⁶ Interview with Michael Kalisa (Oct. 10, 2007).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Film: [Beyond Justice: A Media Case Documentary](#)

any jurisdictional challenges like the defendants at Nuremburg did; nor do I argue that the tribunal lacks the authority to try individuals under international law for genocide or war crimes. Instead, my argument is that the tribunal appears to be created to convict rather than to try.

I return to the question posed above: is the tribunal successful? One can answer this question differently depending on one's perspective. Returning to Michael Kalisa's comments, the system could be considered a success from a security standpoint by removing an undesirable element from society.¹⁰⁰ From a cultural perspective, it is difficult for laypeople to understand why there are still so many alleged genocidaires who are still on trial now over thirteen years after the killings took place.¹⁰¹ But more importantly, the tribunal does not seem to serve any legitimate goals (such as truth, justice, or reconciliation).

Because the tribunal is convicting most of the accuseds based on broad theories of responsibility, the tribunal seems to be administering victors' justice. This may be an accurate term for the trials in the Rwandan national courts or the gacaca courts, because the invading RPF won the war and controlled Rwanda when the category system was instituted. However, the tribunal doesn't fit the typical mold of victor's justice, because it is not pandering to the interests of a conquering nation. Instead, it seems that the international community was attempting to clear its conscience when drafting the tribunal's statute. Under these circumstances, rules and theories of responsibility were created, which allow the victims to convict virtually anyone they please, such as Joseph Nzirorera. Therefore, instead of victor's justice, I would call this victims' justice. It is my opinion that while the international community needed to respond to the atrocities of the Rwandan genocide but the response turned out to be disproportionate and ill-suited. I hope that the new set of ad-hoc tribunals and the permanent International Criminal Court will learn from the mistakes of the ICTR and avoid the pitfalls of victims' justice.

¹⁰⁰ Interview with Michael Kalisa (Oct. 10, 2007).

¹⁰¹ *Id.*