The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda

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I. INTRODUCTION

In countries emerging from periods of great political turmoil, particularly turmoil associated with gross violations of human rights, the question of how to deal with the past has been a crucial part of the transformation process. The issue is: how does a society return to any sort of normality when two neighbors living side by side are, respectively, victim and perpetrator of heinous crimes? Perhaps nowhere else in the world is this question more vital or more difficult than in Rwanda, the small, poor, rural, inland African state that became the site of one of the bloodiest genocides ever known.

As many as a million people died in the Rwandan genocide of 1994, and many others have been killed subsequently, largely because the tragedy

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2. See Rwanda: Crying out for Justice, AMNESTY INT’L, Apr. 1995, at 1. Reports differ significantly as to the actual number of people killed. Estimates range from 500,000 to one million. Most media reports estimate the number to be closer to 500,000 while international NGOs that have been to Rwanda to investigate estimate the number to be closer to one million. See id.; see also Alan Zarembo, Judgment Day: In Rwanda,
remains unresolved in terms of both truth and justice. The victims of the genocide were mostly Tutsis, although Hutus who had demonstrated support for governmental power sharing between Tutsis and Hutus were also targeted.

The genocide followed a civil war in which the Rwandan Patriotic Front (RPF) attempted to seize power from the ruling Hutu party, the Mouvement Revolutionnaire National pour le Developpement (MRND), led by General Juvenal Habyarimana. The fighting, which began in October

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5. The term civil war could be controversial as the RPF considers the conflict of 1990 to 1994 as one of “liberation” against a genocidal regime and therefore “war” might suggest legality or moral equality.
1990, ended with the signing of a peace agreement on 4 August 1993. However, extremist Hutus saw the Accord as a threat to their power. Therefore, while there were many other factors behind the 1994 genocide, it was then that planning for it probably began. The genocide occurred from April to July 1994 and ended when RPF forces seized control from the ruling regime. Millions of Hutus, fearing retribution, then fled to neighboring countries.

Violence has not ceased in Rwanda, however, as both sides engage in acts of retribution. There are victims and perpetrators of abuses on both sides and there is no outlet for the anger and pain behind the abuse. Rwanda’s criminal justice system is wholly inadequate to handle the large number of detainees, and the international tribunal has also not been effective. The need to establish a process that will allow healing to begin is imperative and urgent. The cycle of killing must end.

A problem surrounding the establishment of a truth and reconciliation commission in Rwanda is the instability and ongoing strife in the region. It could be argued that with violence in Rwanda, Burundi, and Congo, the time is not ripe to undertake such an exercise. However, if one followed this line of thinking it may be that the time is never ripe, or when it is so, much more damage has been done so that the task will be even more difficult.

Broadly speaking, there are three types of political transition: overthrow, reform, and compromise. Being overthrown is the fate of a regime that has refused to reform: opposition forces become stronger and finally topple the old order. This is what happened in Rwanda, when as a result of the genocide and the buildup of opposition forces, the RPF in neighboring countries invaded and toppled the government.

In contrast, when reform is undertaken, the old government plays a critical role in the shift to democracy because, at least initially, the opposition is weak. In countries where change is the result of compromise

7. It is alleged by some in Rwanda that the genocide had been planned much longer ago and that genocide was implicit in Government policy since 1973 or even 1959.
8. It is argued by some that the regime toppled by the RPF was different from the Habyarimana Government in terms of personnel and organization.
11. See TRANSITIONS FROM AUTHORITARIAN RULE: PROSPECTS FOR DEMOCRACY (Guillermo O’Donnell et al., eds., 1986).
13. Examples include East Germany, Iran, and the Philippines.
14. Country examples include Chile, Hungary, and Spain.
the existing regime and opposing forces are equally matched and cannot make the transition to democracy without each other. Such was the case in South Africa.15

Obviously, the nature of the transition plays a major role in determining how human rights violations of the past will be dealt with. The strength of the old regime in the new order is critical in determining the ability of the new government to deal with perpetrators of human rights violations committed during the previous order.16 Various countries have established processes outside of the criminal justice system for this purpose, one being the establishment of a truth and reconciliation commission.17

A truth and reconciliation commission creates a record of human rights abuses that is as complete as possible, including the nature and extent of the crimes and a full record of the names and fates of the victims. Some of these commissions have covered very short periods while others have covered much longer but still well-defined periods. A truth and reconciliation commission can be set up in a variety of ways. Tailoring the commission’s mandate and powers to both the country’s current situation as well as its history provides the best chance for success.18

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18. The high-profile investigation by the Organization of African Unity into the causes of the 1994 genocide in Rwanda and its effects on Africa's Great Lakes Region, announced at the beginning of June 1998, could also assist in the healing process in Rwanda as well as in other countries of the region. The Secretary-General of the OAU said that the
This article advocates the establishment of a commission in Rwanda as a means of beginning reconciliation and rebuilding a unified country.\textsuperscript{19} Although Rwanda presents many daunting challenges for a truth and reconciliation commission, or any other process that would promote unification and tolerance,\textsuperscript{20} it is appropriate for a number of reasons.

Firstly, the ongoing animosity and retributive violence between the current and former governments and their respective followers is evidence that the status quo is not working. If a new method for addressing the problems is not implemented, the violence will continue.

Secondly, the Rwandan Government is not equipped to channel all responsible parties through the traditional legal system.\textsuperscript{21} Thus far, attempts to do so have led to increased human rights violations, anger, and distrust of the system among both victims and accused.\textsuperscript{22} Even if the system could accommodate the tremendous number of accused, it does not provide victims with a means of telling their stories and venting their hostilities in a controlled and nonviolent manner. They are not participants in the process and therefore do not receive the kind of psychological benefits achieved by a truth and reconciliation commission.

\textsuperscript{19} UN High Commissioner for Human Rights Mary Robinson in December 1997 on a visit to Rwanda noted, “It is evident that the present human rights situation is bleak. . . . There appears to be an absence of a committed policy of reconciliation.” Deadlocked Talks End UN Role in Rwanda, \textit{Electronic Mail} & \textit{Guardian} (21 July 1998) <http://www.mg.co.za/mg/news/98jul2/2l.html>. Similarly, Archbishop Desmond Tutu, Chairperson of the South African Truth and Reconciliation Commission has said:

We must break the spiral of reprisal and counter-reprisal. . . . I said to them in Kigali “unless you move beyond justice in the form of a tribunal, there is no hope for Rwanda.” Confession, forgiveness and reconciliation in the lives of nations are not just airy-fairy religious and spiritual things, nebulous and unrealistic. They are the stuff of practical politics.

\textsuperscript{20} \textit{See generally} Schabas, \textit{supra} note 6, at 559 (noting that “Rwanda has rejected . . . a truth commission”). The idea of having a truth commission has, however, been explored by the Rwandan Government. Thus, a large delegation of the South African Truth and Reconciliation Commission went to Rwanda in October 1996 and met with government officials. Rwandan officials then went to South Africa to visit the Truth and Reconciliation Commission in January 1997. However, the Rwandans commented that reconciliation would be nice but that they preferred justice, and reconciliation could wait. The Minister of Transport also commented that “we don’t need truth we know who did what.” David Goodman, \textit{Justice Drowns in Political Quagmire}, \textit{Electronic Mail} & \textit{Guardian} (31 Jan. 1997) <http://web.sn.apc.org/wmail/issues/970131>.


\textsuperscript{22} \textit{See} Reis, \textit{supra} note 21.
Finally, a properly constituted commission would generate public awareness of what really happened. This is necessary to counter the extensive propaganda being circulated by the displaced Hutu leadership that denies the genocide and places the blame for all past violence on the genocide victims.\(^{23}\) This has led to further anger and resentment on the part of the victims and to an entrenched belief among the perpetrators that they truly were acting in self-defense. This belief is facilitated by the current government's oppressive tactics, which confirm the perceptions of perpetrators who believe that they were not the instigators of the violence.

Before embarking on a discussion of whether and how a truth and reconciliation commission might be established, it is necessary to attempt to understand the factors that contributed to the genocide in Rwanda.

\section*{II. PRE-GENOCIDE HISTORY}

\subsection*{A. Setting the Scene}

Conflict has existed between Hutus and Tutsis for many years,\(^{24}\) although the notion of "ethnic" differences between the two groups can be seen as a construction of the Germans who first colonized Rwanda. This distinction was entrenched by the Belgians who followed the Germans. It was Belgian colonizers who, in the 1930s, conducted a census, formally classified Rwandans as Tutsi, Hutu, or Twa,\(^{25}\) and issued ethnic identity cards to all

\begin{enumerate}
\item See Rwanda: A New Catastrophe? Increased International Efforts Required to Punish Genocide and Prevent Further Bloodshed, \textit{Hum. RTS. Watch Afr.}, Nov. 1994, at 3-4 [hereinafter A New Catastrophe?].
\item The view held amongst the Hutu is that there was no genocide but rather killings by both sides in the context of a war and that there was no extermination of the Tutsis by the Hutus.
\item Prior to colonization, Tutsi ("cattle-herders") were understood by Hutu to be descendants of pastoral people who emigrated to the northern region of Rwanda in the fifteenth century and subjugated the more numerous Hutu farmers ("cultivators"). Thus, economics rather than ethnicity originally distinguished Hutu from Tutsi. However, assimilation did occur between the two groups. See, e.g., Robert M. Press, \textit{Hutus, Tutsis Try Reconciliation, Easing Rwanda’s Ethnic Conflict, Peace Pact Allows for Greater Democracy, Refugees to Return Home, Christian Sci. Monitor}, 31 Aug. 1993, at 7 (dealing with negotiations between Rwandan exiles and the government of Rwanda to bring peace to the area); Alain Destexhe, \textit{The Third Genocide (Rwanda)}, \textit{Foreign Pol’y}, 22 Dec. 1994, at 3, \textit{available in Westlaw}, 1994 WL 13288264 (examining the events in Rwanda that led to the 1994 genocide). \textit{See also Rwanda: Talking Peace and Waging War: Human Rights Since the October 1990 Invasion, Afr. Watch}, 17 Feb. 1992, at 1 [hereinafter Talking Peace] (examining the different strategies used by the Rwandese government); \textit{African Rights, Rwanda: Death, Despair and Defiance} (rev. ed. 1995); Alison des Forges, \textit{Kings Without Crowns: The White Fathers, in Eastern African History} (Daniel F. McCall et al. eds., 1969).
\item See generally Destexhe, supra note 24, at 2–3.
\end{enumerate}
Rwandans noting their "racial identity." These cards were used during the 1994 genocide to identify Tutsi individuals to be murdered.

The "racial" distinction was based on height and skin-color differences and may have been an attempt to identify and give preference to those Rwandans perceived as having a "more European" look. The shorter, darker Hutu were classified as Bantu, analogous to the "serfs" of medieval European feudalism. The lighter-skinned Tutsis were earmarked for leadership positions because the Belgians ascribed to them a greater intelligence and ability for leadership.

Under Belgian rule, the Tutsis were awarded educational, social, and economic advantages while the Hutus were denied privileges and relegated to peasant status. The Belgians abandoned their support of the Tutsis when Tutsis began to demand independence, transferring their favor to a Hutu political party, Parmehutu, which subsequently overthrew the Tutsi monarchy in 1959. This revolution liberated the Hutu and began a process whereby Hutus excluded Tutsis from areas of political, social, and educational life, limiting their life possibilities. Partially facilitating the revolution was the demographic distribution of Hutu (85 percent), Tutsi (14 percent), and Twa (1 percent).

The experience of ethnic oppression, sixty years of colonial rule, Tutsi rule, and previous massacres perpetrated against them in Rwanda and in neighboring Burundi have embittered the Hutu group. Du Preez describes the genocide against the Tutsi in Rwanda during 1963 and 1964 as a vengeful response to the political, social, and cultural domination by Tutsis

26. See African Rights, supra note 24, at 6, 47.
27. See, e.g., Destexhe, supra note 24, at 4.
28. See id. at 3.
29. See id.
30. The Hamitic tribes, into which the Belgians placed the Tutsis, ruled Rwanda via a monarchy and system of chiefs that can be compared to the lords of medieval European feudalism. See id.
31. See Talking Peace, supra note 24, at 5. Rwanda, a German colony from 1890 to 1916, was mandated (along with Burundi) to Belgium by the League of Nations after World War I. Under Belgian rule, the Tutsi held all of the nation's 43 chieftoms, 549 out of 559 subchiefdoms, and more than 80 percent of government positions in fields such as the judiciary, agriculture, and veterinary sciences. See Catherine L. Watson, Exile from Rwanda: Background to an Invasion 4 (1991).
32. See Brief History, in Rwanda Embassy website (visited 1 Apr. 1999) <http://www.rwandemb.org/info/geninfo.htm#brie>.
33. See Talking Peace, supra note 24, at 5–6.
34. See id.
35. See Alexander De Waal, The Genocidal State: Hutu Extremism and the Origins of the "Final Solution" in Rwanda, N.Y. Times Literary Supp., 1 July 1994, at 3; Talking Peace, supra note 24, at 4. The Twa are descendants of hunters and gatherers and potters and have historically been discriminated against by both of the other groups. See id.
that preceded the 1959 Hutu revolution. Newbury understands Hutu identity as created out of Hutu peasants’ common experience of oppression during the colonial era. Additionally, some see the genocide of 1994 as part of a struggle to recreate Hutu identity, giving Hutu peasants, who were previously excluded from power and privilege, a common experience of being powerful. In other words, a history of repression may help to explain why many Hutu still refuse to see the mass killings of Tutsis in 1994 as a genocide, perceiving the events either as part of an ongoing civil war or as self-defense.

In summary, both the previous massacres that have plagued Rwanda and neighboring Burundi (where Tutsis are still dominant) and the 1994 Rwandan genocide reflect the retributive nature of ethnic strife between Hutu and Tutsi.

B. Factors Leading to the 1994 Genocide

1. Situational Factors

Rwanda has been polarized by a history of ethnic tension. In addition, a strong Hutu ideology and efficient anti-Tutsi propaganda have exacerbated the ethnic hatred between the Hutu and the Tutsi. The Hutu government capitalized on Hutu peasant fears by scapegoating the Tutsi minority.

36. In 1963, the minority Tutsi were attacked by the majority Hutu. See Peter du Preez, Genocide: The Psychology of Mass Murder 6 (1994).
38. See generally African Rights, supra note 24.
39. See id. at 1.
40. The Hutu racial ideology identifies the Tutsi as foreigners in Rwanda and the Hutu as the original inhabiting race. See The Hutu Ten Commandments, reprinted in African Rights, supra note 24, at 42–43.
41. Anti-Tutsi propaganda was advanced in 1993 when government supporters set up the Radio des Mille Collines, a private radio station devoted to anti-Tutsi propaganda. This radio campaign was especially significant because the press in Rwanda is relatively limited and the populace relies heavily on local radio for information. See Destexhe, supra note 24, at 4. Karamira, the man who broadcast much of the propaganda and hate messages, was recently executed for his role in the 1994 genocide. See James C. McKinley, Firing Squads Execute 22 Convicted of Genocide in Rwanda, N.Y. Times News Serv., 25 Apr. 1998, at A1.
42. See Mass Murder, supra note 4, at 3, 11–13; Michael G. Karnavas, Rwanda’s Quest For Justice: National and International Efforts and Challenges, Champion, 21 May 1997, at 16, 17 (quoting Agnes Ntamabyaririo, Minister of Justice, in July 1994, as exhorting Hutus to kill: “When you begin extermination, no one, nothing, must be forgiven. But here, you have merely contented yourselves with killing a few old women.”).
through propaganda designed to incite hatred against them. This involved spreading fear by means of rumors, threats, and lies, including the claim that the RPF was planning an invasion from Burundi and was plotting to murder the Hutu president.43

Economics and scarce resources also played a part in creating a situation ripe for strife. Prior to April 1994, Rwanda was experiencing desperate land pressure.44 The landlocked, overpopulated country could not fairly allocate its land resources to its inhabitants,45 and population density placed chronic pressure on arable land.46 Moreover, a collapse in the international coffee price crippled many small landholders47 and cooperatives involved in producing coffee, one of the country’s principal exports48 and once a booming industry.

On the political level, life in Rwanda was endlessly tense. The situation of low-level civil war existing prior to the genocide placed the Rwandan Patriotic Front at the heart of the extremist Hutu fear of the Tutsi.49 The RPF view was that the ethnic labels of Hutu and Tutsi were colonial constructions that should be discarded: Tutsi and Hutu were in reality one people, speaking the same language and sharing the same physical appearance, political institutions, and territory.50

The RPF gained increasing international support during the 1990s, and President Juvenal Habyarimana, bowing to international pressure, had begun negotiations aimed at including the Tutsi in the government and other institutions. Thus, the prospect of multiparty elections and power sharing

43. See Mass Murder, supra note 4, at 11–13.
44. According to Prunier, “at least part of the reason why it was carried out so thoroughly by the ordinary rank-and-file peasants . . . was the feeling that there were too many people on too little land, and that with a few less there would be more for the survivors.” GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (1995).
45. See generally ALAIN DEBESTHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY (1995) (examining the history and background to violence in Rwanda).
46. Rwanda has a total area of 26,340 sq. km. with 24,950 sq. km. of land and 1390 sq. km. of water. Its land boundaries are 893 km., and it borders on Burundi, Democratic Republic of the Congo, Tanzania, and Uganda. Thirty-five percent of the land is arable. Its population was estimated in July 1997 to be 7,737,537 with a population growth rate of 8.24 percent. Agriculture dominates with coffee and tea accounting for 80 percent to 90 percent of exports. See CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 393–94 (1997).
47. See AFRICAN RIGHTS, supra note 24, at 20.
49. The RPF is a political group composed of children of Tutsi Rwandese exiled to Uganda by the revolting Hutu after the 1959 Hutu revolution (1958–1963). See, e.g., Destexhe, supra note 24, at 4.
50. See generally Talking Peace, supra note 24, at 5 (examining events from 1990, when a civil war raged in Rwanda, and indicating how Hutus tried to emphasize difference and Tutsis wished to remove labels).
was on the political agenda, creating anxiety for extremist Hutus within the army and the government.\footnote{See De Waal, supra note 35, at 3.} It was this clique of extremist Hutus who sought to derail the negotiation process in order to retain their commanding positions and financial privileges. They began with the assassination of a president and followed up with a massacre.

2. Psychological Factors

Together with the political and socioeconomic situational problems prevailing in Rwanda, psychological factors also played a role in creating the potential for brutality. Simmering hatred and anger were ripe for activation, requiring only the trigger of political manipulation within the context of perceived threats to the psychological self-conception of individuals and groups.\footnote{See generally RITA L. ATKINSON ET AL., INTRODUCTION TO PSYCHOLOGY (10th ed. 1990) (examining psychological processes as well as various motivating factors and subjective influences that affect behavior).} In other words, situational stresses such as poverty, political conflict, decline in power, and threats to prestige, combined with an explosive emotional brew deliberately stirred by political manipulation, resulted in a tendency in individuals with particular dispositions to scapegoat and persecute those perceived as “other.”\footnote{See Ervin Staub, Genocide and Mass Killing: Cultural-Societal and Psychological Origins, in SOCIETAL PSYCHOLOGY 230 (Hilde T. Himmelweit & George Gaskell eds., 1990).}

Thus the Hutu massacre of the Tutsi may be understood as an extreme form of scapegoating, whereby the dominant group (or individual) shores up its threatened self-concept by devaluing the outsider or subgroup. The situation of the Tutsi minority had all the characteristics of potential for scapegoating. Not only was there a history of extreme ethnic conflict but also the very existence of the RPF was a threat to the Hutu ideology. Moreover, Tutsis historically had enjoyed wealth and positions that leaders of the dominant Hutu group would have liked to redistribute among the Hutu or enjoy personally.

As a result of all these factors, a genocide occurred in Rwanda. The Tutsi were systematically killed in order to destroy the group to which they belonged.\footnote{See DU PREEZ, supra note 36, at 17.}
III. INVESTIGATIONS OF HUMAN RIGHTS ABUSES IN RWANDA

A. Prior to 1994

A truth commission was at work in Rwanda in 1993, confirming the severity of human rights abuses committed from 1990 to 1993.\textsuperscript{56} The Commission was set up at the request of Rwandan human rights organizations and was created, funded, and financed by international nongovernmental organizations (NGOs).\textsuperscript{57} Africa Watch, the \textit{Federation Internationale des Droits de l'Homme}, the \textit{Union Interafricaine des Droits de l'Homme et des Peuples}, and the \textit{Centre International des Droits de la Personne et du Developpement Democratique}.\textsuperscript{58}

Publicly welcomed by the President of Rwanda, the Commission was established following the signing of the Arusha Accord, which included an agreement between the government and the opposition to create a commission of inquiry into past atrocities.\textsuperscript{59}

Thus the International Commission of Investigation on Human Rights Violations in Rwanda Since 1 October 1990 was formed, with a mandate to

\begin{itemize}
\item \textsuperscript{57} \textit{SeePriscilla B. Hayner, Fifteen Truth Commissions—1974 to 1994: A Comparative Study}, 16 \textit{Hum. Rts. Q.} 597, 629 (1994); \textit{see alsoMichael Hamlyn, Civil Society Holds the Key to Resolving African Conflicts, Track Two, Sept. 1996.}
\item \textsuperscript{58} \textit{SeeHayner, supra note 57, at 630 & n.78}. The NGOs were based in the United States, Canada, France, and Burkina Faso. \textit{See id.}
cover the civil war period. The NGOs appointed ten Commissioners, representing eight nationalities and including a judge, several lawyers, staff members of human rights organizations, and a forensic specialist. Some were already knowledgeable about Rwanda whereas others had no previous experience with Africa at all. In addition, during the first week of the Commission's work, four speleologists (cave experts) were called in to assist in the investigation of the mass graves that were found in caves in Rwanda.

Rwanda's NGOs helped to find financial support for the Commission's work from a variety of European organizations. The total cost of the commission was about $65,000. Although the Rwandan NGOs also helped with logistical coordination in the country, they played no part in the work of the Commission itself.

When the Commission arrived in Rwanda in January 1993, it was formally welcomed by the Rwandan president, although the government was less than pleased by its presence. During the two days immediately preceding the Commission's arrival in Rwanda five people were attacked, all of whom were expected to give evidence to the Commission. On the day the Commission left the country, government forces began killing, and between 300 and 500 people are estimated to have died in the following days.

Thus the effectiveness of the first truth commission was severely undermined. Not only was its legitimacy and potential to contribute to reconciliation subverted by the ongoing violence, but the killing of potential witnesses robbed the process of the element of safety necessary to promote truth-telling, reconciliation, and healing. Support from the ruling government is therefore necessary if the goals of a truth and reconciliation commission are to be realized and participants in the process, both victims and accused, are to be protected.

Commission of Investigation on Human Rights Violations in Rwanda Since 1 October 1990, was published in 1993 by Africa Watch in English and French. The response to the report was enthusiastic in both Rwanda and Europe, with copies quickly being sold out. It is thought that most people in Rwanda were aware of the report. Even in the absence of the Government's support and despite other obstacles, the Commission's work served an important function in promoting international awareness of the Rwandan crisis. The impact of the report was most notable in France and Belgium where government policy towards Rwanda changed as a result.

However, the fact that the report concentrated on human rights abuses committed by the government can be seen as a fundamental weakness. One of the consequences was that the Rwandan Government launched a publicity campaign aimed at making public the atrocities committed by the rebels. The rebels then asked the Commission to return to examine these charges. The Commissioners were planning to do so when the genocide of 1994 began.

It would therefore be important for a truth and reconciliation commission to avoid limiting its investigation to abuses committed by only one group. All violations should be subject to the inquiry.

Additionally, as will be discussed later, a new commission should not confine its investigation to the few months of the actual genocide in 1994. Events leading up to the genocide as well as subsequent actions should be included. Expanding the truth and reconciliation commission's investigation in this way would give it the balance necessary for legitimacy and might encourage greater participation and cooperation by all parties as the whole truth would be more likely to surface and be understood.

IV. THE 1994 GENOCIDE

Rwanda had thus been experiencing political crisis for many years. The RPF was threatening the power base of the Hutu majority through its pressure for negotiation and, as a result of the Truth and Reconciliation Commission report, had the sympathy of the international community. The RPF goal of a negotiated settlement involving power sharing began to materialize with

73. See Hayner, supra note 57, at 631 & n.81.
74. See id.
75. See id.
76. See id.
77. See id. at 632.
78. See id.
the Arusha Accords. Hence, the 1994 genocide may be seen as a pragmatic attempt by the Hutu majority to secure their positions of power in the political institutions of Rwanda.\(^\text{80}\)

On 6 April 1994, Rwandan President Juvenal Habyarimana was killed in a suspicious plane crash.\(^\text{81}\) Within hours of the crash, the killing began.\(^\text{82}\) Hutu militia set up roadblocks where the identity cards of all passers-by were checked.\(^\text{83}\) All those identified as Tutsis were killed.\(^\text{84}\)

Recent reports confirm that not only was the massacre preplanned and well organized, but also that the United Nations had been warned of an imminent genocide.\(^\text{85}\) Evidence submitted to the United Nations included photographs of stockpiled arms, hit lists, and militia training videos.\(^\text{86}\) UN Secretary-General Kofi Annan has admitted that the major powers knew of the planned massacre but chose to do nothing.\(^\text{87}\)

It has emerged that some individuals were responsible for the organization of the massacre and others for the actual killings.\(^\text{88}\) De Waal and Omaar suggest that the killings were strategically organized in advance and that the orders that began the slaughter were passed down from the highest levels of the administrative and military hierarchy.\(^\text{89}\) Senior civil administrators, senior army officers, and members of the self-appointed interim government


\(^{81}\) See Genocide in Rwanda: April-May 1994, HUM. RTS. WATCH/Afr., May 1994, at 2 [hereinafter Genocide in Rwanda]. Many believe that the plane was shot down by a rocket, which may have been fired by the Hutu, although the responsible parties have never been determined. See, e.g., Richard Dowden, Rwanda’s Cruellest Month, INDEPENDENT (London), 26 Dec. 1994, at 9.

\(^{82}\) See Genocide in Rwanda, supra note 81, at 2.

\(^{83}\) See id.; DETERM., supra note 45, at 4–5.


\(^{85}\) See Report Says U.N. Took No Action, supra note 85. Indeed, Human Rights Watch has noted that

[a]s tensions grew throughout February and March, U.N. personnel and the diplomatic community generally were well aware of extremely worrying developments indicating that hardliners in the government intended to overturn the Arusha Accords. They were frequently warned by responsible local persons, including human rights activists and political leaders, that preparations were underway for a campaign to wipe out those who opposed the Habyarimana regime.

\(^{86}\) See James C. McKinley, Jr., Ugly Reality in Rwanda: Denial of Ethnic Slaughter, N.Y. TIMES, 10 May 1998, at 4. Not surprisingly, it was the United States who, in the UN Security Council, “put up the most resistance to getting involved in Rwanda in 1994.” Id. (quoting an aide to Secretary-General Annan).

\(^{87}\) See Report Says U.N. Took No Action, supra note 85, at A5.

\(^{88}\) See AFRICAN RIGHTS, supra note 24, at 45; see also Schabas, supra note 6, at 524.
organized the killings.90 The Presidential Guard isolated and killed political dissidents and opposition figures, including the Prime Minister.91 At the intermediate level, army officers, local administrators, professionals, businessmen, soldiers, and gendarmes were crucial to the organization of the killings.92 The Interahamwe (those with a common goal) were sent to rural areas to force others to kill.93 They mobilized militiamen, one from every ten households, so that every Tutsi family could be identified by someone who knew them personally.94 The Interahamwe killings were disguised by the authorities as a duty of patriotic Hutu in the context of civil war. The Impuzamugambi (those with the same goal) murdered people as well. Many ordinary people also joined in the killings.95

De Waal and Omaar suggest that the motives for killing included greed, fear of pressure from above, and coercion, and that the aim of the organizers of the genocide was for “the entire Hutu populace to participate in the killing. That way, the blood of the genocide would stain everybody. There could be no going back for the Hutu population; Rwanda would become a community of killers.”96

V. AFTER THE GENOCIDE

A. Continuing Violence

Here in this damned country, we have no plans. We breathe a sigh of relief when 24 hours go by then we worry about the next 24 hours. It is like a 24-hour contract.97

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90. See generally AFRICAN RIGHTS, supra note 24, at 100–76.
91. See id. at 177.
92. See id. at 117–20.
93. The Interahamwe and the Impuzamugambi were originally organized as youth wings of the Hutu political parties and became militia groups trained by the Presidential Guard and other members of the Rwandan army for the specific purpose of terrorizing Tutsi citizens. See Destexhe, supra note 24, at 4. The Interahamwe were associated with the MRND (Mouvement Republicain National pour le Developpement et la Democratie) while the Impuzamugambi were associated with the CDR (Coalition pour la Defense de la Republique), an extremist party in alliance with the MRND. See Genocide in Rwanda, supra note 81, at 4–6.
94. See De Waal, supra note 35, at 6.
95. See id.
96. It is estimated that more than 100,000 Hutus joined in the killing of more than half a million Tutsis. See Michael P. Scharf, The Case for a Permanent International Truth Commission, 7 DUKE J. COMP. & INT’L L. 375, 381 (1997).
97. AFRICAN RIGHTS, supra note 24, at xx.
Violence is ongoing in Rwanda. The cycle of violence in Rwanda did not end when the RPF took control in July 1994. A new spate of killings began in November 1996 after the compelled repatriation of some 600,000 refugees from the Democratic Republic of Congo. Former members of the Forces Armées Rwandaises (FAR), the Rwandese armed forces under the Hutu government, and former Interahamwe have returned and have attacked transportation, civilians, and soldiers. Strikes by these ex-FAR and Interahamwe militias increased towards the end of 1996. Families have been targeted and killed, and places of education have been attacked.

In response, the RPF carries out ruthless counterinsurgency operations in which civilians are killed. Consequently, highly educated and other Hutu have vanished into the hills. Further, Hutu refugees who returned were identified by genocide survivors and murdered. Additionally, people who participated in the genocide fear being identified and killed possible witnesses. Thus, relations between the returnees and the regime are in bad shape. Many returnees deny the genocide, saying that what occurred was “war.”

Indeed, the Hutu have been described as “sullen, resentful and unrepentant,” and the present use of repression by the government causes them “to legitimate their recent own genocidal practice which they both deny and justify at the same time.” Prunier notes that this makes it difficult for the new government to rule except by repressive means. It also makes national reconciliation very unlikely in the foreseeable future.

Consequently, Rwandans are “living in a state of fear, knowing that

101. See Prunier, supra note 99, at 1; see also Prepared Statement of Kathi Austin, supra note 100 (explaining how the supply of arms from other countries contributed to the genocide, is supporting the fighting, and is being ignored by the United States and other nations).
102. See Silence, supra note 98, at 11.
103. See id.
104. See Prunier, supra note 99, at 3.
106. Alan Zarembo, Fear and Loathing Still Epidemic Among Rwanda’s Hutu Exiles, San Francisco Chron., 17 July 1995, at A3 (quoting a Hutu refugee as remarking: “It was not genocide. . . . It was self-defense.”).
108. Id.
109. Id.
whatever their ethnic origin or their perceived affiliation, they may become targets of arbitrary violence by one side or the other. Most are too afraid to speak about the situation for fear of being killed." On both sides there is a strong atmosphere of retribution, which may make anything other than full criminal responsibility unpalatable to the people. This atmosphere both presents one of the greatest challenges to the establishment of a truth and reconciliation commission and demonstrates how urgently it is needed. The fear on both sides may make it difficult to encourage full participation by all victims and accused. Yet, without some process for coming forward in a forum that guarantees people safety and an opportunity to tell their stories, explaining the circumstances that led to their participation in abuse and/or victimization, there appears to be little hope for peaceful coexistence among the people of Rwanda.

Even after the genocide, propaganda projects attempt to ensure that Hutus believe that they were the victims of Tutsi attempts to wipe them out. The success of this propaganda is reflected in interviews with Hutu individuals who allege that the massacre was not genocide but rather self-defense based on years of Tutsi violence against the Hutu. Former Minister of Justice Agnes Ntamabalyiro is one of the Hutu officials who has been spreading such propaganda.

110. SILENCE, supra note 98, at 3.
111. See McKinley, supra note 87.
113. See id. This view is regularly propagated. Hutu rebels have begun publishing a newspaper attempting to vindicate the 1994 genocide as a defensive measure. Called Umucunguzi, or Saviour, it is predominantly in the Kinyarwanda language, although some less militant articles written in French also appear. In the May 1998 edition, the fourth published, strongly racist language is used in the text and cartoons, and the Rwandan Patriotic Army is depicted as “an occupation army” raping women as well as decapitating children with machetes and putting their heads in sacks marked “USAid.” Rwandan Hutu Rebels Speak Out, ELECTRONIC MAIL & GUARDIAN (2 June 1998) <http://www.mg.co.za/mg/za/archive/98jun/02jun-news.html#hutu>. These statements and sentiments continue and are reflected in events such as a radio station broadcast in Congo in August 1998 that commented, “People must bring a machete, a spear, an arrow, a hoe, spades, rakes, nails, truncheons, electric irons, barbed wire, stones and the like in order, dear listeners, to kill the Rwandan Tutsis.” Chris McGreal, Why Threatened Rwanda Turned on Kabila, ELECTRONIC MAIL & GUARDIAN (20 Aug. 1998) <http://www.mg.co.za/mg/news/98aug2/20aug-congo_rwanda.html>.
114. See A New Catastrophe?, supra note 23, at 3–4. This view is regularly propagated. A public instance of this was before the International Criminal Tribunal for Rwanda sitting in Arusha, Tanzania in October 1996. Belgian defense lawyer Luc De Temmerman, in the trial of Georges Rutaganda, the vice president of the Interahamwe militia argued that “[i]t is not Hutus who are guilty of this so-called genocide. We are convinced there was no genocide. It was a situation of mass killings in a state of war where everyone was killing their enemies. . . . There are a million people dead, but who are they? They are 800,000 Hutus and 200,000 Tutsis. Everyone was killing but the real victims are the Hutus. So they’ve got this so-called genocide all wrong.

Making the goal of truth telling and reconciliation even more difficult are the persistent efforts of the Hutu leaders of the genocide to maintain leverage against the current government and to rouse the sympathy of international bodies.\textsuperscript{115} Where it seems necessary to these aims, they threaten and abuse the very Hutus who followed them and assisted them in the genocide.\textsuperscript{116} On the other side, the Government made counterinsurgency efforts and targeted and killed some former public servants, intellectuals, and former FAR officers.\textsuperscript{117} Many people have "disappeared" in Rwanda, and fighting between the Rwandese Patriotic Army (RPA), the mostly Tutsi army that replaced the FAR when the RPF took power,\textsuperscript{118} and opposition groups has intensified so that parts of the country have at times become unreachable.\textsuperscript{119}

Thus, serious human rights abuses took place in Rwanda in 1996, including hundreds of killings by the RPA as well as by opponent groups.\textsuperscript{120} At the end of 1996, systematic killing of former FAR soldiers and members of their families began.\textsuperscript{121} The situation worsened in 1997. Amnesty International has reported that thousands of civilians have been killed during security force operations after attacks by opposition groups.\textsuperscript{122} The RPA has been responsible for most of the civilian deaths.\textsuperscript{123}

Because the RPA is an embodiment of the current ruling government, its involvement in such abuses will make it difficult to achieve public confidence in a truth and reconciliation commission unless the government is held accountable and makes a very pointed effort to establish its support for an unbiased investigation. Indeed, it was the involvement of government forces in abuses and the consequential lack of meaningful government support that created grave problems for the pre-1994 truth commission. A new commission would need to be very aware of such historical problems and to address this issue carefully, if it were to have any chance of being effective.

Therefore, if the Rwandan Government were willing to participate actively in a truth and reconciliation commission process and to accept responsibility for abuses committed by it, reconciliation could become a
realistic goal. Government willingness to “own up” would assist in legiti-
mizing the process and could have a very positive effect on the willingness
of other groups and individual citizens to participate honestly and fully in
truth and reconciliation commission investigations.

There is no doubt that some such process is critically needed. Conditions in the northwest of the country are described by some as “fully-
fledged war.”124 About 6000 people, many of whom were civilians, are
believed to have died in Rwanda between January and August 1997 alone.
The real figure is probably considerably higher.125

Thus, the violence on both sides is continuing with no end in sight. Hutu groups have been increasing terrorist attacks on civilians and the
mostly Tutsi army is countering with insurgency campaigns in which other
civilians are killed.126

B. Land

Another very serious problem both presently and for the future is that Hutus
for the most part have, since the genocide, been completely marginalized
both politically and economically.127 Since the 1994 genocide, conflict over

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124. Id. at 4.
125. See Questions of the Violation of Human Rights and Fundamental Freedoms in Any Part
of the World, with Particular Reference to Colonial and Other Dependent Countries and
Rights Field Office in Rwanda in 1997 recorded the murder of at least 5952 persons,
compared with 1575 reported killings in 1996). More than 2300 people were killed
between May and July 1997. See Rwanda: Massacres of Unarmed Civilians Escalate,
ANNEXY INT’L, Aug. 1997, at 4–6 (discussing violence levels); Question of the Violation
of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular
Reference to Colonial and Other Dependent Countries and Territories: Report on the
Situation of Human Rights in Rwanda Submitted by Mr. Rene Degni-Segui, Special
Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Resolution
Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial
and Other Dependent Countries and Territories: Report on the Situation of Human
Rights in Rwanda Submitted by Rene Degni-Segui, Special Rapporteur of the Commis-
Freedoms in Any Part of the World, with Particular Reference to Colonial and Other
Dependent Countries and Territories: Report on the Situation of Human Rights in
Rwanda Submitted by the Special Representative Mr. Michel Mousassali, Pursuant to
Resolution 1997/66, U.N. ESCOR, Comm’n on Hum. Rts., 54th Sess., Agenda Item 10,
126. See McKinley, supra note 87, at 4.
127. See SILENCE, supra note 98, at 21.
property has reemerged as a major source of tension in Rwanda. As Hutu refugees return, they find others on the land they used to occupy. Fear of being denounced as genocide perpetrators stops many from reclaiming their land.

About 700,000 Tutsis returned from exile after the new government came to power in Rwanda. The majority are educated, and many seized the town properties of Hutus who had fled, many of whom were not involved in the genocide. The present Tutsi occupiers claim that these structures are on land that was stolen from them by the Hutus between 1959 and 1964.

The Hutus who did not flee are working on the land, engaged in subsistence farming, so that the more urban, monied portion of the economy is almost totally dominated by the Tutsis. Thus, today, the politics that have resulted from the genocide and the coming to power of the former Tutsi exiles is that one socio-ethnic group is marginalized—a repeat of the colonial pattern that began this cycle of violence.

In 1996 all returnees were compelled to go on a six-month “re-education training” program. It has been reported that an identity card cannot be obtained without attendance at the program and that the card, in turn, is a prerequisite for employment and registration at schools and education colleges. In May 1997, the government sent a circular letter to all employers, forbidding the employment of returnees until “re-education training” had been completed. However, people are afraid to apply for the card as arrests on suspicion of having taken part in the genocide have followed applications for identity cards.

The Rwandan government has proposed a policy of recreating villages (habitats regroupés). This policy would see new villages being built for the homeless. While the policy is supposedly aimed at assisting all Rwandans, a fear exists that such new settlements would be inhabited mainly by Hutus. This could entrench their ghettoization, leading in turn to escalating ethnic tensions and rifts.

129. See id.
130. See id.
131. See id. at 7.
132. See id. at 8.
133. SILENCE, supra note 98, at 21.
134. See id.
135. Id. at 22.
136. See id.
137. See id. at 21.
138. See id.
C. Arrests and Prison Conditions

A critical issue facing Rwanda is the present state of the criminal justice system. This is of vital significance as it is the courts that are being used to deal with crimes committed during the genocide. However, because the system cannot cope with the number of arrested individuals, this endeavor has led to expanded human rights abuses with reports of maltreatment of prisoners. The International Committee of the Red Cross (ICRC) monitored conditions in 135 detention centers in Rwanda and reported that the number of inmates held produced a density of four persons per square meter of floor space in the open courtyards and six persons per square meter in the buildings surrounding the courtyard. Conditions were even worse at the temporary detention centers. Newspaper reports verify the extreme and inhumane conditions of the prisons and detention camps as well. Poor prison conditions have resulted in the death of hundreds of prisoners. Overcrowding, inadequate supplies of food and water, and disease are among the problems plaguing Rwandan prisons.

Many in prison say that they do not know why they are there. Some state that they have been detained because of their former jobs or jobs that relatives held. Assaults occur regularly at the time of arrest, and maltreatment by soldiers, gendarmes, and civilians, sometimes assisted by the security forces, occurs at communal detention centers (cachots communaux).

These factors have led to Hutu groups attacking prisons to release prisoners. In one such raid in December 1997 at Bulinga, thirty miles from Kigali, 600 prisoners were freed. Detainees have been killed by the security forces while allegedly trying to escape while others have been removed from the detention centers and killed. Public summary executions of

139. See id. at 3; U.S. Dep’t of State, supra note 122, at 279.
140. See Genocide in Rwanda, supra note 81, at 4.
141. See id. at 5.
143. See Silence, supra note 98, at 3; U.S. Dep’t of State, supra note 122, at 279 (estimating that 860 deaths occurred in 1997 in Rwandan prisons from “preventable disease and the debilitating effects of overcrowding”).
144. See Karnavas, supra note 42, at 16 (reporting that many of those being held suffer from AIDS, malaria, dysentery, respiratory infections, and tuberculosis).
146. See Silence, supra note 98, at 20.
147. See id. at 18.
148. See id. at 8; U.S. Dep’t of State, supra note 122, at 278 (stating that “[t]here are some indications that 88 prisoners whom the Ex-FAR unsuccessfully attempted to free from a
alleged murder suspects and journalists and others who have criticized governmental officials and security forces have occurred.\textsuperscript{149}

The need for a Rwandan truth and reconciliation commission is thus demonstrated by the fact that about 120,000 people accused of participating in the genocide are in prison. Some of them have been held for up to three years without trial.\textsuperscript{150} No judicial system anywhere in the world was designed to handle the stress presented by an attempt to prosecute more than 100,000 people accused of committing crimes. Rwanda's system in particular does not have the capability to handle these demands.\textsuperscript{151} Although new centers are being built to accommodate more detainees,\textsuperscript{152} the capacity of detention centers in Rwanda is only designed for a total of 17,000 detainees.\textsuperscript{153} Between May and July 1997, the number of prisoners in custody increased by more than 40,000. The current prison system is housing about 120,000 prisoners connected to the genocide, and these numbers are still rising.\textsuperscript{154} Another 37,500 detainees are being housed in communal cachots.\textsuperscript{155}

A process for dealing swiftly with these detainees is obviously necessary as the legal system and detention facilities are not equipped to handle the number of prisoners awaiting trial. Indeed, not dealing with the large number more quickly is serving only to create additional problems. There is
an urgent need for new processes to be instituted, including revision of the laws under which those accused of genocide are being tried.

D. Applicable Law

1. The Constitution and Arusha Accords

To understand Rwandan society and to fully appreciate how the legal system operates it is necessary to understand the constitutional history of Rwanda. It is also vital to understand the constitutional makeup of the country as well as the criminal laws that are on the statute books.

It is also necessary to examine some of the provisions of the various accords agreed to during the negotiations between the governing regime and the RPF before the genocide, as they contain provisions that envisage processes that will allow Rwandan society to heal. Various institutions are provided for to promote and protect human rights and encourage reconciliation. Thus, Rwandans have already agreed on some institutions and mechanisms to move the society forward in addition to any other process that is set up.

The Constitution of Rwanda in force during the 1980s and early 1990s was the 1978 Constitution that had come into force after being accepted in a supposedly popular referendum held on 17 December 1978. Eighty-nine percent of voters approved the new instrument, and, when elections took place on 24 December 1978, President Habyarimana, the sole candidate, received ninety-nine percent of the vote. The new Constitution replaced the National Assembly with a National Development Council (Conseil National de Développement). All other political structures were prohibited.

Twelve years later, when the Rwandan Patriotic Front (RPF) invaded Rwanda on 1 October 1990, the ensuing strife caused President Habyarimana to declare after six weeks that other political parties would be tolerated and that the endorsement of ethnic origin on Rwandan identity cards would be removed.

A new constitution was formally promulgated on 10 June 1991. This Constitution gave executive power to the president in collaboration with the prime minister, ministers, and secretaries of state. Legislative power was

157. See id.
158. See id. at 8.
159. See id. at 9.
160. See id. at 9.
placed in the hands of the National Assembly. The 1991 Constitution was later revised as a consequence of the Arusha Peace Agreement.\textsuperscript{161}

The Arusha Peace Agreement between the government of Rwanda and the RPF is made up of seven documents, which were negotiated between October 1990 and 4 August 1993.\textsuperscript{162} The agreement provided for transitional structures, including a Transitional National Assembly, a decrease in presidential powers, an increase in the prime minister’s power, and the strengthening of the Supreme Court.\textsuperscript{163} The agreement stated that the transition would last for twenty-two months and that a new constitution would be drafted.\textsuperscript{164} To this end, various constitutional amendments were effectuated on 3 August 1993.\textsuperscript{165}

Various legal instruments, including the Fundamental Law of Rwanda and the Arusha Peace Agreement, created a variety of commissions.\textsuperscript{166} For

\begin{itemize}
\item 161. See Schabas & Imbleau, supra note 156, at 9.
\item 162. See id.
\item 163. See id.
\item 164. Additionally, Article 1 of the Protocol on the Rule of Law states:
\begin{quote}
National unity must be based on equality of all citizens before the law, equal opportunities in all fields including the economic field and respect for fundamental rights as stipulated, notably, in the Universal Declaration of Human Rights and in the African Charter on Human and Peoples’ Rights.
\end{quote}
Protocol on the Rule of Law, supra note 59, art. 1.

\begin{itemize}
\item Article 2 states:
\begin{quote}
National unity implies that the Rwandese people, as constituent elements of the Rwandese nation, are one and indivisible. It also implies the necessity to fight all obstacles to national unity, notably, ethnicism, regionalism, integrism and intolerance which subordinate the national interest to ethnic, regional, religious and personal interest.
\end{quote}
\textit{Id.} art. 2.
\end{itemize}

\begin{itemize}
\item Article 3 states:
\begin{quote}
National unity entails the rejection of all exclusions and any form of discrimination based notably, on ethnicity, region, sex and religion. It also entails that all citizens have equal opportunity of access to all the political, economic and other advantages, which access must be guaranteed by the State.
\end{quote}
\textit{Id.} art. 3.
\end{itemize}

\begin{itemize}
\item Article 4 states:
\begin{quote}
The two parties acknowledge that the national unity of the people of Rwanda cannot be achieved without a definitive solution to the problem of Rwandese refugees. They recognize that the return of the Rwandese refugees to their country is an inalienable right and represents a factor of peace, unity and national reconciliation. They undertake not to hinder the free exercise of this right by the refugees.
\end{quote}
\textit{Id.} art. 4.
\end{itemize}

\begin{itemize}
\item Article 17 states:
\begin{quote}
The two parties concur that national unity, democracy and peace are invaluable and solemnly undertake to do everything possible so as to preserve these values in the interest of the present and future Rwandese generations.
\end{quote}
\textit{Id.} art. 17.
\end{itemize}

\item 165. See Schabas & Imbleau, supra note 156, at 10.
\item 166. The Government, in the Fundamental Law of the Republic of Rwanda, which was adopted by the Transitional National Assembly on 5 May 1995, made reconciliation a priority. The law states that the Government is
\begin{quote}
[resolved to complete the task of liberation of the Rwandese people which was begun by the Rwandese Patriotic Forces, in particular by applying principles of national reconciliation, of
\end{quote}
instance, the National Commission of Human Rights was established by the Arusha Peace Agreement to monitor human rights abuses in Rwanda. The Commission was to be permitted to approach the courts, and report, educate, and “sensitize” Rwandans on human rights. The UN Human Rights Commission called on Rwanda in 1997 to establish this commission.

The Arusha Peace Agreement also provided for the establishment of an International Fact-Finding Commission on Human Rights Violations Committed During the War and a Commission for National Unity and National Reconciliation, which has the task of providing information to the public and facilitating a national debate on unity and national reconciliation. The Commission for National Unity and National Reconciliation has

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168. See id.
169. See id.
171. Arusha Peace Agreement, supra note 59, ch. III, art. 16. Article 16 states:

Id.

172. Id. ch. IV, art. 24, which reads as follows:

Chapter IV. Specialized Commissions

Article 24

In addition to the Commissions already agreed upon in the previous Agreements, the following broad-based specialized Commissions shall be established, whose composition and modalities of functioning shall be determined by the Broad-based Transitional Government.

A. Commission for National Unity and National Reconciliation

This commission, which reports to the Government, shall be responsible for:

1. Preparing a national debate on national unity and national reconciliation.
2. Prepare and distribute information aimed at educating the population and achieving national unity and national reconciliation.

Id.
the additional task of reporting on the respect shown for the Political Code of Ethics\textsuperscript{173} that binds participants in the transitional regime.\textsuperscript{174}

The genocide took place between April and July 1994, ending when the RPF seized power.\textsuperscript{175} In a declaration on 17 July 1994, which also distributed seats in the National Assembly, the RPF reaffirmed its commitment to the Arusha Peace Agreement.\textsuperscript{176} The declaration was approved by representatives of eight political parties in a Protocol of Agreement endorsed on 24 November 1994.\textsuperscript{177}

There is thus a legal basis for the establishment of a truth and reconciliation commission in that a Human Rights Commission and a National Unity and Reconciliation Commission were agreed to in the Arusha Accords\textsuperscript{178} and the establishment of these organs was confirmed as government policy by the Minister of Justice and the Attorney General at a conference\textsuperscript{179} in Kigali in August 1997.\textsuperscript{180}

At various times the United Nations has recommended that Rwanda strive to establish an independent and credible national human rights commission and that international financial support be given to ensure its

\textsuperscript{173} The nine principles from the Code of Ethics are:
1. Support the Peace Agreement and work towards its successful implementation;
2. Promote national unity and national reconciliation of the Rwandese people;
3. Abstain from all sorts of violence and inciting violence, by written or verbal communication, or by any other means;
4. Respect and undertake to fight any political ideology or any act aimed at fostering discrimination based mainly on ethnic, regional, sexual or religious differences;
5. Promote and respect the rights and freedoms of the human person;
6. Promote political education among their members, in accordance with the fundamental principles of the Rule of Law;
7. Work towards a system whereby the political power serves the interests of all the Rwandese people without any discrimination;
8. Respect the secularism of the Rwandese State;
9. Respect national sovereignty and the territorial integrity of the country.

\textit{Arusha Peace Agreement, supra} note 59, ch. IV.

\textsuperscript{174} \textit{See Arusha Peace Agreement, supra} note 59, ch. IV, art. 80.

\textsuperscript{175} \textit{See Alex De Waal & Rakiya Omaar, The Genocide in Rwanda and the International Response, 94} \textit{Current Hist.} 156 (1995).

\textsuperscript{176} \textit{See Schabas & Imbleau, supra} note 156, at 10.

\textsuperscript{177} \textit{See id. While Government officials stress that the Government of National Unity is multiethnic and multiparty there have been no elections in Rwanda and citizens are not able democratically to change their government. The Arusha Accords of 1992 and 1993 are relied upon to organize and divide up government ministries. While the new Government has brought in representatives of four opposition political parties and the National Assembly sits in session with nine political parties present, none of these officials have been elected. \textit{See U.S. Dep't of State, supra} note 122, at 281.}

\textsuperscript{178} \textit{See Arusha Peace Agreement, supra} note 59, ch. IV, art. 24.

\textsuperscript{179} \textit{Where this author presented proposals for a truth and reconciliation commission.}

\textsuperscript{180} \textit{Conference on the Role of the Church and the Restoration of Justice in Rwanda, Kigali, Rwanda, 19–21 Aug. 1997 (on file with author).}
effective functioning.\textsuperscript{181} A bill to establish such a human rights commission was put before the Rwandan Parliament in October 1995.\textsuperscript{182} However, criticism of the law centering on issues of independence, jurisdiction and powers, accessibility, operational efficiency, and accountability of the Commission led to the bill's withdrawal in December 1995 for further drafting.\textsuperscript{183}

Therefore, while various commissions are provided for in Rwanda, it is the traditional Rwandan courts that bear institutional responsibility for dealing with the past. It is the courts that conduct all investigations into what occurred and prosecute those accused of genocide.

2. Penal Law

To understand the manner in which the genocide is being dealt with in Rwanda it is crucial to know what law is in force to deal with the genocide and how the legal system operates.

Rwanda's penal law was originally a replica of the Belgian law. However, in 1940 the Congo Penal System was extended to Rwanda, and a specifically Rwandan penal code was adopted in 1977, taking effect on 1 January 1980.\textsuperscript{184} This legal system is both inquisitorial and adversarial in nature. Magistrates who conduct investigations are required to be neutral and impartial in their task.\textsuperscript{185} Rules of evidence are not as complex as under an adversarial system because the judge is meant to arrive at the truth through an active role.\textsuperscript{186} Under this type of system trials are generally of shorter duration than those under a pure accusatorial system.\textsuperscript{187} However, in the trial itself, proceedings are adversarial.\textsuperscript{188}

The Penal Code permits detention before trial. Thus, where an accused, if found guilty, can be punished by six months' imprisonment or more, an arrest can be effected "if there are serious indications of guilt." Also, the accused can be arrested and detained before trial if there are serious reasons to believe that the suspect will flee.\textsuperscript{189} As many people were arbitrarily detained after the genocide without proper charges and mostly without

\textsuperscript{182} See id. ¶ 29.
\textsuperscript{183} See id.
\textsuperscript{184} See Schabas & Imbleau, supra note 156, at 34.
\textsuperscript{185} See id at 47.
\textsuperscript{186} See id at 48.
\textsuperscript{187} See id.
\textsuperscript{188} See id.
\textsuperscript{189} See id. at 53.
appearance before a court, the Constitution was amended and new provisions decreed to suspend the Code of Criminal Procedure in 1996, in order to permit detention in much wider circumstances.\textsuperscript{190} It is believed that a significant number of those in detention may be blameless.\textsuperscript{191}

Rwanda’s Organic Law,\textsuperscript{192} which created the apparatus for prosecuting crimes of genocide, applies to crimes against humanity that occurred between 1 October 1990 and 1 December 1994. Appeals of genocide cases under the Organic Law are limited to questions of law or flagrant errors of fact.\textsuperscript{193} However, in prosecutions for genocide under the Organic Law, there is an additional review by the Court of Cassation if the Court of Appeal reverses an acquittal and sentences an accused to death.\textsuperscript{194}

The Genocide Law divides genocide defendants into four categories based on their level of liability.\textsuperscript{195} Category 1 is defined\textsuperscript{196} to include those persons who acted in positions of authority at the national, prefectoral, communal, sector, or cell level, or in a political party, the army, religious organizations, or in a militia, and who perpetrated or fostered such crimes.\textsuperscript{197} Also included in this category are “notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed.”\textsuperscript{198}

However, if a full and accurate confession is given and a guilty plea entered, a person who would otherwise be placed in Category 1 will be

\addcontentsline{toc}{section}{Notes}

\begin{itemize}
\item \textsuperscript{190} See id. at 54.
\item \textsuperscript{191} See Silence, supra note 98; see also Carla J. Ferstman, Rwanda’s Domestic Trials for Genocide and Crimes Against Humanity, 5 Hum. RTS. BRIEF, Fall 1997, at 1 (examining the various problems in the criminal trials occurring in Rwanda as a result of the genocide).
\item \textsuperscript{192} Loi organique sur l’organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l’humanité, commises à partir du ler octobre 1990 [ON the ORGANIZATION of PROSECUTIONS FOR OFFENSES Constituting the CRIME of GENOCIDE or CRIMES AGAINST HUMANITY COMMITTED SINCE 1 October 1990], Organic Law No. 8/96 (adopted by Rwanda in Aug. 1996) [hereinafter Organic Law] (on file with author). See Schabas, supra note 6, at 530, 535.
\item \textsuperscript{193} See Organic Law, supra note 192, art. 24.
\item \textsuperscript{194} See id. art. 25. The ordinary courts in Rwanda have four levels: canton courts, courts of first instance, courts of appeal, and the Supreme Court. See Arusha Peace Agreement, supra note 59, ch. IV, art. 26. There are also two military tribunals, the Courts Martial and the Military Court. See id. The Supreme Court has five sections: the Department of Courts and Tribunals, the Court of Cassation, the Constitutional Court, the Council of State, and the Public Accounts Court. See id. ch. IV, art. 28. The Constitutional Court is a section of the Supreme Court.
\item \textsuperscript{195} Id. ch. IV, art. 2.
\item \textsuperscript{196} Amnesty International has stated that the definition of Category 1 may victimize certain people, such as those who previously held local authority positions. See Justice Denied, supra note 145, at 16. Thus the category could be used for political purposes and have a negative effect on closing the gap between the ethnic groups.
\item \textsuperscript{197} See Organic Law, supra note 192, art. 2.
\item \textsuperscript{198} Id.
placed into Category 2.\textsuperscript{199} Category 2 covers perpetrators, conspirators, or accomplices of intentional homicide or serious assault that caused death.\textsuperscript{200}

The possibility of conversion from Category 1 to Category 2 is open to all except those placed on an initial list of 1946 Category 1 names published by the government on 30 November 1996, shortly before the first genocide trials began.\textsuperscript{201} According to the Genocide Law, those on the list cannot benefit from a confession.\textsuperscript{202} Moreover, the courts are obliged to impose the death sentence on people found guilty in Category 1.\textsuperscript{203}

It must be stressed in this regard that use of the death penalty is inconsistent with the goal of achieving peace and reconciliation, because it can only perpetuate the already vicious cycle in Rwanda of anger, killings, and counterattacks. Use of the death penalty does not promote respect for human rights.\textsuperscript{204}

The Law determines further that Category 2 perpetrators should receive prison sentences of between seven and eleven years if they plead guilty\textsuperscript{205} or a term of between twelve and fifteen if they do so after the trial has begun.\textsuperscript{206} If, however, they do not plead guilty and are convicted they must receive life sentences.\textsuperscript{207}

Category 3 covers persons "whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person."\textsuperscript{208} Individuals who are accused of crimes that fall into Category 3 receive one-third of the sentence that they would normally receive for the crime they have committed if they plead guilty before the prosecution begins.\textsuperscript{209} If they plead guilty after the prosecution begins they receive half the usual sentence.\textsuperscript{210} If convicted at the trial they receive the sentence usually meted out for that crime.

\textsuperscript{199} See id. Article 9 states:
\begin{quote}
\(\text{[A]}\) person who confesses and pleads guilty, and whose name was not published on the list of Category 1, shall not be placed in Category 1 if the confession is complete and accurate. If his confession should place him in Category 1, he shall be placed in Category 2.
\end{quote}

\textit{Id.} art. 9. Category 2 is subject to life imprisonment. Categories 3 and 4 receive lesser sentences. See \textit{id.} art. 14.

\textsuperscript{200} See \textit{id.} art. 2, Category 2.

\textsuperscript{201} See \textit{JUSTICE DENIED, supra} note 145, at 20.

\textsuperscript{202} Organic Law, \textit{supra} note 192, art. 9.

\textsuperscript{203} See \textit{id.} art. 14 (a). Execution is carried out by firing squad. See Rwandan Penal Code Section 28.

\textsuperscript{204} See \textit{JUSTICE DENIED, supra} note 145, at 15.

\textsuperscript{205} See Organic Law, \textit{supra} note 192, art. 15(a).

\textsuperscript{206} See \textit{id.} art. 16(a).

\textsuperscript{207} See \textit{id.} art. 14(b).

\textsuperscript{208} \textit{Id.} art. 2.

\textsuperscript{209} See \textit{id.} art. 15(b).

\textsuperscript{210} See \textit{id.} art. 16(b).
Category 4 covers individuals who have committed crimes against property. The Organic Law provides that an accused who is convicted and sentenced to a term of imprisonment for a Category 4 crime will have that sentence suspended.211

E. Trials to Date

Trials did not begin in Rwanda until December 1996.212 Since then, prosecutions have resulted in the first executions associated with the 1994 genocide.213 The manner in which the trials have been conducted has raised questions about their fairness.214 Due process rights are practically non-existent—in violation of both international standards and Rwandan law itself.215

Prosecutions have gone very slowly in Rwanda, and the courts have only tried about 350 people. Of those, approximately one-third have received death sentences and another third have been sentenced to life in prison. There have been only twenty-six acquittals. However, some 125,000 people are still awaiting trial, four years after the genocide.216

The trials that have taken place in Rwanda have been beset with problems and have often not given due regard to the rights of the accused. There have been reports of defendants asking for their trials to be conducted in French, an official language of Rwanda, and this request being refused.217 Where an adjournment was sought to study the case file, this too was refused.218 Even where a defense lawyer requested a postponement on the basis of insufficient time to study the contents of a case file, the request was refused.219 The defense has not been allowed to present witnesses and has been refused the right to cross-examine prosecution witnesses.220 In addition, the court milieu’s hostility to those on trial has been made apparent by

211. Id. art. 14(d).
212. See Justice Denied, supra note 145; Schabas, supra note 6, at 559.
213. See McKinley, supra note 41.
214. See id. at 1.
215. See Justice Denied, supra note 145, at 5.
216. See McKinley, supra note 41. On 24 April 1998, Rwanda carried out the executions of 22 people convicted of crimes that occurred during the 1994 genocide. “Among those executed . . . in front of large crowds were several people whose trials were grossly unfair, such as Déogratias Bizimana and Egide Gatanazi, the two first people to be tried for participation in the genocide in Rwanda and who did not even have access to a defense lawyer.” Amnesty International, Major Step Back for Human Rights as Rwanda Stages 22 Public Executions, Amnesty News, 24 Apr. 1998, available in <http://www.amnesty.org.uk/news/press/releases/27_april_1998-0.shtml>.
217. See Justice Denied, supra note 145, at 4.
218. See id.
219. See id.
220. See id.
the booing of defendants and applause for the prosecutors.\textsuperscript{221} In some cases trials have been concluded in as little as four hours.\textsuperscript{222}

As far as representation of the accused is concerned, the Genocide Law under which the prosecutions are taking place states: “Persons prosecuted under the provisions of this Organic Law enjoy the same rights of defense given to other persons subject to criminal prosecution, including the right to the defense counsel of their choice, but not at government expense.”\textsuperscript{223}

Thus, while the right to a lawyer is provided for in the genocide law,\textsuperscript{224} some of those on trial were not informed of this right.\textsuperscript{225} In fact, very few trials have had defense lawyers playing a part. There are 200 lawyers in Rwanda but only sixteen lawyers practicing, most of whom refuse to appear for those accused of genocide.\textsuperscript{226} Many refuse to get involved in the trials because of the enmity in the situation or fear of probable harassment, while others refuse for reasons of conviction or emotion.\textsuperscript{227}

The judicial system lacks resources and trained personnel.\textsuperscript{228} The Van Lierop Report notes that there are about 700 judges and magistrates, very few of whom have formal legal backgrounds.\textsuperscript{229} Many of the judges have had very little training, some less than six months, which has to have at least some effect on the result of some trials.\textsuperscript{230} Some judges have been dismissed or forced into exile by the authorities.\textsuperscript{231} Others have been intimidated or detained, have vanished, or have even been murdered.\textsuperscript{232}

\begin{itemize}
\item \textsuperscript{221} See id. at 14.
\item \textsuperscript{222} See JUSTICE DENIED, supra note 145, at 5.
\item \textsuperscript{223} Organic Law, supra note 192, art. 36.
\item \textsuperscript{224} See id.
\item \textsuperscript{225} See JUSTICE DENIED, supra note 145, at 8.
\item \textsuperscript{226} See Reis, supra note 21, at 649.
\item \textsuperscript{227} See JUSTICE DENIED, supra note 145, at 5.
\item \textsuperscript{228} See id.
\item \textsuperscript{229} Robert F. Van Lierop, Rwanda Evaluation: Report and Recommendations, 31 Int’l Law. 887, 890 (1997). The Van Lierop Report was written by Robert Van Lierop, the chair of the Association of the Bar of the City of New York’s Committee on African Affairs. The report also notes that most of the Hutu detainees want to be represented by Hutu lawyers. Id. at 899.
\item \textsuperscript{230} See JUSTICE DENIED, supra note 145, at 12.
\item \textsuperscript{231} See id.
\end{itemize}
The government of Rwanda asked the UN Security Council to establish an international criminal tribunal to deal with genocide, war crimes, and crimes against humanity in Rwanda. The Security Council did so on 8 November 1994. The crimes of genocide and crimes against humanity, including crimes against person or property committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds, and serious violations of the laws of war applicable to internal armed conflicts can be prosecuted by the International Criminal Tribunal for Rwanda (ICTR), which is located in Arusha, Tanzania. The ICTR has concurrent jurisdiction with the courts in Rwanda but, unlike the Rwandan courts, may not impose the death penalty. The first case before the ICTR began in January 1997, a full two and a half years after the end of the genocide. This body has thus far been ineffective. The tribunal has managed to indict only about twenty-five people but has not been able to gain custody of all of them. It did, however, in 1998, convict a former prime minister and a mayor for their role in the genocide.

Thus, the criminal justice system in Rwanda is floundering under a huge tide of defendants, lacking the resources to keep itself afloat. The International Criminal Tribunal is also not doing a great deal to assist the situation. Further human rights abuses are occurring as a result, entrenching resentment on both sides of the conflict.

233. The Rwandese Government took the initiative in proposing the formation of an international criminal tribunal for Rwanda. See Payam Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, 90 AM. J. INT’L L. 501, 504 (1996). However, when the Security Council voted on the establishment of the Tribunal, Rwanda voted against it. The Rwandan government voted against the Tribunal for a number of reasons: (1) It would only cover the period 1 January 1994 to 31 December 1994; (2) the composition and structure was “inappropriate” and would make it “ineffective” because of “meager” resources; (3) it would prosecute “crimes that come under the jurisdiction of internal tribunals” like “crimes of plunder, corporal punishment or the intention to commit such crimes, while relegating to a secondary level the genocide”; (4) fear that judges for the tribunal would be appointed by countries that “took a very active part in the civil war”; (5) that those convicted would be imprisoned outside of Rwanda; (6) that the Tribunal could not impose the death penalty; and (7) that the Tribunal would not sit in Rwanda. Id. at 504–08.

234. See Schabas, supra note 6, at 549.

235. See Genocide Convention, supra note 4, art. 1.


237. See Schabas, supra note 6, at 553.


239. See, e.g., Schabas & Imbeau, supra note 156, at 12–13.

240. See Rwanda Embassy website, supra note 155.
VI. WHY A TRUTH AND RECONCILIATION COMMISSION IS NECESSARY

A process of public truth-telling is an essential component of any attempt at healing and reconciliation. Truth and reconciliation commissions have been identified as useful mechanisms for coming to terms with an atrocious past. Ignoring history leads to collective amnesia, which is not only unhealthy for the body politic but essentially an illusion: an unresolved past will inevitably return to haunt citizens.

In the absence of the processes envisaged in the workings of a truth and reconciliation commission, anger, resentment, hatred, and revenge tend to be the order of the day. If the future is to offer an improvement on the past, there must be both a conscious and a continuing rejection of the crimes committed and the ideology that justified them. In the case of Rwanda, the current tendency of the Hutu to deny the genocide while at the same time justifying their actions on the basis of their own perceived or feared losses (of property, prestige, position, security, self-esteem, and so on) will continue, and they will mourn only for themselves. Such a mindset makes true reconciliation all but impossible. Only by publicly and collectively acknowledging the horror of past human rights violations is it possible for a country to establish the rule of law and a culture of human rights.

Should a truth and reconciliation commission be established, victims across the spectrum will have a credible and legitimate forum through which to reclaim their human worth and dignity; perpetrators, irrespective of persuasion and motivation, will have a channel through which to expiate their guilt. Failure to establish this kind of process disregards the rights and views of victims, denies the need for a healing process, prevents recovery of the past, imagines that forgiveness can take place without full knowledge of whom and what to forgive, and fails to establish human rights values as the core standard for the future.

A truth and reconciliation commission can facilitate a national catharsis. Should the commission be successful in its work, future generations

243. See earlier discussion on perceptions and statements by Hutus on the genocide.
244. See Hayner, supra note 57, at 607 (quoting Juan Mendez, past director of Americas Watch: “Knowledge that is officially sanctioned, and thereby made ‘part of the public cognitive scene’ . . . acquires a mysterious quality that is not there when it is merely ‘truth.’ Official acknowledgment at least begins to heal wounds.”).
245. See Schabas, supra note 6, at 539.
will be served by the knowledge that the record of past abuses is as complete as it can be. Such a record should include the nature and extent of the crimes committed, the names and fates of the victims, and the identities of those who gave the orders and those who executed them. The hope is that such a record, in combination with the recommendations made by the commission, will ensure the avoidance of such human rights violations in the future and will also further the development of a human rights culture.

In Rwanda violence has continued at such a rate that healing has not yet begun. Resentment and hostility are still the prevailing sentiments. Thus, it is necessary that a commission be established. A truth and reconciliation commission can develop a complete picture of the causes, nature, and extent of gross violations of human rights and, importantly, make this known. It could also provide a mechanism that would facilitate confession of crimes and ease the pressures on the weak criminal justice system. If the route of granting amnesty is chosen it can assist in this process or suggest sentences for persons who make full disclosure of all the relevant facts relating to acts associated with a political objective. A truth and reconciliation commission should establish and make known the fate or whereabouts of victims and restore the human and civil dignity of survivors of abuse by granting them an opportunity to relate their own accounts of the violations they suffered. By recognizing and publicizing the victim's story, the inherent worth and dignity of the person is acknowledged. In addition, the commission can recommend such reparation measures as are possible.

A commission can also compile a public report detailing its activities and findings and recommending measures to prevent future violations of human rights. The new government should officially adopt and recognize such a report. Several positive consequences would flow from this action. First, it would deter new governmental authorities from committing abuses themselves because they will have to follow the rule of law as there will be greater scrutiny and accountability. Second, it would reduce the threat posed by the old government. During the transition period, the new government is likely to be vulnerable to criticisms based on the poor state of the economy, the housing situation, the educational system, and so on.


248. See Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century, in 1 TRANSITIONAL JUSTICE, supra note 12, at 65, 80.

249. See Zalaquett, supra note 247, at 31.
Government endorsement of a committee reporting process and a final report would prevent the old regime from attempting to retake control because the process would eviscerate the old authorities’ ability to deny responsibility, blame others, or claim exigent circumstances. It would demystify the past and expose the previous regime’s brutality and its inability to govern fairly. Third, it would imbue the new government with respectability because, especially by prosecuting the planners of the genocide, they would be sending the clear message that no one is above the law, and that ethical values may not be discarded in the name of a political goal. Finally, it would legitimize the new government's actions because it upheld the rule of law.

Another benefit of truth and reconciliation commissions generally is that they satisfy the retribution impulse by dispensing punishment. While this role can be as formal as sentencing powers, a more informal retributive function can also be effective. The naming of perpetrators and the exposure of their violations constitutes punishment through public stigma, shaming, and humiliation. This is the course that should be pursued in Rwanda, where there simply is not enough space, resources, or time to prosecute each individual suspected or accused of participating in the massive slaughter without simultaneously depriving them of their human and legal rights.

Another argument for establishing a truth and reconciliation commission is that while some transitional societies may have the will to bring perpetrators of abuses before the courts and to punish them, they may lack the political power or resources to do so. Similarly, while there may be a duty to prosecute in terms of international law, it is an obligation that cannot always be met in practice. This is certainly an issue of major importance in Rwanda.

A possible danger, and something that should be anticipated and proactively addressed, is the fact that a truth and reconciliation commission holds the potential of opening up old wounds, renewing resentment and hostility against the perpetrators of abuses.251 Thus, careful planning and preparation is crucial to ensure that the process achieves its aims and objectives. If this is not done revenge and retaliation killings might result.

250. See infra note 260. In addition, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities has recommended that the General Assembly adopt a resolution declaring the duty of every state to fight impunity. This includes, first and foremost, a right to know the truth.

251. See Hayner, supra note 57, at 609.
VII. WHOSE COMMISSION?

It is, of course, vital that a truth and reconciliation commission is set up by a credible and legitimate authority; otherwise it will not be accepted by all parties and whatever results it arrives at will be questioned. In other words, it is crucial to ensure that the commission has political legitimacy. In the absence of such legitimacy, whatever record of past human rights abuses the commission produces will be contested and reconciliation will remain a vain hope.

No model of a truth commission is ideal for all purposes, and no model can be transplanted from one situation to another, particularly in view of the cultural, historical, political, and other differences across the world. However, it is obviously useful to attempt to learn from the experiences of other countries and to adapt their models to fit specific circumstances.

Various key factors have to be considered when establishing a truth and reconciliation commission. For example, the choice of the time period over which human rights violations are to be examined will often determine the acceptability of the commission. If a truth and reconciliation commission has the power to suggest sentencing, it is vital that proceedings are characterized by due process. This requirement of due process is facilitated when a commission is able to gather reliable confessions and evidence through powers of search, seizure, and subpoena. Other key issues are: who sponsors the commission, what access to information it is given, and the ability of the commission to operate without fear of intervention by the state. No single model of a truth commission can be applied to every country. The ad hoc nature of a truth commission dictates that any model or standard be sufficiently pliable to be molded to fit the specific situation that it must address. One cannot take a truth issue forward without addressing the wider political context. The question is: how does one produce a commission that also moves toward national reconciliation? Exploration of previous truth and reconciliation commissions and recommendations for universal minimum standards help illuminate the proper path for a Rwandan commission.

A. Legitimacy

It is vital to the success of the project that all sectors of the population buy into the process. If the commission is not seen as independent of the

252. See id. at 598.
government, this will affect the public’s perception of the commission’s objectivity.

If a truth and reconciliation commission is to enjoy legitimacy and fulfill its function of enabling reconciliation, its establishment must be informed by an understanding of the particularities of the history and transition of the country within which it is to operate. The extent to which a truth and reconciliation commission process is established by the new order, in cooperation with those who were vanquished, plays an important part in determining whether such a process can assist in national reconciliation. On the other hand, the extent of the involvement of the vanquished perpetrators also has a bearing on the acceptance of that institution by those who suffered human rights abuses. Great sensitivity is called for in this regard.

Even though there cannot be one final “objective truth,” it is critical that the version of “the truth” arrived at by the commission embraces the experience of all. Unless the people feel that they have been a part of the process of decision making, they will doubt the integrity and motivations of those setting up the commission and those involved in its processes. The fact that has to be addressed is that the government of Rwanda is in the role of victor, is Tutsi in the main, and will have to be perceived as evenhanded if a truth and reconciliation commission is to be seen as legitimate by the remainder of the population. The first key question, then, is that of legitimacy. Legitimacy for a commission means that the commission is accepted as an objective body capable of finding an unbiased “truth.” This perception is generally achieved by having a well-balanced commission of highly respected people. A commission is well-balanced when its commissioners are from a variety of ethnic and political backgrounds and constituencies. The key to legitimacy is that the commission must not only be unbiased and nonpartisan in fact, but it must also be perceived as such by the Rwandan population as a whole (meaning all ethnic groups) and by the international community.

To attain legitimacy, a commission must be an officially designated nonpartisan entity.254 This means that the commission cannot be controlled or influenced by the government or even appear to be under the government’s control or influence. To ensure that this is the case, the very creation and setup of the commission must be unbiased and, most importantly, perceived as such by the country’s nationals and by international observers.

José Zalaquett, former Chairperson of Amnesty International’s Executive Committee and Commissioner of the Chilean National Commission on

Truth and Reconciliation, enumerated three “conditions for legitimacy” for any state’s approach to dealing with past human rights violations:255

(1) the truth must be known;256

(2) the policy must represent the people’s will;257 and

(3) the policy must abide by international human rights norms.258

The first and third criteria are widely accepted at least in theory if not always in practice, but the second condition, that the policy coincide with the will of the people, is rarely met or even considered.259 The South African approach, as discussed below, is exceptional in its degree of public participation.

Similarly, Priscilla Hayner has proposed minimum guidelines for the creation and operation of truth commissions, the first of which is “public participation in crafting the commission.”260 Such participation is particu-


257. Zalaquett, supra note 247, at 34 (suggesting a popular referendum or approval by a body of democratically elected representatives).

258. Id.

259. See, e.g., Hayner, supra note 57, at 639–40.

larly important in Rwanda because the government is unelected and widely regarded as Tutsi.

B. Establishment of Commission & Appointment of Commissioners

The state, not the government, must establish the commission by law.\textsuperscript{261} If the state does not establish the commission and give it certain powers, legal problems might ensue. Without the state legally establishing the commission, conflicts between the commission’s mandate and existing national laws will arise. For example, search and seizure laws may conflict with the commission’s ability to carry out its work. Further, if the government were to create the commission, the life and work of the commission would be at the whim of the government. The commission would not be an independent body as is required for legitimacy.\textsuperscript{262}

Additionally, who appoints the commissioners is crucial. If the government appoints the commissioners many will feel that the commission is not sufficiently independent to arrive at a version of the truth with which the public will be satisfied. Thus, a neutral process is critical to ensure that commissioners have obtained public confidence and trust.

In Argentina President Alfonsin appointed ten people who had domestic and universal stature and came from a variety of different social and political backgrounds so that all sectors of society could feel represented by the Commission.\textsuperscript{263} The Chamber of Deputies in the Argentine Congress also designated three individuals to serve on the commission.\textsuperscript{264} Because all sectors of Argentine society felt represented on the Commission, the Commission was regarded as credible and nonpartisan: it was legitimate.\textsuperscript{265}

As a result, it was successful in creating an official truth of what happened in Argentina (the human rights abuses that occurred during military rule).\textsuperscript{266} If the Rwandan commission is to be successful, it must be comprised of commissioners representing various interests—not the least of which are

\textsuperscript{261} See Hayner, \textit{supra} note 253, at 179. One of Hayner’s minimum standards for a truth commission is that a commission must have clear operational independence, and, once established, be “free of direct influence or control by the government, including in the interpretation of its written mandate . . . , in developing its operating methodology for research and public outreach, and in shaping its report and recommendations.” \textit{Id.}

\textsuperscript{262} See Statement of José Zalaquett, \textit{in Harvard Comparative Assessment, supra} note 254, at 40.

\textsuperscript{263} See Hayner, \textit{supra} note 57, at 615.

\textsuperscript{264} See \textit{id.} at 615 & n.33.

\textsuperscript{265} The Argentine Truth Commission is widely regarded as the first truth commission (in the form as known today) and as the most successful of the 1980s. See Aryeh Neier, \textit{An Overview of the Issue and Human Rights Watch Policy}, 4 \textit{Hum. Rts. Watch}, Dec. 1989, at 2. Respected author Ernesto Sábató headed the Commission, which gave it greater legitimacy and credibility in the eyes of the Argentine people.

\textsuperscript{266} See Hayner, \textit{supra} note 57, at 615–16.
different ethnic groups. A Rwandan commission must incorporate all sectors of Rwandan society, Hutu, Tutsi, and Twa, in its membership and staff so that no part of the population feels excluded from the process.

In Chile, President Aylwin appointed eight commissioners, carefully balancing opposite sides of the political spectrum. This balance gave the Commission great credibility because no one could accuse it of being partisan or one-sided. Rwanda must have a balanced commission as well, so that it too will be seen as nonpartisan.

Much of the violence in African states revolves around ethnic, religious, geographic boundary, or other group-identity antagonisms. Rwanda is no exception. If a sector (or sectors) of the population believes that the truth and reconciliation commission is partisan then whatever truth about the past it discovers and reports, regardless of whether it is true, will not be believed and respected by that group of people. Thus, it is particularly important that the commissioners be chosen from a wide cross section of society and not be perceived as one-sided or oriented to a certain outcome; otherwise, the Rwandan commission will be considered biased and therefore illegitimate.

C. A Panel to Appoint Commissioners?

In South Africa, the Commission was created as an independent investigative body by an Act of Parliament. NGOs called for a process of appointing commissioners that would ensure transparency and public

267. The Chileans studied the Argentine and Uruguayan models and felt that they reflected the opposite ends of the spectrum. Chileans thus opted for a more modified approach. They were of the opinion that Uruguay did not go far enough and that the Argentine model went too far as it did not appear to provide any incentives, merely punishment. The Chilean Commission worked nationwide for nine months examining 3400 cases, of which 2920 were within its mandate. See Hayner, supra note 57, at 621 & n.51.

268. See id. at 621.

269. See generally Jorge Correa Sutil, Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship, 67 Notre Dame L.R. 1455, 1470 (1992) (discussing the way in which the commission was accepted by the citizens). Members of the Commission traveled around the country visiting families of victims in their own homes and also held hearings with staff throughout the country. The personal touch was thought to increase victims' faith in the administration. The Commission was chaired by well-respected former Senator Raúl Rettig and is therefore often referred to as the "Rettig Commission." There were eight commissioners: four were supporters of the Pinochet regime and four opposed it (these were leaders in national human rights organizations). The report was thought to have gained acceptance and credibility largely because of the composition of the Commission. The Commission enjoyed widespread public support. It carried out a professional and systematic investigation, although it was not given strong investigative powers.

270. See Hayner, supra note 57, at 653–54.

participation while preventing political horse trading. As a consequence, President Mandela, who in terms of the Act was to appoint commissioners in consultation with the Cabinet, announced a process along the lines of NGO proposals. A panel to appoint the commissioners was established. It consisted of five politicians, one from each main political party, plus three others. The three others were a bishop, the Secretary General of the South African Council of Churches, and a trade union official. Forming the panel to decide who the commissioners ought to be was a vital step toward creating a credible structure: were the commissioners not broadly acceptable, the results of the Commission itself would not be accepted. This panel created a structure that people could accept. It meant that there was no fear of bias in the Commission’s findings. The panel was meant to guarantee a critical distance between the Government and the Commission. The selection panel was tasked with interviewing candidates and preparing a shortlist of twenty-five names. Criteria for selection were: impartiality, moral integrity, known commitment to human rights, reconciliation and disclosure of the truth, absence of a high party political profile, and lack of intention to apply for amnesty.

The panel received a total of 299 nominations, of which forty-seven were shortlisted for public interviews. NGOs made use of this opportunity to make submissions to the panel highlighting concerns about some candidates’ human rights track records.

In Rwanda, a similar approach would ensure a truth and reconciliation commission’s legitimacy. Such a panel may be necessary for a Rwandan commission to attain legitimacy because the government is not seen to be representative. The panel could be made up of one person appointed by each of the following: the UN Secretary-General, the Organization of African Unity (OAU) Secretary-General, the European Union (EU) President, the Rwandan government, the Catholic Archbishop of Rwanda, the General Secretary of the National Council of Churches of Rwanda, and the General Secretary of the umbrella body of Rwandan human rights organizations (CLADO).

International involvement would help to give the commission further

274. A serious danger exists if only victims, or the government that represents the victims, make up a commission. It would then be seen to come from only one part of society.
275. See id.
276. See id.
277. See Rwanda Embassy website, supra note 155; U.S. DEP’T OF STATE, supra note 122, at 277, 281.
credibility. In a highly polarized society with strong ethnic, religious, or political divides, international involvement in a truth and reconciliation commission is often necessary for the commission to function, let alone appear credible. El Salvador provides a case in point.

Like Rwanda, Salvadoran society was completely polarized and the level of fear and intimidation among out-groups was intense. As a result, the United Nations formed the Salvadoran Commission without a single Salvadoran; the three very highly respected commissioners and the entire staff were foreigners, and none of them was even Central American. This international approach was highly successful in establishing the Commission as a credible, independent, and legitimate institution because, as nonnationals, the Commission members and staff had no vested interests in the outcome of the Commission’s investigation. Any national, on the other hand, would have been viewed as being partisan and seeking to further his or her own interests through his or her work with the Commission. Its international nature also allowed the Salvadoran Commission to broadly interpret its mandate and carry out in-depth investigations in a political climate that precluded nationals from such activity.

There was a downside to the international nature of the Commission, however. As foreigners, the Commissioners and staff could not fully comprehend the nuances of the locality—knowledge that nationals would have had to their advantage. Also, because foreigners conducted the process, it did not “serve to bring together diverse national actors to write a common history,” as did the commissions in Chile and Argentina.

Such disadvantages to international action, however, pale in compari-


281. See Buergenthal, supra note 279, at 541–42; Popkin, supra note 280, at 207.

282. See Buergenthal, supra note 279, at 541–42; Popkin, supra note 280, at 207.

283. See Roht-Arriaza, supra note 278, at 283.

284. See Popkin, supra note 280, at 207.
son to the benefits attained by involving international actors in a society such as Rwanda. In addition, the panel suggested for use in Rwanda would not hand over the entire truth-seeking process to foreigners, as the United Nations did in El Salvador.

Rwanda, being as highly polarized\(^{285}\) as El Salvador was, would similarly benefit from international involvement in its truth commission. Thus, it may be useful to have both Rwandan nationals as well as foreigners on the commission so that a Rwandan commission could enjoy the benefits of international involvement while avoiding the negative consequences that resulted in El Salvador from a lack of local involvement.

The panel of seven would thus appoint the commissioners and would establish the terms of reference for the commission (determine the overall objectives and scope of the investigation or the commission’s mandate). The seven individuals on the panel would invite nominations for the commissioners. They would establish criteria for the selection of commissioners and select from those who were nominated. The panel would also decide for how long the commissioners would serve.

The seven individuals on the panel would be asked to attend a meeting to choose the commissioners. The invitation to potential commissioners would go out to as many as possible to ensure that there would be a good number from which to choose. This would help to ensure legitimacy in the long term. As well, the appointment process and the mandate need to be visible to take into account all points of view.\(^ {286}\)

In addition to inviting nominations for commissioners, the panel would invite suggestions for the criteria to be applied in their selection. While the commission should be established as swiftly as possible, it is important that sufficient time be allowed for these processes. The aim must be to ensure that nominations and proposals are received from all quarters of society and also to allow time for building awareness of the future commission’s work in Rwanda.

The panel, when it met, would need to decide on various issues, including:

(1) objectives for the commission;

(2) the time period over which past human rights violations would be considered;

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\(^{285}\) See Statement of José Zalaquett, supra note 262, at 41 (“If there is a trade-off between representativeness and quality, one should opt for quality. If the commission produces a good report, no one is going to remember its degree of representativeness. If it is bad, representativeness will not redeem it.”).

\(^{286}\) In Uganda, the commission’s mandate has in recent years been modified, and the commission can now recommend who should be prosecuted. This change was needed to keep public interest motivated in spite of the long-term nature of the project, as it is thought that many Ugandans lost faith that the report would ever be published.
(3) the geographical region in which human rights violations would be considered (whether only in Rwanda or in other countries as well); and

(4) what types of human rights abuses would be examined.

The panel, after considering and deciding on all of these issues must then appoint the commission and call the first meeting of the commissioners.

D. Setting Terms of Reference

1. Duration of Commission and Time Period for Study

The duration of truth and reconciliation commissions is almost always limited, and should be, in order to ensure efficacy and completion of the task and also to enable healing to begin swiftly after old wounds are opened. The terms of reference should set aside a certain period of time and resources for laying the administrative and logistical foundations of the commission. Otherwise commissions lose precious operating time out of their limited life span.

Such an approach would have been useful for previous commissions, for example, in Argentina. The Argentine Commission had only nine months in which to generate an authoritative account of the military's practice of disappearances. It had to cover a period of seven years and investigate nearly 9000 cases, although it did not focus on any individual case.

The truth commissions in Chile and El Salvador also had only nine months in which to complete their tasks. The Commission for Guatemala, established under a 1994 UN-facilitated agreement between the guerrillas and the civilian government (but not set to begin work until the parties had signed a final peace accord, which occurred in December 1996), had only one year (six months with the possibility of a six-month extension) in which to complete its investigation of "[all] human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict" since 1960.

287. See Hayner, supra note 57, at 640–41.
288. See Hayner, supra note 253, at 178–79.
289. The duration of the military regime.
290. See Hayner, supra note 57, at 645 tbl.II. The Argentine Commission did not deal with any individual cases, but instead analyzed the mechanisms and controls behind the disappearances and the manner in which they took place.
291. See Hayner, supra note 262, at 56.
The Commission of Inquiry into Violations of Human Rights in Uganda, established in 1986, provides an exception to the norm of a limited life span for truth commissions. This has led to a problematic result. Formed by the Minister of Justice and Attorney-General, the Commission was designed as a temporary body but its mandate oddly did not limit its duration, and the Commission still has not reported. This is possibly due to the enormity of the task: the Commission's mandate is to address the situation in Uganda between 1962 and January 1986—the abuses of the Amin and Obote governments. Many Ugandans have, however, lost faith that the Commission will ever publish a report.

These lessons need to be taken into account when establishing a process in Rwanda. The time period that a truth and reconciliation commission should investigate will be particularly contested terrain. The options

293. An earlier commission was set up in 1971 by then-President Idi Amin to investigate disappearances in Uganda. Though the Commission of four members included an expatriate Pakistani judge and three others who came from the police and the army, it nevertheless concluded that the security forces were responsible for the disappearances. While nothing came of the report, the judge lost his job, another was framed for murder, and another went into exile to avoid arrest. See Hayner, supra note 57, at 612.


295. The duration of the Commission has been attributed to several other factors, as well. For example, the dramatic lack of resources has stalled its operation. Also, there are too many witnesses for the Commission to hear, so it has been taking only samples of each type of atrocity that occurred. Many witnesses give public statements, although if they are far away from Uganda or too frightened to speak publicly, the Commission will accept either videotaped testimony or a written affidavit. The advantage of this is that it both adheres to the concept of the public telling the truth that seems to have been favored in the African context as well as ensures that all witnesses come forward. The risk with allowing the Commission to be public is that some will be too intimidated to come forward. Legal counsel is available to assist, adduce, and assemble evidence. Additionally, all witnesses before the Commission have the right to cross-examine any other witnesses who give evidence against them. There is also an investigative team that identifies witnesses and collects evidence, but does not arrest people. The public response has been enthusiastic. The Commission has been seen to demonstrate the Government's seriousness, and there is a possibility that it will become permanent. Publicity has been difficult in a country where many are illiterate and few have access to television. Thus, the Commission has utilized radio broadcasts. Yet it is still feared that those in remote outlying regions of the country are unaware of the Commission and are not coming forward as witnesses. In some regions in Uganda, because batteries are so expensive, even the radio is an ineffective form of communication.

are: April to July 1994, 1990 to 1994, 1990 to 1998, or, even, 1959 to 1998. This issue is of vital importance because the commission must interest all parts of Rwandan society, and the choice of time period affects who is considered, by themselves or others, to be a victim. Thus, if only the 1994 genocide were to be addressed, large segments of society would be likely to consider the commission’s investigation illegitimate. They would argue that the history of discrimination and brutality perpetrated against them during colonial times as well as during other periods of Rwanda’s history are the reasons for the events in 1994. Thus, if only the events of 1994 are examined they would regard the investigation as prejudicially narrow on the basis that it failed to take into account the long history of human rights abuses in Rwanda during which the roles of perpetrators and victims alternated.

It may be that mandating the commission to investigate the period between 1959 and 1998 would enable all parts of society to feel that they were getting some main aspects of their version of the truth on to the table. It may be necessary, however, for pragmatic resource and political reasons for the commission to concentrate first on events surrounding the genocide of April to July 1994. Thus, the first phase of the commission’s work could be to focus on the period between 1990 and 1998, because killings have continued beyond 1994. It would be important to emphasize that what is happening at present will also come under the scrutiny of the commission and that consequences will flow from current abuses.

2. Determining the Scope of Rights to Examine

It is important that commissions are given broadly worded mandates that allow them to interpret their duties and powers flexibly, so that the commissions themselves can determine what abuses require investigation and official, public recognition.297 This is critical in Rwanda as the commission must be able to investigate and report on all issues that are relevant in arriving at the truth and achieving reconciliation.

The Salvadoran Truth Commission’s mandate was broadly worded, allowing it to investigate what it deemed were “serious acts of violence.”298 Additionally, the mandate granted the Commission broad investigatory powers.299

The South African Truth and Reconciliation Commission’s mandate calls for investigation of “gross violations of human rights, including

297. See Hayner, supra note 253, at 179.
299. See id. at 190–91.
violations which were part of a systematic pattern of abuse.\textsuperscript{300} Although gross violations are defined solely as "killing, abduction, torture or severe ill-treatment,"\textsuperscript{301} the mandate still allows considerable discretion on the part of commissioners, especially relative to other commissions’ mandates.\textsuperscript{302}

Most truth commission reports fail to address the issue of international involvement in sponsoring or augmenting human rights violations. Many commentators feel that this lack should be overcome by future commissions.\textsuperscript{303} The Chad Commission is an exception insofar as it did investigate and report on the international financial support given to the regime and the extent of intelligence training provided by foreign actors.\textsuperscript{304} The Chilean Commission report included a section on international reaction to the regime and briefly outlined relations between the regime and the United States, but went no further.\textsuperscript{305}

E. Assistance and Resources

A truth and reconciliation commission process needs financial and other support from the international community.\textsuperscript{306} It must have sufficient resources for investigating, researching, establishing a data base, and examining the issue of repatriation. A commission with inadequate resources is bound to fail. International, national, and other donors, particularly those

\begin{itemize}
\item \textsuperscript{300} PNURA, supra note 271, § 4(a)(i).
\item \textsuperscript{301} Id. § l(ix)(a). On the issue of making torturers accountable, see Terence S. Coonan, Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable, 20 Fordham Int’l L.J. 512 (1997).
\item \textsuperscript{302} For instance, the Uruguayan Commission’s mandate limited the scope of its investigation to disappearances, despite the fact that disappearances were not a primary part of the military regime’s intimidation and abuse scheme. See Zalaquett, supra note 247, at 59. It is common knowledge that the military systematically practiced torture, but there has been no official acknowledgment or record of this fact. See id. at 61. This tremendous shortcoming sparked an unofficial investigation by a private human rights group, Servicio Paz y Justicia (SERPAJ), that culminated in a published report. SERVICIO PAZ Y JUSTICIA URUGUAY, URUGUAY NUNCA MAS: HUMAN RIGHTS VIOLATIONS, 1972–1985 (Elizabeth Hampsten trans., 1992). See Neil J. Kritz, Uruguay: Editor’s Introduction, in 2 Transitional Justice: How Emerging Democracies Reckon with Former Regimes 383, 384 (Neil J. Kritz ed., 1995) [hereinafter 2 Transitional Justice]. Chile’s mandate, while considerably broader than that of Uruguay and Argentina in the scope of violations to be examined, was still heavily criticized for not including investigations of torture victims who survived. See Popkin & Roht-Arriaza, supra note 292, at 271.
\item \textsuperscript{303} See, e.g., Hayner, supra note 57, at 637–39 and accompanying citations.
\item \textsuperscript{304} See id. at 638.
\item \textsuperscript{305} See id. at 639; 2 Report of the Chilean National Commission on Truth and Reconciliation 632 (Phillip E. Berryman trans., 1993).
\item \textsuperscript{306} Hayner suggests that the international community is obligated to contribute to truth commissions when assistance is required. Hayner, supra note 253, at 180.
\end{itemize}
who bear some responsibility either directly or by omission for the genocide, owe it to Rwanda to assist in providing resources to make such an exercise possible.

A feature of the success of the commissions in both Argentina and Chile was that they were well-resourced, each having a staff of about sixty people. In Uganda, by contrast, the Commission has suffered many financial and logistical difficulties. For example, it had neither an office nor transport initially, a situation that eventually improved mainly as a result of a grant of $93,000 from the Ford Foundation.

The staffing of commissions has varied greatly across countries. Whereas the Latin American commissions have enjoyed relatively large staff complements, the African commissions in Uganda, Rwanda, Chad, and Zimbabwe have had to make do with very few personnel. Additionally, in El Salvador, the United Nations not only created the Commission but funded and staffed it as well.

In the examples above, those commissions that were well-funded and staffed were most successful in both depicting the overall picture of human rights abuses and contributing to the achievement of national reconciliation. In Rwanda, therefore, it would be vital to the commission’s success that it have sufficient resources to investigate nationwide and to establish regional bases of operation.

A related matter is cooperation and assistance from other countries because many of the individuals involved in the execution of the genocide have since fled Rwanda to live in a variety of other countries. Unless these countries are prepared to cooperate with Rwanda, the suspects that they are harboring will not only escape having to face the legal consequences of their acts, but they may also pose an enduring danger to the possibility of peace.

When Rwandan fugitives enter other national jurisdictions, those countries may investigate, charge, and prosecute for genocide or may arrest

307. See Hayner, supra note 57, at 644. In Chile, the Commission interpreted its mandate as requiring accounting by name for every person who had been abused, exploring the circumstances of these events, and making a detailed recommendation for prevention. See 1 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 14 (Phillip E. Berryman trans., 1993).

308. See Hayner, supra note 57, at 619.


310. See Hayner, supra note 57, at 644.

311. See, e.g., id. at 643–44; Buergenthal, supra note 279, at 499.


313. See id.
and detain such persons until they can be prosecuted by the International Tribunal. Unfortunately, many countries have been unwilling to investigate or prosecute these fugitives. Others, such as Canada and Tanzania, have attempted to prosecute these people for lesser crimes, avoiding any charges of genocide.

F. Process of the Commission

If the process is not managed well, as in South Africa, the danger is that it will open wounds without facilitating healing. Truth commissions take on a victim-centered approach in that they acknowledge the humanity and the loss of the victims by listening to their stories and incorporating them into the official truth (the final report).

A commission must make counseling available to victims both before and after they testify. It is vital to consider what happens when victims go home: many must live alongside perpetrators. The process must allow for the victim/perpetrator relationship to be dealt with thoroughly. The process of airing the evil done and acknowledging the suffering of the victims sparks the catharsis required for reconciliation. However, there is a danger that a truth and reconciliation commission can do more harm than good, and

315. As of 1995, France, Kenya, Cameroon, the Central African Republic, and the Democratic Republic of Congo (Zaire) had taken no action at all against Rwandan fugitives. See id.
316. See id.
317. The model used in South Africa was excellent for the conditions existing in that country. However, the methods employed by the Commission have seen a relatively large amount of the truth about the past emerge, but very little reconciliation. This has been the result, at least in part, because, rather than remaining neutral throughout the process, Commissioners made statements of finding on many different occasions throughout the process. If the Commission had collected all of the evidence, remained neutral and impartial throughout, and made findings only in its final report, more individuals and groups would have bought into the process and then could not have disputed the findings with the same degree of resonance.
319. See id.
320. See Statement of Henry Steiner, in HARVARD COMPARATIVE ASSESSMENT, supra note 254, at 79. [T]he argument for a truth commission grows stronger in those intrastate or international conflicts where the conflicting parties continue to inhabit the same territory. . . . The two peoples must learn to live together, or continue their agony. . . . The principal contribution of the truth commission may be to enable onetime enemies to live together better—not ideally, but better. . . . [P]eople are bound together in a setting where they need some degree and method of working through the past, something different from prosecutions and verdicts, to help them to live and work together.

Id.
therefore any process must be carefully structured and sufficient groundwork must be laid to prepare a community for events and issues that emerge.

Additionally, for a commission to create as complete a picture as possible of the human rights abuses of a regime, it must carry out its own investigations. Too often truth commissions rely exclusively or nearly exclusively on testimony of victims (and/or perpetrators in the case of South Africa) who come forward and on records compiled by governments or NGOs. Besides these records often being inaccurate and having been collected for political reasons, the use of this material exclusively can lead to perceptions of bias or unfairness.

The Salvadoran Commission process reflects the usefulness of having a process with sufficient resources. It was able to carry out (relatively) in-depth investigations because of its broad mandate, sufficient funding, and international staff and Commissioners.\(^321\)

In Chile, the Commission did not carry out its own investigations despite its rather broad mandate.\(^322\) This lack of investigation has been viewed as a serious shortcoming of the Commission, which explains the substantial lack of information relating to victims’ fates and the identities of the perpetrators.\(^323\) The ability to carry out an independent investigation is, of course, closely linked to the availability of such resources as sufficient staff and transportation.\(^324\)

The Argentine Commission did not have the power to compel testimony or subpoena witnesses,\(^325\) but it did have access to all governmental facilities.\(^326\) The Commission engaged in public investigation into the facts, established branches in different major cities, and inspected military and police facilities as well as clandestine cemeteries.\(^327\) Various human rights organizations assisted the Commission by handing over considerable

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321. See Hayner, supra note 57, at 628.
322. See Jorge Mera, Chile: Truth and Justice Under the Democratic Government, in IMPUNITY, \textit{supra} note 278, at 171, 178. The Commission felt that, as they were appointed by the executive, they could not conduct trials without abusing the concept of the separation of powers. The Commission consulted the Church on legal and educational reforms that it (the Commission) was recommending.
323. See id. The Commission chose to negotiate with the military rather than try to pressure military forces into revealing information. See \textit{id}. However, this was likely a result of the political constraints operating at the time.
324. In South Africa, however, the Commission has been incredibly well provided with resources, yet the funds and staff dedicated to investigations have been terribly limited.
documentation of human rights abuses. The Commission also collected abundant statements from victims and family members. It did not examine any particular case in depth, opting to develop an overall picture of the types of abuses that occurred under the military regime.

In Rwanda, even if the most limited time period is chosen and investigations are thus confined to the 1994 period of genocide, the numbers involved are far too staggering to allow for an in-depth analysis of each individual case. It is quite simply a practical impossibility. In light of this fact, the commission should adopt a hybrid approach: it should strive to develop an overall picture and, while acknowledging all of the violations, carry out an in-depth analysis of a fair number of them so that its report can document the types of violations that have been paradigmatic of the period.

The commission should hold public hearings at these regional bases, listening to statements from victims of abuses, statements of victims’ family members, selected testimonies, and other reports. The hearings should be open and public so that the Rwandan people can attend and experience for themselves that the commission is unbiased in its process. Broadcasting hearings over the radio would also help to ensure popular awareness and participation in the process. Such open processes will give the commission’s operations the transparency required to achieve legitimacy.

G. Final Report

The process of a truth commission culminates in a final report. While the process itself is crucial for the catharsis that must precede reconciliation, the final report is equally vital for both the past and the future. It is the raison d’être of a truth commission: a statement encapsulating as completely as possible a picture of events in the country during the investigated time period. It is the formal acknowledgment of what has occurred—what has been done to people. The goal of the report is to establish the official

328. See id.
329. See id.
330. See Hayner, supra note 57, at 645 tbl.II.
331. See id.
332. However, Radio Rwanda is government-owned. See U.S. DEP’T OF STATE, supra note 122, at 281.
truth—the official record of what occurred. It will become the definitive history, provided it is viewed as legitimate.

A Rwandan truth and reconciliation commission would have to be sure that its final report is balanced and representative. A one-sided and unrepresentative report would not be accepted by the majority of Rwandans or by the international community. It would not be considered legitimate. As a result, the report would neither help reestablish the rule of law nor help the victims.

The legitimacy of the commission's process directly affects the perceived legitimacy, value, and usefulness of its final report. The report must result from a public process accepted by all parties. The report must be made public immediately after it is written so that there can be no actual or perceived alteration of the findings. The report's legitimacy depends on the extent to which people believe that it is the genuine result of a public, legitimate, unbiased, independent process.

Publication itself is also mandatory in order to achieve reconciliation. The entire population must have access to the report because reconciliation results not only from the process of telling the truth but also from the process of hearing and acknowledging the truth. Acknowledgment can only come when the official truth is known and accepted. In addition, knowledge of the truth about the atrocities is considered a necessary step toward prevention of future abuses. The goal is to keep history from repeating itself. Thus, the final report must be made public.

In Argentina the Commission produced a systematic account of the oppressive policies of the regime, chronicling what happened to the nearly 9000 people who had disappeared. The report, entitled “Nunca Más” (Never Again), included the names of victims but not those of the perpetrators. Lists of names of alleged perpetrators were presented to the courts, however. The report became a bestseller in Argentina and was widely acclaimed as a success.

In Chile the Truth Commission’s report was presented on television by President Aylwin, who asked for forgiveness on behalf of the state even though he himself had opposed the regime.

335. See Buergenthal, supra note 279, at 540.
337. See Hayner, supra note 57, at 615.
339. See Nunca Más, supra note 338, at 449.
340. See Hayner, supra note 57, at 615.
These publication and dissemination efforts in Argentina and Chile contributed to the overall success of the projects. People knew that the reports were genuine, and their publication led to a nationwide acknowledgment of the atrocities that had occurred. This acknowledgment has helped to heal the societal wounds and begin the process of reconciliation.

In Brazil, the Catholic Church and the World Council of Churches played the major role in the production of an unofficial clandestine report analogous in some respects to those produced by truth commissions. The Archdiocese of Sao Paulo was named as author of the report in order to avoid prosecutions of the actual authors and to add legitimacy to the project. In 1985, the report, “Brasil: Nunca Mais,” was the number one bestseller in the country for twenty-five weeks, and it has since become the all-time best-selling work of nonfiction in Brazil. The church also played a key role in Paraguay, where the Commission was sponsored by the Committee of Churches. A similar process is taking place in Guatemala.

Although these church-backed commissions were unofficial, they still played an important role in the search for truth and reconciliation in the countries concerned. In some cases, such unofficial investigative missions have led to official acknowledgment of wrongs at a later date. While official mechanisms are preferred, commissions independent of government are the most successful in leading to a cathartic truth-telling experience.

H. Relationship to Criminal Justice System

In order for a commission to maintain its legitimacy, it must be independent of the national criminal justice system. However, truth commissions and criminal prosecutions need not be mutually exclusive. A truth commission may exist where criminal trials are being pursued. In fact, such a combination could be tremendously useful, if not necessary, for determining

342. See id. at 204.
344. See Lawrence Weschler, A Miracle, a Universe: Settling Accounts with Torturers 7–79 (1990); Brazil, in 2 Transitional Justice, supra note 302, at 431–52; Hayner, supra note 57, at 651.
346. See Hayner, supra note 57, at 651.
347. See Jeffrey, supra note 292, at 3.
348. See, e.g., Kritz, supra note 279, at 152 (explaining the heightened importance of the private sector efforts in Brazil).
349. See Hayner, supra note 57, at 651.
350. See Kritz, supra note 279, at 143.
the truth and for reconciliation. In isolation, trials allow for recognition of only a single version of events.\textsuperscript{352} A commission, on the other hand, analyzes various versions of events and can validate more than one version by accepting differing testimony and incorporating all versions into the final report, which becomes the official history. As Juan Méndez explains, trials can help lead to truth; however, the judicial system must always adhere to international human rights norms such as due process and assignment of individual, not collective, responsibility.\textsuperscript{353}

In Rwanda, while the commission will need to work with the criminal justice system, it will have to preserve its independence. If it is seen to be simply an arm of the criminal justice system, its credibility will be questioned. There are various possible ways forward.

First, the commission could accept confessions from those who are in prison. It would then prepare a dossier for each case, and the case would be passed back into the criminal justice system where the process could continue.

Second, the commission could be completely separate from the criminal justice system and play no part in collecting confessions. It could, however, play a facilitatory role by being a neutral link between the criminal justice system and the accused.

A third option would be for the commission to impose sentences itself. However, this option would be very controversial and is unlikely because it requires the government to hand over power to the commission to determine which statements are valid and make sentence determinations.

Even if the commission is given the very limited mandate that requires it to pass cases back to the criminal justice process, its role would still be valuable. It is probable that individuals would be more willing to take their accounts to a commission rather than directly to a government prosecutor. In this sense, the commission acts as a facilitator and, in effect, is passing a sentence even though the formal sentencing process still lies with the criminal justice process. The extent to which the government would be willing to give the commissioners this power would be a matter to be negotiated in crafting the commission’s mandate.


\textsuperscript{353} Méndez, \textit{supra} note 259, at 278–79. \textit{See also} Zalaquett, \textit{supra} note 247, at 34–35 (explaining that any policy for dealing with past human rights abuses must itself respect international human rights norms).
VIII. CONCLUSION

If the Rwandan Government wishes to adequately address the massive human rights violations of the genocide, it must go beyond mere criminal trials. Despite the existence of the UN Security Council’s war crimes tribunal, the immense task of trying all the accused who are within the Rwandan system is currently too great for the system to bear. The deficiencies of the Rwandan judiciary are a major concern. The few judges who are available are inexperienced, are not seen as impartial, and lack sufficient resources. Thus, reliance on the Rwandan judicial system, and even more so on the International Tribunal, to achieve reconciliation and break the country’s lengthy cycle of violence will prove fruitless.

The key concern in combating impunity is to develop an objective truth to which all can turn for a reliable assessment of what has occurred. Unless an independent institution is developed that provides the opportunity for victims to tell their stories and for those who are guilty of human rights violations to confess, Rwandan society will continue to live under the shadow of division, tension, and violence. A credible and legitimate truth and reconciliation commission could address the problems of Rwanda’s history and ongoing crisis.

Rwanda must start down that road. Currently, the majority of the population (the Hutus) are being collectively blamed for atrocities, and the country’s history shows that ethnic violence will continue unless serious steps are taken to unite the nation. The truth commission report should therefore be comprehensive and made public. Because so many of the Rwandan people are both rural and illiterate, the report should also be dealt with in nationwide radio broadcasts in order to reach the widest audience possible.

This body need not replace criminal prosecutions or grant amnesties. In fact, international law prohibits the granting of amnesty for the gross

354. See Schabas, supra note 6, at 559 (“Rwanda has rejected . . . a truth commission, and seems determined, at least at present, to try the more than 87,000 suspects now in custody and to punish those who are found guilty. Yet its existing judicial system is incapable, if only for practical reasons, of responding to the challenge.”).

355. While one may argue that no such animal exists, the term “objective truth” describes as complete and unbiased an account of the facts of a situation as possible, achieved through extensive fact-finding by a legitimate, independent body.

356. See General Report of the Secretary-General of the Commission Nationale Consultative des Droits de l’Homme, in Justice Not Impunity: International Meeting on Impunity of Perpetrators of Gross Human Rights Violations 337, 343 (International Commission of Jurists eds., 1993) (“[R]egardless of the situation, we all agree that the chief priority is to establish the facts, that is, to pursue an investigation. This is an obligation owed the victims and their relatives, an obligation owed historical memory and a safeguard against forgetting.”)
violations of human rights that have occurred in Rwanda. The Commission should instead complement other initiatives already under way in Rwanda, serving as a forum in which victims can tell of their suffering and be heard and acknowledged, and so regain their dignity.

As important is the contribution a truth and reconciliation commission can make towards a process of justice for the future. If it is a legitimate and impartial body and if its processes facilitate participation by all, so that all Rwandans can discern in its report some acknowledgment of their particular truths, then catharsis and reconciliation can be the fruits. The ground is then prepared for the prevention of future abuses, and the need for a culture of human rights becomes part of the official record. Additionally, the truth and reconciliation commission’s process and recommendations should attempt to reestablish the rule of law. The best way to prevent future human rights abuses is by strengthening the rule of law and the corresponding independent judicial institutions and uncorrupted governmental bodies.

Rwandans need to come to terms with their past and build the country into a united one. Various other strategies to rehabilitate Rwandan society have to be undertaken in the short, medium, and long term.


The Genocide Convention specifically creates a duty for states parties to prosecute. Genocide Convention, supra note 4. Article 1 of the Genocide Convention obliges the contracting parties to “confirm that genocide . . . is a crime under international law which they undertake to prevent and punish.” Id. art. 1. Article 4 provides that persons “committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Id. art. 4. Article 5 calls on states parties to “provide effective penalties,” and Article 6 provides for trials by “a competent tribunal” of the state where the act occurred or by an international tribunal. Id. arts. 5, 6. See also Orentlicher, supra, at 2562–66. “If the punishment of [genocide] was left to the State in question, the convention on genocide would be in the nature of a fraud.” Id. at 2564 n.106 (quoting a former US delegate to the United Nations).

358. See Carlos Santiago Nino, Radical Evil on Trial 145 (1996) ("Radical evil requires an evil political and legal framework in which to flourish.").


360. Some of these strategies are taking place although only to a limited extent. See, e.g., Peter M. Manikas and Krishna Kumar, Protecting Human Rights in Rwanda, in Rebuilding...
One of the most critical and pressing issues is for Rwanda to move towards democracy. This is of fundamental necessity. Unless all citizens in Rwanda have a government that they believe represents them there will continue to be instability and strife. While it is accepted that it is not possible to hold elections immediately, because of the ethnic demography and the legacy of the genocide, some type of constitutional reform process needs to begin. One possibility would be for a constitutional reform process to be set up, possibly outside the country, so that all political representatives could meet to negotiate a way forward. Paving the way to an inclusive democracy will be a critical step in dealing with the past and halting the continuing violence and division that haunts Rwanda.

Societies After Civil War: Critical Roles for International Assistance 63 (Krishna Kumar ed., 1997) [hereinafter Rebuilding Societies]; Kimberly A. Maynard, Rebuilding Community: Psychosocial Healing, Reintegration, and Reconciliation at the Grassroots Level, in Rebuilding Societies, supra, at 203; David Tardif-Douglin, Rehabilitating Household Food Production After War: The Rwandan Experience, in Rebuilding Societies, supra, at 265.