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## RELEASING ACCUSED GENOCIDAL PERPETRATORS IN RWANDA: THE DISPLACEMENT OF PREVENTIVE JUSTICE

George S. Yacoubian, Jr., Ph.D.<sup>†</sup>

### Introduction

In addition to the International Criminal Tribunal for Rwanda (“ICTR”),<sup>1</sup> established by the United Nations (“UN”) during the early 1990s to prosecute individuals accused of committing genocide and other crimes against humanity, the Rwandan government has also prosecuted accused genocidal perpetrators for their alleged participation in the 1994 Rwandan Genocide. To date, the ICTR has prosecuted and convicted twenty offenders, while national Rwandan authorities have prosecuted approximately 200 offenders,<sup>2</sup> and another 80,000 persons are still awaiting trial in Rwanda.<sup>3</sup> Unfortunately, the unmanageable quantity of accused offenders awaiting trial before the national courts has forced authorities to release thousands of detainees in an effort to ease prison overcrowding.<sup>4</sup> By any objective standard, this is an unsatisfactory resolution to the Rwandan Genocide since the prevention of genocide is partly contingent on the successful prosecution and punishment of perpetrators.<sup>5</sup> As a result, the international community is now at a greater risk of succumbing to new genocidal events.

A review of the situation in Rwanda and the current state of international criminal law suggests that there may be alternative solutions that could balance the practical quagmire of prison overcrowding and the need to bring genocidal perpetrators to justice. Part I of this essay provides a brief historical assessment of genocide in the Twentieth Century. Part II summarizes the events that culminated in the 1994 Rwandan Genocide and reviews the investigations and prosecutions conducted to date at the ICTR and in Rwanda. Part III presents a history of the International Criminal Court (“ICC”),<sup>6</sup> established in the summer of 2002, and reviews the work undertaken by the ICC to date. Part IV discusses

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<sup>†</sup> George S. Yacoubian, Jr., is an associate research scientist with the Pacific Institute for Research Evaluation (PIRE) in Calverton, MD. The author would like to thank Roger S. Clark, Board of Governors Professor at Rutgers (Camden) School of Law, for his review of an earlier draft of this paper. The author has written extensively in the area of genocide and international criminal justice. Address correspondence to: Dr. George S. Yacoubian, Jr., PIRE, 11710 Beltsville Drive, Suite 300, Calverton, MD, 20705, (301) 755-2790, (301) 755-2799 – Fax, or by email to [gyacoubian@pire.org](mailto:gyacoubian@pire.org).

<sup>1</sup> S.C. Res. 955, U.N. Doc. S/1994/1168 (Nov. 8, 1994).

<sup>2</sup> Amnesty International, *Amnesty International Report 2005* (Amnesty Int’l. 2005), available at <http://web.amnesty.org/report2005/rwa-summary-eng>.

<sup>3</sup> *Rwanda to Speed up Genocide Trials*, SYDNEY MORNING HERALD, Jan. 17, 2005, available at <http://www.smh.com.au/news/World/Rwanda-to-speed-up-genocide-trials/2005/01/16/1105810774432.html> (last visited Jan. 19, 2006).

<sup>4</sup> Press Release, Amnesty International, *Rwanda: End of Provisional Release of Genocide Suspects* (Apr. 23, 2003), available at <http://web.amnesty.org/library/Index/ENGAFR470052003>.

<sup>5</sup> LEO KUPER, *THE PREVENTION OF GENOCIDE* 193-94 (1985).

<sup>6</sup> See generally International Criminal Court, <http://www.icc-cpi.int/> (last visited Jan. 19, 2006).

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the problems and potential alternative solutions to the Rwandan prison overcrowding and the impact that the release of accused genocidal perpetrators will have on the international community. A thoughtful analysis of these alternatives suggests that releasing thousands of suspected genocidal perpetrators for the sole purpose of easing prison overcrowding is an inadequate resolution to a criminal phenomenon that has consistently plagued the global community for the past century.

### I. Genocide

The Armenian Massacres of 1915 are widely considered to be the first principal genocide of the Twentieth Century.<sup>7</sup> During the second half of the nineteenth century, Armenia fell under Ottoman Turk rule.<sup>8</sup> In 1908, the Young Turks, the ruling political party of the Ottoman Empire that was comprised of army officers,<sup>9</sup> adopted a credo of pan-Turanism, which alleged a mythic unity among Turanian peoples based on the concept of 'Turkification.'<sup>10</sup> Motivated by a feverish sense of jingoism, the Young Turks sought an empire that stretched from central Asia to China.<sup>11</sup> Between 1908 and 1914, the seemingly democratic Young Turks became xenophobic nationalists intent on eliminating the Armenian people.<sup>12</sup>

By the end of April 1915, the stage had been set for the Armenian Massacres. Men, women, and children were led to secluded areas and murdered.<sup>13</sup> Those who were not killed immediately were killed as a result of the conditions surrounding the Ottoman deportation orders.<sup>14</sup> As Dadrian stated, "the Ottoman authorities ordered . . . the wholesale deportation of the Armenian population of the empire's Eastern and Southeastern provinces."<sup>15</sup> By the time the killings ceased, more than one and a half million Armenians had been slaughtered.<sup>16</sup>

At the time of the Armenian Massacres, neither the crime nor the definition of genocide had been conceptualized. As I have written, "[t]here were certain rules of war to protect civilian populations, but these regulations failed to cover a gov-

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<sup>7</sup> See generally JAY WINTER ET AL., *AMERICA AND THE ARMENIAN GENOCIDE OF 1915* (Jay Winter ed., 2004); SAMANTHA POWER, "A PROBLEM FROM HELL" *AMERICA AND THE AGE OF GENOCIDE* 1-16 (2002); VAHAKN N. DADRIAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* (Berghan Books 6th rev. ed. 2003).

<sup>8</sup> DADRIAN, *supra* note 7, at 45.

<sup>9</sup> *Id.* at 45.

<sup>10</sup> JOSEF GUTTMANN, *THE BEGINNINGS OF GENOCIDE* (Armenian Historical Research Assn. 1965).

<sup>11</sup> DADRIAN, *supra* note 7, at 185.

<sup>12</sup> *Id.* at 180-184.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> DADRIAN, *supra* note 7, at 219.

<sup>16</sup> DADRIAN, *supra* note 7, at xiviii.

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ernment's persecution of its own people."<sup>17</sup> Rather, France, Great Britain, and Russia referred to the Armenian Massacres as "crimes against humanity."<sup>18</sup>

The term "genocide" was ultimately coined and defined in 1944 by Raphael Lemkin, a Polish-Jewish jurist, to denote "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."<sup>19</sup> Lemkin's efforts culminated in the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>20</sup> which officially came into effect as a binding piece of international law on January 12, 1951.<sup>21</sup> Today, 137 states have ratified or acceded to the Convention, including all member states of the European Union and all permanent members of the UN Security Council ("SC").<sup>22</sup> Article II of the Genocide Convention defines genocide as:

Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- and
- e) Forcibly transferring children of the group to another group.<sup>23</sup>

No state has ever asserted that genocide is not a crime, and the definition contained in Article II is considered to be binding international law.<sup>24</sup>

Despite the ratification of the Genocide Convention and an increased awareness of the potential for unparalleled destruction since the end of the Second World War, genocide has been perpetrated repeatedly during the past four decades. I have observed that "its contemporary manifestation has indicated a ca-

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<sup>17</sup> George Yacoubian, *Underestimating the Magnitude of International Crime: Implications of Genocidal Behavior for the Discipline of Criminology*, 14 *WORLD BULL.* 23 (1998), available at <http://www.habermas.org/yacoubiandoc.htm>.

<sup>18</sup> Roger S. Clark, *Crimes Against Humanity*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177 (George Ginsburg & V.N. Kudriavtsev eds. 1990).

<sup>19</sup> RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION – ANALYSIS OF GOVERNMENT – PROPOSALS FOR REDRESS* 79 (1944).

<sup>20</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. GAOR, 3rd Sess., 179th plen. mtg., U.N. Doc. A/810 (Dec. 9, 1948) [hereinafter Genocide Convention].

<sup>21</sup> University of Minnesota: Human Rights Library, Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (Jan. 12, 1951), available at <http://www1.umn.edu/humanrts/instree/x1cpcpg.htm>.

<sup>22</sup> See Office of the United Nations High Commissioner for Human Rights, Convention on the Prevention and Punishment of the Crime of Genocide, <http://www.ohchr.org/english/countries/ratification/1.htm> (last visited Jan. 19, 2006).

<sup>23</sup> Genocide Convention, *supra* note 20, at 174.

<sup>24</sup> EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, *INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS* 690 (2d ed. 2004).

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capacity for atrocity on an unprecedented scale.”<sup>25</sup> Victimized groups include 400,000 civilians during the Vietnam War,<sup>26</sup> more than one million Bengalis in Bangladesh in 1971,<sup>27</sup> 150,000 Hutu in Burundi in 1972,<sup>28</sup> 1.5 million Cambodians between 1975 and 1979,<sup>29</sup> 200,000 Bosnian Muslims and Croats in the Former Yugoslavia in 1992,<sup>30</sup> and 800,000 Tutsi in Rwanda in 1994.<sup>31</sup> It was the genocidal events that took place in Rwanda that ultimately yielded legal responses in the form of both national prosecutions and the creation of an international criminal tribunal.<sup>32</sup>

## II. Rwanda

The popular but dangerously simplistic version of Rwanda’s catastrophe is that tribal rivalry led to an eruption of savagery. This description erroneously allows the international community to dismiss not only its complexity, but also its significance in the development of international criminal law. The events in Rwanda illustrate how the coexistence of different social groups can evolve into problems with overwhelmingly racial dimensions. As Destexhe affirmed, “archaic political divisions were progressively transformed into racial ideologies . . . which then brought them into the political arena.”<sup>33</sup>

During the second decade of the Twentieth Century, Germany colonized the region in Africa that now encompasses Rwanda and Burundi.<sup>34</sup> Three ethnic groups inhabited the area: the Twa, the original denizens comprising one percent of the population; the Hutu, who entered the area during the fourth and seventh centuries comprising eighty-five percent of the population; and the Tutsi, the newest inhabitants, comprising fourteen percent of the population.<sup>35</sup> Belgium

<sup>25</sup> George Yacoubian, *The Efficacy of International Criminal Justice: Evaluating the Aftermath of the Rwandan Genocide*, 161 WORLD AFFAIRS 186, 186 (1999).

<sup>26</sup> GUENTER LEWY, AMERICA IN VIETNAM 443 (1978).

<sup>27</sup> FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE 396 (Yale U. Press 1990); LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 79 (1981).

<sup>28</sup> LEO KUPER, THE PITY OF IT ALL: POLARISATION OF RACIAL AND ETHNIC RELATIONS 91 (1977).

<sup>29</sup> George Yacoubian, *Countdown to a Permanent International Criminal Court— Toward a Rapprochement of the Cambodian Genocide*, 1 J. STUDY PEACE & CONFLICT 4 (1999); Ben Kiernan, *The Cambodian Genocide: Issues and Responses*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 191-228 (G. J. Andreopolus ed., U. Pa. Press 1994).

<sup>30</sup> M. CHERIF BASSIUNI, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, in THE PROSECUTION OF INTERNATIONAL CRIMES 11, n.28 (1996).

<sup>31</sup> LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE 250 (2004); ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY (1995); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 1959-1994 265 (1995); *See generally* Jean Mukimbari, *The Seven Stages of the Rwandan Genocide*, 3 J INT’L. CRIM. JUST. 823 (2005).

<sup>32</sup> WISE ET AL., *supra* note 24, at 570; *see also* S.C. Res. 955, *supra* note 1, para. 1.

<sup>33</sup> DESTEXHE, *supra* note 31, at 47.

<sup>34</sup> PRUNIER, *supra* note 31, at 23-26.

<sup>35</sup> DESTEXHE, *supra* note 31, at 37.

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annexed the colonies after the First World War, when the Tutsi were the more dominant group, despite larger numbers of Hutu.<sup>36</sup>

Three years before Rwanda gained independence from Belgium, in 1962, a Hutu uprising resulted in the deaths of more than 20,000 Tutsi refugees who were fleeing the country for Tanzania, Uganda, Kenya, and the Congo.<sup>37</sup> The Belgians, responding to pressures for democratization within its colonies, supported the Hutu.<sup>38</sup> Although evidence suggests animosity between the Hutu and Tutsi began prior to Belgian rule, colonial intervention greatly exacerbated these difficulties.<sup>39</sup> Ethnic tensions heightened due to the favoritism of the Tutsi by the Belgians throughout their colonial rule and because of their subsequent support of the Hutu coup.<sup>40</sup> This ultimately created conditions that expedited the path toward genocide.<sup>41</sup>

The Hutu party, led by General Juvenal Habyarimana, came to power through a military coup in 1973.<sup>42</sup> For the next twenty years, Hutu rule dominated Rwanda.<sup>43</sup> Although Habyarimana claimed to have established a nation of balanced resources and job distribution, the President and his National Revolution Movement for Democracy and Development ruled Rwanda as a one-party state.<sup>44</sup> The new government initially sought to accommodate the Tutsi, giving them a place in Rwandan society in proportion to their population (fourteen percent).<sup>45</sup> This transition meant quotas throughout the government and the economy. Throughout Habyarimana's rule, Rwandan Tutsi in neighboring countries tried to return to their homeland, but the Rwandan government denied repatriation.<sup>46</sup> Then, in the fall of 1990, the Rwandan Patriotic Front, which consisted of Tutsi who had fled Rwanda years before, entered northern Rwanda from Uganda.<sup>47</sup> They now demanded democracy and power sharing from what they claimed was a corrupt Habyarimana regime.<sup>48</sup>

Though several concessions were made to the Tutsi rebels, the government's more extreme Hutu elements became increasingly organized and the government took steps to consolidate their power.<sup>49</sup> In response to the overwhelming political frustration, Tutsi rebels attacked President Habyarimana's airplane on April

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<sup>36</sup> *Id.* at 40.

<sup>37</sup> *Id.* at 78.

<sup>38</sup> *Id.* at 43.

<sup>39</sup> *Id.* at 41.

<sup>40</sup> PRUNIER, *supra* note 31, at 26-35.

<sup>41</sup> *Id.*

<sup>42</sup> DESTEXHE, *supra* note 31, at 45.

<sup>43</sup> *Id.*

<sup>44</sup> PRUNIER, *supra* note 31, at 76-79.

<sup>45</sup> *Id.*

<sup>46</sup> DESTEXHE, *supra* note 31, at 46.

<sup>47</sup> PRUNIER, *supra* note 31, at 90-94.

<sup>48</sup> DESTEXHE, *supra* note 31, at 45.

<sup>49</sup> *Id.* at 46.

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6, 1994.<sup>50</sup> Everyone on board was killed.<sup>51</sup> The annihilation of all Tutsi began instantaneously.<sup>52</sup> By July, Hutu soldiers, police officers, and militia members, recurrently aided by civilians, killed approximately 800,000 Tutsi in several well-coordinated waves of mass killing.<sup>53</sup>

### III. International Criminal Tribunal for Rwanda (“ICTR”)

The crisis in Rwanda was initially interpreted as a humanitarian catastrophe affecting hundreds of thousands of refugees, and eliciting international compassion. Surprisingly, the crisis failed to give due attention to the genocide that had already run its course. As Destexhe observed, “humanitarian action provided a way of responding to the crisis while continuing to conveniently overlook the fact that genocide had taken place until the situation had evolved to the point where it could be forgotten altogether.”<sup>54</sup> In a belated response to the atrocities, the SC established a Commission of Experts in July 1994 to investigate violations of international humanitarian law in Rwanda.<sup>55</sup> In its first interim report, the Commission concluded that there was evidence of genocide as defined by the Genocide Convention.<sup>56</sup> Having confirmed that genocide and other flagrant violations of international humanitarian law had been committed, the SC established the ICTR<sup>57</sup> in 1994.<sup>58</sup>

The international community has traditionally relied on five ways of responding to violations of international criminal law: (1) doing nothing; (2) granting amnesty; (3) creating a truth commission; (4) foreign prosecutions; and (5) creating *ad hoc* international tribunals.<sup>59</sup> The Genocide Convention states that, “persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, *or* by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>60</sup> Therefore, three options exist to prosecute accused genocidal perpetrators in Rwanda. Domestic officials can prosecute individuals accused of genocidal behavior internally, a foreign state can intervene

<sup>50</sup> *Id.* at 31.

<sup>51</sup> MELVERN, *supra* note 31, at 133-136; MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA 95 (2003).

<sup>52</sup> DESTEXHE, *supra* note 31, at 31.

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<sup>53</sup> MELVERN, *supra* note 31, at 164-220.

<sup>54</sup> DESTEXHE, *supra* note 31, at 58.

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<sup>55</sup> BARNETT, *supra* note 51, at 142-152; MELVERN, *supra* note 31, at 248-249.

<sup>56</sup> *Id.*

<sup>57</sup> S.C. Res. 955, *supra* note 1.

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<sup>58</sup> *Id.*

<sup>59</sup> See generally M. CHERIF BASSIOUNI, *The Prosecution of International Crimes and the Establishment of an International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW, 3-11 (M. Cherif Bassiouni ed., 2d ed. 1999).

<sup>60</sup> Genocide Convention, *supra* note 20, at Art. VI.

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and prosecute an accused perpetrator,<sup>61</sup> or the United Nations can convene an *ad hoc* criminal tribunal. To date, four such international *ad hoc* criminal tribunals have convened: the International Military Tribunal at Nuremberg in 1945,<sup>62</sup> the International Military Tribunal for the Far East at Tokyo in 1946,<sup>63</sup> the International Criminal Tribunal for the Former Yugoslavia at The Hague in 1992,<sup>64</sup> and the ICTR.<sup>65</sup>

The creation of the ICTR supported Rwandan efforts to allocate individual responsibility for genocide and other crimes against humanity by offering an objective forum for investigating genocidal events.<sup>66</sup> The SC decided to create the ICTR to bring to justice those persons responsible for acts of genocide and violations of humanitarian law in Rwanda between January 1 and December 31, 1994.<sup>67</sup> As such, the ICTR is authorized to prosecute four clusters of offenses: grave breaches of the Geneva Conventions, violations of the laws or customs of war, the crime of genocide, and crimes against humanity.<sup>68</sup>

The first trial at the ICTR started in January 1997.<sup>69</sup> Fifty persons have been indicted to date.<sup>70</sup> As of March 2005, there have been seventeen judgments against twenty-three accused perpetrators.<sup>71</sup> Twenty of the twenty-three accused (eighty-seven percent) were convicted, including one prime minister, four ministers, one prefect, five burgomasters and several others who held leadership positions in 1994.<sup>72</sup> Eight trials were in progress as of March 2005, involving a total

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<sup>61</sup> While the Genocide Convention does not specifically permit foreign states to prosecute accused genocidal perpetrators, foreign states can assume jurisdiction via the principle of universal jurisdiction. Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim, or any other connection to the state exercising the jurisdiction. Universal jurisdiction can be exercised by a competent judicial body of any state to prosecute a person accused of committing a serious crime under international law, like genocide. See *CrimC (Jer) 40161 Israel v. Eichman [1962] IsrsC [5](1-70)* (discussing a brief history and application of universal jurisdiction against a defendant prosecuted for assisting the Nazi regime in genocide outside of Israeli borders).

<sup>62</sup> The International Military Tribunal at Nuremberg was established pursuant to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, available at <http://www1.umn.edu/humanrts/instreet/imt1945.htm>.

<sup>63</sup> Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 Jan. 1946, available at <http://www.yale.edu/lawweb/avalon/imtfech.htm> (giving full text of the Tribunal's Constitution).

<sup>64</sup> S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

<sup>65</sup> S.C. Res. 955, *supra* note 1.

<sup>66</sup> Erik Mose, *Main Achievements of the ICTR*, 3 J. INT'L. CRIM. JUST. 920, 939-40 (2005); George Yacoubian, *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 3 WORLD AFFAIRS 133, 135 (2002).

<sup>67</sup> Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L. L. 501, 502 (1996).

<sup>68</sup> *Id.* at 502-3.

<sup>69</sup> See International Criminal Tribunal for Rwanda, <http://www.ictor.org/ENGLISH/factsheets/detainee.htm> (last visited Jan. 19, 2006).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

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of twenty-five accused, including eight ministers, one parliamentarian, two prefects, three burgomasters, one councilor, and three military officers.<sup>73</sup>

#### Trials in Rwanda

In December 1996, the genocide prosecutions in Rwanda began.<sup>74</sup> To date, Rwandese courts have concluded approximately 200 trials, with an additional 80,000 suspected perpetrators still awaiting trial.<sup>75</sup> Not surprisingly, the sheer magnitude of genocide cases has placed a severe strain on Rwanda's criminal justice system.<sup>76</sup> That said, general amnesty was out of the question at the time the prosecutions began because the new government, the Rwandan people, and the international community believed that "those responsible for the genocide should be held accountable for their acts in order to eradicate the culture of impunity, reinforce respect for the law and uphold the principle of punishment for crimes."<sup>77</sup> Because the possibility of amnesty had been dismissed, national authorities attempted to ease the pressure by categorizing the detainees according to the crimes for which they were accused and adopted an alternative justice system—the *Gacaca* institution.<sup>78</sup>

National Rwandese officials created four categories of people accused of genocide.<sup>79</sup> Category One consists of the "planners, organisers, and framers of genocide or crimes against humanity."<sup>80</sup> Category Two includes persons who committed homicide or attempted homicide.<sup>81</sup> Category Three includes persons who committed "serious attacks without the intent to cause the death of the victims."<sup>82</sup> Category Four includes "crimes against property."<sup>83</sup>

The *Gacaca* law was adopted in March 2001.<sup>84</sup> The law gives a role to the community in the trial and sentencing process because the Government believes that community involvement can contribute significantly to reconciliation.<sup>85</sup> The primary principle of the *Gacaca* courts is to bring together all parties (i.e., pepe-

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Rwanda to Speed up Genocide Trials*, *supra* note 3.

<sup>76</sup> *See id.*

<sup>77</sup> Penal Reform International, *Gacaca Courts in Rwanda*, [http://www.penalreform.org/english/theme\\_gacaca.htm](http://www.penalreform.org/english/theme_gacaca.htm) (last visited Jan. 19, 2006).

<sup>78</sup> *See* Mark A. Drumbl, Lecture, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 55 (2005).

<sup>79</sup> William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L. CRIM. JUST. 879, 892-93 (2005); *Gacaca Courts in Rwanda*, *supra* note 77; *see also* Jacques Fierens, *Gacaca Courts: Between Fantasy and Reality*, 3 J. INT'L. CRIM. JUST. 896, 909-10 (2005) (discussing how Article 51 of Organic Law no. 16/2004 of June 19, 2004 redefined the different categories of alleged perpetrators for the third time, after the laws of 1996 and 2001).

<sup>80</sup> Schabas, *supra* note 79, at 893.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 891-92; *see also Gacaca Courts in Rwanda*, *supra* note 77.

<sup>85</sup> *See Gacaca Courts in Rwanda*, *supra* note 77.

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trators, victims, and witnesses) at the location of the crime for the purposes of establishing the truth and identifying the guilty.<sup>86</sup> The *inyangamugayo*, or non-professional judges elected from the community, will chair the proceedings.<sup>87</sup> These judges are also responsible for imposing the sentences on those convicted.<sup>88</sup>

There are four primary advantages to the *Gacaca* institution: (1) an expedited process, which should provide closure to victims, offenders, and the international community and begin to foster national reconciliation; (2) the reduction of prison maintenance costs, enabling the government to concentrate on more pressing needs; (3) the participation of every member of the community, facilitating the establishment of the truth; and (4) innovative criminal justice methods created by the new courts particularly with sentencing and community reintegration.<sup>89</sup> Unfortunately, the establishment of the *Gacaca* jurisdictions has been delayed until 2006.<sup>90</sup> Contributing to the problem of judicial resolution to the genocide of 1994 is the release of 36,000 suspected genocidal perpetrators during the summer of 2005 to reduce prison overcrowding.<sup>91</sup> This is an unsatisfactory resolution to one of the most horrific genocidal events of the Twentieth Century. The prosecution and punishment of accused perpetrators of genocide is necessary to achieve global justice and peace.<sup>92</sup> By not punishing perpetrators of genocide, the international community is now at a greater risk of succumbing to new genocidal events.

## IV. International Criminal Court

The international legal community worked toward the creation of a permanent international criminal court for most of the Twentieth Century.<sup>93</sup> The goal of

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See *Rwanda to Speed up Genocide Trials*, *supra* note 3.

<sup>91</sup> See Integrated Regional Information Networks, *Rwanda: Release of thousands of prisoners begins*, Aug. 1, 2005, <http://www.irinnews.org/report.asp?ReportID=48373> (last visited Mar. 2, 2006).

<sup>92</sup> See HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH CENTURY EXPERIENCE 214 (1999).

<sup>93</sup> See Elizabeth Chadwick, *A Tale of Two Courts: The 'Creation' of a Jurisdiction?*, 9 J. CONFLICT & SEC. L. 71, 72 (2004); M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of the International Criminal Court*, 52 J. INT'L AFFAIRS 795, 795-96 (1999); Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT'L L. 1, 4-14 (1998); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 49-57 (1997); M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 50-53 (1995); M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 152-58 (1992); Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 382-390 (1992); William N. Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 FORDHAM INT'L L. J. 88, 92-98 (1992); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L. & COMP. L. REV. 1, 2-11 (1991); M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J.

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establishing a permanent institution to prosecute the most egregious violations of international criminal law culminated with the formation of the International Criminal Court (“ICC”).<sup>94</sup> The Rome Statute, which came into force during the summer of 2002, includes four categories of offenses: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>95</sup> The ICC prosecutes these categories of offenses because they violate fundamental humanitarian principles and constitute the most serious crimes of international concern.<sup>96</sup>

The Twentieth Century demonstrated the harsh reality that the global community failed to create a mechanism to enforce international humanitarian law. Most violations of the established norms of international behavior, such as the crime of genocide, war crimes, and crimes against humanity, are committed with the complicity of the state and its leadership.<sup>97</sup> The Hague Conventions of 1899 and 1907 were the first significant codifications of the laws of war in an international treaty.<sup>98</sup> However, these Conventions failed to create a permanent international criminal court with jurisdiction transcending national boundaries, primarily because sovereign nations were unwilling to be bound by the judgments of an international judicial authority.<sup>99</sup> The United States, for example, persistently claimed that it “reserved the right to resolve any purely American issue.”<sup>100</sup>

Between 1946 and 1996, the United Nations led the efforts to codify certain international crimes.<sup>101</sup> Immediately after the Second World War, the United States sponsored Resolution 95(I), which recognized the principles of international law contained in the Nuremberg Charter.<sup>102</sup> In 1947, the United Nations General Assembly (“GA”) directed the International Law Commission (“ILC”) to formulate the principles of international law in a draft code of offenses, while a special rapporteur was assigned to formulate the Draft Statute for the Establishment of the International Criminal Court.<sup>103</sup> While many nations supported the establishment of a permanent international criminal court, it was clear that none

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INT’L. L. 27, 33-34 (1983); Vespasian Pella, *Towards an International Criminal Court*, 44 AM. J. INT’L. L. 37, 41-42 (1950); Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROB. 263, 264 (1950).

<sup>94</sup> See International Criminal Court: About the Court, <http://www.icc-cpi.int/about.html> (last visited Jan. 19, 2006).

<sup>95</sup> Rome Statute of the International Criminal Court art. 5(1), July 7, 1998, U.N. Doc. A/CONF.183/9, available at [http://www.un.org/law/icc/statute/99\\_corr/cstatute.htm](http://www.un.org/law/icc/statute/99_corr/cstatute.htm) [hereinafter Rome Statute].

<sup>96</sup> See International Criminal Court: About the Court, *supra* note 94.

<sup>97</sup> BENJAMIN B. FERENCZ, *NEW LEGAL FOUNDATIONS FOR GLOBAL SURVIVAL: SECURITY THROUGH THE SECURITY COUNCIL* 67 (1994).

<sup>98</sup> *Id.* at 1-2.

<sup>99</sup> BALL, *supra* note 92, at 16.

<sup>100</sup> *Id.*

<sup>101</sup> M. Cherif Bassiouni, *The Draft Code of Crimes Against the Peace and Security of Mankind*, in 1 INTERNATIONAL CRIMINAL LAW 293, (M. Cherif Bassiouni ed., 2d ed. 1999).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 293-94.

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of the world's superpowers were ready to support the establishment of an international criminal court.<sup>104</sup>

Various draft reports were produced between the 1950s and 1980s, but it was not until 1989 that the GA was faced again with the question of an international criminal court when Trinidad and Tobago sought to address international drug trafficking.<sup>105</sup> The ILC persevered in developing the limited 1989 mandate related to illicit drug trafficking, which eventually evolved into the Draft Statute for an International Criminal Court.<sup>106</sup> It was this draft that served as the basis for the GA's decision to establish the *ad hoc* Committee on the Establishment of an International Criminal Court and later the Preparatory Committee for the Establishment of an International Criminal Court.<sup>107</sup>

On July 17, 1998, the Rome Statute was adopted at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.<sup>108</sup> Of the more than 150 nations in attendance, 120 voted in favor of the court, and 7 against, with 21 abstentions.<sup>109</sup> As of May 12, 2005, ninety-nine nations, not including Rwanda, have ratified the treaty and thus became parties to the Rome Statute of the International Criminal Court.<sup>110</sup>

There are two primary reasons why states have elected not to ratify the ICC Statute. First, countries that do not value democracy and human rights, like China and the Sudan, have little or no incentive to cede criminal jurisdiction to an international entity whose primary offenses address human rights violations.<sup>111</sup> By ceding jurisdiction to the ICC, they would potentially be turning over their own nationals for prosecution before the international community. Second, states that purport to value human rights, like the United States, argue that their sovereignty is better protected by rejecting the Court than by joining it.<sup>112</sup> This is a clear paradox, for those states that purport to value human rights have the greatest incentive to promote an institution dedicated to the realization of international peace. In the case of Rwanda, the refusal to ratify the Rome Statute was philosophical. Capital punishment is not an eligible sanction for any offense falling under the subject matter jurisdiction of the ICC. The maximum

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<sup>104</sup> *Id.* at 295.

<sup>105</sup> *Id.* at 295-99.

<sup>106</sup> *Id.* at 301.

<sup>107</sup> *Id.*

<sup>108</sup> Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Doc. L/ROM/22 (July 17, 1998), available at <http://www.un.org/icc/pressrel/lrom22.htm>.

<sup>109</sup> *Id.*

<sup>110</sup> The International Criminal Court: The States Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Jan. 19, 2006).

<sup>111</sup> Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. INTL. LAW & COM. REG. 407

<sup>112</sup> See Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 385-86 (2002); see also Scheffer, *supra* note 93, at 17-19 (discussing the flaws the United States saw in the statute).

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punishment permitted by the Rome Statute is life imprisonment.<sup>113</sup> Because Rwanda favored the death penalty for convicted genocidal perpetrators, they declined to recognize the Court's jurisdiction.<sup>114</sup>

There are four significant jurisdictional components to the Rome Statute. First, the Rome Statute entered into force on July 1, 2002.<sup>115</sup> This means that only acts perpetrated after July 1, 2002 are eligible for prosecution. Second, all nations that are party to the Rome Statute must accept its jurisdiction.<sup>116</sup> This is the cornerstone of a cooperative, international legal community. Third, states that have not ratified the Statute may, by special declaration, accept the temporary jurisdiction of the ICC for crimes covered by its subject matter jurisdiction.<sup>117</sup> Finally, the Court can exercise jurisdiction if a SC referral is made to the prosecutor.<sup>118</sup>

The subject matter jurisdiction of the ICC includes four categories of offenses:<sup>119</sup> the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>120</sup> The definition of genocide articulated in the ICC Statute follows the definition in the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>121</sup> Crimes against humanity include enslavement,<sup>122</sup> deportation or forcible transfer of population,<sup>123</sup> torture,<sup>124</sup> the crime of apartheid,<sup>125</sup> and other acts "committed as part of a widespread or systematic attack directed against any civilian population."<sup>126</sup> War crimes include any of the following acts against persons or property protected under the Geneva Conventions: torture or inhumane treatment,<sup>127</sup> taking of hostages,<sup>128</sup> intentionally directing attacks against civilian populations that are not part of the hostilities,<sup>129</sup> killing or wounding a combatant who has surrendered,<sup>130</sup> pillaging,<sup>131</sup> using asphyxiating

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<sup>113</sup> Rome Statute, *supra* note 95, art. 77(1)(b).

<sup>114</sup> MELVERN, *supra* note 31, at 249.

<sup>115</sup> Rome Statute, *supra* note 95, art.11(1).

<sup>116</sup> *Id.* art. 12(1).

<sup>117</sup> *Id.* art. 12(3).

<sup>118</sup> *Id.* art. 13(b).

<sup>119</sup> *Id.* art. 5(1).

<sup>120</sup> *Id.*; *see also id.* art. 5(2) (which states that while aggression falls under the subject matter jurisdiction of the ICC, a definition of the crime must be finalized before jurisdiction can be exercised).

<sup>121</sup> *Id.* art. 6.

<sup>122</sup> Rome Statute, *supra* note 95, art. 7(1)(c).

<sup>123</sup> *Id.* art. 7(1)(d).

<sup>124</sup> *Id.* art. 7(1)(f).

<sup>125</sup> *Id.* art. 7(1)(j).

<sup>126</sup> *Id.* art. 7(1).

<sup>127</sup> *Id.* art. 8(2)(a)(ii).

<sup>128</sup> *Id.* art. 8(2)(a)(viii).

<sup>129</sup> *Id.* art. 8(2)(b)(i).

<sup>130</sup> *Id.* art. 8(2)(b)(vi).

<sup>131</sup> *Id.* art. 8(2)(b)(xvi).

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gases,<sup>132</sup> sexual slavery and forced sterilization.<sup>133</sup> The Court will have jurisdiction over the crime of aggression after it has been formally defined.<sup>134</sup>

It is also important to note that the ICC will not operate on the basis of primary jurisdiction, but will be subject to the principle of complementarity.<sup>135</sup> The principle of complementarity provides that the ICC will exercise jurisdiction only when a national judicial system is unable to investigate or prosecute transgressors.<sup>136</sup> In other words, the ICC is a subsidiary mechanism to handle the prosecution of crimes within its jurisdiction. Some states, fearing the possibility of sham investigations or trials protecting perpetrators, argue that the Court should go further and intervene where a national judicial system would be ineffective or unavailable.<sup>137</sup>

To date, four cases have been referred to the Office of the Prosecutor. The state parties themselves referred three of these situations—in the Republic of Uganda on January 29, 2004,<sup>138</sup> the Democratic Republic of Congo on April 19, 2004,<sup>139</sup> and the Central African Republic January 7, 2005.<sup>140</sup> The fourth situation in Darfur, Sudan was referred by the Security Council on March 30, 2005.<sup>141</sup> Of these four, the Prosecutor initiated investigations into the situations in the DRC on June 23, 2004<sup>142</sup> and in the Republic of Uganda on July 29, 2004.<sup>143</sup>

## V. Discussion

Prison overcrowding is a significant concern for criminal justice officials and policymakers across the world. It has been shown to cause increased arousal and

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<sup>132</sup> *Id.* art. 8(2)(b)(xviii).

<sup>133</sup> *Id.* art. 8(2)(e)(vi).

<sup>134</sup> *Id.* art. 5(2).

<sup>135</sup> *Id.* arts. 17, 18.

<sup>136</sup> John T. Holmes, *The Principle of Complementarity, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS* 41, 42 (Roy S. K. Leed ed., Kluwer Law Int'l 1999).

<sup>137</sup> *Id.*

<sup>138</sup> Press Release, International Criminal Court, President of Uganda Refers Situation Concerning Lord's Resistance Army (LRA) to the ICC, [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html) (last visited Jan. 19, 2006).

<sup>139</sup> Press Release, International Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo, [http://www.icc-cpi.int/pressrelease\\_details&id=19.html](http://www.icc-cpi.int/pressrelease_details&id=19.html) (last visited Jan. 19, 2006).

<sup>140</sup> Press Release, International Criminal Court, Prosecutor Receives Referral Concerning Central African Republic, [http://www.icc-cpi.int/pressrelease\\_details&id=87.html](http://www.icc-cpi.int/pressrelease_details&id=87.html) (last visited Jan. 19, 2006).

<sup>141</sup> S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

<sup>142</sup> Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation, [http://www.icc-cpi.int/pressrelease\\_details&id=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html) (last visited Jan. 19, 2006).

<sup>143</sup> Press Release, International Criminal Court, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda, [http://www.icc-cpi.int/pressrelease\\_details&id=33&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html) (last visited Jan. 19, 2006).

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stress among inmates,<sup>144</sup> inmate illness complaints,<sup>145</sup> violence and disciplinary problems,<sup>146</sup> resentment among correctional officers,<sup>147</sup> and homicide<sup>148</sup> among inmates. Several approaches to overcrowding have been implemented, including the construction of larger facilities,<sup>149</sup> diversion programs for non-violent offenders,<sup>150</sup> and the release of offenders back into the community earlier than their sentences have warranted.<sup>151</sup> The Supreme Court of the United States has also weighed in on prison overcrowding. In *Rhodes v. Chapman*, the Court ruled that the housing of two inmates in a single cell did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>152</sup> While in *Wilson v. Seiter*, in addition to tightening the requirements needed to prove cruel and unusual punishment, the Court held that inmates must prove deliberate indifference on the part of prison officials to succeed with an Eighth Amendment claim.<sup>153</sup>

When determining what might constitute an appropriate strategy for reducing prison overcrowding, it is critical to distinguish between types of offenders. For non-violent offenders or offenders with substance abuse or mental health problems, diversion programs have had positive results.<sup>154</sup> There is also a distinction between offenders awaiting trial and offenders who have already served part or most of their sentence. Offenders in the latter classification have been formally punished by the criminal justice system for the crimes they committed.

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<sup>144</sup> See Claire Lawrence & Kathryn Andrews, *The Influence of Perceived Prison Overcrowding on Male Inmates' Perception of Aggressive Events*, 30 *AGGRESSIVE BEHAVIOR* 273, 281 (2004); Frank J. Porporino, *Managing Violent Individuals in Correctional Settings*, 1 *J. INTERPERSONAL VIOLENCE* 213, 229-30 (1986); Verne C. Cox, Paul B. Paulus, & Garvin McCain, *Prison Crowding Research: The Relevance for Prison Housing Standards and a General Approach Regarding Crowding Phenomena*, 39 *AM. PSYCHOL.* 1148, 1156 (1984); Paul B. Paulus & Garvin McCain, *Crowding in Jails*, 4 *BASIC & APPLIED SOC. PSYCHOL.* 89, 105 (1983).

<sup>145</sup> Garvin McCain, Verne C. Cox, & Paul B. Paulus, *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 *ENV'T. & BEHAV.* 283, 288 (1976).

<sup>146</sup> D. Farrington, & C. Nuttal, *Prison Size, Overcrowding, Prison Violence and Recidivism*, 8 *J. CRIM. JUST.* 221, 230 (1980).

<sup>147</sup> See Helsingin Sanomat, *Prison Overcrowding Source of Stress for Inmates and Guards*, <http://www.helsinginsanomat.fi/english/article/Prison+overcrowding+source+of+stress+for+inmates+and+guards%0D%0A/1101981260600> (last visited Jan. 19, 2006).

<sup>148</sup> George B. Palermo, Mark T. Palermo & Douglas J. Simpson, *Death by Inmate: Multiple Murder in a Maximum Security Prison*, 40 *INT'L J. OFFENDER THERAPY & COMP. CRIM.* 181, 182 (1996).

<sup>149</sup> Thomas B. Marvell, *Is Further Prison Expansion Worth the Costs?*, *FED. PROBATION*, Dec. 1994, at 59; P.L. Dressel, . . . and *We Keep on Building Prisons: Racism, Poverty, and Challenges to the Welfare State*, 21 *J. SOC. & SOC. WELFARE* 7 (1994)

<sup>150</sup> DEAN CHAMPION, *CORRECTIONS IN THE UNITED STATES, A CONTEMPORARY PERSPECTIVE* 109 (Pearson/Prentice Hall, 4th ed. 2004).

<sup>151</sup> *Id.*

<sup>152</sup> *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

<sup>153</sup> *Wilson v. Seiter*, 501 U.S. 294, 301 (1991).

<sup>154</sup> Henry J. Steadman & Michelle Naples, *Assessing the Effectiveness of Jail Diversion Programs for Persons with Serious Mental Illness and Co-Occurring Substance Use Disorders*, 23 *BEHAV. SCI. & L.* 163, 168 (2005); M. Alexis Kennedy, Carolin Klein, Boris B. Gorzalka, & John C. Yuille, *Attitude Change Following a Diversion Program for Men Who Solicit Sex*, 41 *J. OFFENDER REHAB.* 41, 58 (2004); Cassia Spohn, R.K. Piper, T. Martin, & E.D. Frenzel, *Drug Courts and Recidivism: The Results of an Evaluation Using Two Comparison Groups and Multiple Indicators of Recidivism*, 31 *J. DRUG ISSUES* 149, 150-176 (2001).

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They are convicted offenders, and theories of deterrence and retribution have, to a significant degree, been implicated. In contrast, offenders incarcerated pre-trial have not been subjected to formal sanctioning, and theories of deterrence and retribution have not been implicated.

The release of suspected genocidal perpetrators fails both the Rwandan and international communities on three levels. First, the strength of the Genocide Convention is compromised. If genocide is indeed one of the most reprehensible crimes that can be committed,<sup>155</sup> then all persons accused of participating in genocidal events should be brought to justice. While “justice” does not necessarily mean convictions and incarceration, the timely initiation of a criminal trial would certainly suffice. Practical problems inherent to correctional facilities, like overcrowding, should not hinder the need to prosecute those accused of having orchestrated or perpetrated genocidal events.

Second, the domestic trials were originally actualized because Rwandan officials believed that justice and reconciliation could only be served if the accused were prosecuted and judged by Rwandan society.<sup>156</sup> Not only does the release of suspected offenders fail to accomplish the goals of justice and reconciliation, but it compromises the legitimacy of Rwanda’s criminal justice process. Moreover, released offenders will likely return to the communities where the atrocities were committed. Without a formal resolution to the genocidal campaigns, Rwanda’s national security is likely to be jeopardized and the reintegration of the accused will be considerably more difficult.<sup>157</sup>

Third, future acts of genocide cannot be prevented if perpetrators are permitted to elude responsibility for their crimes. On April 7, 2004, in a speech commemorating the tenth anniversary of the Rwanda genocide, UN Secretary General Kofi Annan announced the Five Point Action Plan to Prevent Genocide.<sup>158</sup> The first point was prevention of armed conflict which usually provides the context for genocide; second, protection of civilians in armed conflict including a mandate for UN peacekeepers to protect civilians; third, ending impunity through judicial action in both national and international courts; fourth, information gathering and early warning through a UN Special Advisor for Genocide Prevention; and fifth, swift and decisive action along a continuum of steps, including military action.<sup>159</sup>

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<sup>155</sup> See generally ROMÉO A. DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2004); WILLIAM HEWITT, *DEFINING THE HORRIFIC: READINGS ON GENOCIDE AND HOLOCAUST IN THE 20TH CENTURY* (Pearson Edu. 2003); KURT JONASSOHN, *GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS IN COMPARATIVE PERSPECTIVE* (1998); GEORGE J. ANDREOPOULOS, *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* (1994); ISRAEL W. CHARNY & CHANAN RAPAPORT, *HOW CAN WE COMMIT THE UNTHINKABLE? GENOCIDE, THE HUMAN CANCER* (1982).

<sup>156</sup> WISE ET AL., *supra* note 24, at 540.

<sup>157</sup> See generally Carter Hay, *An Exploratory Test of Braithwaite’s Reintegrative Shaming Theory*, 38 J. RES. CRIME & DELINQ. 132, 133-34 (2001); JOHN BRAITHWAITE, *CRIME, SHAME & REINTEGRATION* 1-15 (1989) (arguing that the key to crime control is cultural commitments to shaming that is re-integrative).

<sup>158</sup> Press Release, United Nations, Secretary-General Observes International Day of Reflection on 1994 Rwanda Genocide, <http://www2.unog.ch/news2/documents/newsen/sg04003e.htm> (last visited Nov. 2, 2005).

<sup>159</sup> *Id.*

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His third point affirmed comments by leading scholars that future acts of genocide are best deterred by the prosecution of suspected perpetrators.<sup>160</sup>

The world community has already witnessed the aftermath of failed prosecutions of genocidal perpetrators. The Cambodian genocide is a prime example of inadequate international criminal justice. The Khmer Rouge, headed by Pol Pot, gained control of Cambodia in April of 1975.<sup>161</sup> Although most Cambodians welcomed the new regime, the initial enthusiasm faded as the Khmer Rouge began to institute some of the most radical policies ever experienced by a post-revolutionary nation.<sup>162</sup> Within days of its victory, the Khmer Rouge began evacuating the country's major cities.<sup>163</sup> Money was abolished and symbols of Western technology, such as automobiles and refrigerators, were destroyed.<sup>164</sup> The Khmer Rouge severed contact with the outside world, cutting off international telephone lines, telegrams, and international mail service.<sup>165</sup>

Between 1975 and 1979, the Pol Pot regime systematically subjected the Cambodian population to forced labor, starvation, and murder.<sup>166</sup> The genocide in Cambodia was perpetrated against three categories of victims: religious groups, ethnic groups, and a part of the majority national group.<sup>167</sup> During Pol Pot's effort to remold society, eradicate individualism, and create "total communism," Cambodia was subjected to what was likely the world's most radical political, social, and economic revolution.<sup>168</sup> As Kiernan affirmed, "the country was cut off from the outside world; . . . schools and hospitals were closed; . . . families were separated; . . . and one and a half million of its nearly eight million people were starved to death or massacred."<sup>169</sup>

Three decades later, the international community still thirsts for justice for the Khmer Rouge atrocities.<sup>170</sup> In 2003, the UN and Cambodia drafted an agreement

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<sup>160</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L. L. 7, 12 (2001); Helen Fein, *Introduction to GENOCIDE WATCH 14* (Helen Fein ed., 1992); LEO KUPER, *THE PREVENTION OF GENOCIDE* 101-02 (1985).

<sup>161</sup> Kiernan, *supra* note 29, at 191.

<sup>162</sup> See ELIZABETH BECKER, *WHEN THE WAR WAS OVER* 178 (Simon & Schuster 1986).

<sup>163</sup> *Id.* at 176.

<sup>164</sup> *Id.* at 182, 184.

<sup>165</sup> *Id.* at 180.

<sup>166</sup> Kiernan, *supra* note 29, at 191.

<sup>167</sup> *Id.* at 197-202.

<sup>168</sup> *Id.* at 191.

<sup>169</sup> *Id.*

<sup>170</sup> See Daniel K. Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L. L. J. 551, 575 (2003); Mann Bunyanunda, *The Khmer Rouge on Trial: Whither the Defense*, 74 S. CAL. L. REV. 1581, 1583 (2001); Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137, 138 (2000); Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?* 15 ARIZ. J. INT'L. & COMP. L. 833, 834 (1998); See generally Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 ILSA J. INT'L. & COMP. L. 507 (2000)



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to convene a Khmer Rouge tribunal.<sup>171</sup> Though no trials have yet begun, approval by the GA effectively cleared the way for an international tribunal. The efforts made by the Cambodian government and the international community to bring genocidal perpetrators to justice were significant, not only for the political stability of Cambodia, but also for the legitimacy of the international criminal law regime. The fact that international legal scholars and government officials worked for three decades to secure some resolution to the genocide in Cambodia suggests how important a resolution must be. A curious irony befalls us when persons work for decades to secure some justice for Cambodian victims, while others dismantle the redress in Rwanda for the sake of easing prison overcrowding.

There are six potential solutions to the prison overcrowding dilemma currently faced by the Rwandan government, each with various advantages and disadvantages. First, government officials could release non-genocide-related offenders from prison whose crimes were innocuous or whose sentences are close to completion. This is not a novel idea,<sup>172</sup> and it would continue to secure the most violent convicts and genocidal detainees. Given finite prison space, this alternative offers economic pragmatism and is consistent with recent efforts at penal reform.

Second, a plea bargaining system could be instituted for Category Four offenders. For those genocidal detainees whose prison sentences would not be significant or whose sanction would involve immediate release into the community, the reliance on plea bargaining would provide legitimate dispositions for what could potentially be thousands of cases.

Third, additional prisons can be built. While this is not an inexpensive solution, it can address problems related to capacity relatively expeditiously. Given the hundreds of millions of dollars expended to date by the United Nations for creating and sustaining the ICTR,<sup>173</sup> funds for new prison construction would likely pale in comparison, and may also assist Rwanda's economy with an influx of perdurable employment.

Fourth, other nations can assume the prosecutions of the offenders. Because the Rwandan detainees have been charged with violating the Genocide Convention, other nations can intervene based on the principle of universal jurisdiction, which permits states to assume jurisdiction over those offenses that are so egregious to mankind (e.g., genocide) that custody of the offender is enough.<sup>174</sup> Unlike the principles of territoriality (jurisdiction over criminal acts committed within a state's territory),<sup>175</sup> nationality (jurisdiction over a state's own nation-

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<sup>171</sup> Press Release, United Nations, General Assembly Approves Draft Agreement between U.N., Cambodia on Khmer Rouge Trials, U.N. Doc. GA/10135, <http://www.un.org/News/Press/docs/2003/ga10135.doc.htm> (last visited Jan. 19, 2006).

<sup>172</sup> Marvell, *supra* note 149, at 61.

<sup>173</sup> Yacoubian, *supra* note 66, at 137.

<sup>174</sup> WISE ET AL., *supra* note 24, at 62-63; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 836 (1988).

<sup>175</sup> WISE ET AL., *supra* note 24, at 47-51; Randall, *supra* note 174, at 836.

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als),<sup>176</sup> or passive personality (jurisdiction if the crime's victims are nationals of the state),<sup>177</sup> the principle of universality focuses on the category of offenses. While the assumption of jurisdiction over genocidal events committed more than a decade ago is neither a logistically straightforward nor inexpensive task, it is certainly within the realm of possibility that more stable nations could assume responsibility for the prosecution of some of these crimes.

Fifth, the ICTR could assume jurisdiction. While the logistical and pecuniary capabilities of the ICTR are already strained,<sup>178</sup> the ICTR could assume jurisdiction over Category One offenders to assure that the most serious offenses are tried before a competent tribunal with considerable experience prosecuting genocide-related offenses.

Sixth, the proceedings in Rwanda could continue at their current pace until 2009, at which time the Rome Statute becomes eligible for revision. Article 123 of the Rome Statute calls for its review seven years after entry into force.<sup>179</sup> This means that the ICC could assume jurisdiction of the Rwandan genocide prosecutions even though the Statute went into force during the summer of 2002, eight years after the crimes were committed.<sup>180</sup> Such a retroactive revision would "guarantee lasting respect for and the enforcement of international justice."<sup>181</sup> Given the inconceivable alternative of releasing accused genocidal perpetrators, a temporary revision of the Rome Statute to accommodate prosecutions of the Rwandan genocide seems appropriate.

Genocide is distinguishable from all other crimes by the motivation behind it. Toward the end of the Second World War, when the full horror of the Third Reich was revealed, Winston Churchill stated that the world was being confronted with a "crime that has no name."<sup>182</sup> Indeed, history was of little use in finding a recognized word to fit the nature of Nazi Germany's crime. With the possible exception of the Armenian Massacres of 1915,<sup>183</sup> there simply were no precedents with respect to either the nature or the degree of this crime.

While the prosecution of 80,000 suspected genocidal perpetrators is a colossal undertaking, the solution currently being undertaken by the Rwandan Government is ineffective and incomprehensible. What effectively amounts to a general pardon for suspected genocidal victimizers is inconsistent with what presumably is the foundation of international criminal law—that the most pernicious offenders are found criminally responsible for their actions before a tribunal recognized by the world community. The lessons learned by the release of genocidal detainees are dangerous ones. Persons committed to the rule of law should not be

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<sup>176</sup> WISE ET AL., *supra* note 24, at 51-53.

<sup>177</sup> *Id.* at 59-62.

<sup>178</sup> Yacoubian, *supra* note 66, at 138.

<sup>179</sup> Rome Statute, *supra* note 95, art. 123(1).

<sup>180</sup> *Id.* art. 11(1).

<sup>181</sup> *Id.* Preamble.

<sup>182</sup> Jack N. Porter, *Introduction to GENOCIDE AND HUMAN RIGHTS: A GLOBAL ANTHOLOGY* 2, 5 (Univ. Press of America 1982).

<sup>183</sup> DADRIAN, *supra* note 7, at 302-05.

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disheartened that the international criminal justice system is incapable of addressing the prosecutorial needs for the type of crime it was created to litigate. Potential perpetrators, in turn, can take comfort in the knowledge that if their genocidal campaigns are implemented by enough persons and on a large enough scale, the global community will be ill-equipped to address the legal ramifications.

### Conclusion

As the international criminal enterprise increases in both scope and severity, it is the responsibility of the global community as a whole to develop adequate legal protections against these transgressions. There can be no dispute that consistent enforcement of the Genocide Convention is imperative to the deliverance of international criminal justice. Close to a decade after the horrors of 1994, the ICTR and the domestic prosecutions have not been particularly successful in their mandate to prosecute the accused and punish the guilty. In 1946, the GA recognized that the denial of the right to existence of entire human groups “shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.”<sup>184</sup> Today, genocide is generally recognized as the paramount violation of international criminal law. As such, enforcement of the Genocide Convention should be shouldered by all nation-states. Because the ICC cannot yet assume jurisdiction, it is strongly recommended that states step forward and provide national prosecutions for those offenses that constitute the “most serious crimes of concern to the international community as a whole.”<sup>185</sup>

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<sup>184</sup> G.A. Res. 96, U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1 (Dec. 11, 1947).

<sup>185</sup> Rome Statute, *supra* note 95, art. 5(1).

