

*Cultural Relativism in International War Crimes Prosecutions:  
the International Criminal Tribunal for Rwanda*

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Abstract:

*The tension between universalism and cultural relativism lies at the heart of war crimes and war crimes prosecutions. While cultural relativism arguments should never be the basis for ignoring war crimes outside of the West (particularly in Africa), neither should the international community adopt a radical universalist approach that ignores the unique circumstances underlying each war crimes prosecution. The establishment of the ICTR, over the objection of the post-genocide Rwandan government, probably erred on the side of universalism by ignoring the legitimate needs of the Rwandan people. Nevertheless, the ICTR has appropriately adopted a “mild” cultural relativist approach in its proceedings, by considering cultural differences when evaluating witness testimony, interpreting the definition of certain crimes within the context of the Rwandan experience, and considering Rwandan sentencing practices when sentencing defendants. Future international tribunals should learn from the ICTR experience and consider cultural differences as necessary to do justice in the communities they are designed to serve.*

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“While academic debates about the possibility of objective truth and falsehood are often rarified to the point of absurdity, Rwanda demonstrated that the question is a matter of life and death.”<sup>1</sup>

## **I. Introduction**

The creation of several new international war crimes tribunals over the past fifteen years raises a host of legal and policy issues concerning the way these tribunals seek to do justice. Arguably one of the most important issues is the role, if any, that cultural differences should play in the establishment and operation of these tribunals. This issue is important because the long-run legitimacy of the tribunals will depend on their acceptance by both the communities in which they seek to do justice as well as the larger international community. This dual acceptance, in turn, will largely depend on the ability of these courts to recognize and take into account cultural differences that may affect their ability to uncover the truth, while also ensuring that people from all backgrounds are equally protected from (or held accountable for) the crimes under their jurisdiction.

There are easily recognizable truths on both sides of the debate. On the one hand, if the international community has universally condemned a particular crime, why should cultural differences play any role in how an international tribunal investigates and prosecutes that crime? On the other hand, how can international judges seek to adjudicate the guilt or innocence of individuals from a culture that is not their own, while also attempting to combine different legal cultures and receive evidence in a language that they do not speak, without recognizing and taking these differences into account?

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<sup>1</sup> PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 259 (1998).

Part II of this article explores this dilemma in general terms. First, I give a brief summary of the debate between universalism and cultural relativism in the field of international human rights. I then argue that cultural relativism issues lie at the heart of war crimes and war crimes prosecutions. The very definition of “war crimes” is affected by cultural relativism, and relativism is often a subtext in debates about whether war crimes should be addressed by international, domestic, or hybrid courts. Moreover, even within the context of an international criminal tribunal, there is a need for cultural sensitivity in the way that tribunal seeks to do justice.

Part III of this article applies these general observations to the establishment and operation of the International Criminal Tribunal for Rwanda (“ICTR” or “Tribunal”). First, I set out the facts leading up the Rwandan genocide and the establishment of the ICTR, with an eye toward the role that the international community played in these events. I then ask whether the establishment of the tribunal was reflective of a harmful “one size fits all” attitude in the international community, or if it was a necessary step in order to accord justice equally in Africa as in Europe. I also explore select decisions of the ICTR with an eye toward whether, and how, these decisions were influenced by real or perceived cultural distinctions between the international judges and the persons before them. I specifically focus on: (1) cultural factors that affect witness testimony; (2) the question of applying the international law of genocide in the Rwandan context; and (3) the role of culture in sentencing at the ICTR.

In Part IV, I conclude that future international tribunals can learn a great deal from the ICTR experience. I argue generally that sensitivity to cultural differences will assist international tribunals to be more effective in war crimes prosecutions, but that the

international community must also be careful not to allow actual or perceived cultural differences to become an excuse to disregard or minimize war crimes. I specifically argue that international tribunals should follow the lead of the ICTR in its willingness to recognize and take into account cultural differences as they arise. I also argue that hybrid tribunals have a better chance of striking the proper balance in this respect. Finally, I argue that any international or hybrid tribunal should exercise jurisdiction only when the domestic courts are unable or unwilling to do so. In this way, I advocate a “mild” cultural relativism approach to international war crimes prosecutions.

## **II. The Cultural Relativism Debate and its Application to War Crimes and War Crimes Prosecutions**

### **A. The Universalism-Cultural Relativism Debate**

One of the major ongoing debates in the field of international human rights is between the opposing views of universalism and cultural relativism. Put most starkly, the debate is between (1) those who believe that “[h]uman rights are, literally, the rights that one has simply because one is a human being,”<sup>2</sup> regardless of an individual’s location, culture, or background; and (2) those who maintain that at least some rights vary depending upon the culture to which a person belongs.

According to Professor Jack Donnelly, a Western political scientist, this debate is better understood as points along a continuum rather than as a choice between two extremes. At one end of the spectrum, “radical” cultural relativism holds that culture is the *only* source of the validity of a human right or rule.<sup>3</sup> On the other end of the spectrum, radical universalism holds that culture is completely irrelevant to the validity

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<sup>2</sup> JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* 10 (2d ed. 2003).

<sup>3</sup> *See* DONNELLY, *supra* note 2, at 89-90.

of these rights and rules.<sup>4</sup> Between these two extremes lies a continuum of views ranging from “strong” to “weak” cultural relativism.<sup>5</sup> Strong cultural relativists would argue that culture is the principal source of the validity of a right or rule, but would nevertheless accept the universal validity and application of a few basic rights. Weak cultural relativists (strong universalists) would presume the universality of most rights and rules, but would hold that culture may also be an important source of the validity of others.<sup>6</sup>

In addition, one element of confusion that runs through this debate is that there are two different “faces,” or aspects, to cultural relativism, one generally positive and the other negative. On the positive side, cultural relativism evolved largely as a reaction to the evils of colonialism: given the fact that “African, Asian, and Muslim (as well as Latin American) leaders and citizens have vivid, sometimes personal, recollections of their sufferings under colonial masters,” there is an understandable sensitivity to external pressure.<sup>7</sup> In addition, cultural relativism may be seen as a rejection of the West’s “moral imperialism,” or “the rush to judge another person’s flaws without revealing or

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<sup>4</sup> *See id.* at 90.

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See id.* at 99. Professor Donnelly also argues that this sensitivity, though understandable, is not always justifiable. *See id.*

recognizing one's own."<sup>8</sup> Finally, as a practical matter, human rights activists are likely to be more effective if they ground their advocacy in local cultural norms.<sup>9</sup>

In its negative face, however, cultural relativism arguments are often used as an excuse to avoid responsibility for human rights violations. Thus regime elites often make cultural relativism arguments in an "attempt to deflect attention from their [own] repressive policies."<sup>10</sup> A related problem is that, although the community and the state are different entities, cultural relativism arguments sometimes "assume unjustifiably an identity between government objectives and cultural values."<sup>11</sup> "[P]articularly in states that lack democratic institutions, the crude cultural relativists' identification of the state – and its objectives – with the cultural values of its people remains dubious."<sup>12</sup>

Another, slightly more subtle version of the "negative face" of cultural relativism is that of the international community ignoring or excusing human rights abuses that are occurring in a particular state. This may take the form of well-meaning Westerners,

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<sup>8</sup> BERTA ESPERANZA HERNÁNDEZ-TRUYOL ET AL., *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 8-9 (2002); see also DONNELLY, *supra* note 2, at 99 (noting that U.S. President Clinton expressed great indignation at the prospect of an American teenager being publicly caned in Singapore, without "find[ing] it even notable that in his own country people are being fried in the electric chair."); see also Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights*, in ABDULLAHI AHMED AN-NA'IM, *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES* 38 (1992) ("[I]t is extremely important to be sensitive to the dangers of cultural imperialism, whether it is a product of colonialism, a tool of international economic exploitation and political subjugation, or simply a product of extreme ethnocentricity. Since we would not accept others imposing their moral standards on us, we should not impose our own moral standards on them.").

<sup>9</sup> See, e.g., Michael McDonald, *Reflections on Liberal Individualism*, in AN-NA'IM, *supra* note 8, at 155 ("Often appeal to local shared understandings [in denouncing practices such as torture, slavery, and genocide] has the practical advantage of touching a government or political movement more deeply than an appeal to international standards [which] can be portrayed as alien and invasive, especially to collective autonomy."); see also An-Na'im, *supra*, note 8, at 20 ("[S]ince people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards.").

<sup>10</sup> DONNELLY, *supra* note 2, at 100.

<sup>11</sup> Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 *VAND. J. TRANSNAT'L L.* 527, 586 (2001). For example, it has been argued that "in the Rwandan genocide of 1994, it was not culture *per se*, but a political elite's manipulation and exacerbation of preexisting socio-cultural divisions within Rwandan society that caused the systematic slaughter of Tutsi." *Id.* at 587.

<sup>12</sup> *Id.* at 587.

aware of the largely negative legacy of Western colonialism, failing to criticize arguments advanced by non-Westerners “even when [those arguments] are inaccurate or morally absurd.”<sup>13</sup> Or it may take the more vicious form of neglect or outright xenophobia, with an underlying attitude of “they’ve always been that way, why should we make any effort to change things now?”<sup>14</sup>

The anti-relativist, or universalist, stance is also strengthened by recognizing that relativist arguments are sometimes put forward by those cultures who would seem to need their protective value the least.<sup>15</sup> For example, in the past the United States sometimes adopted a cultural relativist approach with regard to the juvenile death penalty, a practice widely recognized to be in violation of customary international law.<sup>16</sup> Finally, Professor Donnelly argues with some force that in developing countries today, rather than “the persistence of traditional culture in the face of modern institutions . . . we usually see instead a disruptive and incomplete westernization, cultural confusion, or the enthusiastic embrace of ‘modern’ practices and values. In other words, the traditional culture advanced to justify cultural relativism far too often no longer exists.”<sup>17</sup>

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<sup>13</sup> DONNELLY, *supra* note 2, at 100.

<sup>14</sup> *Cf.* GOUREVITCH, *supra* note 1, at 284 (criticizing Western commentators who, observing the serious post-colonial problems in Zaire, “took cynical solace in the conviction that this state of affairs was about as authentic as Africa gets. Leave the natives to their own devices, the thinking went, and – *Voilà!* – Zaire. It was almost as if we *wanted* Zaire to be the Heart of Darkness; perhaps the nation suited our understanding of the natural order of nations.”); Richard Delgado, *Rodrigo’s Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215, 238-39 (1998) (discussing “norm theory” and social science studies that demonstrate that “[w]e respond to persons in need according to how normal or abnormal their plight seems to us. Thus, famines in Biafra evoke little response because we think they are normal in that part of the world.”).

<sup>15</sup> *See* DONNELLY, *supra* note 2, at 99.

<sup>16</sup> *See Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 CHI. J. INT’L L. 311, 315 (2004). In fact, the Supreme Court recently held that the juvenile death penalty is unconstitutional, in part because of the “stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005).

<sup>17</sup> Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 410 (reprinted in DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW POLICY, AND PROCESS 216 (3D ED. 2001)).

## B. Application of the Debate to War Crimes and War Crimes Prosecutions

### 1. Cultural Relativism and War Crimes

As in other areas of human rights, cultural relativism issues lie at the heart of war crimes and war crimes prosecutions. With respect to the crimes themselves, most scholars, including relativists, seem to agree that there are at least a small, core set of prohibitions that are universal.<sup>18</sup> “Few today, for example, would resort to cultural relativism to defend cultural practices that sanction slavery, human sacrifice, or genocide.”<sup>19</sup> Beyond this sense of agreement as to a small subset of crimes, however, the specifics of what acts are universally prohibited, and when, is seldom articulated.<sup>20</sup>

In fact, one commentator, David Chuter,<sup>21</sup> has pointed out that there “there are few, if any, war crimes . . . that were not at some time regarded as permissible, if not actually praiseworthy, in various civilizations.”<sup>22</sup> Moreover, Chuter argues that

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<sup>18</sup> See, e.g. MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE xi (2002); see also *id.* at 66; Henry J. Richardson III, *Book Review: Imperatives of Culture and Race for Understanding Human Rights Law: Human Rights: A Political and Cultural Critique by Makau Mutua*, 52 BUFF. L. REV. 511, 514-15, 517 (2004).

<sup>19</sup> Sloane, *supra* note 11, at 583; see also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 126 n.145 (2004) (“[E]ven those inclined to embrace relativist positions on human rights never press their relativism to the point of overtly defending genocide or crimes against humanity.”)

<sup>20</sup> See, e.g., An-Na‘im, *supra* note 8, at 21 (“[D]espite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits, and values that can be identified and articulated as the framework for a common ‘culture’ of universal human rights. It would be premature in this exploratory essay to attempt to identify and articulate these interests, concerns, and so on, with certainty.”) (emphasis added); Donald W. Shriver, Jr. 16 J.L. & RELIGION 1,5 (2001) (arguing that there is an “emerging international consensus on the nature of ‘war crimes’ and ‘crimes against humanity,’” but also noting that “[w]e are still in the midst of an international struggle to specify these categories [and] to give them legal definition . . . .”); MUTUA, *supra* note 18, at xi (“There are aspects of the official human rights corpus that I think are universal. Prohibitions against genocide, slavery, and other basic abominations violate humanity at the core. But beyond these obvious points of agreement, the ground becomes tricky.”) (emphasis added).

<sup>21</sup> Chuter works for the British Ministry of Defense, where he has had responsibility for Balkans war crimes issues and support to the ICTY. See DAVID CHUTER, WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD 299 (2003).

<sup>22</sup> *Id.* at 10 (citing Deuteronomy 20:12-18); see also *id.* at 17 (“Killings, wife-stealing (the basic story in Homer’s *Iliad*), cattle-rustling, and the spoiling of crops were among the staples of intergroup relationships in earlier times, and there was no sense that any of these acts was wrong, provided it was directed at a member of the out-group. Indeed, most heroic poetry (see Homer) praises deeds that today would be thought illegal as well as immoral.”).

“international criminal justice [today] has a heavily Western, white, Anglo-Saxon character,” and that its “vocabulary and concepts are not neutral [but instead] are culturally specific, constructed and manipulated by a very small number of countries, most of which have English as their native or second language.”<sup>23</sup> Chuter therefore concludes that international humanitarian law does not embody universal values, but rather “is in part a form of neocolonialism, in the sense that it gives the West practical leverage to achieve political objectives such as the replacement of rulers or regimes.”<sup>24</sup>

Even the term “war crimes” is problematic. In this paper, I use the term generally to refer to all of the crimes that fall under the jurisdiction of international criminal tribunals, including war crimes, crimes against humanity, and genocide. As such, it is useful shorthand, but it can also be confusing and deceptive, and inevitably means different things in different contexts.<sup>25</sup> In fact, “each successive international court has tended to define the categories of war crimes and crimes against humanity with new components or variations . . . .”<sup>26</sup>

Moreover, the crimes that do fall under this broad umbrella are international crimes only because of the *context* in which they take place. In other words, rape is rape, and murder is murder, but sometimes they are violations of international law and

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<sup>23</sup> *Id.* at 94. Chuter specifically argues that international humanitarian norms reflect Western biases in their focus on individual guilt, imputation of command responsibility, and demand that soldiers disobey unlawful orders. *Id.* at 96-97. Chuter also notes that “[n]one of the major players in the international humanitarian law game can dictate to others from a position of complete moral superiority: all have done things comparable to some of the atrocities of Rwanda and Yugoslavia in modern times, or they have excused similar behavior on the part of their allies. Likewise, all have blocked, or attempted to block, investigations by international authorities into their own conduct more recently.” *Id.* at 95.

<sup>24</sup> *Id.* at 95.

<sup>25</sup> *See id.* at 3 (noting that the expression ‘war crimes’ “needs to be used with great care. Neither the [ICTY] nor the [ICTR] tribunals punish war crimes – they punish serious violations of international humanitarian law. Confusingly, the Statute of the [ICC] *does* refer to war crimes, but in a context that is describing what was called Violations of the Laws or Customs of War or Grave Breaches of the Geneva Conventions in the past. It is a mistake to assume that war crimes are a conceptual category all their own.”)

<sup>26</sup> Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 235 (2004).

sometimes not. In general, it depends on whether they take place during an “armed conflict” or in a situation where the violence is “widespread and systematic” in nature: all inquires that are somewhat subjective.<sup>27</sup> Finally, within the context of an armed conflict, it is typically the character of the victim as a civilian or other non-combatant that makes a certain act a crime, and there is often “a degree of subjectivity” in the definitions of combatants and non-combatants.<sup>28</sup>

Thus several levels of contextual nuance surround the *definition* of war crimes – all of which will be impacted by the cultural viewpoints of, *inter alia*, the victims, perpetrators, judges, and others who create and interpret international humanitarian law. It is therefore unsurprising that cultural relativism arguments also play a large role in determining the appropriate *response* to war crimes when they occur, particularly the response by the international community.

## 2. Cultural Relativism and Responses to War Crimes

Since the end of the Cold War, the international community and particularly the United Nations has begun to respond more and more often to the occurrence of war crimes throughout the world. In many cases, that international response has taken the

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<sup>27</sup> See, e.g., CHUTER, *supra* note 21, at 77-78 (“violations of the laws or customs of war, as well as grave breaches of the Geneva Conventions, require an armed conflict of some kind if they are to be charged. . . . [The ICTY’s] statute requires it to prove the existence of an armed conflict first before crimes against humanity can be charged. (This stipulation is not found in the statute for the [ICTR] or in the ICC Statute.)”); *id.* at 214-15 (the requirement of an armed conflict “has been dropped in the ICC Statute . . . [b]ut the other requirement for the proof of crimes against humanity is that the atrocities should be ‘widespread and systematic,’ which is to say that random atrocities, even conducted on a large scale and very brutally, would not qualify unless there were an underlying plan of some kind.”); see also Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT’L L. 145, 160 (2003) (“[J]udging individual acts of criminal responsibility always presupposes some normative context, but in many cases involving alleged war crimes, it is that very context that is the subject of dispute. As soon as the law tries to assess that larger historical and political context, the law moves into areas of indeterminacy and political conflict.”).

<sup>28</sup> For example, “[a]ny troops sent into Rwanda in 1994 to ‘stop the genocide’ would have found themselves firing on women and children, who made up a substantial proportion of the Hutu killers.” CHUTER, *supra* note 21, at 78.

form of the establishment of an international legal tribunal. First, in 1993 the United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in response to atrocities in the Balkans during the various conflicts in that region.<sup>29</sup> Then in 1994, the Security Council created the ICTR in response to the Rwandan genocide of that same year.<sup>30</sup> In addition, several “hybrid” courts, combining national and international judges and law, have also been established or discussed – most notably in Sierra Leone, Kosovo, East Timor, and Cambodia.<sup>31</sup> Finally, the long-awaited International Criminal Court (ICC), the first ever permanent, treaty based international criminal court, was established in July 1998, and the Rome Statute governing the jurisdiction and functioning of the court entered into force in July 2002.<sup>32</sup>

Yet if “[l]aw is a form of cultural expression and is not readily transplantable from one culture to another,”<sup>33</sup> then the creation of international criminal tribunals will necessarily have implications for the cultural relativism debate. The concept of

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<sup>29</sup> See S.C. Res. 808, U.N. SCOR, 48<sup>th</sup> Sess., at 28, U.N. Doc. S/INF/49 (1994), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/098/21/IMG/N9309821.pdf?OpenElement> (deciding in principle to establish the tribunal); S.C. Res. 827, U.N. SCOR, 48<sup>th</sup> Sess., at 29, U.N. Doc S/INF/49 (1994), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement> (adopting the Statute of the tribunal); see also 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 30-31 (1998); Ivana Nizich, *International Law Weekend Proceedings: International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT’L & COMP. L. 353, 353 (2001).

<sup>30</sup> See S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., at 15, U.N. Doc. S/INF/50 (1996), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>; see also 1 MORRIS & SCHARF, *supra* note 29, at 72; Nizich, *supra* note 29, at 353.

<sup>31</sup> See, e.g., Patricia M. Wald, *Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?*, 98 AM. SOC’Y INT’L L. PROC. 192, 192 (2004); Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone’s War Crimes*, 17 EMORY INT’L L. REV. 55 (2003); Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1059, 1070-71 (2003); Laura A. Dickerson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 296-300 (2003).

<sup>32</sup> See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), available in 37 I.L.M. 999 (entered into force July 1, 2002); see also International Criminal Court, *About the Court*, at <http://www.icc-cpi.int/about.html>.

<sup>33</sup> MARY ANN GLENDON, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 10 (1982); see also Note, Kristina D. Rutledge, “Spoiling Everything” – *But for Whom? Rules of Evidence and International Criminal Proceedings*, 16 REGENT U.L. REV. 151 (2004).

“universal” jurisdiction over war crimes is largely accepted and “there is a remarkable degree of consensus among international lawyers in favor of international criminal accountability for mass murderers, rapists, and torturers.”<sup>34</sup> There is also, however, a healthy body of scholarship that argues that purely “outsider” prosecution is a flawed response to war crimes.

For example, in critiquing the international community’s response to the Rwandan genocide, including the establishment of the ICTR, Professor Jose Alvarez has argued that “the international community needs to be responsive to the *idiosyncratic conditions* that gave rise to massive violations of human rights as well as to the conditions prevailing in those societies in the immediate wake of atrocities.”<sup>35</sup> Professor Alvarez asserts that his critique “is not premised on cultural relativism”<sup>36</sup>; however, he does admit that there may be “idiosyncratic cultural or historical reasons why Rwandans or other groups may resist solutions designed or imposed by the international community,” and he agrees that some of those reasons are suggested by his analysis.<sup>37</sup>

Similarly, in an analysis of the effectiveness of both the ICTR and the ICTY, Ivana Nizich, a former intelligence analyst and research officer for the ICTY, has opined that “[t]he international community cannot have an elitist, paternalistic attitude toward [war] crimes and toward the victims of these crimes, i.e., viewing local participation as inherently biased, tribal, inexperienced, and inept.”<sup>38</sup> Nizich also argues that “hybrid attempt[s] to fuse international and national participation in adjudicating war crimes may,

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<sup>34</sup> Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda* 25 YALE J. INT’L L. 365, 366 (1999).

<sup>35</sup> See *id.* at 370 (emphasis added). The Rwandan situation and the ICTR are discussed in greater detail in Part III, *infra*.

<sup>36</sup> See *id.* at 369.

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

<sup>38</sup> Nizich, *supra* note 29, at 364.

in some cases, be preferable [to] the ‘elitist’ models (i.e., the ICTY and ICTR).”<sup>39</sup> Again, though not specifically using the language of cultural relativism, the subtext to this argument is that the hybrid tribunals will better understand and reflect cultural values and be less prone to the moral imperialism dangers of a radical universalist approach.

Finally, Professor Mark Drumbl has argued that “although all genocides are among the most serious crimes of concern to the international community as a whole,” nevertheless, “each genocide is unique . . . [and] the modalities of securing accountability and encouraging healing should vary in each individual case.”<sup>40</sup> Professor Drumbl thus argues that policy responses to war crimes should be based on a “contextual approach” rather than a “deontological approach . . . [that] posits that trials of selected individuals (preferably undertaken at the international level) constitute the favored and often exclusive remedy to respond to all situations of genocide and crimes against humanity.”<sup>41</sup> Although he hesitates to specifically invoke the language of cultural relativism,<sup>42</sup> Professor Drumbl clearly embraces at least some aspects of the theory, arguing that “[p]rocesses *based on local culture and regional practice* may create a greater sense of familiarity among victims than the potentially alienating procedure of trials.”<sup>43</sup> Thus the

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<sup>39</sup> *Id.* at 363. I return to the advantages of hybrid tribunals in Part IV, *infra*.

<sup>40</sup> Mark Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1224 (2000); *see also* Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 548 (2005) (“[I]nterpretations of justice are often multi-layered and, for many people, take root in national and local contexts.”)

<sup>41</sup> Drumbl, *Punishment, Postgenocide*, *supra* note 40, at 1228.

<sup>42</sup> *See, e.g.*, Drumbl, *Collective Violence and Individual Punishment*, *supra* note 40, at 603 (“Cultural relativism should not impede the establishment of a system-wide norm that holds accountable those individuals who perpetrate acts of great wickedness. There is no culture that views the infliction of such acts as tolerable.”)

<sup>43</sup> Drumbl, *Punishment, Postgenocide*, *supra* note 40, at 1265; *see also* Drumbl, *Collective Violence and Individual Punishment*, *supra* note 40, at 548-49, 610 (“[A]t a minimum, some space should be retained in this accountability process for alternative (and perhaps competing) mechanisms, such as those that draw from local custom, national practices, or indigenous legal process. . . . I propose . . . that international criminal law and punishment contemplate communitarian underpinnings, in which international norms

subtext of cultural relativism is present, and should be recognized, in this and other debates about the relative value of international versus domestic responses to war crimes.

### 3. Cultural Relativism Within International War Crimes Prosecutions

As this discussion illustrates, the response to war crimes that reflects the most “universalist” approach is that of an international war crimes tribunal such as the ICTY or ICTR. Nonetheless, even given a decision to address war crimes through the use of an international prosecutorial body, there may still be room for cultural sensitivity in how that body goes about doing justice.

Of course, one could argue that the philosophy underlying international war crimes prosecutions is diametrically opposed to the idea of cultural relativism. For example, Justice Richard Goldstone, the former Chief Prosecutor for the ICTY and ICTR, has called cultural relativism “a dangerous trend” and has argued that it should play no role in war crimes prosecutions.<sup>44</sup> Indeed, we would be appalled if an international war crimes tribunal judged the architect of a genocide in Africa differently from the architect of a genocide in Europe on the basis that the African defendant’s actions reflected a part of his “culture” with which the international community should not interfere.

Yet at the same time, culture – and cultural differences – have been and will continue to be an undeniable fact of life for all parties involved with international tribunals. International tribunals typically consist of legal officers (judges, prosecutors, defense attorneys, and staff) who come from different cultures than the defendant and/or

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become sedimentarily integrated into communities in a manner that takes into account cultural needs instead of imposing cultural values.”)

<sup>44</sup> Justice Richard Goldstone, *Symposium: Prosecuting International Crimes: An Inside View*, 7 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 11 (1997).

victims.<sup>45</sup> As Judge Patricia Wald has noted with respect to the ICTY, “[The ICTY] tries suspects in a country to which they have no ties and sentences them to prison in other foreign countries. To many internationalists this may reflect a triumph, but there are also voices urging caution. . . . Our judicial systems, with their peculiar rights and remedies, are products and reflections of our unique political and cultural notions.”<sup>46</sup> If international legal officers refuse to acknowledge this reality, and instead simply judge the witnesses, facts, and defendant’s behavior solely based on their own cultural norms, it is less likely that justice will result. We would therefore want these judges to acknowledge and consider cultural differences as they proceed.

Thus one could accept the universal validity and application of certain war crimes, but nonetheless see a role for cultural sensitivity in how an international war crimes tribunal operates. To return to Professor Donnelly’s thesis, cultural relativism arguments can apply to either the *substance* of human rights, the *interpretation* of particular rights, and/or the *form* in which those rights are implemented.<sup>47</sup> One could, for example, advocate a universalist position with respect to a substantive list of human rights (e.g., protection against genocide), but also allow culture-based deviations from international norms at the level of interpretation (e.g., how genocide is defined in a particular situation) or at the level of form and implementation (e.g., how a tribunal goes about investigating and prosecuting an alleged genocide).

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<sup>45</sup> For example, Professor Drumbl notes that the ICTR prosecutions are “held in Tanzania, . . . where the language of the trial may not be understandable to all Rwandans, . . . [and] where the trials may be encumbered by foreign (and seemingly technical) procedures.” Drumbl, *Punishment, Postgenocide*, *supra* note 40, at 1259. I return to a discussion of the specific impact that cultural or language differences have had at the ICTR in Part III, *infra*.

<sup>46</sup> Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemma of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 117 (2001).

<sup>47</sup> See DONNELLY, *supra* note 2, at 90, 96-98.

### III. Cultural Relativism and the International Criminal Tribunal for Rwanda

With these general observations in mind, it will be helpful at this point to apply them to a specific case study. The ICTR is an ideal subject for this study, because several aspects of the cultural relativism debate have resonated throughout the Rwandan experience. Moreover, the Tribunal has considered cultural differences in the course of fulfilling its mandate, thus illustrating the importance of these issues even when operating within an universalist framework.

#### A. History of the Rwandan Genocide and the Establishment of the ICTR

##### 1. Rwandan History Through 1994

The history leading up to the Rwandan genocide is well documented elsewhere.<sup>48</sup> However, a brief recitation of the relevant facts here – with special emphasis on the role that the international community played in these events – will assist us in evaluating the relevance of cultural relativism to the establishment and work of the ICTR.

On April 6, 1994, the Rwandan President, Juvénal Habyarimana, was killed when his plane was shot down by a surface-to-air missile.<sup>49</sup> This incident sparked the widespread and systematic murder of between 500,000 and 1,000,000 civilians – mostly Tutsis – throughout the country.<sup>50</sup> When the violence subsided, more than 75% of Rwandan’s ethnic Tutsi population had been slaughtered.<sup>51</sup> The scale of the violence was unprecedented: the murders occurred at almost three times the rate of the killing of Jews

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<sup>48</sup> See generally, e.g., GOUREVITCH, *supra* note 1; GERARD PRUNIER, THE RWANDAN CRISIS: HISTORY OF A GENOCIDE (1995); 1 MORRIS & SCHARF, *supra* note 29, at 47.

<sup>49</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 47.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

during the Holocaust.<sup>52</sup> Yet this genocide was not a spontaneous uprising, nor the inevitable result of ancient tribal warfare. It was carefully planned, and, most agree, fully preventable by the international community.<sup>53</sup>

Rwanda is composed primarily of two “ethnic” groups: the Hutu majority and the Tutsi minority.<sup>54</sup> Yet these two groups historically “spoke the same language, followed the same religion, intermarried, and lived intermingled, without territorial distinctions . . . sharing the same social and political culture in small chiefdoms.”<sup>55</sup> In fact, because of the great degree of intermixing throughout the years, ethnographers and historians question whether the Tutsi and Hutu are in fact distinct ethnic groups.<sup>56</sup> Rather, the main historic distinction between the two groups was economic: “Hutus were cultivators and Tutsis were herdsman.”<sup>57</sup> Because being a herdsman was a more prosperous vocation, the minority Tutsi eventually emerged as an aristocratic elite; however, the lines between the two groups remained porous.<sup>58</sup>

Nevertheless, when European colonizers arrived in Rwanda at the end of the nineteenth century, they quickly seized on real or perceived differences between the two

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<sup>52</sup> See *id.* at 47 & n.215 (citing Philip Gourevitch, *After the Genocide*, THE NEW YORKER, Dec. 18, 1995, at 78, and Daphna Shrager & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT’L L. 501, 501 (1996)).

<sup>53</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 48. *But see* CHUTER, *supra* note 21, at 123-24 (criticizing the *post hoc* calls for intervention in Rwanda as unrealistic).

<sup>54</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 48. A third ethnic group, the Twa, comprise approximately 2% of the Rwandan population. *Id.* at 48 n.221.

<sup>55</sup> GOUREVITCH, *supra* note 1, at 47. Although the Tutsis are generally described as tall and lanky, with aquiline noses and longer jawbones, and the Hutus as stocky, dark-skinned, and round-faced, “[n]ature presents countless exceptions.” *Id.* at 50. Moreover, intermarriage was common, and “through marriage and clientage, Hutus could become hereditary Tutsis, and Tutsis could become hereditary Hutus.” *Id.* See also 1 MORRIS & SCHARF, *supra* note 29, at 48-49.

<sup>56</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 49; see also GOUREVITCH, *supra* note 1, at 48 (stating that “ethnographers and historians have lately come to agree that Hutus and Tutsis cannot properly be called distinct ethnic groups.”)

<sup>57</sup> GOUREVITCH, *supra* note 1, at 48; see also 1 MORRIS & SCHARF, *supra* note 29, at 49.

<sup>58</sup> GOUREVITCH, *supra* note 1, at 48; see also 1 MORRIS & SCHARF, *supra* note 29, at 49.

groups in order to further their own brand of “race science.”<sup>59</sup> As Phillip Gourevitch describes it in his history of the Rwandan genocide:

[W]hen the Europeans arrived in Rwanda at the end of the nineteenth century, they formed a picture of a stately race of warrior kings, surrounded by herds of long-horned cattle and a subordinate race of short, dark peasants, hoeing tubers and picking bananas. The white men assumed that this was the tradition of the place, and they thought it a natural arrangement.<sup>60</sup>

Thus to conform reality to their vision of it, the colonizers encouraged and deepened the divide between the two groups. The Germans and then the Belgians set up a policy of indirect colonial rule, with the Tutsis serving as feudal lords on the Europeans’ behalf.<sup>61</sup> The Belgians also furthered the division of Hutu and Tutsi by “conduct[ing] a census for the purpose of issuing identity cards which labeled every Rwandan as a Hutu, a Tutsi, or a Twa.”<sup>62</sup> A person’s classification was based on patrilineal lineage, and membership in a particular group became increasingly rigid.<sup>63</sup>

Naturally, the majority Hutu population resented the assumption of Tutsi superiority and the imposition of Tutsi rule by the Europeans.<sup>64</sup> After World War II, as independence movements spread throughout Africa, the Belgians began to sympathize with the Hutus desire for self-determination.<sup>65</sup> The Hutus therefore seized power in Rwanda in 1959,<sup>66</sup> and the first wave of systematic political violence between Hutus and

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<sup>59</sup> See *id.* at 50; see also 1 MORRIS & SCHARF, *supra* note 29, at 49.

<sup>60</sup> GOUREVITCH, *supra* note 1, at 50.

<sup>61</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 49; see also GOUREVITCH, *supra* note 1, at 54.

<sup>62</sup> 1 MORRIS & SCHARF, *supra* note 29, at 49.

<sup>63</sup> See *id.* at 49-50.

<sup>64</sup> See GOUREVITCH, *supra* note 1, at 57-58.

<sup>65</sup> See *id.* at 58.

<sup>66</sup> See GOUREVITCH, *supra* note 1, at 58; 1 MORRIS & SCHARF, *supra* note 29, at 50.

Tutsis followed. During the next few years, over 100,000 Tutsis fled the country in the face of mass killings.<sup>67</sup>

Throughout the 1970s and 1980s, Rwanda was a dictatorship ruled by the French-supported President Habyarimana, and France brought the country within its “neocolonial sphere in Francophone Africa.”<sup>68</sup> During this same time period, the exiled Tutsis attempted several times to invade Rwanda and overthrow the government. After each unsuccessful attempt, Tutsis in Rwanda would be massacred by the thousands.<sup>69</sup>

In 1990, the largely Tutsi refugee army known as the Rwandan Patriotic Front (RPF) attacked again, and France responded by sending arms to Rwanda and providing a contingent of troops to fight with the Rwandan army.<sup>70</sup> In late 1992, the fighting between the Rwandan army and the RPF forces reached a stalemate, and the two camps began negotiating a series of agreements that culminated in the August 1993 Arusha peace accords.<sup>71</sup> “[C]rucially, throughout the peace-implementation period a United Nations peacekeeping force would be deployed in Rwanda.”<sup>72</sup>

Hutu extremists, many of whom were close to President Habyarimana, were strongly opposed to the peace agreement, even as Hutu moderate opposition parties gained increasing support among the Rwandan population.<sup>73</sup> To shore up his support among the Hutus, President Habyarimana soon sought to again unite them against “a

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<sup>67</sup> See GOUREVITCH, *supra* note 1, at 59; 1 MORRIS & SCHARF, *supra* note 29, at 50.

<sup>68</sup> 1 MORRIS & SCHARF, *supra* note 29, at 50.

<sup>69</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 50. The British philosopher Sir Bertrand Russell described the scene in Rwanda in 1964 as “the most horrible and systematic massacre we have had occasion to witness since the extermination of the Jews by the Nazis.” GOUREVITCH, *supra* note 1, at 65.

<sup>70</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 50; GOUREVITCH, *supra* note 1, at 88. France continued to funnel huge arms shipments into Rwanda “right through the killings in 1994 . . . .” GOUREVITCH, *supra* note 1, at 89. Gourevitch also notes that “[i]nitially, Belgium and Zaire also sent groups to back up [Habyarimana’s forces], but the Zaireans were so given to drinking, looting, and raping that Rwanda soon begged them to go home, and the Belgians withdrew of their own accord.” *Id.*

<sup>71</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 50-51; GOUREVITCH, *supra* note 1, at 99.

<sup>72</sup> GOUREVITCH, *supra* note 1, at 99.

common enemy”: the Tutsis.<sup>74</sup> In 1993, a training camp for the “Hutu militia” was established, providing groups of 300 Hutus at a time with courses “on methods of mass murder and indoctrination in ethnic hatred.”<sup>75</sup> The Rwandan authorities distributed six million dollars worth of firearms provided by France to militia members and other Habyarimana supporters; in addition, “machetes were imported *en masse* from China and stored in secret caches throughout the country.”<sup>76</sup>

In early 1994, the commander of the U.N. peacekeeping force in Rwanda (UNAMIR), Major General Romeo Dallaire, sent a cable to the U.N. Headquarters warning that the Hutu hard-liners were planning a genocidal massacre of the Tutsis.<sup>77</sup> In the weeks following, he made repeated requests for reinforcements and sought authorization to use force to seize the weapons caches, but U.N. officials – still stinging from the death of U.S. soldiers in peacekeeping operations in Somalia – refused these requests.<sup>78</sup>

This set the stage for the mass genocide that began in April 1994. Almost instantly after Habyarimana was assassinated, Hutu soldiers and the newly trained militia began to hunt down and kill Tutsi civilians and moderate Hutus.<sup>79</sup> Barricades were erected on major thoroughfares, at which members of the Hutu Presidential Guard inspected identity cards and executed those who had a Tutsi identity card or were

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<sup>73</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 51.

<sup>74</sup> *Id.* (quoting Gourevitch, *After the Genocide*, *supra* note 52, at 86.)

<sup>75</sup> 1 MORRIS & SCHARF, *supra* note 29, at 52; see also *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, para. 65 (reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 150, 160 (1998)).

<sup>76</sup> 1 MORRIS & SCHARF, *supra* note 29, at 52.

<sup>77</sup> See *id.* at 52-53; GOUREVITCH, *supra* note 1, at 103-05.

<sup>78</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 53; GOUREVITCH, *supra* note 1, at 105-06.

<sup>79</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 53.

perceived to have Tutsi Physical traits.<sup>80</sup> Tutsis were hunted down and killed through house-to-house searches, and Tutsis who sought refuge at churches or hotels were often surrounded by soldiers and massacred.<sup>81</sup> Hundreds of thousands of Tutsis were murdered, and tens of thousands of Tutsi women were raped and/or sexually mutilated.<sup>82</sup>

In the meantime, Belgium withdrew from the U.N. Peacekeeping force after a contingent of ten Belgian United Nations Peacekeepers were captured, tortured, and murdered.<sup>83</sup> On April 21, 1994, the U.N. Security Council passed a resolution that ordered the retreat of all but 270 U.N. Peacekeeping troops.<sup>84</sup> The United States not only sought to avoid involvement with peacekeeping missions but also urged others not to undertake missions that it wished to avoid.<sup>85</sup> When other countries began pushing for the return of U.N. troops, the United States demanded control of the mission and then encouraged delays in the deployment of troops on the Security Council.<sup>86</sup>

At the same time, French diplomats were depicting the massacre as a “mass popular outrage” in response to the President’s assassination.<sup>87</sup> France also encouraged the view that that the killing was an extension of the war with the RPF, and that the RPF was either the greater offender, or that at most a two-way genocide was taking place: “in short, that Rwandans were simply killing each other as they were wont to do, for primordial tribal reasons, since time immemorial.”<sup>88</sup> France also launched *Operation*

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<sup>80</sup> See *id.* at 54; see also *Final Report of the Commission of Experts*, *supra* note 75, at para. 69.

<sup>81</sup> See *Final Report of the Commission of Experts*, *supra* note 75, at paras. 69-72.

<sup>82</sup> See I MORRIS & SCHARF, *supra* note 29, at 55.

<sup>83</sup> See GOUREVITCH, *supra* note 1, at 114, 150.

<sup>84</sup> GOUREVITCH, *supra* note 1, at 150.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* at 151.

<sup>87</sup> *Id.* at 154.

<sup>88</sup> *Id.* at 154; see also *id.* at 156.

*Tourquoise*, which the Security Council endorsed and gave permission to use force.<sup>89</sup> (By a strange coincidence, the Rwandan government occupied a rotating seat on the Security Council at this time.<sup>90</sup>) *Operation Turquoise* set up a “safe zone” in southwestern Rwanda, but many asked “safe for whom?”<sup>91</sup> The operation did rescue at least 10,000 Tutsis, but thousands more were killed in the zone under France’s control.<sup>92</sup> The Hutu government even moved its radio station into the French zone and continued to broadcast incitements to kill Tutsis.<sup>93</sup>

Nevertheless, by mid-July, the RPF had pushed its way to the capital, and hundreds of thousands of Hutus had fled into Southwest Rwanda and Zaire (now the Democratic Republic of the Congo).<sup>94</sup> On July 18, the Hutu extremist government fled the country and the RPF established a new coalition government with the surviving members of the anti-Hutu Power opposition parties.<sup>95</sup> Thus the genocide ended, but Rwanda was left with hundreds of thousands dead and wounded, and hundreds of thousands of murderers and accomplices.

## 2. After the Genocide: The International Community’s Response

The international community had failed to prevent or stop the genocide, but it nevertheless quickly turned to the question of what it might do to help bring the perpetrators to justice.<sup>96</sup> The Rwandan penal system had been completely decimated,<sup>97</sup>

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<sup>89</sup> *Id.* at 155-56.

<sup>90</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 60.

<sup>91</sup> GOUREVITCH, *supra* note 1, at 157.

<sup>92</sup> See *id.* at 158.

<sup>93</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 61.

<sup>94</sup> See GOUREVITCH, *supra* note 1, at 162. Those fleeing included many who had been responsible for the killings. See *id.* at 156. They “were indiscriminately received with open arms by U.N. and humanitarian agencies and accommodated as refugees in giant camps.” *Id.*; see also 1 MORRIS & SCHARF, *supra* note 29, at 60.

<sup>95</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 58; GOUREVITCH, *supra* note 1, at 162.

<sup>96</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 61.

and the new government – which now occupied the Rwandan seat on the Security Council – began pressing for a war crimes tribunal similar to the ICTY, set up the pervious year.<sup>98</sup>

However, many on the Security Council were resistant to the idea of a “costly international investigation and a tribunal which the United Nations could ill-afford.”<sup>99</sup>

Such resistance was harshly criticized, and some suggested that it smacked of racism.<sup>100</sup>

As one commentator noted:

[H]ad the sequence of events between the Yugoslav and Rwanda conflicts been different, it is by no means certain that a tribunal for Rwanda would have been established. On the basis of international responses to other situations, it has been suggested that the plight of African victims would not generate the same outcry as the suffering of Europeans. In other words, the Rwanda Tribunal was established [only] because of the precedential effect of the Yugoslav Tribunal.<sup>101</sup>

Or as the Prime Minister-delegate of the new Rwandan coalition government asked, “Was a war crimes court not set up in Germany? Is it because we’re Africans that a court has not been set up [for Rwanda]?”<sup>102</sup>

Thus in November 1994 the Security Council established the ICTR.<sup>103</sup> In a strange turn of events, however, Rwanda was the only member of the Security Council to

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<sup>97</sup> See Jose Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. INT’L & COMP. L. 359, 369 (1999) (noting that, after the genocide, there were “sixteen lawyers left alive” in Rwanda); see also Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT’L L. J. 391, 406 (2001) (noting that “the genocide in Rwanda left the judicial system virtually destroyed – approximately ninety-five percent of the country’s lawyers and judges were killed, exiled, or imprisoned.”).

<sup>98</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 62.

<sup>99</sup> *Id.*

<sup>100</sup> See *id.*

<sup>101</sup> Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT’L L. 501, 501 (1996).

<sup>102</sup> 1 MORRIS & SCHARF, *supra* note 29, at 62.

vote against the Resolution that created the Tribunal.<sup>104</sup> Although it had initially requested its creation, as negotiations progressed Rwanda objected to a number of the provisions in the Tribunal's governing statute.<sup>105</sup> First, Rwanda objected because the ICTR would have jurisdiction only over crimes committed during the 1994 calendar year,<sup>106</sup> which would prevent the ICTR from fully investigating the activities that led up to the genocide.<sup>107</sup> Second, Rwanda objected that the ICTR would be understaffed and underfunded, with only a handful of judges and with the appellate body and chief prosecutor to be split between the ICTR and the ICTY.<sup>108</sup> Third, Rwanda objected to the fact that the seat of the court would be in Tanzania rather than Rwanda, which would make it more difficult for the Rwandan people to follow the court's proceedings.<sup>109</sup>

Finally, Rwanda objected to the fact that the Tribunal's statute prohibits the imposition of the death penalty.<sup>110</sup> This objection was tied to the fact that the ICTR was never expected to try more than a handful of defendants, and that it would focus on the regime elites who had the greatest role in organizing and executing and the genocidal plan.<sup>111</sup> Because the Rwandan Penal Code does provide for the death penalty, "[t]hose most responsible for the killings" would not face the death penalty, while lower-level perpetrators tried in the Rwandan courts might be executed.<sup>112</sup> Similarly, Rwanda argued

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<sup>103</sup> See *id.* at 72; see also Statute of the International Tribunal for Rwanda, Nov. 8, 1994, S.C. Res. 955, Annex, U.N. SCOR, 49<sup>th</sup> Sess., at 15, U.N. Doc S/INF/50 (1996), reprinted in 2 MORRIS & SCHARF, *supra* note 75, at 3.

<sup>104</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 72.

<sup>105</sup> See Madeline H. Morris, *Justice in the Wake of Genocide*, in WAR CRIMES: THE LEGACY OF NUREMBERG 211 (Belia Cooper, Ed.) (1999).

<sup>106</sup> See Statute of the International Tribunal for Rwanda, *supra* note 103, at art. 7.

<sup>107</sup> See Morris, *Justice in the Wake of Genocide*, *supra* note 105.

<sup>108</sup> See *id.*

<sup>109</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 68.

<sup>110</sup> See Morris, *Justice in the Wake of Genocide*, *supra* note 105.

<sup>111</sup> See CHUTER, *supra* note 21, at 221.

<sup>112</sup> *Id.*

that the prison terms for those convicted at the Tribunal should be served in Rwanda, “not in some posh facility in Europe.”<sup>113</sup>

These specific disputes also reflected Rwanda’s broader frustration with the international community. Many felt that Rwanda needed international assistance to fit its unique situation, but instead the international community applied a “cookie-cutter” approach by establishing a tribunal that was “essentially a weaker, more impoverished replica” of the ICTY.<sup>114</sup> Moreover, whereas at the time of the establishment of the ICTY there was little reason to expect serious local prosecutions of war crimes perpetrators, the situation with Rwanda was different: “local authorities were willing to prosecute and could have used extensive international assistance to make such efforts more credible.”<sup>115</sup> Instead, international resources that could have gone to rebuild the shattered Rwandan justice system were diverted to the ICTR.<sup>116</sup> Thus some have argued that the existence of the ICTR is more a reflection of “internationalist priorities” than a genuine response to the needs of the Rwandan victims.<sup>117</sup>

## B. Cultural Relativism and the Rwandan Experience

This history – both of the Rwandan genocide and of the establishment of the ICTR – illustrates several of the issues in the universalist/cultural relativist debate

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<sup>113</sup> 1 MORRIS & SCHARF, *supra* note 29, at 68; *see also* CHUTER, *supra* note 21, at 221 (“[P]risons that house convicted criminals indicted by the ad hoc tribunals have to meet minimum U.N. standards, and these standards are often higher than average Africans would expect in their private homes.”); *see also* Drumbl, *Collective Violence and Individual Punishment*, *supra* note 40, at 579 (noting also that many victims as well as perpetrators of the violence in Rwanda are HIV-positive, and that prisoners of the ICTR have access to medical care that is not available to most of the victims).

<sup>114</sup> Alvarez, *Lessons from the Akayesu Judgment*, *supra* note 97, at 369-70. Gourevitch quotes one Rwandan diplomat as saying that “We asked for help to catch these people who ran away and to try them properly in our own courts . . . [but instead] the Security Council just stared writing ‘Rwanda’ under the name ‘Yugoslavia’ everywhere.” GOUREVITCH, *supra* note 1, at 252.

<sup>115</sup> Alvarez, *Lessons from the Akayesu Judgment*, *supra* note 97, at 370.

<sup>116</sup> *See id.* (stating that resources “reaching between \$40 and \$50 million a year” were going to the international tribunal).

<sup>117</sup> *Id.* at 370.

discussed *supra*. In fact, both universalists and cultural relativists can find support for their positions in these facts.

### 1. The Universalist Response

First, a universalist could point out that certain real or perceived elements of Rwandan “culture” appear to have contributed to the genocide. For example, Rwandans and non-Rwandans alike often speak of the “culture of impunity” that prevailed prior to 1994.<sup>118</sup> Although this is more in the nature of rhetoric – meaning simply that perpetrators of previous abuses had gone unpunished – than an assertion of an actual “cultural” value, the use of the word is nonetheless telling. Moreover, there does in fact appear to have been a cultural norm that encouraged inter-ethnic violence in Rwanda, especially when that violence was orchestrated and ordered by community leaders.<sup>119</sup> This aspect of Rwandan society is sometimes referred to as a “culture of obedience”:<sup>120</sup>

[T]here had always been a strong tradition of unquestioning obedience to authority in the pre-colonial kingdom of Rwanda. This tradition was of course reinforced by both the German and the Belgian colonial administrations. And since independence the country has lived under a well-organized tightly-controlled state. When the highest authorities in that state told you to do something you did it, even if it included killing.<sup>121</sup>

To the extent that these can be considered “cultural” values or traits, a universalist approach would argue – correctly – that these traits are not worthy of protection.

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<sup>118</sup> See, e.g., Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 333 (1997).

<sup>119</sup> See GOUREVITCH, *supra* note 1, at 123 (“During the genocide, the work of the killers was not regarded as a crime in Rwanda; it was effectively the law of the land, and every citizen was responsible for its administration.”).

<sup>120</sup> Akhavan, *Justice and Reconciliation*, *supra* note 118, at 335.

<sup>121</sup> *Id.* (quoting GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 244-45 (1995)); see also Drumbl, *Collective Violence and Individual Punishment*, *supra* note 40, at 568 (“[I]n certain circumstances,

In addition, as illustrated by the history of Rwanda discussed *supra*, Rwanda is an example of “disruptive and incomplete westernization [and] cultural confusion,” and thus cultural relativism arguments have less force when applied to modern Rwandan culture.<sup>122</sup> Indeed, the supposedly ancient “tribal” conflicts between Hutu and Tutsi in Rwanda are directly rooted in the legacy of colonialism, and until “1959 there had never been systematic political violence recorded between Hutus and Tutsis – anywhere.”<sup>123</sup> As one scholar has pointed out, the “simplistic ‘tribal war thesis’ is often a reflection of ethnocentrism, if not an expedient absolution from apathy in the face of immense human suffering.”<sup>124</sup> This version of “ethnocentrism” thus reflects one aspect of the “negative face” of cultural relativism – the outsider dismissing human rights abuses on the grounds that “that’s just their culture, so there’s nothing that we can do about it.”

Similarly, with respect to the establishment of the ICTR, the universalism argument directs our attention to the admonitions by Rwandans and others that genocide in African is just as worthy of international adjudication as is genocide in Europe. Indeed, we must avoid cultural relativism arguments in cases where such arguments are nothing more than a way for the international community - particularly the West - to avoid responding to horrors that take place in cultures that do not more closely resemble our own.

## 2. The Cultural Relativist Response

However, the history of Rwanda and the establishment of the ICTR provides support for cultural relativism arguments as well. Cultural relativism is – at least in part

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those who commit extraordinary international crimes are the ones conforming to social norms whereas those who refuse to commit the crimes choose to act deviantly.”)

<sup>122</sup> Jack Donnelly, *Cultural Relativism and Universal Human Rights*, *supra* note 17, at 410.

<sup>123</sup> GOUREVITCH, *supra* note 1, at 59.

– a response to colonialism and the harm that comes from outside (particularly “Western”) influences in another culture. Given the fact that the Tutsi/Hutu distinction and ultimate conflict was largely furthered through Western influence - based on then-current notions of race and ethnicity - Rwanda would be justified in resisting further impositions of Western values, even if those values are now couched in terms of assistance rather than conquest. Moreover, given the failure of the international community to prevent or stop the genocide, as well as the cooperation of some Western states with the regime that perpetrated the genocide, Rwanda would be correct to greet any new offer of Western help with skepticism.

In addition, elements of moral imperialism (the “negative face” of universalism) can be found in the Security Council’s decision to create the ICTR in spite of the objections by the post-genocide Rwandan government. This decision may reflect the perception “that the Rwandan judiciary was incapable of reaching just verdicts,” and that “any trials that Rwanda might hold [would be] beneath international standards.”<sup>125</sup> This perception is furthered by the fact that the ICTR has “primary” jurisdiction in any case that fits under its mandate, meaning that it may require Rwandan (or other) domestic courts to relinquish any defendant falling under its mandate to its jurisdiction.<sup>126</sup> While this does not necessarily reflect insensitivity to specific Rwandan cultural values, it does imply that the international community is a better judge of Rwandan events than are Rwandans. This is (1) questionable, in light of the international community’s actions leading up to and during the genocide; and (2) dangerous, as it may encourage the

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<sup>124</sup> Akhavan, *Justice and Reconciliation*, *supra* note 118, at 328.

<sup>125</sup> GOUREVITCH, *supra* note 1, at 252-53.

<sup>126</sup> *See, e.g.*, Madeline H. Morris, *Rwandan Justice and the International Criminal Court*, 5 ILSA J. INT’L & COMP. L. 351, 354 (1999).

perception of Rwanda as lawless, tribal, or primitive (a perception that universalists would also seek to avoid).

### C. The Role of Culture in ICTR Trials and Decisions

Thus by looking at Rwanda through the lens of the universalist/cultural relativist debate, we can see that there are truths – and dangers – in both lines of thought. I next turn to the question of what role, if any, cultural sensitivity does or should play in the operation of the Tribunal. As demonstrated by several cases issued by the Tribunal, I believe that it has appropriately adopted a “mild” cultural relativist approach in its operations, and that it has endeavored, where appropriate, to recognize and take into account differences in the Rwandan culture when recognition of those differences has assisted the Tribunal to do justice.

#### 1. Cultural and Language Factors Affecting Witness Testimony

Several ICTR decisions have noted the difficulty of receiving and interpreting testimony from witnesses whose culture and language is foreign to the Tribunal Judges’ own. The first case to discuss this issue was *The Prosecutor v. Akayesu*, in which the Trial Chamber found the former *Bourgmestre* (mayor) of Taba guilty of genocide, direct and public incitement to commit genocide, and crimes against humanity, and sentenced him to life in prison.<sup>127</sup>

In assessing the evidence against Mr. Akayesu, the Trial Chamber specifically considered “cultural factors which might affect an understanding of the evidence

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<sup>127</sup> See *the Prosecutor v. Akayesu*, ICTR-96-4-T, (1998) available at 1998 WL 1782077; see also Cecile E.M. Meijer, *The War Crimes Research Office Presents: News from the International Criminal Tribunal*, 9 NO. 3 HUM. RTS. BRIEF 30 (2004), available at <http://www.wcl.american.edu/hrbrief/09/3tribunals.cfm#6101>.

presented.”<sup>128</sup> Some of these difficulties stemmed from the fact that most of the witnesses spoke Kinyarwanda. For example, the Trial Chamber noted that there appeared to be contradictions between the testimony of several witnesses on the stand and earlier statements by these same witnesses given to Tribunal investigators.<sup>129</sup> The Trial Chamber explained these inconsistencies, in part, by noting that “the interpretation of oral testimony of witnesses from Kinyarwanda into one of the official languages of the tribunal [French and English] has been a particularly great challenge due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English.”<sup>130</sup> These difficulties, the Tribunal reasoned, affected the pre-trial interviews as well as the interpretation of in-court testimony.<sup>131</sup>

The Trial Chamber also noted that certain Kinyarwanda terms were infused with special meaning that could only be understood within the context of the Rwandan culture. For example, the basic meaning of the term *Inyenzi* is “cockroach.”<sup>132</sup> However, the term had also been used to refer to the incursions of Tutsi refugees since the 1960s,<sup>133</sup> and it was later used by anti-Tutsi extremist media to refer to all Tutsis.<sup>134</sup> Similarly, the term

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<sup>128</sup> *Akayesu*, *supra* note 127, at para. 130.

<sup>129</sup> *See id.* at para. 140.

<sup>130</sup> *Id.* at para. 145.

<sup>131</sup> *See id.* Although not mentioned by the Tribunal, Chuter also argues that “not every society expects ordinary people to volunteer evidence unless asked,” and that the investigators may not have been thorough enough in their questioning to elicit full responses, responses which would later come out in the court room. CHUTER, *supra* note 21, at 157.

<sup>132</sup> *Akayesu*, *supra* note 127, at para. 148.

<sup>133</sup> “Throughout the 1960’s incursions on Rwandan soil were carried out by some of these refugees, who would enter and leave the country under the cover of the night, only rarely to be seen in the morning. This activity was likened to that of cockroaches, which are rarely seen during the day but often discovered at night, and accordingly these attackers were called *Inyenzi*.” *Id.*

<sup>134</sup> *See id.* at para. 149.

Ibyitso, which literally means “accomplice,” evolved in the early 1990s to refer to all Tutsi.<sup>135</sup>

Moreover, taking such linguistic nuances into account may be relatively simple compared to the additional, broader “cultural factors” that the Tribunal found were also affecting witness testimony.<sup>136</sup> For example, the Tribunal received expert testimony that “most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often *irrespective of whether the facts were personally witnessed or recounted by someone else.*”<sup>137</sup> Thus during the examination of certain witnesses, it was “at times clarified that evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed.”<sup>138</sup> The expert witness explained that this was common in the Rwandan culture, but also that “the Rwandan community was like any other and that a clear distinction could be articulated by the witnesses between what they had heard and what they had seen.”<sup>139</sup> The Trial Chamber therefore “made a consistent effort to ensure that this distinction was drawn throughout the trial proceedings.”<sup>140</sup>

Moreover, the Tribunal also received expert testimony that “it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be ‘decoded’ in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the

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<sup>135</sup> See *id.* at para. 150.

<sup>136</sup> *Id.* at para. 155-56.

<sup>137</sup> *Id.* at para. 155 (emphasis added).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

orator and the listener, and the subject matter of the question.”<sup>141</sup> The Trial Chamber noted specific instances of this in the proceedings: for example, several witnesses were reluctant or unwilling to state that the ordinary meaning of the term *Inyenzi* was cockroach, although all Rwandans know the meaning of the word.<sup>142</sup> More generally, the Trial Chamber also attributed to “cultural constraints” the “difficulty [of some witnesses] to be specific as to dates, times, distances and locations.”<sup>143</sup>

In light of these observations, the “Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.”<sup>144</sup> This is significant, as it acknowledges that in many cultures such “reticence” or “circuitous” testimony *would* affect a witness’s credibility. Indeed, the Judges’ inclusion of this discussion in the opinion reflects the fact that the Judges themselves would – in their home countries – likely have drawn a negative inference about these witnesses’ credibility.<sup>145</sup> However, in this case, an insistence on the type of directness that the Judges would normally associate with truthfulness might have led them to discount truthful testimony and reach an unjust result. The Judges therefore correctly recognized that they must consider the cultural differences between themselves and the witnesses before them in adjudicating the case.

Similarly, in *The Prosecutor v. Rutaganda*, the Trial Chamber found Georges Rutaganda, second vice-president of the youth wing of the *Interahamwe* - the youth

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<sup>141</sup> *Id.* at para. 156.

<sup>142</sup> *See id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> The Trial Chamber consisted of Presiding Judge Laity Kama from Senegal, Judge Lennert Aspegren from Sweden, and Navanethem Pillay from South Africa.

militia responsible for many of the killings - guilty of genocide and crimes against humanity and sentenced him to life in prison.<sup>146</sup> The Trial Chamber noted that it had:

taken into consideration various social and cultural factors in assessing the testimony of some of the witnesses. Some of these witnesses were farmers and people who did not have a high standard of education, and they had difficulty in identifying and testifying to some of the exhibits, such as photographs of various locations, maps etc. These witnesses also experienced difficulty in testifying as to dates, times, distances, colours and motor vehicles.<sup>147</sup>

The Trial Chamber also noted “that many of the witnesses testified in Kinyarwanda and as such their testimonies were simultaneously translated into French and English. As a result, the essence of the witnesses’ testimonies was at times lost.”<sup>148</sup>

On appeal,<sup>149</sup> Rutaganda argued that the Trial Chamber committed an error of law “by improperly taking judicial notice of social and cultural factors.”<sup>150</sup> Rutaganda argued that “social and cultural factors are not ‘matters of common knowledge’ in respect of which judicial notice should be taken” under the ICTR Rules of Procedure and Evidence, and that the Judges “made generalizations that were not corroborated by evidence or, especially, by expert opinion.”<sup>151</sup> Thus, the defendant argued, “facts that were noted as being matters of common knowledge were in reality only matters of personal knowledge and stereotypes that the various members of the Trial Chamber may have had on the

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<sup>146</sup> See *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3 (1999), available at 1999 WL 33288416, at paras. 2, 11; see also Alexandra L. Wisotsky, *News From the International Tribunals*, 8 NO. 3 HUM. RTS. BRIEF 18 (2004), available at <http://www.wcl.american.edu/hrbrief/08/3tribunals.cfm#12999>.

<sup>147</sup> *Rutaganda*, *supra* note 146, at para. 23.

<sup>148</sup> *Id.* For instance, Witness A testified at trial that he had four children who died in the genocide and one who survived. In contrast, in a pre-trial statement he had stated that he had three children, all of whom had died. The Trial Chamber concluded that this inconsistency was not material, and that it could be attributed to “difficulties of transcription and translation” relating to the pre-trial statements. Thus the Trial Chamber did not draw any adverse inferences from these inconsistencies. *Id.* at para. 292.

<sup>149</sup> See *ICTR v. Rutaganda*, Case No. ICTR-96-3-A (2003), available at 2003 WL 23678345.

<sup>150</sup> *Id.* at paras. 12, 223

<sup>151</sup> *Id.* at para. 223.

Rwandan people.”<sup>152</sup> Rutaganda also criticized the Trial Chamber for applying the factors in a general way, without indicating the specific witnesses to which they applied.<sup>153</sup>

The Appeals Chamber rejected the defendant’s argument. It held that the steps taken by the Trial Chamber could not be properly characterized as “judicial notice, the underlying purpose of which is to dispense with future proof of officially recorded facts that are indisputable.”<sup>154</sup> Instead, the Appeals Chamber reasoned that “the Trial Judgment only states an observation that obviously dawned on the Trial Chamber as it heard the evidence given before it, namely, the fact that some of the persons heard were farmers and people who were not sufficiently literate, and that this situation had repercussions on the quality of their evidence . . . .”<sup>155</sup>

The Appeals Chamber also rejected the contention that the Trial Chamber improperly took a general approach rather than indicating “in which cases and to what extent, in its assessment, it applied the test based on the impact of socio or cultural factors.”<sup>156</sup> The Appeals Chamber concluded that the Trial Chamber acted properly in setting out an introductory observation, and that it was not required to “articulate every step of its reasoning for each particular finding it makes.”<sup>157</sup> The Appeals Chamber also reasoned that the Trial Chamber had provided some specificity about the witnesses to whom its general observation applied, i.e., “farmers and people who did not have a high standard of education.”<sup>158</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> *See id.* at para. 223.

<sup>154</sup> *Id.* at para. 225.

<sup>155</sup> *Id.* at para. 226.

<sup>156</sup> *Id.* at para. 228.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at para. 229.

The Appeals Chamber then used the Example of Witness A, who “was born in a rural prefecture and lived in Rwanda all his life, spoke only Kinyarwanda, and was a mason by profession.”<sup>159</sup> When asked to estimate a distance in kilometers, the witness instead gave a distance based on his own visual assessment.<sup>160</sup> The witness also had difficulty giving directions in terms of north/south designations.<sup>161</sup> The Appeals Chamber concluded that these difficulties “must be taken into account,” but that they “do not affect the testimony as a whole or its credibility.”<sup>162</sup>

Thus, once again the Tribunal refused to hold the witnesses to a “universal” standard of credibility – i.e., a standard that would conform more to the Judge’s own cultural expectations. However, although the Trial Chamber probably should not be *required* to name each instance in which it considered cultural factors in evaluating testimony, it would nonetheless be better if the Trial Chamber did so in most cases. Only then can the Appellate division, the defendants, the larger Rwandan community, and the international legal community truly evaluate whether these were appropriate exercises in cultural sensitivity, or whether at times the Tribunal may have seen “cultural” differences where they did not exist.

Specifically, Rwandans have an interest in ensuring that the Tribunal does not characterize any cultural differences in such a way that they are perceived as inferiorities. For example, it is unclear whether the lack of a witnesses ability to give directions in north-south designations is truly due to “cultural differences” (e.g., this mode of direction

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

<sup>160</sup> *See id.* The witness stated: “I lived on the hill and the airport was located on a different hill. You can see the hill from us, as the crow flied, from our home.” *Id.*

<sup>161</sup> *See id.*

<sup>162</sup> *Id.* at para. 230. Interestingly, the Appeals Chamber did not address the issue of the inconsistency with regard to the number of Witness A’s children. *See* note 148, *supra*. Presumably, either Rutaganda did not

is not used in some segments of Rwandan society) or was due to the fact that a particular individual was not educated. In fact, the Appeals Chamber appears to favor the later explanation, while also giving lip service to the notion of true “cultural” differences that can affect witness testimony.

Thus the Trial Chamber should endeavor in the future to be more specific about the particular witnesses to whom it applies these standards, and in relation to which part of their testimony. Nevertheless, the ICTR should be commended for recognizing the cultural issues that are raised by its work, rather than taking a radical universalist approach that could have interfered with its ability to do justice.

## 2. Genocide and the Definition of “Ethnicity”

Cultural differences may also affect the application of international legal concepts to specific fact situations. For example, the *Akayesu* decision reflected the first time that an international court found an individual guilty of genocide, but this was not a foregone conclusion as a matter of law. Article 2(2) of the ICTR’s statute reflects, verbatim, the definition of genocide as contained in the Genocide Convention.<sup>163</sup> Genocide “means any of [a series of] acts . . . committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such,” including, *inter alia*, “killing members of the group [or] causing serious bodily or mental harm to members of the group.”<sup>164</sup> The Trial Chamber found as fact that the defendant engaged in these acts with the intent to destroy the Tutsi.<sup>165</sup> Yet as described *supra*, it is debatable whether the

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raise the issue on Appeal, or the Appeals chamber also accepted that the inconsistency was a translation or transcription error.

<sup>163</sup> See Statute of the International Tribunal for Rwanda, *supra* note 103, art. 2; see also *Akayesu*, *supra* note 127, at para. 494.

<sup>164</sup> *Akayesu*, *supra* note 127, at para. 113; see also Statute of the International Tribunal for Rwanda, *supra* note 103, art. 2.

<sup>165</sup> See *Akayesu*, *supra* note 127, at paras. 167-460.

Tutsis constituted a separate group, ethnic, racial, or otherwise, at the time of the massacre.<sup>166</sup>

Nevertheless, the Trial Chamber recognized that “in the context of the period in question,” the Tutsi and Hutu “were, in consonance with a distinction made by the colonizers, considered both by the authorities and themselves as belonging to two distinct ethnic groups . . . .”<sup>167</sup> The Trial Chamber also noted that “in a patrilineal society like Rwanda, the child belongs to the father’s group of origin,” and that pregnant Hutu women were killed on the ground that Tutsi men fathered the fetuses they carried.<sup>168</sup> Thus, because the victims were not chosen as individuals or because they were RPF fighters, but rather due to their membership in the “Tutsi ethnic group,” the Trial Chamber concluded that genocide was committed “against the Tutsi as a group.”<sup>169</sup> The Tribunal thereby adopted “a strikingly modern definition of an ethnic group that accepts its constructed nature while acknowledging the power and potency of ethnic self-determination.”<sup>170</sup>

Similarly, in *Rutaganda*, the Trial Chamber stated that there were currently no “internationally accepted precise definitions” of “the concepts of national, ethnical, racial, and religious groups,” and that therefore “[e]ach of these concepts must be assessed in light of a particular political, social and cultural context.”<sup>171</sup> The Court also held that, for purposes of applying the Genocide Convention, membership in a particular group is a subjective concept – the victim either perceives him/herself as belonging to a

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<sup>166</sup> See also *id.* at para. 123 (“[O]ne can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture.”).

<sup>167</sup> *Id.* at para. 122 n.56.

<sup>168</sup> *Id.* at para. 121.

<sup>169</sup> *Id.* at para. 126.

<sup>170</sup> Alvarez, *Lessons from the Akayesu Judgment*, *supra* note 97, at 360.

<sup>171</sup> *Rutaganda*, *supra* note 146, at para. 56.

group and/or the perpetrator perceives the victim as belonging to the group slated for destruction.<sup>172</sup> Thus the Trial Chamber held that “in assessing whether a particular group may be considered as protected from the crime of genocide, [we] will proceed on a case-by-case basis, taking into account both the relevant evidence proffered *and the political and cultural context . . .*”<sup>173</sup> The Trial Chamber also agreed with the *Akayesu* judgment that although the Tutsi population does not have its own language or a culture distinct from other Rwandans, “there were a number of objective indicators of the group as a group with a distinct identity.”<sup>174</sup> These included the identity cards that all Rwandans were required to carry, Rwandan laws in force prior to 1994 that identified Rwandans by reference to their ethnic group, and “customary rules . . . governing the determination of ethnic group, which followed patrilineal lines.”<sup>175</sup> Considering both these subjective and objective factors, the Trial Chamber concluded that the “identification of persons as belonging to the group of Hutu or Tutsi or Twa had thus become *embedded in Rwandan culture,*” and concluded that the Tutsi qualified as a stable and permanent ethnic group under the Genocide Convention.<sup>176</sup>

Thus in these cases the interpretation and implementation of a universal norm – the prohibition against genocide – was informed and assisted by a consideration of the specific cultural context in which a potential genocide occurred. Conceivably, the

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<sup>172</sup> *See id.*

<sup>173</sup> *Id.* at para. 58 (emphasis added).

<sup>174</sup> *Id.* at para. 374.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at paras. 374-77 (emphasis added); *but see* CHUTER, *supra* note 21, at 84-88 (criticizing the ICTR’s finding of genocide as a political decision that ultimately weakens the legal definition of the crime). Chuter also acknowledges, however, that “[i]n the period when the Genocide Convention was drafted . . . it was generally assumed that ‘nations were genetically different from each other. . . . [Also, at that time] ethnic groups were supposed to be primordial entities rigidly and permanently distinguished from each other. More recently, as the debates about ethnicity have grown more complex, it is becoming clear that it is a variable concept, constructed often by elites for their own benefit.’” *Id.* at 87. Thus while Chuter argues,

Tribunal could have adopted a rigid, radical universalist view that only “ethnic groups” as defined by “objective” Western sociologists would meet the definition under the Genocide Convention. Instead, the Tribunal correctly recognized the fluidity of culture and context, and did justice to the real-world experience of the Rwandan Tutsis.<sup>177</sup>

### 3. Sentencing Practices

As discussed *supra*, the lack of a death penalty option at the ICTR was one reason that the Rwandan government voted against the establishment of the Tribunal.

Nevertheless, there are other aspects of the ICTR sentencing structure that are more sensitive to the Rwandan culture and judicial system. Specifically, Article 23 of the ICTR Statute states that “[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber *shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.*”<sup>178</sup>

This again reflects a form of “mild” cultural relativism, in this instance built into the ICTR Statute itself. Under this provision, two people – one in Rwanda and one in Yugoslavia – could commit the exact same act with the exact same *mens rea*, and both be found guilty of the same crime. However, if the sentencing practices in Rwanda (which presumably reflect Rwandan cultural preferences) were harsher than those of Yugoslavia,<sup>179</sup> the Rwandan defendant could receive a harsher sentence for the same act.

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perhaps correctly, that “[t]his is not what the ‘crime of crimes’ was supposed to look like [in the 1940s],” he concedes that he is describing the initial Western ‘race science’ conception of the crime.

<sup>177</sup> Similarly, the ICTR held that with respect to the crime of “direct and public incitement to commit genocide,” the “direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as ‘direct’ in one country, and not so in another, depending on the audience. . . . On this subject, see above, in the findings of the Chamber on Evidentiary Matters, the developments pertaining to the [expert] analysis of the Kinyarwanda language . . . .” *Akayesu*, *supra* note 127, at para. 557 & n. 130.

<sup>178</sup> Statute of the International Tribunal for Rwanda, *supra* note 103, at art. 23.

<sup>179</sup> The governing statute for the ICTY contains an identical provision requiring that in imposing sentence, that body “shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.” Statute of the International Tribunal for the Former Yugoslavia, annexed to Report of the

This might be unfair to the individual defendant, but a contrary result would arguably ignore the needs of Rwandan victims to see justice done in a way that accords with their cultural expectations.

A specific example of the ICTR's sentencing practice helps to illustrate the point. In *The Prosecutor v. Georges Ruggiu*, the accused, a Belgian journalist who moved to Rwanda and broadcast discriminatory and threatening remarks against the Tutsis and others on Rwandan radio, pled guilty to incitement to commit genocide.<sup>180</sup> In sentencing Mr. Ruggiu, the Tribunal noted Article 23's requirement that it take Rwandan sentencing practices into account.<sup>181</sup> Under Rwandan domestic law, perpetrators of genocide or crimes against humanity are grouped into categories: Category 1 offenders are those who were "among planners, organizers, supervisors and leaders" of the genocide, persons who "acted in positions of authority," or "[n]otorious murderers" who "distinguished themselves" "by virtue of the zeal or excessive malice with which they committed atrocities."<sup>182</sup> Category 2 offenders are those whose acts "place them among the perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death."<sup>183</sup> Under Rwandan law, the sentence for Persons found guilty of Category 1 offenses is the mandatory death penalty, and for Persons in

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Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N.S.C.Doc. S/25704, para. 49 (1993), *reprinted in* 32 I.L.M. 1159, 1163, 1186 (1993), at art. 24.

<sup>180</sup> *See The Prosecutor v. Ruggiu*; Case No. ICTR-97-32-I, *available at* 2000 WL 33348736; *see also* Wisotsky, *supra* note 146.

<sup>181</sup> *See Ruggiu*, *supra* note 180, at para. 27.

<sup>182</sup> *Id.* para. 28.

<sup>183</sup> *Id.* Category 3 offenders are those guilty of "other serious assaults against the person," and Category 4 offenses are those who "committed offenses against property." *Id.*

Category 2 it is life imprisonment.<sup>184</sup> However, persons in Category 2 or below can have their sentence reduced by entering a plea of guilty.<sup>185</sup>

The Tribunal concluded that Ruggiu would most likely fall under “Category Two” in the Rwandan system. The Trial Chamber then noted that, under Rwandan law, those who pled guilty after prosecution for a Category Two offense receive 12-15 years in prison.<sup>186</sup> The Tribunal also noted, however, that it was not required to conform to Rwandan sentencing practice, but was merely obliged to “take account” of that practice.<sup>187</sup> “[W]hile the Chamber will refer as much as practicable to the sentencing provisions under the [Rwandan] law, it will also exercise its unfettered discretion to determine sentences.”<sup>188</sup>

In considering the appropriate sentence for Mr. Ruggiu, the Trial Chamber noted that “[t]he accused is a European with a moderate level of education, who is inspired by a sense of justice.”<sup>189</sup> The Trial Chamber also stated that “[d]efense counsel submitted that the accused was indoctrinated by a biased picture of the socio-political situation in Rwanda. The Chamber takes into account that the accused was not sufficiently knowledgeable to be able to make informed assessments of the situation. . . . [T]he accused was a person of good character imbued with ideals before he became involved in the events in Rwanda.”<sup>190</sup> The Trial Chamber then sentenced Ruggiu to two 12-year sentences, to be served concurrently.<sup>191</sup>

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<sup>184</sup> *Id.* at para. 29.

<sup>185</sup> *See id.* at para. 29.

<sup>186</sup> *See id.* at para. 30.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at para. 31.

<sup>189</sup> *Id.* at para. 62.

<sup>190</sup> *Id.* at para. 63.

<sup>191</sup> *See id.* at Part IV, Verdict.

The Trial Chamber was correct to conform Mr. Ruggiu's sentence to Rwandan sentencing practices. However, the Chamber's references to Ruggiu's European background and seeming "corruption" by his visits to Rwanda are deeply troubling. This language implies that the Chamber was more lenient with the defendant on the theory that, as a European, Mr. Ruggiu is the product of a more "just" culture.<sup>192</sup> If true, this would be a gross mistake. Perhaps this is an example where one positive cultural relativist notion (Rwandan victims deserve sentencing consistent with their own cultural notions of justice) balanced a negative cultural relativist notion (Europeans are more "just" and less violent than Rwandans) to arrive at a sentence that, though light, was at least consistent with Rwanda's own sentencing practices.<sup>193</sup>

#### **IV. Lessons for the Future**

At first glance, there would appear to be little room for cultural relativism with regard to war crimes. Indeed, in responding to a particular situation, international actors – particularly those from the West – should never ignore or minimize these crimes simply because they occurred in a culture dissimilar to our own. Thus claims for dissimilar treatment in war crimes prosecution on the basis of culture should be treated with caution, particularly with regards to Africa. The international community could easily hide its own neglect, or regime elites could hide their abuses, behind a veil of cultural sensitivity. Therefore, because the trend appears to be for the prosecution of war crimes by international tribunals, these tribunals should apply to persons of all cultures equally.

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<sup>192</sup> The Judges who issued this Judgement and Sentence were Presiding Judge Navanethem Pillay of South Africa, Judge Erik Møse of Norway, and Judge Pavel Dolenc of Slovenia.

<sup>193</sup> *But cf.* Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT'L & COMP. REV. 53 (2001) (evaluating the sentencing practices of the ICTR and ICTY and concluding that in general these bodies were not giving enough weight to Rwandan and Yugoslav sentencing practices).

However, there is also room for caution. The establishment of the ICTR by the U.N. Security Council probably went too far in embracing “universal” values at the expense of the true needs of the Rwandan people. Specifically, certain aspects of the Tribunal’s statute appeared to contradict Rwandan notions of justice. The absence of the death penalty, for example, raised the specter of moral imperialism, especially in light of the fact that those found guilty at Nuremberg were given the death penalty.<sup>194</sup> More generally, the establishment of the Tribunal over the opposition of the post-genocidal government will do very little to further the rule of law in Rwanda or to assist in building the capacity of the Rwandan judicial system.

As discussed *supra*, the ICTR has tried in its operations to strike a balance between universalism and cultural relativism concerns. Nevertheless, the Tribunal has not “made real contact with the populace[] affected by [its] proceedings. [It is] perceived as distant and unconcerned with the effect of [its] activities upon victims.”<sup>195</sup> The very fact that the Tribunal is struggling with these difficulties should warn us against rushing to establish international tribunals that will apply international law without prior input from or knowledge about the affected culture. Judge Wald reached a similar conclusion with respect to the ICTY:

My experience with the inner workings of an international court suggests care. With careful self and public scrutiny, such courts can responsibly perform important adjudication and accountability functions that national courts in the thrall of leaders who are themselves alleged war criminals

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<sup>194</sup> See 1 MORRIS & SCHARF, *supra* note 29, at 5. If the United Nations strongly believes that the imposition of the death penalty violates modern international norms of justice (or, put in cultural relativism terms, that the death penalty is not a “cultural value” or is not a value worthy of international recognition), then one possibility might have been to negotiate assistance that would have provided more long-term capacity building for the Rwandan judicial system in exchange for the abolition of the death penalty in Rwanda’s domestic criminal law. Of course, this solution would likely have met resistance from other members of the United Nations who continue to impose the death penalty in their own domestic systems.

<sup>195</sup> Wald, *Accountability for War Crimes*, *supra* note 31, at 192.

cannot. However, they should be reserved for just such extreme situations.<sup>196</sup>

At the time the Tribunal was established, Rwanda was no longer “in the thrall” of its previous genocidal government. Of course, Rwanda did need international assistance, and badly. Moreover, the presence of international judges and other legal personnel can have a beneficial effect on war crimes prosecutions. For example, “the presence of international judges can help to (a) educate local judges on international law and minimal standards of fairness, (b) create an impression of impartiality, and (c) insulate local judges to some degree against intimidation from their own governments.”<sup>197</sup> Thus international involvement in these situations can be useful and should not be completely rejected. Nonetheless, in the case of the ICTR, it would have been better to seek a compromise such that the Tribunal would have involved more participation by Rwandans and better consideration of Rwandan needs.

Hybrid courts, or courts which have aspects of both international and national courts, likely reflect the best balance between universalism and cultural relativism concerns in this respect.<sup>198</sup> Hybrid models have several advantages over “pure” international models: they are generally cheaper to establish and operate, and – key to the cultural relativism debate – they are “considered to be politically less divisive, more meaningful to victim populations, and more effective at rebuilding local justice systems.”<sup>199</sup> In addition, because hybrid courts typically consist of both domestic and foreign judges, local judges may be able to explain relevant cultural norms to their

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<sup>196</sup> Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age*, *supra* note 46, at 117-18.

<sup>197</sup> See Wald, *Accountability for War Crimes*, *supra* note 31, at 194.

<sup>198</sup> See, e.g., Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age*, *supra* note 46, at 118 (“[I] am happy to see the newer proposed U.N. tribunals relying more on tribunals located closer to the countries involved and composed in part, at least, of jurists from these countries.”)

international colleagues, thus lessening the need for costly and time consuming expert witness testimony and decreasing the chance of error in interpreting cultural norms.

For example, the hybrid “Special Court” for Sierra Leone is prosecuting those who allegedly committed war crimes in that country’s civil war.<sup>200</sup> The Sierra Leone Tribunal differs from the ICTR model in several respects: (1) it is based on a treaty between the United Nations and Sierra Leone, as opposed to the ICTY and ICTR which were established pursuant to the Security Council’s Chapter VII powers; (2) the Special Court has the ability to consider not only violations of international humanitarian law, but also certain crimes under Sierra Leonean domestic law; (3) while it has primacy over domestic prosecutions in Sierra Leone, it lacks primacy over national courts of third party states; and (4) most importantly for our purposes, “unlike the ICTY and ICTR, which are composed exclusively of international judges elected by the U.N. General Assembly and a Prosecutor selected by the Security Council, the Special Court is . . . composed of both international and Sierra Leonean judges, prosecutors, and staff . . . .”<sup>201</sup>

More specifically, of the three judges who sit in each trial chamber of the Special Court, one is appointed by Sierra Leone and two are appointed by the U.N. Secretary General, and of the five judges who serve in the Appeals chamber, two are appointed by the Government of Sierra Leone and three by the Secretary-General.<sup>202</sup> The Sierra Leone

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<sup>199</sup> Udombana, *supra* note 31, at 246.

<sup>200</sup> See S.C. Res. 1315, U.N. SCOR, 4186<sup>th</sup> mtg., U.N. Doc. S/RES/1315 (2000), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement>; see also Udombana, *supra* note 31, at 56. It is estimated that between 100,000 and 200,000 people died during the 10-year civil war beginning in 1991. See Nancy Kaymar Stafford, *A Model War Crimes Court: Sierra Leone*, 10 ILSA J. INT’L & COMP. L. 117, 120 (2003).

<sup>201</sup> Udombana, *supra* note 31, at 84, 130, 132; see also Stafford, *supra* note 200, at 126.

<sup>202</sup> See Udombana, *supra* note 31, at 86; see also Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Annex to Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915 (2000), available at <http://www.sc-sl.org/scsl-agreement.html>.

government can, but is not required to, appoint judges from Sierra Leone.<sup>203</sup> The Secretary General also appoints the Prosecutor for a four-year term,<sup>204</sup> who shall be independent from any government, but the Deputy Prosecutor must be a Sierra Leonean.<sup>205</sup> The Prosecutor may also have other Sierra Leonean or international staff.<sup>206</sup> Thus the Special Court is more inclusive than the ICTR in several respects, thereby recognizing the value of participation by those most affected by the crimes under its jurisdiction.

Another advantage of the Special Court is the fact that it is located *in* Sierra Leone.<sup>207</sup> There are significant advantages to having the court “on site”: it gives the Court better and timelier access to witnesses and evidence, makes site visits possible without long delays in the trials, and may make victims and witnesses more comfortable when testifying.<sup>208</sup> It can also help strengthen the legal system in Sierra Leone, by giving the government significant involvement in the establishment and administration of the court, as well as by leaving behind the actual physical structure of the Court – no small matter in one of the poorest countries in the world.<sup>209</sup> In addition, it will give the local population greater access to the court’s proceedings, and allow local journalists to provide current updates in native languages.<sup>210</sup>

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<sup>203</sup> See Udombana, *supra* note 31, at 88 (noting that the Sierra Leonean government’s first appointments consisted of one Sierra Leonean judge for the trial chamber, and one Sierra Leonean judge and one judge from the United Kingdom for the Appeals Chamber); see also U.N. Press Release, *Appointment to Sierra Leonean Special Court*, SG/A/813, AFR/444 of July 26, 2002, at <http://www.UN.org/News/Press/docs/2002/sga813.doc.htm>.

<sup>204</sup> See Udombana, *supra* note 31, at 89. David Crane of the United States was appointed as the Special Court’s first Prosecutor in May 2002. See *id.*

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> See *id.* at 133.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.*

<sup>210</sup> See *id.* at 134.

Of course, a purely international tribunal could also be located within the country where the crimes occurred, so this is not an inherent advantage of hybrid courts over the ICTY/ICTR model. Nonetheless, the location of a court in the country of origin reflects an important improvement in terms of the universalism/cultural relativism debate: it allows the local population to accept the court as part of the local culture, and it helps to lessen the perception of outsider justice and moral imperialism while still involving the international community in the process. The inclusion of domestic crimes within the court's mandate should also be an advantage in this respect, as these laws may reflect local culture more directly and fully than do purely international norms.

Of course, hybrid courts are not a panacea for all of the problems inherent in war crimes prosecutions. Because of the participation of international judges, hybrid courts will inevitably have the same language and translation difficulties that plague any international tribunal.<sup>211</sup> In addition, since hybrid courts are more likely to apply a mixture of international and national law, they will need to interpret domestic law correctly – a task with which the ICTR has apparently had some difficulty.<sup>212</sup> Of course, the risk of error should be lessened by the presence of at least some judges from the affected country on the court, but these judges may have to take extra care monitoring the work of their international colleagues.

It could also be argued that the inclusion of local judges on hybrid courts will make the proceedings more biased (either in favor of or against the defendants) and thus less likely to achieve legitimacy with the local or international communities.<sup>213</sup> Or put in

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<sup>211</sup> See, e.g., Tom Briody, *Defending War Crimes in Africa: The Special Court for Sierra Leone*, 29F EB. CHAMPION 34 (2005); cf. CHUTER, *supra* note 21, at 207, 217.

<sup>212</sup> See, e.g., Morris, *Rwandan Justice and the International Criminal Court*, *supra* note 126, at 352-53.

<sup>213</sup> See Stafford, *supra* note 200, at 140.

the context of the cultural relativism debate, the inclusion of local judges could further (or be perceived as furthering) negative aspects of the local culture. This argument might have extra force where, as in Rwanda, local judges would almost inevitably be a member of one of the disputing racial or ethnic groups. However, this problem would also be inherent in any domestic tribunal, and thus the presence of international judges on hybrid courts should reduce any perceived or real bias. Perhaps this is also a good reason to have a majority of the judges come from or be appointed by third countries, as is the case with the Special Court for Sierra Leone.

Hybrid courts have also suffered from funding difficulties – for example, the Sierra Leone Special Court was to be funded by voluntary contributions, a problematic approach that can lead to serious budget shortfalls.<sup>214</sup> However, this is not a problem inherent in the hybrid system, and the ICTR and ICTY have also had funding struggles. Rather, it reflects that fact that *any* court, in order to be successful, must be given the resources it needs to fulfill its mandate. The funding problem does, however, reflect the fact that more needs to be done to convince the international community of the advantages of the hybrid system. Although it may not look as inherently “international” as some tribunals (and thus the international community may be more tempted to say “it’s not our concern”) – in reality the hybrid model reflects a wise compromise between the international and domestic systems, and is probably a better way for the international community to spend its money.

The existence of the International Criminal Court does not moot the issue. Although the ICC will undoubtedly be an important factor in war crimes prosecutions, due to various factors (especially the resistance of the United States to the court) it

appears unlikely that it will become the sole international body to prosecute war crimes in the foreseeable future.<sup>215</sup> Thus hybrid tribunals may have an important role to play, and should be considered in any instance where the ICC can not or does not assume jurisdiction over international crimes.

Nevertheless, the ICC will likely be a major force in the future of war crimes punishments, and it should be aware of universalism/cultural relativism issues as it pursues its mandate. As a “pure” international court, the ICC may inherently tilt too far toward radical universalism ideas, as with the ICTR.<sup>216</sup> However, because it is a treaty body, at some point the affected local government (or the government of the defendant) will have agreed to its jurisdiction, thus hopefully representing some consent by the local

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<sup>214</sup> See e.g., *id.* at 138-39.

<sup>215</sup> In this regard, the United States took a very positive step when it did not veto the Security Council’s referral of war crimes committed in Darfur, Sudan to the ICC. S.C. Res. 1593, U.N. SCOR, 60<sup>th</sup> Sess., U.N. Doc. S/Res/1593 (2005). However, it is unlikely that this signals a major U.S. policy change toward the ICC. Not only has the U.S. government declared its intention never to become a party to the ICC Statute, it has also taken various measures to weaken the court. See Letter from John R. Bolton, U.S. Department of State, to Kofi Annan, UN Secretary General (May 6, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>. These measures include (1) pursuing bilateral “Article 98” agreements – which prevent the surrender of any American to the ICC – all over the world; (2) enacting the American Servicemembers Protection Act, which, *inter alia*, largely prohibits any U.S. court or agency from cooperating with the ICC and requires the United States to cut off military assistance to ICC members who have not signed an Article 98 agreement; (3) enacting – as part of the 2005 Consolidated Appropriations Act – the “Nethercutt Amendment,” which prohibits peacekeeping and democracy-building assistance to any country that is a party to the ICC but has not signed an Article 98 Agreement; and (4) blocking Security Council peacekeeping action until receiving assurances that the ICC would not investigate or seek custody over peacekeepers from non-state parties. See, e.g., The American Non-Governmental Organizations Coalition for the International Criminal Court, *Bilateral Immunity Agreements*, at [http://www.amicc.org/usinfo/administration\\_policy\\_BIAs.html#recent](http://www.amicc.org/usinfo/administration_policy_BIAs.html#recent) (92 Article 98 agreements signed as of July 13, 2004); American Servicemembers Protection Act, 22 U.S.C. §§ 7401-7433 (2005); Consolidated Appropriations Act 2005, 118 Stat. 2809, 3027-28 (2004); Ambassador Richard S. Williamson, U.S. Alternative Representative to the United Nations, Remarks on the situation in Bosnia and Herzegovina, June 19, 2002, available at <http://www.amicc.org/docs/Williamson.pdf>. (opposing the extension of the U.N. mandate in Bosnia unless international peacekeepers were given immunity from ICC prosecution); S.C. Res. 1497, U.N. SCOR, 58<sup>th</sup> Sess., U.N. Doc. S/RES/1497 at 2. (2003) (peacekeeping mission in Liberia delayed until the United States received a permanent exemption from ICC jurisdiction for non-state parties); Philip T. Reeker, Spokesman, U.S. Department of State, Daily Press Briefing, Aug. 25, 2003, available at [http://www.amicc.org/docs/Reeker8\\_25\\_03.pdf](http://www.amicc.org/docs/Reeker8_25_03.pdf); S.C. Res. 1502, U.N. SCOR, 58<sup>th</sup> Sess., U.N. Doc. S/Res/1502 (2003) (refusing to support a resolution condemning violence against humanitarian aid workers in Iraq and elsewhere until references to the criminalization of these acts in the ICC Statute were removed).

culture.<sup>217</sup> In addition, unlike the ICTR, which can require any national court to relinquish jurisdiction over a defendant under its mandate,<sup>218</sup> the Rome Statute provides that cases will be admissible only if national justice systems are “unwilling or unable genuinely” to investigate or prosecute.<sup>219</sup> In terms of the universalism/cultural relativism debate, this is an improvement, and should allow the court to avoid many of the pitfalls that other international tribunals have encountered. Most importantly, it gives the country affected the chance to implement justice according to local customs and norms, yet it still gives the ICC the opportunity to assume jurisdiction if the local efforts are nonexistent or merely sham proceedings.

Finally, the ICC can strike the proper balance between universalism and cultural relativism concerns by “working with local governments to get their systems in shape rather than merely fighting off their efforts to resist ICC jurisdiction.”<sup>220</sup> The ICC can also work in conjunction with hybrid tribunals: at least one scholar has proposed the establishment of joint initiatives between the ICC and national or hybrid courts.<sup>221</sup> Finally, where it does assume jurisdiction, the ICC can and should follow the lead of the ICTR in recognizing and taking into account cultural differences when they arise.

## **V. Conclusion**

In conclusion, judges and others involved in international war crimes prosecutions must be aware of the dangers of both radical universalism and radical cultural relativism. They should attempt to strike a balance that will recognize legitimate cultural differences

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<sup>216</sup> Note, for example, that unlike the ad hoc tribunals, the ICC is not required to take local sentencing practices into account. See Drumbl, *Collective Violence and Individual Punishment*, *supra* note 40, at 598.

<sup>217</sup> See Rome Statute, *supra* note 32, at art. 12.

<sup>218</sup> See Morris, *Rwandan Justice and the International Criminal Court*, *supra* note 126, at 354.

<sup>219</sup> See Rome Statute, *supra* note 32, at art. 17.

<sup>220</sup> Wald, *Accountability for War Crimes*, *supra* note 31, at 194.

<sup>221</sup> See Stafford, *supra* note 200, at 137-38.

– particularly when those differences may make it more difficult to uncover the truth about what occurred – but without ignoring the danger of using cultural relativism as a shield behind which to hide atrocities. A “mild” cultural relativism approach is the best way to accomplish these goals. This approach applauds the involvement of the international community in war crimes prosecutions, regardless of the identity of the victims. However, this approach also recognizes the value of the cultural sensitivity and encourages the international community to understand and work with the culture of those whom it seeks to judge. The best balance can be struck by establishing hybrid tribunals and/or by international tribunals exercising jurisdiction only where the domestic courts are unable or unwilling to do so. By following this approach, the international community can further the cause of universal justice without alienating the very people it is designed to serve.