

LESSONS FROM THE AKAYESU JUDGMENT

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The judgment issued on September 2, 1998 by the International Criminal Tribunal for Rwanda (hereinafter ICTR) finding Jean-Paul Akayesu guilty on various charges of genocide and crimes against humanity is likely to please those who have long struggled for the progressive development and effective enforcement of international criminal law.¹ This judgment, directed at the bourgmestre of the Taba commune in the Prefecture of Gitarama in Rwanda, is the first international conviction of an individual for genocide.² Its symbolic significance is not likely to be lost on international lawyers.

The Akayesu judgment makes a number of noteworthy determinations. First, its crucial finding, that the killings of between one half and one million people within Rwanda in the middle of 1994 were clearly aimed at exterminating the group that was targeted and, given their undeniable scale systematic nature and atrociousness, undoubtedly constitute genocide within the traditional definition of that term as reflected in both the Genocide Convention and the ICTR's statute should help to put an end to debates in academic and policy circles on the nature of that massacre. There have been some who have continued to assert that neither *ethnic cleansing* in the Balkans nor the Rwandan killings of 1994 constitute genocide because of the alleged intent of the perpetrators or because of the identity of the victims targeted. Some have suggested, for example, that since in both instances the perpetrators were primarily seeking to acquire land occupied by others, neither the Tutsis nor Muslims (or other groups in the Balkans) were ever really targeted for extermination. Others have questioned whether the people killed in Rwanda in the middle of 1994, namely Tutsis and Hutus regarded as sympathetic to them, were attacked on the basis of *ethnicity* as opposed to their political beliefs. Yet others

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1. See *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Sept. 2, 1998 (carried on the ICTR's web site at < www.un.org/ict/english/judgement/akayesu.html > .

2. The term genocide did not appear in the Tribunal's judgment at Nuremberg for the major Nazi defendants, although the prosecution made reference to the term during those proceedings and in its indictments. The later trials, in Germany, of Nazi defendants included charges of genocide. See, e.g., STEVEN RATNER AND JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 25 (1997).

have suggested that, at least in the case of Rwanda, what occurred was a *double genocide* for which both Tutsis and Hutus share equal responsibility.

All of these contentions are explicitly or implicitly rejected in the course of this judgment. Akayesu's judges have no trouble identifying those aspects of the Rwandan massacre of 1994 that meet the requisite specific intent required of genocide. The judges point to specific testimony about the nature of the atrocities, including the killing of newborns and pregnant women and the cutting of Achilles' tendons to prevent escape, as evidence of the resolve of the perpetrators not to spare any Tutsi. Further, the chamber adopts a strikingly modern definition of *ethnic group* that accepts its *constructed* nature while acknowledging the power and potency of ethnic self-identification. The judges quote approvingly, for example, from the definition given by one expert witness, Alison Desforges, in which she notes that the *primary criterion* for defining an ethnic group is not a difference in appearance, language or culture but the sense of belonging to that ethnic group, a sense that can *shift over time* as definitions of relevant *groups* change over time. This malleable view of ethnicity is likely to be attractive to those anxious to extend the scope of the crime of genocide.

A second achievement relates to the preservation of collective memory. Akayesu's judges render barbaric killings more comprehensible (though no less horrible), thereby making it at least more likely that future generations will learn from the mistakes of the past. While the factual findings in the Akayesu judgment are not comparable in length or in level of detail to the *historical* sections in the International Criminal Tribunals for the Former Yugoslavia (ICTY) Tadic judgment,³ the judges still manage to indicate, albeit briefly, the background facts necessary to understand the 1994 genocide, including the origins of Tutsi/Hutu distinctions. The judges suggest that ethnic distinctions in that country were of recent, not ancient, lineage and can be traced to the legacy of colonialism. The judges state that in the minds of European colonizers, "the Tutsi looked more like them because of their height and color, and were, therefore, more intelligent and better equipped to govern."⁴ They further indicate how Belgian colonial administrators helped to institutionalize their racism by dividing the Rwandan population into three "ethnic" groups and issuing mandatory identity cards containing their holders' ethnic affiliation. Those seeking European complicity in the events leading to genocide need look no further than the judges' description of the historical context of the events in Rwanda in 1994. These early sections in the judgment also puncture any illusion that the 1994 killings

3. See Opinion and Judgment, Prosecutor v. Tadic, Case No. IT-94-1-T (Trial Chamber, ICTY, May 7, 1997) <www.un.org/icty/970507jt.htm>.

4. *Id.*

were in any sense spontaneous. On the contrary, the judges state that the genocide was *meticulously organized* and *planned* and included the preparation of lists of Tutsi to be eliminated, the training of militiamen by Rwandan Armed Forces, as well as a coordinated effort by Rwandan media (particularly radio). The judgment presents a concise account of how the killings were incited.

Third, the judges elaborate the controversial offense of incitement to genocide. They find that incitement need not be *direct* but *can be implicit*. They point out that a conviction can result from behavior that “plays skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favorable to the perpetration of the crime.”⁵ Perhaps most significantly, the judges find that public incitement to commit genocide can be punished even where such incitement was unsuccessful. Drawing from the common law’s notion of inchoate offenses, the Akayesu judges find that the drafters of the Genocide Convention did not intend, by omission, to suggest that unsuccessful incitement was not punishable. The judges affirm that even incitement that fails to produce the results intended by the perpetrator warrants punishment because of the high risks such actions pose for society.

Fourth, the judges apply the evidentiary rules of the ICTR in a way that responds to the difficulties presented by these cases from the perspective of the prosecution. Doubtlessly aware of the challenges to successful prosecutions posed by the wariness of witnesses to come forward in situations that present little real prospect for effective witness protection, the judges affirmatively reject the evidentiary rule, contained in some civil law systems, requiring corroboration of evidence prior to its admission. The judges state that they are not bound by such national rules. Citing to their own procedural rules as well as the precedent established by the ICTY’s Tadic judgment, the judges affirm their own ability to “freely assess the probative value of all relevant evidence” even when such evidence is presented only by a single witness.

Fifth, advocates of progressive development of international criminal norms will also be pleased by the chamber’s clear affirmation that the ICTR’s statute “does not establish a hierarchy of norms,” but grants jurisdiction over distinct offenses on equal footing. The judges therefore find that the offenses of genocide, crimes against humanity, and war crimes each have different constituent elements and can lead to multiple convictions even in relation to the same set of facts.

Sixth, the Akayesu judgment shows a sensitivity to gender-specific violence that, to date, has been absent from previous international judgments either at the end of World War II or more recently within the ICTY. Critics of the Tadic trial’s dismissal of the sole rape charge against

5. *Id.*

that defendant, and of the handling of gender-specific international crimes by the ICTY more generally, will be reassured by the judicial backing given here to the ICTR's statute's provision indicating that genocide includes "measures intended to prevent births within the group." The Akayesu judgment affirms that such measures, specifically targeting women as both members of an ethnic group and as women, can constitute genocide. The Akayesu judges note that, "in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group."⁶ The judges affirm that the facts underlying the Rwandan genocide indicate that sexual violence was "a step in the process of destruction of the Tutsi group" and that acts with the requisite genocidal intent "were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public . . . and often by more than one assailant."⁷ The judges also indicate that "measures intended to prevent births within the group"⁸ may be mental as well as physical, noting that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate."⁹

The judges also affirm that mass rape can constitute a crime against humanity. In this connection, the judges note that while there is "no commonly accepted definition of rape in international law, it includes acts used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. The judges define rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. For this purpose, the judges affirm that rape when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity constitutes torture."¹⁰ They specifically recognize that sexual violence, including rape, when committed as part of a widespread or systematic attack on a civilian population on a discriminatory basis constitutes a crime against humanity.¹¹ Indeed, Akayesu is found guilty of

6. See *supra* note 3.

7. *Id.*

8. Prosecutor Jean-Paul Akayesu ICTR-96-4-T, Sept. 2, 1998.

9. *Id.*

10. *Id.*

11. More generally, the judges affirm that, as stated in article 3 of the ICTR's statute, a prosecution for crimes against humanity requires proof of acts committed either in a widespread

genocide and crimes against humanity in part due to his links to sexual violence.

Seventh, even with respect to the charges against Akayesu that do not result in convictions, namely those arising under the laws of war,¹² progressive developers of international humanitarian law will nonetheless be pleased by the judges' recognition that, at least ever since the Tokyo trials, it has been well established that civilians may be held responsible for violations of international humanitarian law.

As those familiar with the ineffectual history of international criminal norms will attest, these judicial findings, rendered in the course of a real international trial of a real perpetrator are significant achievements. The Akayesu judgment, as the Tadic judgment by the ICTY before it, is a valuable symbolic affirmation that international war crimes trials are viable. Further, since Akayesu was functionally at least the equivalent of a town mayor, his conviction, unlike Tadic's, shows that even relatively high government officials can be held accountable. Under the circumstances it is understandable if international lawyers see the Akayesu judgment as their badge of honor, a testament to what has been achieved to make international criminal law finally (if belatedly) effective. It is also all too easy, given the dismal, and apparently worsening, state of affairs within Rwanda reported by my fellow panelist, Madeline Morris, to draw another related lesson as well: namely, that it is futile to expect countries that have been involved in mass atrocities to themselves make credible efforts at providing criminal accountability. Given the *successful* and progressive precedents being established by the ad hoc criminal tribunals, including the ICTR, as compared to the struggles with Rwandan national prosecutions and plea bargained guilty pleas, it is all too tempting to conclude that international criminal prosecutions are invariably superior to national attempts since the latter are only too apt to compromise either with respect to the rights of victims, as in the case of the Former Yugoslavia, or the rights of alleged perpetrators, as in the case of Rwanda. International trials are likely to be regarded as less destabilizing to fragile governments, less likely to cede to the short term objectives of national politics, more likely to have the expertise of better qualified jurists of an international stature better able to progressively develop the law in a uniform fashion, more impartial than proceedings conducted by those caught up in the milieu that

fashion or systematically. Such crimes do not require evidence that acts of violence were both widespread and systematic.

12. Akayesu is found not guilty on these charges due to lack of what the chamber calls "factual" evidence showing a sufficient link between his actions as bourgmestre and the actions of those conducting the underlying armed conflict in Rwanda in 1994. It is unclear why the judges failed to find such a link based on the presented evidence.

gave rise to the atrocities, and better able to investigate crimes with interstate dimensions.¹³

It is all too easy to conclude that international criminal accountability is best able to fulfill our Nuremberg-inspired goals -- that is, preserve collective memory, vindicate and respond to the needs of victims, affirm the national and international rule of law, and promote national reconciliation. While drawing such a sanguine lesson from the operation of the ICTR to date would be a grave mistake, there is some evidence that the international legal community may indeed be making that mistake. There is a risk that the international community may become engaged in a two track approach: (1) an emphasis on and preference for international venues; and (2) benign neglect for domestic approaches.¹⁴ This is suggested by the criteria by which some international lawyers propose to judge domestic criminal prosecutions. Thus, in a recent, well received book, Steven Ratner and Jason Abrams argue that local criminal prosecutions will yield benefits only if there is, at the national level:

[a] workable legal framework through well-crafted statutes of criminal law and procedure; a trained cadre of judges, prosecutors, defenders and investigators; adequate infrastructure, such as courtroom facilities, investigative offices, record-keeping capabilities, and detention and prison facilities; and, most important, a culture of respect for the fairness and impartiality of the process and the rights of the accused.¹⁵

This is essentially a recipe for preferring, in the wake of virtually every instance of mass atrocity, international venues for prosecution. It is difficult to imagine what country, in the immediate aftermath of mass atrocities, could fulfill, for example, Ratner and Abrams' expectations for a desirable legal culture. It would appear that the first victim of atrocity is precisely the culture of respect for the rights of the accused that they find so important. Acceptance of the Ratner/Abrams premises is reflected in the jurisdictional primacy enjoyed by the ICTY and ICTR over national courts.¹⁶

13. For arguments along these lines, see, e.g., Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998).

14. Consider in this regard the abundance of law review articles addressing the international ad hoc tribunals compared to the relative paucity of pieces addressing the local Ethiopian or Rwandan prosecutions. Indeed, as is suggested by the case of Rwanda, there is some question about how "benign" the neglect of domestic venues has been. Still, at the level of rhetoric at least international lawyers have not condemned out of hand national prosecutions and usually stress the need to encourage them.

15. RATNER AND ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 159 (1997).

16. See, e.g., art. 8 of the ICTR's Statute.

Further, the Ratner and Abrams' recipe for preferring international venues over domestic ones could prevail even with respect to the "complementarity" contained in the new treaty for a proposed permanent international criminal court (hereinafter ICC). The Rome treaty's recipe for permitting an international prosecution, when national authorities are "unwilling" or "unable" to do so,¹⁷ could lead to a preference for international venues in situations like those in Rwanda -- where, in the immediate wake of mass atrocities, local investigations or trials are simply not possible not because of lack of political will by the new government, but due to very real and serious resource constraints. While much will depend on the discretion exercised by the ICC's prosecutor (and its judges), the ICC's proposed "complimentary" jurisdiction could become, in the worst case scenario, a race to the courthouse between international and domestic prosecutors, with the first to emerge with a plausible criminal investigation precluding retrial by the other. As my fellow panelist here, Professor Morris, argues, such contests of concurrent jurisdiction could produce destructive *anomalies of inversion* that is, serious perceptions of injustice if, for example, higher level perpetrators secure fairer and kinder treatment before international bodies as compared to those guilty of lesser crimes who receive expedited justice (and perhaps the death penalty) in national courts.¹⁸ At best, the proposed ICC suggests the international lawyer's willingness to leave the issue of international support for domestic venues to another day. It reflects the notion that domestic venues for accountability, whether in states that have suffered the atrocities or third states, need to be factored into our schemes only to the extent no international alternatives exist or because local courts are closer to where the evidence and witnesses are located, but not because local approaches might afford preferable methods for achieving our grand goals, including national reconciliation. The contemplated operation of the ICC does not envision that national venues may need to be affirmatively encouraged and supported by international proceedings or that strengthening local methods for accountability may be, at least in cases like Rwanda, the more important task.

As with the ad hoc tribunals now in place, there are no provisions in the ICC treaty (at least not yet) for joint investigations between national and international prosecutors or for the international prosecutor's turning over cases or investigations to domestic processes once these emerge. As appears to have occurred with respect to Rwanda, there is a risk that scarce international resources could well be diverted in the future to the new international court rather than to restoring the credibility of national judicial

17. See arts. 17-19, Rome Statute.

18. Also, as Professor Morris indicates, less severe international sentences may also undermine local attempts to convince perpetrators to plead guilty to lesser offenses in order to escape more severe punishment -- as appears may now be occurring with respect to Rwanda.

institutions. As with respect to the ICTR, the new ICC is not seen as needing to be complimentary in this sense to domestic venues. The latter are seen as mere concessions to real politik. There is nothing in the ICC's treaty, and little in the underlying legal literature, that suggests thoughtful discussion of how local criminal trials, reflective of local community sentiments, significantly enhance the prospects for preserving collective memory, vindicating victims, and affirming the national and the international rule of law. Further, there has been relatively little attention paid to what "accountability" can mean in cases like Rwanda involving thousands if not millions of perpetrators where individual trials for all those accused are impossible at either the national or international levels.¹⁹

The lesson we should be drawing from Rwanda is that attention to domestic processes, from Rwanda-styled plea bargains to South Africa-styled truth commissions, and to making international venues compatible with these are vital to the prospects for restoring the rule of law where it matters most: that is within communities and nations devastated by mass atrocities. Encouragement of and sensitivity to grass roots efforts when these are consistent with making perpetrators accountable confers a sense of legitimacy to both international and domestic efforts. The prospects for national reconciliation would appear to be enhanced to the extent those who are to be reconciled are accorded a sense of ownership in the process. As the Tokyo trials should have taught us, top-down "foreign" efforts are less likely to leave a lasting imprint on the societies international elites hope to influence.

To Rwandans it seems to matter a great deal whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom, subjected to local procedures (with all its attendant imperfections), and given a sentence that accords with local sentiments, including the death penalty.²⁰ This should not surprise as any Oklahoman

19. For rare counter-examples, see Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127; Madeline H. Morris, *International Guidelines Against Impunity: facilitating Accountability*, 59 LAW & CONTEMP. PROBS. 29.

20. The result of the ICTR's jurisdictional primacy, together with the protection against a second trial, is that Rwanda is barred, by Security Council fiat, from imposing the death penalty on the most culpable perpetrators of genocide, at least to the extent these are tried by the ICTR. This highly exceptional imposition of the international community's will, seen by human rights advocates as a significant step towards the abolition of the death penalty, is the source of considerable tension within Rwanda. Unlike some European states, Rwandan authorities have never consented to any independent treaty restricting the imposition of the death penalty and Rwanda's Organic Law for the handling of these crimes specifically reserves the right to impose death on the most serious offenses and, to date, over thirty such executions have taken place. See Organic Law No. 08/96 of Aug. 30, 1996 on the Organization of the Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since Oct. 1, 1990 <<http://www.rwandemb.org/prosecution/law.htm>>.

will tell you if asked whether Timothy McVeigh should have faced a trial abroad for terrorism instead of one in the United States. Given a choice between local and foreign justice (as in a trial in Tanzania under unfamiliar processes and judges), it should hardly surprise if most survivors of the Rwandan genocide prefer local trials or local plea bargains, especially where it appears that national venues may produce quicker results. The place where trials are conducted, as well as who conducts them, has consequences, particularly to the prospects for the restoration of faith in credible local legal institutions.

Despite its numerous achievements with respect to the progressive development of the law, the Akayesu judgment itself suggests some of the hazards presented by international processes for criminal accountability. The length of the Akayesu proceedings is a problem. Akayesu was indicted on Feb. 13, 1996 and a verdict was issued against him more than two years later. The undue length of these proceedings was not caused by the case's complexity but by numerous delays caused by the defense; there are inefficiencies built into the ICTR's operation that go beyond the well-known difficulties relating to its establishment. Such a lengthy trial not only exacerbates the differences between such international trials and expedited proceedings or plea bargains within Rwanda but also presents a challenge to those who would draw public attention to international trials. It is difficult to use such proceedings to send messages of deterrence or messages of reconciliation to victims of mass atrocities if no one hears about the trials or if media outlets devote their short attention spans to other matters. Moreover, it is not at all clear that the most important audiences for such messages, namely those who have suffered the consequences of the Rwandan genocide or remain incarcerated within Rwanda, have much access to the media coverage of such international trials that manages to occur. The evidence is all to the contrary: in a country with as high an illiteracy as Rwanda's, it should scarcely surprise us that most Rwandan get their news from local radio emphasizing local events. Thus, even critics of Rwandan local prosecutions admit that such trials have received far more extensive local coverage than have events in distant Arusha involving the ICTR.²¹

Although international lawyers have reserved their harshest criticism for local Rwandan prosecutions, ICTR proceedings present difficulties of their own which should not be underestimated. As we have just heard from Professor Morris, the international legal specialists within the ICTR are not adept at criminal law and the judges are getting national law wrong. This is a matter of enormous potential significance to the legitimacy of

21. Thus, the July 1997 report of the Lawyers Committee for Human Rights reports that one of the best public education campaigns was the live radio broadcast of the trial of Froduald Karimara, a trial conducted inside Rwanda which drew massive crowds to the local courtroom. Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: The ICTR and National Trials* at 64 (July 1997).

ICTR verdicts. On a number of crucial issues, including the propriety of multiple convictions or the meaning of *complicity*, the gaps in international legal norms make recourse to national law inevitable. International lawyers need to be concerned about how *progressive* gap-filling occurs and about whether those expert in international law are necessarily best able to do it. We should also be concerned about the number of gaps that are now being filled by judges in the course of their decisions. The criticisms of Nuremberg for imposing *ex post facto* criminal liability should have taught us to be leery about relying on judicial innovations in the course of applying them. The downside of many of the developments identified above are precisely that they might be perceived to constitute *progressive development (lex ferenda)* instead of the application of well-established legal norms (*lex lata*). There are, in addition, a number of places in the judgment that present troubling (if predictable) issues of cultural misunderstanding or linguistic difficulties. These are difficult to avoid when foreign judges need to have recourse to translators and cultural experts in order to determine, for example, whether a witness understands the difference between reporting something as an eyewitness and presenting a second-hand account or whether perpetrators truly understood that they were meant to go out and kill those who were portrayed as their ethnic enemies. Despite the substantial improvement made with respect to the rights of defendants since the days of Nuremberg, the Akayesu judgment shows that the *ad hoc* tribunals remain vulnerable to fairness critiques for both defendants and victims.

Above all, international lawyers need to bear in mind that the primary benefit of the Akayesu judgment, and of the ICTR generally, remains symbolic. The realities are stark. While the ICTR will be fortunate, at the end of the day, to conduct trials for more than a few dozen perpetrators, at this writing approximately 135,000 Rwandans remain in detention in local jails, about one percent of the entire population. Plainly, the ICTR has not yet had a beneficial effect on the restoration of the rule of law within Rwanda or on the prospects for national reconciliation.²² International lawyers should not pat themselves on the back for establishing a process that manages to ignore the needs of the vast number of defendants or of survivors of that genocide. We should not congratulate ourselves for creating international processes that have left a devastated Rwanda to handle the vast bulk of perpetrators or risk a renewed bloodbath if detainees are summarily released. Although international lawyers may be justifiably proud of the advances made with respect to the due process rights now accorded defendants before international courts (as compared to Nuremberg), we should not lose sight of the fact that the ICTR does nothing for the vast majority of those detained in Rwanda in horrendous

22. Indeed, as Professor Morris has suggested on this panel previously the ICTR's effect on the effectiveness of the plea bargain process within Rwanda has probably been negative.

conditions. Only a minuscule proportion of Rwandan perpetrators are likely to see the inside of an international courtroom and the international process has done nothing for their due process rights. These facts make the international community's critiques of Rwandan proceedings to date seem hollow and hypocritical. While Rwandan plea bargains are doubtless a flawed alternative, some kind of expedited arrangement designed to avoid individualized trials for the vast majority of perpetrators would appear to be inevitable under the circumstances. It is unimaginable how even rich nations could provide individual trials for one percent of their own populations. While we may be disappointed that the Rwandan plea bargained arrangements have fallen far short of expectations, the number of domestic trials conducted to date (over 300) and of guilty verdicts accepted and awaiting processing (some 8,000) is undeniably impressive for a country that less than four years ago had sixteen lawyers left alive. Three hundred trials, even trials ranging from two to three days in length, are still 299 more trials than the international community has managed to conclude in four years within the ICTR. Before we condemn Rwandan authorities for the serious lapses in due process or for the slow pace of local proceedings,²³ the international community needs to accept its own share of responsibility for the inadequacies of Rwandan processes. It is the international community, after all, that has failed to prevent on-going incursions into Rwandan territory by Hutus bent on continuing their unfinished genocide and we need to consider to what extent the continuation of violence has exacerbated tensions between factions within Rwanda and encouraged retaliatory acts by Rwandan authorities. As we have just heard from Professor Morris, ethnic tensions are on the rise within Rwanda, amidst continuing suspicions of the international community and its intentions within the ICTR. While it may be true that the willingness to deal fairly with the accused may be withering away within Rwanda, we should be leery of simple-minded attempts to point the finger solely at the Rwandan authorities. Attempts to conduct criminal proceedings amidst on-going violence are bound to be severely compromised.

Drawing lessons from the Akayesu judgment and from the case of Rwanda is a treacherous business precisely because the likely lessons depend on the time horizon. Through at least 1996, there was a serious prospect that the new Rwandan government that took control in the wake of the 1994 genocide would undertake a serious and even-handed effort to conduct fair trials for those accused of mass violence, including of Tutsis accused of violent retaliation. For the most part, the international community failed to support such efforts and devoted most of its attention and resources, now reaching between \$40 and \$50 million a year, to establishing and operating an international tribunal with primacy over

23. See, e.g., Lawyers Committee Report, *supra* note 21 at 67.

national proceedings. The international community took a cookie-cutter approach to the ICTR, establishing an entity that was essentially a weaker, more impoverished replica of the tribunal established for the former Yugoslavia a year earlier. It took this approach, including provision for jurisdictional primacy, despite the fact that the situations with respect to the two regions were vastly different. In the former Yugoslavia there was little prospect for serious or even-handed local prosecutions while the same cannot be said once the government changed hands in Rwanda in the middle of 1994. At that time the local governmental authorities were only too willing to prosecute and could have used extensive international assistance to make such efforts more credible.

The challenges facing the international community at the end of the Rwandan genocide in 1994 were vastly different from what it faced with respect to the former Yugoslavia. With respect to Rwanda the challenge was to help fashion processes for criminal accountability that would take into account the vast number of likely defendants, the necessity of complimenting and not undermining local approaches, and the need to convince Rwandan authorities that the international community that failed to act to prevent the 1994 genocide could now be counted upon to prevent on-going violence. The international community failed on all three counts and the ICTR threatens to become, for these reasons (and not merely due to well-publicized inefficiencies or fiscal improprieties), an embarrassing failure. In my view, the international community has been more cognizant of internationalist priorities than of the needs of people who in the case of Rwanda continue to suffer egregious atrocities. In fashioning an exclusively international process for criminal accountability, international lawyers failed in this case to consider to whom accountability is ultimately owed.