The UN Security Council and Transitional Justice: Rwanda

HOW INTERNATIONAL AND DOMESTIC DYNAMICS SHAPED THE PROSECUTION OF GENOCIDE AND THE PURSUIT OF RECONCILIATION

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An extensive set of international, national and localized transitional justice processes have been established in Rwanda since the civil war and the 1994 genocide against the Tutsi. This case study assesses the impact of the UN Security Council on these justice initiatives. It highlights the role of the Council in embedding legal responses to international crimes at both the international and national level. However, it also shows how the Council's dominant focus on “accountability for serious international crimes, and the re-establishment of the rule of law” neglected attending to how multiple transitional justice initiatives interacted with one another. Understanding the impact of the Security Council's actions in Rwanda requires a recognition first of the Council's early role in balancing diplomatic support for a negotiated peace settlement with the normative commitments to prosecuting international crimes; and second the importance of the relationship between the Council and the Rwandan State. Overall, the study shows the central importance of taking account of how the actions of the Council and State-led responses to atrocity can be underpinned by different motivations, incentives and goals, fundamentally shaping the impact of the Council on the ground.

Transitional justice in Rwanda can be characterized by four phases and this study will examine each phase, assessing the impact of the Security Council on these activities. **Phase I** was internationally oriented. It saw an early focus by the Security Council on supporting the Arusha Peace Agreement (APA) followed by a strong shift, in the wake of the extreme violence from 6 April 1994, towards international criminal accountability with the establishment of the UN's International Criminal Tribunal for Rwanda (ICTR). The Council's public acknowledgment of potential violations of international humanitarian law during the genocide paved the way for its investment in accountability mechanisms set up after the violence. But on the ground, the peacekeeping mission was simultaneously left with a mandate and staffing that rendered it unable to meaningfully mitigate the staggering loss of civilian lives. This highlights how perceptions of the Council's role in transitional justice initiatives will be informed by the prior or ongoing practice of peacekeeping operations in the country concerned.

**Phase II** saw the Rwandan Government respond to domestic security concerns through mass incarceration of genocide suspects coupled with a limited set of domestic criminal trials. The early drivers behind these actions are found in the large-scale participation of Rwandan citizens in the genocide, the Rwandan Government's criticisms of the capacity and structure of the ICTR, and the huge population movements into refugee camps during and after the violence. As detailed below, these challenges were identified by the Security Council, but the Rwandan State led on the response, with notably different motivations underpinning their actions from those articulated at the international level.

**Phase III** was characterized by the national introduction of locally adjudicated accountability mechanisms through the *gacaca* courts, in operation from 2005 until 2012. These courts were designed, at least in part, to deal with the severe prison overcrowding, an issue identified by the Security Council. Although the Security Council does not directly engage with *gacaca*’s handling of these ‘lower level’ cases, the *gacaca* courts have interacted with the ICTR in complex ways, which shows the importance of taking account of the overlaps and differing goals and interpretations of concurrent transitional justice processes. In addition, adopting a wider lens on transitional justice shows that these penal practices of the ICTR, the national courts’
Special Chambers and the *gacaca* courts, have been coupled with strong local civil society work aimed at improving inter-community relations. However, these actions have operated in a very different register and entirely separate to the work of the Security Council.

**Phase IV**, the justice-seeking phase, has seen the referral of cases of ICTR indictees and fugitives to national jurisdictions, including Rwanda and the establishment of the International Residual Mechanism for Criminal Tribunals (IRMCT). This mechanism is part of the completion strategy of the ICTR. This has prompted the Security Council to return its attention to domestic infrastructural support, with a clear focus on judicial institutions. In addition, the Rwandan Government’s efforts to have cases referred from the ICTR to its domestic jurisdiction must be understood in light of its much wider efforts to extradite, deport or enable foreign prosecutions of genocide suspects in countries around the world.

The four phases of transitional justice in Rwanda highlight the central importance of taking seriously the agency and objectives of the affected State when examining how transitional justice initiatives are implemented on the ground. Each phase will now be discussed in turn, highlighting the impact of the Council on the ground and the potential role for the Council in engaging with transitional justice in the future. This paper is based on a review of all of the Security Council resolutions and presidential statements on Rwanda since the start of 1994, identifying how and in what way justice-related questions were addressed. This assessment is coupled with extensive desk-based research and insights from prior empirical work undertaken by the first author, based on interviews with 182 participants who have been involved in the enactment of transitional justice processes in Rwanda, including judges, lawyers and government officials alongside witnesses, victims and suspects subject to the authority of the ICTR, the Rwandan national courts and the localized *gacaca* courts.
In the build-up to the genocide in Rwanda in 1994, the initial focus of the Security Council, as evidenced through its resolutions, was on the implementation of the Arusha Peace Agreement (APA). Central to this agreement was that parties to the Rwandan Civil War, which had begun in 1990, were urged to establish a broad-based transitional government. The Council coupled this support for the APA with the establishment of the United Nations Assistance Mission for Rwanda (UNAMIR), initially mandated, inter alia, to contribute to the security of Kigali, monitor the ceasefire and repatriation of refugees, assist in coordinating humanitarian assistance, and investigate and report on incidents regarding the activities of the gendarmerie and police.

While the Security Council’s presidential statements flagged concern about the delays to setting up the transitional power-sharing government and the deteriorating humanitarian situation as early as February 1994, the Security Council’s focus in its resolutions was...
I. Early Impact of the Security Council in Responding to the Rwandan Genocide

on UNAMIR’s “valuable contribution to peace.” Through UNAMIR, the first tool identified as necessary for establishing peace through the APA was the deployment of a battalion in the demilitarized zone, which would indicate, in the words of Resolution 900, that “the international community has thus done its part in ensuring that conditions exist for implementing the [Arusha Peace Agreement].” Chillingly, this resolution was passed on 5 April 1994, one day before the downing of President Juvénal Habyarimana’s plane and the start of the Rwandan genocide.

On 7 April 1994, the Belgian and Ghanaian peacekeepers responsible for the security of the Prime Minister Agathe Uwilingiyimana were taken to Camp Kigali in the capital’s centre and the Belgian soldiers were executed. The killing of these ten peacekeepers prompted the withdrawal of the Belgian contingent from UNAMIR on 18 and 19 April 1994. Two days later, the Security Council passed Resolution 912 reducing the number of UNAMIR troops from approximately 2000 to 270. UNAMIR’s mandate was adjusted stating that it would act as an “intermediary in the political negotiations, with the aim of bringing the two sides back to the Arusha Peace Process” and would “assist in the resumption of humanitarian relief operations to the extent feasible.” The mission was left with a single infantry company that was mandated to “provide security [to the UNAMIR Force Commander], as well as a number of military observers to monitor the situation”. This reduction in troops and limited mandate left UNAMIR unable to respond to the rapid escalation in violence that predominately targeted Tutsi civilians and those Hutu and Twa opposed to the genocidal order. By May 1994, the genocidal violence had spread across the country with some of the largest massacres of unarmed Tutsi civilians occurring at the Nyarubuye Catholic Church in the east of the country, Murambi Technical School in the south, and Nyamata, just outside of Kigali. The pressure on the Security Council to expand the use of force mandate of UNAMIR is evident in the Security Council resolutions, but also largely resisted. When faced with the explicit decision to reinforce UNAMIR or significantly limit its role, the Security Council
Council chose the latter. On the ground, this had devastating consequences as the capacity of UNAMIR to implement its limited humanitarian mandate was negligible. These domestic impacts are well documented. UNAMIR did not play an effective role in preventing the staggering loss of human life. This engendered a strong sense of abandonment among genocide survivors and the Rwandan Patriotic Army (RPA), now the ruling party in Rwanda, and the Rwandan Patriotic Front (RPF). On 17 May 1994, Resolution 918 extended UNAMIR’s mandate to “contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas,” increasing troops to 5,500 personnel. This resolution also offers the first mention that “the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law” without making explicit use of the term genocide. The Security Council’s public acknowledgment of potential violations of international humanitarian law during the conflict paved the way for accountability mechanisms to be set up after the violence.

While the language of the Council shifted to accountability when the genocide was ongoing, the first steps in gathering information to underpin any transitional justice mechanisms only began in July 1994, once the RPF had gained control of much of the territory of Rwanda. The Security Council led on this accountability push through the establishment of “an impartial Commission of Experts” with the mandate to present “conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide.” Their work was supported by the appointment of a Special Rapporteur for Rwanda whose mandate was established by the UN Commission on Human Rights. The Commission of Experts followed on from an equivalent commission set up in response to violations of international humanitarian law in the former Yugoslavia. The importance of these fact-finding missions must be acknowledged as they are now well-established tools through which the Security Council can influence early responses to large-scale atrocity. In the case of Rwanda, the Commission’s report was instrumental in supporting the establishment of the ICTR and was later relied on in the judgments of the ad hoc Tribunal.
I. Early Impact of the Security Council in Responding to the Rwandan Genocide

In this internationalized phase of transitional justice, which was strongly focused on criminal accountability, the interplay between actions taken by the Security Council and the Rwandan Government is key in understanding the Council’s impact on the ground. On 28 September 1994, in a letter to the President of the Security Council, the Permanent Representative of Rwanda to the UN identified an international criminal tribunal as one of the means to respond to the security concern raised by the remaining ex-government fighters and génocidaires on the borders of the Rwandan territory. Three days later, in a letter dated 1 October 1994, the Secretary-General informed the Security Council that the Commission of Experts had recommended that the mandate of the International Criminal Tribunal for the former Yugoslavia should be expanded to include the situation in Rwanda. This chronology shows how there was initially strong Rwandan Government support for the establishment of the ICTR. However, by 8 November 1994, when the Security Council finally adopted Resolution 955 establishing the ICTR, it was with one dissenting vote, that of Rwanda, an elected member of the Council at the time.

Rwanda articulated a number of concerns regarding the agreed structure of the ICTR. These included first, that the Tribunal was granted jurisdiction from 1 January 1994 through to 31 December 1994, while Rwanda felt it should extend back to 1990 to include crimes committed by the previous regime during the civil war period. This was viewed by the new Rwandan Government as key to proving the planning and preparation of the genocide. Second, that the number of judicial personnel designated to staff the Tribunal was seen by the Rwandan Government as insufficient to deal with the number of suspects, whose arrests by RPF soldiers were continuing at the time and seen as key in securing control of the territory. Third, that the seat of the Tribunal had not been specified and that it should have been made clear that it would sit in Rwanda. Fourth, that there were concerns that the Tribunal would not give sufficient focus to the crimes of genocide, perhaps masking a concern among the RPF leadership of liability for their own conduct during and after the genocide. Finally, there was a concern that the Tribunal prohibited the use of capital punishment, which was still in force in Rwanda. This early disagreement between the UN and the Rwandan Government on the structure and reach of the ICTR helps to explain Phase II of the transitional justice initiatives in Rwanda, as it was the catalyst for the enactment of legislation allowing for the domestic prosecution of international crimes. It also set the terms for the Rwandan Government’s engagement with the ICTR going forward, where the Government largely cooperated but maintained a critical stance on the ICTR and withdrew cooperation in order to apply pressure on politically sensitive issues.

It is interesting to note that, following Resolution 955 establishing the ICTR and throughout 1995, the Security Council maintained a commitment to establishing genuine reconciliation “within the frame of reference of the APA.” As noted above, this peace agreement aimed to establish
a power-sharing transitional government, to integrate the armed forces and repatriate Rwandan refugees. It was about a political transfer of power, not about the establishment of any accountability mechanisms. In June 1995, UNAMIR’s mandate was adjusted with a stated goal of helping to achieve national reconciliation. Reconciliation became the bridging term. It is the continued articulation of the goal of reconciliation that is used to justify the UN’s shift away from supporting the Peace Agreement, which is not mentioned again after August 1995, and towards the dominant support for the ICTR. The move towards international criminal accountability began during the genocide, following the reduction in the size and mandate of the peacekeeping mission and was then consolidated following the violence. The importance of justifying the reorientation away from the APA and towards international criminal accountability helps to explain the explicit inclusion of reconciliation within the mandate of the ICTR. However, it also leads to a decoupling of international criminal accountability from a notion of democratic political transition.

In its founding resolution, the ICTR was mandated to respond to a threat to international peace and security by putting an end to the crimes and taking effective measures to bring to justice the persons who were responsible for them, alongside contributing to the process of national reconciliation and to the restoration and maintenance of peace. The potential for the ICTR to contribute to national reconciliation offers a key point of continuity in terms of the stated aims of the Security Council as, in practice, it shifts from primarily supporting the implementation of a peace agreement to getting strongly behind the use of criminal trials. The role of criminal trials in contributing to reconciliation is made explicit by 2000, with the Council stating it was:

“You must remember that the Tribunal is not just about Rwanda, it is about the world. It was set up by the United Nations to apologize because they had not acted when Dallaire had called them to act.”

It also emerged in interviews with other ICTR personnel who were wrestling with the capacity of the international court to contribute to reconciliation. As one participant in the Office of the Prosecutor said: “If reconciliation is a criterion by which to measure the work of the Tribunal, it has failed dismally.” Meanwhile, a Senior Defence Counsel interviewee said:

“The contribution [of the ICTR] has been mixed...I do not believe that these trials have had an impact on reconciliation in Rwanda. If they wanted to contribute to this, there needed to also be trials for RPF crimes”.

In pursuit of its mandate, the ICTR has concluded legal proceedings against 80 individuals with 61 successful prosecutions and 14 acquittals, at the time of writing. This has been a major endeavour in international criminal accountability. For individuals who participated in the ICTR, the Tribunal’s contribution to the development of international criminal case law, particularly with regard to the crime of genocide, is recognized as its major contribution and this is similarly reflected in the emerging assessment of the ICTR offered by the Security Council and evidenced in its resolutions.

The impact of the ICTR cases in Rwanda is more difficult to discern. In order to connect these legal proceedings with the affected
population, the ICTR engaged in an outreach programme. However, inside Rwanda this was largely interpreted as a top-down information dissemination process rather than a meaningful route through which to engage with the trials.36 That said, Rwandans are generally well aware of the work of the ICTR and have strong views on it, often shaped by their own direct engagement with the domestic transitional justice processes discussed below. In addition, as discussed in Phase IV, as part of its completion strategy the ICTR returned its focus to domestic judicial processes and this has impacted domestic activities in this sphere.
In response to the concerns about the ICTR, coupled with the clear decision to use mass incarceration as a means of establishing territorial control, the Rwandan Legislature passed the 1996 Organic Law, establishing a Special Chamber of the Supreme Court to try both genocide and crimes against humanity, with a temporal jurisdiction from October 1990 until December 1994. This followed the explicit rejection of the use of a truth commission by the Rwandan Government although some Rwandan scholars, involved in these early domestic processes, have continued to argue for the need for an independent truth-seeking mechanism that is outside of the criminal justice system. When the Special Chamber began its operations, it was severely understaffed and was faced with the overwhelming task of trying over 100,000 suspects. Partly as a result of these challenges, the initial trial proceedings were severely criticized by international observers. The criticisms focused on three principal issues: judicial personnel, particularly the limited
number of defence counsel; Rwanda's continued use of capital punishment; and the restricted appeal procedure that only went forward through written submission.38

This second transitional justice phase opens up a question of the role of the Security Council in supporting the development of domestic judicial infrastructure. In establishing the ICTR, the Council "stressed the need for international cooperation to strengthen the Courts and Judicial System of Rwanda, having regard in particular to the necessity for those Courts to deal with large numbers of suspects."39 Later that same year, the Council called “upon States and donor agencies to fulfil their earlier commitments to give assistance for Rwanda's rehabilitation efforts, to increase such assistance, and in particular to support the early and effective functioning of the International Tribunal and the rehabilitation of the Rwandan justice system.”40 Here, the dual resource demand is evident between international and national legal infrastructure. The final resource allocation was strongly skewed towards the activities of the ICTR. In part, this is because the ICTR was a component of the wider building of supranational institutions to try international crimes, laying the groundwork for the establishment of the International Criminal Court (ICC) in 1998, something acknowledged by the judges and lawyers working inside the institution itself.41

This contrasts starkly with the views of the judges and lawyers who were interviewed inside the Rwandan national courts. These legal practitioners placed a much heavier weight on what they saw as the role of international actors in supporting the enhancement of domestic legal training and capacity. They then judged the activities of the ICTR in light of this view.42 This highlights the dynamic interplay between the objectives articulated at the level of the Security Council and how these actions are interpreted by national actors and shaped by State interests. As discussed below, the Security Council would later sharpen its focus on domestic legal capacity in the final phase of these transitional justice processes as part of the conclusion of the work of the ICTR.

The form of Rwanda's domestic transitional justice initiatives must be understood in the context of the refugee crisis that immediately followed the genocide, which was a central issue identified by the Security Council in its resolutions.43 The Rwandan Government acted in response to this issue and to what it saw as the stalling of the UN-led voluntary repatriation processes. This action prioritized arrests and forced repatriation of refugees and internally displaced persons (IDP) to achieve national security objectives, over respect for human rights standards. As the refugee crisis escalated, with over one million refugees in the border town of Goma in the eastern Democratic Republic of Congo (DRC), the Security Council presidential statements threatened those destabilizing refugee camps with the implementation of international justice, stating that those committing acts of violence were merely stealing the international community's resolve to punish them.44

Closure of the refugee and IDP camps began on 22 April 1995, with the forced repatriation of over 150,000 IDPs in Kibeho camp, the largest IDP camp on Rwandan soil, located in the south-western part of the country. Unwilling to accept the potential for the consolidation of fighting forces in the camps, the newly constituted Rwandan Defence Forces (RDF) acted quickly and brutally. It was estimated that over 4,000 people were killed during the actual closing of the Kibeho camp. The official figure, accepted by the then precarious Government of National Unity, was 338 lives lost. The deaths were largely attributed to “criminal elements” operating in the camp.45 This large-scale forced repatriation was coupled with continued widespread arrests of genocide suspects as a major domestic security response. It was only after the closure of Kibeho that UNAMIR’s mandate was adjusted to include facilitating voluntary refugee repatriation, while at the same time reducing its military component. However, this voluntary repatriation programme46 floundered amid rumours of revenge killings and arbitrary arrests in Rwanda. Despite the continued efforts from UNAMIR, the refugee camps in the DRC were similarly closed through military action, led by the Rwandan Government in 1996 and 1998 during the First and
the Second Congo Wars. The Security Council's response in relation to Rwanda's involvement in the DRC was muted, with a focus on efforts to reduce the flow of arms into the DRC.47

Despite rising international criticisms of Rwanda's response to the refugee crisis, its involvement in the DRC, and its domestic trials, on 24 April 1998, 22 people convicted of genocide before the national courts were executed in five different locations in Rwanda. This occurred five months before the ICTR handed down its first conviction of genocide and crimes against humanity, sentencing Jean-Paul Akayesu to life imprisonment.48 These executions would be the only death sentences for the offence of genocide carried out in the country. Just two weeks later, amid both international and domestic outrage and concerns regarding the pressures on the prisons, courts, and a traumatized citizenry, then-President Pasteur Bizimungu opened discussions on alternative justice mechanisms.49 These talks ultimately led to the establishment of the new gacaca courts. The timing of these events is notable: just as the establishment of the domestic courts was, in part, a reaction to the criticisms that the Rwandan Government raised against the ICTR, so gacaca was, in part, a response to the international criticisms and domestic challenges raised by the national courts' prosecutions. The establishment of one transitional justice process often informs the development of others, however these processes will not automatically complement one another.

What is notable in this second phase of domestic transitional justice is that the challenges of prison conditions and the repatriation of refugees in Rwanda were consistently recognized by the Security Council resolutions. However, the activities implemented on the ground were driven by the objectives and methods of the Rwandan Government, even when the scope of these activities fell with the UNAMIR mandate. This phase of transitional justice in Rwanda brings to the fore the centrality of understanding the dynamic relationship between the Security Council, its constituent members, peacekeeping missions and crucially the State in which the transitional justice processes are being implemented, in order to determine the Security Council's impact on the ground.
Connecting the Security Council with Localized Transitional Justice

The major domestic transitional justice mechanism implemented in Rwanda is not reflected in any of the resolutions or presidential statements of the Security Council. However, it has interacted with the ICTR in complex ways. Gacaca was a State-implemented but locally-administered transitional justice process that drew its name and some of its procedural aspects from a traditional Rwandan process of dispute resolution.50 Established by law in 2001, from 2005 to 2012 over 12,000 courts operated across Rwanda, trying individuals suspected of involvement in the genocide, coordinated by the National Service for Gacaca Jurisdictions (NSGJ), a centralized government body. Procedurally, the courts functioned very differently from the national courts and the ICTR. Lawyers did not play any formal role in the hearings and the trials were presided over by popularly elected lay-members of the local community, the inyangamugayo.51 The courts drew on the categorization of suspects initially used by the plea bargaining structure adopted before the national courts. This was based on categorizing the accused in four groups, according to the severity of their offence. Category 1 was reserved for people suspected of being in positions of responsibility and engaging in the organization of the genocide at the national, prefecture, sector or cell level.52 Category 2 consisted of those accused
of being perpetrators and accomplices of murder. Category 3 applied to persons accused of serious assaults against the person, and Category 4 related to those accused solely of committing property offences.\textsuperscript{53} This categorization formed the backbone of a confession and guilty plea procedure. From 2005, the \textit{gacaca} courts had jurisdiction over suspects in Categories 2, 3 and 4. By 2008, some of the Category 1 cases were also transferred to the localized courts. The number of individuals tried by \textit{gacaca} is quite staggering, with over 600,000 people tried in Categories 1 and 2 and significantly more tried for property offences, leading to a total of over one million individuals tried at the local level.

There is now a very well-established literature on \textit{gacaca} that details the role of these courts in accounting for violence during the genocide, highlighting what \textit{gacaca} endeavoured to achieve,\textsuperscript{54} particularly its contribution to identifying the victims of the violence as well as its impact on interpersonal and State-citizen relations. In line with much of the criticism on transitional justice in Rwanda, the central concern regarding \textit{gacaca} has been the ways in which the process has strengthened the power of the Rwandan Patriotic Front (RPF) and, with that, its capacity to limit investigations into human rights violations and international crimes committed by its own forces in the build up to, during and after the genocide.\textsuperscript{55} For the purposes of this account, it is important to note that, although the ICTR judges and lawyers were generally inclined to distance their work from \textit{gacaca}, the ICTR's decisions have referred extensively to the local courts. Since the nationwide implementation of \textit{gacaca} in 2005, the ICTR judged 49 individuals for their alleged involvement in the genocide. 47 of these 49 cases referred to the findings of the \textit{gacaca} courts. An analysis of these judgments shows that the ICTR's use of these documents has often been partial and misdirected. However, where the ICTR Chambers were able to have a more grounded and informed view on the local courts, they have been better able to make use of its evidence.\textsuperscript{56}

The concurrent operation of the ICTR, the Rwandan national courts and the localized \textit{gacaca} courts shows that compatibility between concurrent transitional justice processes cannot
be assumed but that it is valuable to think through and plan at the outset how multiple institutions could potentially support one another. This could include any initial fact-finding commissions, alongside international criminal processes and any wider domestic transitional justice initiatives.

The Security Council's focus on international and, to a lesser extent, national justice processes belies the significance of both the *gacaca* courts and of civil society involvement in peace and justice initiatives. Looking across local civil society initiatives in Rwanda, there is a dominant focus on intercommunity relations. Influential local NGOs have focused on how to enable dialogues at the community level and how to research them. This is seen in the work of the Institute of Research and Dialogue for Peace (IRDP), which led on early initiatives in this area; Radio La Benevolencija, which produced a hugely popular radio soap opera based on the *gacaca* courts; and the Community-based Socio-therapy Rwanda set up following the conclusion of *gacaca* to look at ongoing tensions particularly within family units. In addition, genocide survivor-led organizations have played an important role, including the work of the Aegis Trust, which runs the Kigali Genocide Memorial on behalf of the Government's National Commission for the Fight Against Genocide (CNLG) and has led on the roll-out of peace education across Rwanda; Ibuka, an umbrella organization of survivors, associations and concerned individuals, which has consistently advocated for survivor interests; and most recently, the Ishami Foundation, which is focused on the role of survivors in education and peacebuilding. In addition, there has been an increase in policy think tank work, seen in the work of the Institute of Policy Analysis and Research (IPAR) and Never Again Rwanda, whose work tracks the wider trend in Rwanda towards a greater focus on economic development. Among international NGOs, the focus has been much more starkly on prison conditions and human rights concerns. Up until 2008, Penal Reform International (PRI) played an active role in monitoring prison conditions and the post-genocide trials. In addition, Human Rights Watch and Amnesty International have continued to monitor and prominently report on human rights-related concerns in Rwanda.

Suffice to say that the building of realistic and effective connections between decisions at the level of the Security Council and these civil society-led peace processes is ambitious and challenging and it might require further thinking about what fits within the mandate of contributing to “international peace”. The Rwandan case shows that the prosecution of international crimes, which has been articulated as fitting within the mandate of contributing to “international peace and security” will be affected by actions that are taken at the local level; and knowledge and awareness of the full spectrum of justice initiatives will deepen the capacity of the Security Council to impact transitional justice on the ground.
The fourth phase of transitional justice in Rwanda returns to the ICTR and the role of the Security Council in prompting domestic legal change. From 2003, the Security Council endeavoured to conclude the work of the Tribunal, urging the move to a completion strategy that would involve the transfer of lower-ranking perpetrators “to competent national jurisdictions, as appropriate, including Rwanda.”

The introduction of this completion strategy, initially aimed at the conclusion of all trials by 2010, saw the Security Council return to an articulation that “the strengthening of national judicial systems is crucially important to the rule of law in general.” At this prompting by the Council, Rule 11bis of the ICTR’s Rules of Evidence and Procedure was amended to facilitate the referral of cases to national jurisdictions. This rule established that cases could be referred if countries had a legal framework that criminalized the alleged conduct, appropriate punishment for the offence, adequate conditions of detention, met fair trial guarantees, and the death penalty was not being imposed or carried out.
The push by the Security Council towards concluding the work of the ICTR undoubtedly impacted domestic practice. Rwanda undertook extensive domestic changes including drafting and amending bespoke legislation, removing the death penalty and investing in prison infrastructure. The first four applications for the referral of cases to Rwanda were denied based on fair trial concerns, resulting in further legislative change on domestic witness protection measures, leading to the transfer of three accused along with the referral of five fugitive dossiers to Rwanda.

The Council’s stated goal was to “reaffirm its determination to combat impunity for all those responsible for serious international crimes,” while acknowledging “the substantial contribution of the ICTR to the process of national reconciliation and the restoration of peace and security, and to the fight against impunity and the development of international criminal justice, especially in relation to the crime of genocide.” The referral of cases was the tool it used to impact domestic practice in support of this aim. These cases have then been monitored under the auspices of the International Residual Mechanism for Criminal Tribunals (IRMCT), which on three occasions has refused motions to revoke the Rwandan referrals.

Inside Rwanda, the push to receive these cases has fit into a much wider judicial and political agenda. As the then-Prosecutor General Martin Ngoga stated during the oral hearings of the first ICTR Rule 11bis application:

“Rwanda is working very hard to secure cooperation of national jurisdictions in which we find fugitives of genocide. And the decision of this Chamber will either complement those efforts or cripple them. And this forms the very basis of the legacy of this Court”. 

For Rwanda, the ICTR referral cases were part of the wider activities of the Rwandan Genocide Fugitives Tracking Unit (GFTU), a specialist unit of the National Public Prosecution Authority (NPPA). The establishment of the GFTU was preceded by an initial partnership formed in 2004 among Interpol, the ICTR and the NPPA. This led to the issuing of 300 Interpol Red Notices against Rwandan nationals, including the then nine remaining ICTR fugitives. While these Interpol warrants have been a centrepiece of the work of the GFTU, the number of indictments issued by the Rwandan Government goes well beyond this, with the official GFTU report from April 2018 stating that 911 indictments have been issued. In response, at the time of writing, 31 individuals have had their extradition to Rwanda denied, 36 have faced domestic criminal trials outside of Rwanda and 29 people have had their refugee protection, residency permits or citizenship revoked or have been prosecuted for immigration offences on the basis of an allegation of their involvement in an international crime.

There are multiple drivers for this final phase of criminal accountability for the genocide. There is no doubt that one of them is the need to keep the experience of the Rwandan genocide alive in the international sphere while signaling the importance of trying those accused of involvement in violence that was undertaken with intent to destroy, in whole or in part, the Tutsi ethnic group. However, as with most transitional justice initiatives, they can serve multiple purposes - mandates can diverge and can also be interpreted by the people implementing them and by the citizens who participate in them. These transnational proceedings are a mechanism of ensuring that the Rwandan Government maintains influence and reach into its diaspora communities, given the number of indictments and the distribution of these individuals around the world. This highlights a theme evident throughout this study: that following the failures of the UN to act during the genocide, the Rwandan Government has been quite successful at leveraging its own interests at the international level in pursuing criminal accountability for the genocide in particular, while resisting extensive investigation and trial proceedings against RPF actors. This is not to say that the positions of the permanent members of the Security Council, particularly those of the US and the UK, both of whom have strengthened ties with Rwanda since 1994, have not been diplomatically important,
but rather to acknowledge the significant role and agency of the Rwandan Government in these processes.

The effective lobbying for Rwandan Government interests is similarly seen with two further transitional justice agenda items being acknowledged in the Security Council resolutions. The first concerns the location and access to the ICTR archives. These archives are currently within the IRMCT and the Security Council has advised that the Mechanism and Rwanda must work together on issues of both reconciliation and access to the archives. Similarly, in 2018, the Security Council notes concerns, largely held by the Rwandan Government over the early release of individuals convicted by the ICTR. From the establishment of the ICTR, to the muted responses to Rwandan military involvement in the DRC, to this more rhetorical support for areas of ongoing transitional justice concern, the Rwandan Government has influenced the Security Council’s direction of travel and its impact on the ground. At the same time, actions by the Council drove early fact-finding activities and embedded international and, to a lesser extent, national criminal justice processes in response to the genocide.
Based on the above analysis, the following section offers some broader conclusions and recommendations for the Security Council, UN Secretariat, and peace operation leadership.

1 BUILD COMPLEMENTARY TRANSITIONAL JUSTICE PROCESSES

Do not assume compatibility. National and local goals might differ from those articulated at the international level. Complementary processes require ongoing communication between transitional justice initiatives that recognizes that mandates shift over time and are influenced by those implementing them. The Rwandan case shows this dynamic relationship with regard to local, national and international proceedings that result in criminal punishment. However, such compatibility will also be important if other legally-oriented transitional justice mechanisms are involved, such as truth commissions or reparations proceedings. This compatibility needs to be evident in the mandates of these transitional justice processes. It could also usefully be enabled through identifying where there may be evidentiary overlap and, crucially, through designing deliberative channels through which personnel involved in the implementation of a transitional justice intervention can communicate with one another and with affected populations. This will help to identify where domestic initiatives should lead and shape internationalized interventions.

2 THE SECURITY COUNCIL CAN PLAY A ROLE IN EMBEDDING LEGAL RESPONSES TO INTERNATIONAL CRIMES

At both the international and national level, the Council can help to embed legal responses. However, in-country government support will...
influence the form and orientation of these initiatives. The more the Security Council directly engages with the affected State and understands these objectives, the better placed it is to find common ground on which to develop embedded transitional justice processes.

3 PRIORITIZE JUSTICE AND FACT-FINDING INITIATIVES EARLY IN THE PEACE PROCESS

Be careful that a shift towards focusing on accountability for serious violations of international humanitarian law does not inhibit or justify the reduction in the peacekeeping actions necessary to prevent ongoing atrocities.

4 STATE BUY-IN TO A TRANSITIONAL JUSTICE PROCESS IS CRUCIAL FOR ITS OPERATION

Even in post-conflict States that may be considered ‘weak’, State interest will influence the form, mandate and operation of these justice initiatives. The interplay between actions taken by the Security Council and the relevant government is key in understanding the Council’s impact on the ground and a dialogical approach aimed at understanding the domestic objectives would increase the chances of achieving this buy-in.

5 FACT FINDING MISSIONS

Offer a tool through which the Security Council can influence early responses to large scale atrocity. This fact-finding should not replace peacekeeping operations but could usefully run in tandem with them and could feed into a wide spectrum of possible accountability mechanisms, including truth-telling processes, reparations mechanisms, vetting procedures and criminal trials.
References

1 The 1994 Genocide against the Tutsi in Rwanda is the descriptive phrase currently used in all official commemorative events and currently supported and advocated for by the Rwandan government and a number of genocide survivor groups. In 2018 the United Nations General Assembly adopted resolution A/72/L.31, amending Resolution A/RES/58/234, to designate the 7th April the International Day of Reflection on the 1994 Genocide against the Tutsi in Rwanda. As discussed at length in this paper, this genocide occurred in a civil war context in which other violations of international humanitarian law occurred. For an important discussion of the violence in the 1990s particularly against Hutu and Twa civilians that is excluded, in part, through the genocide designation see, Scott Straus, ‘The Limits of a Genocide Lens: Violence Against Rwandans in the 1990s’, Journal of Genocide Research 21, 4 (2019): 504.


3 As discussed at length in this case study, the initial stated goals of the Security Council centred on contributing to “the process of national reconciliation and to the restoration and maintenance of peace” See for example S/RES/955 (1994) Preamble.


13 All of these sites are now home to important commemorative memorials.


19 The recognition of the on-going violation of international humanitarian law is first noted in S/RES/918 (1994) which also justifies the continuation of a very limited role for UNAMIR. Ibid.


21 This is acknowledged in the first trial chamber judgment of the ICTR para 2.

22 For example see Prosecutor v Jean-Paul Akayesu (Judgment and Sentence), ICTR-96-4-T, T Ch 1 (2 September 1998); para 575, in which the report is drawn on to substantiate a legal finding and Prosecutor v Théoneste Bagasora, Gratien Kabiligi, Aloys Ntabakuze and Anatole in which it is drawn on to substantiate an evidentiary finding, Nsenyirumva (Judgment), ICTR-98-41-T, T Ch 1 (18 December 2008): para 1904.


The ICTR’s contribution to international criminal case law was identified most often by the thirty-two participants interviewed who worked inside of the ICTR. Ten participants from each section of the Tribunal were interviewed on the basis of their involvement in the Rule 11 bis transfer decisions or their participation in the Karengera case. Two participants were interviewed in the Registry.

Inyangamugayo is a Kinyarwanda term translating to ‘persons of integrity’. It refers to the laypersons who preside as judges over the gacaca hearings. These judges were selected through popular vote in 2001.

A prefecture corresponds to a provincial structure and is made up of several sectors that in turn contain several cells. A cell is comparable to a neighbourhood in an urban setting.

In 2004, Category 2 and 3 were amalgamated.


For important analysis of the work of this NGO led by Rwandan researchers Emmanuel Sarabwe, Annemieq Richters, Manirane Vysma, “Marital conflict in the aftermath of genocide in Rwanda: an exploratory study within the context of community based sociotherapy,” Interactions 16, 1 (2018).


Prosecutor v Yussuf Munyakazi (Decision on the Prosecutor’s Appeal against Decision on Referral under Rule 11 bis), ICTR-97-36-R11bis, Ap Ch (8 October 2008), Prosecutor v Gaspard Kanyarugika (Decision on the Prosecutor’s Appeal against Decision on Referral under Rule 11 bis) ICTR-2002-78-R11bis, Ap Ch (30 October 2008) Prosecutor v Iidephonse Hategekimana (Decision on the Prosecutor’s Appeal against Decision on Referral under Rule 11 bis), ICTR-00-558-R11bis, Ap Ch (4 December 2008) (hereinafter Hategekimana Rule 11 bis Appeal judgment). The transfer of Jean-Baptiste Gatete was also refused by the Trial Chamber and was not appealed: Prosecutor v Jean-Baptiste Gatete (Decision on the Prosecutor’s Request for Referral to the Republic of Rwanda) ICTR-2000-81-1, T Ch 1 (17 November 2008).

Prosecutor v Jean Uwinkindi (Decision on the Prosecutor’s Request for Referral to the Republic of Rwanda), Case-No. ICTR-2001-75-R11bis, T.Ch., 28 June 2011 and Prosecutor v Bernard Munyagishari (Decision on the Prosecutor’s Request for Referral to the Republic of Rwanda). Case-No. ICTR-05-89-R11bis, T Ch, 6 June 2012. Six cases of individuals still at large were transferred from the ICTR to Rwanda. One of these men, Ladislas Ntaganzwa was arrested and extradited from the DRC.


Prosecutor v Jean Uwinkindi (Decision on Uwinkindi’s Request for Revocation), Case-No. MICT-12-25-R14.1, T.Ch., 22 October 2015 and Prosecutor v Munyagishari, Decision on Second Request for Revocation of an Order Referring a Case to the Republic of Rwanda, Case-No. MICT-12-20-R14.1, T.Ch., 26 June 2014.

Prosecutor v Yussuf Munyakazi (Oral Hearing on Rule 11 bis), ICTR-97-36-A, T Ch III (24 April 2008) [transcript on file with the first author].


Six cases of individuals still at large were transferred from the ICTR to Rwanda. One of these men, Ladislas Ntaganzwa was arrested and extradited from the DRC. Most recently, the most well-known fugitive Félicien Kabuga has been arrested and transferred to the IRMCT in Arusha Tanzania.

Genocide Fugitive Tracking Unit Report, April 2018 [on file with the first author].

This is based on an independent dataset generated by the first author; for further discussion of this work see Nicola Palmer, “International Criminal Law and Border Control: The expressive role of the deportation and extradition of genocide suspects to Rwanda,” Leiden Journal of International Law 33, 3 (2020).

For a useful discussion of this in relation to the role of the USA in the establishment of the ICTR see Zachary Kaufman, United States Law and Policy on Transitional Justice, (New York: Oxford University Press, 2018).