UNIVERSITY OF WESTERN CAPE

TOPIC: GACACA COURTS VERSUS THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND NATIONAL COURTS: LESSONS TO LEARN FROM THE RWANDAN JUSTICE APPROACHES TO GENOCIDE

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SUPERVISOR: PROFESSOR DR GERHARD WERLE

A Thesis submitted in partial fulfilment of the requirements for the Degree of Doctor of Law (LLD) in the Faculty of Law, University of the Western Cape, South Africa

2013
PLAGIARISM DECLARATION

I, Charity Wibabara, hereby declare that the work presented in this thesis entitled ‘Gacaca Courts versus the International Criminal Tribunal for Rwanda and National Courts: Lessons to Learn from the Rwandan Justice Approaches to Genocide’ is original. It has never been presented before in the University of Western Cape or any other University. Where other people’s works have been used, references have been provided.

Signature: ................................
Charity WIBABARA

Date: ................................
DEDICATION

To the Almighty God of Abraham, Isaac and Jacob for his effective grace on me, 1 Corinthians 15:10-11

I lovingly dedicate this thesis to my husband Arakaza Fleury Davy (Trèsor) for supporting me each step of the way. It is also dedicated to my precious son Arakaza Gisa Yan-Fael.

Thank you Trèsor for the endless love, patience and understanding during the period of study

_Dad and Mum, Thank you very much for the investment in my education: Tubisangire Twese_
ACKNOWLEDGEMENTS

Writing a Ph.D thesis can be a long and difficult process, and many people helped me along the way. I wish to extend my deepest appreciation to each of the following people for their support.

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Though a Ph.D thesis may appear to be solitary work, to complete a study of this magnitude requires a network of support, and I am indebted to my friends and colleagues, especially Windell, for the administrative assistance, collaboration, and various ideas shared. Sosteness, Samantha, and Tania also deserve acknowledgement. In particular, Juliet’s friendship, encouragement, and discussions during the study period was greatly needed and profoundly appreciated.
My deepest appreciation goes to my husband and child. Both of these men provided me with the needed moral support and reasons to be happy. They have endured a lot due to my research abroad. With their daily encouragement and understanding, I was able to reach heights of this research. I am equally grateful to my Dad Andrew Kagabo, for blessing me with the Rwandan identity and Mum Faith Mukakalisa who taught me that even the largest task can be accomplished if it is done one step at a time. My mother in law deserves special regard for her excellent care to Gisa. Also, my sincere gratitude is owed to the family of Sangano Felix and Chantal, whose extreme generosity will always be remembered, they provided me with adequate atmosphere conducive for research in their happy home in Berlin. Frau Steffi Werle deserves acknowledgement for her ‘warm welcome’ in Charlottenburg.

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Finally, the financial support of DAAD is gratefully acknowledged. DAAD has been very generous since 2009 by funding my academic pursuits in Cape Town, Berlin and Kigali. The scholarship was not only a turning point in my life, but also a wonderful experience. I was delighted to interact with various international experts and lecturers organized by the program. ‘If I have seen further, it is by standing on the shoulders of the Giants’ that the Transnational-Criminal Justice Program exposed me to.

Charity Wibabara
2013.
LIST OF ABBREVIATIONS

A.D : After Death of Christ
AFP : Agence France Presse
AIDS : Acquired Immuno Deficiency Syndrom
Art. : Article
ASF : Avocats Sans Frontières
AVEGA : Association des Veuves du Génocide d’Avril
BBC : British Broadcasting Corporation
BC : Before Christ
Cat : Category
CCM : Centre for Conflict Management
CCP : Rwanda Code of Criminal Procedure
CDR : Coalition pour la Défense de la République
CLADHO : Collectif des Ligues et Associations de Défence des des Droits de l’Homme
CNLG : National Commission for the Fight against Genocide
Cpl. : Corporal
CPL : Criminal Penal Law, aka Penal Code
Cpt. : Captain
DAAD: Deutscher Akademischer Austausch Dienst (German Academic Exchange Service)
Dr. : Doctor
DRC : Democratic Republic of Congo
e.g : Example
ECHCR : European Convention for the Protection of Human Rights
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<thead>
<tr>
<th>Acronym</th>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>Edn.</td>
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<td>et al.</td>
<td>et alii (and others)</td>
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<td>etc</td>
<td>et cetera</td>
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<tr>
<td>FAR</td>
<td>Forces Armées Rwandaises</td>
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<tr>
<td>FARG</td>
<td>Fonds d’Assistance aux Rescapés du Genocide</td>
</tr>
<tr>
<td>FIDH</td>
<td>Federation Internationale des Droits de L’Homme</td>
</tr>
<tr>
<td>FRW</td>
<td>Rwandan Francs</td>
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<tr>
<td>G.A/Res.</td>
<td>General Assembly Resolution</td>
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<tr>
<td>HIV</td>
<td>Human Immuno-deficiency Virus</td>
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<td>HRW</td>
<td>Human Rights Watch</td>
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<td>That is</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICG</td>
<td>International Crisis Group</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IDEA</td>
<td>Institute for Democracy and Electoral Assistance</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<tr>
<td>IMT</td>
<td>International Military Tribunal</td>
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<td>Inter alia</td>
<td>Among others</td>
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<td>IRIN</td>
<td>Integrated Regional Information Network</td>
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<td>LIPRODHOR</td>
<td>Ligue Rwandaise pour la Promotion et la Défence Droits de l’Homme</td>
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TIG : Travaux d'Intérêt Général (community service)
TRC : Truth and Reconciliation Commission
U.K : United Kingdom
U.N : United Nations
UNSC : United Nations Security Council
U.S. : United States of America
UDHR : Universal Declaration of Human Rights
UN Doc. : United Nations Document
UN : United Nations
UNAMIR : United Nations Assistance Mission for Rwanda
UNAR : Union Nationale Rwandaise
UNDP : United Nations Development Program
UNHCR : United Nations High Commissioner for Refugees
UNIFEM : United Nations Development Fund for Women
USD : United States Dollar
UWC : University of Western Cape
V. : Versus
Vol. : Volume
VStGB : German Code of Crimes against International Law (Völkerstrafgesetzbuch)
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KEY WORDS
Highlighted below, are ten key words that are central to the entire study:

- Rwanda
- Complementarity
- Concurrent Jurisdiction Relationship
- Core Crimes
- Gacaca Courts
- Genocide
- International Criminal Law
- International Criminal Tribunal for Rwanda
- National Courts
- Transitional Justice
The 20th century witnessed several wars and genocides worldwide. Notable examples include the Armenian and Jews genocides which took place during World War I and World War II respectively. The Rwandan genocide of 1994 is a more recent example where a large number of the population was affected, either as victims or perpetrators. Over 800,000 Tutsis were dead, and more than 120,000 suspects were in prison for the genocide. The present study focuses on the Rwandan genocide against Tutsi where the scale of the crimes simultaneously dictated the overwhelming need for justice at both international and national level.

At the international level, the ICTR was set up by the United Nations to deal with the organisers of the genocide while the Rwandan national courts were left to deal with the remaining suspects. Yet it became increasingly clear that the national courts lacked themselves the capacity to deal with the vast majority of alleged perpetrators. If their impact was to be enhanced, they needed to rely on the support of alternative justice mechanisms. So Rwanda introduced a modern version of the traditional Gacaca courts as an attempt to deal with the huge backlog of cases in order to combat the culture of impunity.

However, having different courts for one and the same situation has had its own limitations. One of these issues is the legal and practical disparities that exist between the ad hoc International Tribunal and national justice mechanisms in the process of prosecuting perpetrators, such as the unequal treatment of the accused. This study therefore attempts to show these discrepancies and their impact on the process of accountability and reconciliation. Thus, the study analyses the relationship between the ICTR, national courts and Gacaca in prosecution of genocide suspects as well as lessons from the adopted ‘multifaceted approaches’ to deal with the crime of genocide.
CHAPTER ONE: GENERAL INTRODUCTION OF THE STUDY

A. Background of the Study

In 1994, the small East African country of Rwanda suffered largest-scale ethnic violence that the world had never witnessed since the Second World War.\(^1\) Within a period of three months genocide, the country lost between 800,000 to 1,000,000 Tutsi victims and moderate Hutu out of a population of 7,590,235 Rwandans.\(^2\) The aftermath of genocide posed a unique challenge to the criminal justice system given that there were more than 120,000 Hutu suspects in pretrial detention awaiting trial.\(^3\) The magnitude and the nature of the human rights violations that engulfed Rwanda in 1994 prompted both the Rwandan government and the international community to establish different accountability mechanisms\(^4\) in order to hold perpetrators accountable, achieve justice for the victims and survivors, promote reconciliation, and deter future mass atrocities.\(^5\)

---

1 Between 250,000 and 500,000 women were raped during the genocide, 20,000 were born out of these rapes, 50,000 widows, 75,000 orphans, 2 million refugees and about 650,000 internally displaced persons not to mention the enormous deaths of victims and huge number of perpetrators.


At the international level, the UN established the ICTR to try those bearing the greatest responsibility, and the Rwandan national courts were to deal with Category One offenders, whereas Gacaca courts handled the bulk of cases under Category Two and Three, that clearly could not be handled by the ICTR and national courts.

The different judicial approaches were given concurrent jurisdiction over the crime of genocide but with primacy of the ICTR over the national processes. However, the practice of prosecutions by the various approaches reveals a number of conflicting values which have crucially influenced this study. Therefore Rwanda offers a unique opportunity to analyse the interplay of criminal justice systems on different levels.

B. Statement of the Problem

Although under the principle of concurrent jurisdiction, the ICTR Statute gives primacy to the ad hoc Tribunal over national courts, it is sufficient to mention that the ICTR and Rwandan national mechanisms still lack a coherent and organised structure that links all the processes and

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7 In 1996, the Government adopted Organic Law N° 08/96 of 30 April 1996, on the Organization of Prosecutions for Offences Constituting the Crimes of Genocide or Crimes against Humanity Committed since 1 October 1990; Category one includes individuals whose criminal acts place them among the planners, organizers, instigators, and leaders. However this category overlapped somewhat with those over whom the ICTR could attempt to establish jurisdiction.

8 In 2001, Organic Law N° 40/2000 of 26/01/2001 governing the creation of Gacaca Courts and Organizing the Prosecution of Genocide Crimes and other Crimes against Humanity committed in Rwanda entered into force and was replaced by the 2004 Organic Law; Category two includes, persons whose criminal participation place them among killers or who committed acts against others causing death, together with their accomplices. And Category three includes persons who committed offenses against property.


allows the various systems to play complementary roles.\textsuperscript{11} This has contributed to the overlap of international and domestic processes, and both formal and informal processes.\textsuperscript{12} For instance, it is a trite fact that the Tribunal and Rwandan courts have often competed for defendants, in several instances requesting the same defendants from governments.\textsuperscript{13}

Another problem is that the existence of prima facie differences in structure, laws, procedure, and sentencing options among these three systems which try genocide suspects for the same situation yields inequalities.

For instance, the various systems entail differences in their sentences against genocide convicts. While the death penalty was abolished in 2007, the maximum penalty under national courts and Gacaca goes up to life imprisonment in solitary confinement, unlike the ICTR Statute which limits its maximum penalty to only life imprisonment, without any secondary penalty. In regard, to fair trial guarantees, the right to legal representation was not envisaged in Gacaca legislation, while the national courts and ICTR acknowledge this right but still in different forms. Therefore, these courts present prima facie contradictions such as divergent perceptions on facts constituting genocide, sentences and minimum guarantees.


\textsuperscript{13} Froduald Karamira became the object of a brief ‘tug of war’ between the ICTR and the government of Rwanda but later he was deported to Rwanda from Ethiopia and was convicted to death sentence; see M. H Morris, ‘The Trials of Concurrent Jurisdictions: The Case of Rwanda,’ 7 \textit{Duke Journal of Comparative and International Law}, (1997), at 365 et seq; In another case, the ICTR, Rwanda and the Belgian governments were engaged in efforts to gain custody of the same suspect, by the names of Bagosora who was held in Cameroon. See C. Tomlinson, ‘Tug of War over Rwanda Suspect,’ \textit{The Independent}, 13 March 1996, at 10; M. Bigg, ‘UN Rwanda Genocide Tribunal Adjourns,’ \textit{Reuters World Service}, 9 January 1997.
In view on these discrepancies, the author addresses the following questions:

i) What are the key challenges and lessons emerging from the use of multifaceted transitional justice mechanisms in the contemporary international legal order?

ii) What is the extent of each court’s legitimacy and effectiveness as a tool for accountability and reconciliation?

iii) What are the disparities in the prosecution of the crime of genocide?

iv) What is the optimal relationship or mechanism in addressing large scale atrocities?

In this respect, the thesis therefore explores these amongst a series of other related questions that will be addressed in subsequent chapters.

C. Objectives of the Study

In view of the above-mentioned research questions, the general aim of this study consists in analysing comparatively the approaches adopted by international and national court mechanisms to prosecute the crime of genocide, with the aim of bringing to fore their weaknesses and gaps. In other words, the study will reveal the discrepancies that exist between the ICTR, national courts and Gacaca in terms of respecting the rights of the accused, challenges faced, budget differences, the disproportion in number of prosecutions as well as their overall effect on the whole process of justice.

It is also the objective of this work to examine the relationship between the Rwandan national mechanisms and the ICTR. An assessment of the efficiency of having these different institutions to prosecute the same crime but employing their own procedural rules and laws is paramount in this regard.

D. Significance of the Study

The significance of this work lies in its attempt to show the problems that exist in having different approaches in the prosecution of the same international crime. It views the problems
from all sides revealing the disparities, along with their causes, and makes possible suggestions. For instance, though a brief discussion is anticipated, the study reveals how the international and national courts are treating suspects in a similar situation differently, which impacts on the rights of the accused. By doing so, the work will assist both the national and international community to identify areas that need due consideration in the prosecution of genocide to protect the rights of the accused.

In fact, taking Rwanda’s approach as a case study offers a number of lessons to be learnt, not only by the international courts but also by other domestic jurisdictions. Many of the shortcomings it addresses are not exclusive to Rwanda. Rwanda is merely presented as a ‘guinea pig’ for the parallel use of differing justice mechanisms over the crime of genocide. In addition to highlighting major achievements of each mechanism, the thesis significantly suggests coherent options of how national and international relationship can be structured.

E. Methodological Approach

The research is mainly library-based, and will explore both primary and secondary sources. The primary sources include national laws, international law instruments, resolutions, reports, and case law emanating from international and domestic jurisdictions. Secondary sources include books by pre-eminent scholars in the field, law journal articles, papers and electronic sources such as internet references on the topic.

As the topic itself suggests, a comparative approach is employed by analysing critically analysing the ICTR approach as against the two Rwandan justice approaches through reference to available literature and documented facts on the subject under study. The author thus uses descriptive research to explain how the mechanisms are structured. This is done using the relational or correlational method, which discusses each justice approach in relation to other mechanisms.
F. Scope of the Study

A precise definition of the ambit is needed in order to keep this research within a manageable magnitude. Hence, this study focuses solely on the prosecution of the 1994 genocide in Rwanda. And concern is limited to the foremost lessons and discrepancies faced by the ICTR, the Rwandan national courts and the Gacaca courts in their overall process of ensuring accountability of the perpetrators of genocide, with limited reference to war crimes and crimes against humanity.

Against this background, the whole thesis is divided into seven chapters. Chapter one introduces the study and focuses on the background of the study, the statement of the problem, the objectives, the significance of the study, the methodological approach and its scope.

Chapter two provides a historical background to the internecine conflict in Rwanda and identifies significant developments in the socio-political relationships of Rwandans. It therefore explores the relationships between Tutsi and Hutu and the context within which those relationships were damaged. Discussing this pre-genocide history is informative to readers without knowledge of the circumstances that gave rise to ethnic tensions which later culminated into genocide in 1994.

Chapter three analyses the retributive international approach of the ICTR. It provides a relatively concise background of the Tribunal’s establishment, structure and status of cases. The chapter further presents the most important milestones of the Tribunal by bringing to fore the ICTR’s jurisprudential contribution to the development of international criminal law and other achievements from the international criminal prosecution of core crimes. This chapter also examines the principal shortcomings and limitations faced by the Tribunal in the process of ensuring accountability for crimes in a post-conflict society.
Chapter four discusses the prosecution of the crime of genocide under the Rwandan justice system and examines the status of genocide trials since 1996. This study also seeks to reveal the flaws of classical criminal law on the one hand, along with its achievements on the other hand. Concerns over national courts’ adherence to fair trial rights under international law are addressed in this chapter. Also, a section is devoted to a discussion on extradition and third state prosecutions of Rwandan genocide suspects.

Chapter five is dedicated particularly to the Gacaca court system as a traditional mechanism which was adopted and modified by the Rwandan government to deal with genocide crimes. The It further analyses the nature of Gacaca courts in the context of transitional justice and international criminal law. This chapter also puts forward some of the recognised achievements of the system in terms of accountability and reconciliation, and for the most part, it focuses on its major shortcomings, such as the lack of legal representation for defendants.

Chapter six critically analyses the interplay between national and international criminal justice systems. The chapter seeks to make a comparative evaluation of the concurrent relationship of the courts, while identifying the legal incompatibilities and overlaps between the different mechanisms of justice. At the end of this chapter, there will be a discussion on the impact of trials of the three mechanisms towards reconciliation.

Chapter seven, as the last part of this thesis, summarises the whole study by drawing the major findings. It reviews the shortcomings of the various courts and then provides a summary of the positive trends and transformations of the multifaceted approach that the international and domestic processes have so far transmitted. Finally, this part also suggests the optimal relationship between national and international jurisdiction.
In sum, the study basically compares all the justice approaches to the 1994 genocide in Rwanda. Therefore, the status of the ICTR trials will stand in contrast to those of the Rwandan national courts and Gacaca courts. The study questions why the huge difference between the budget of the ICTR Tribunal and the Gacaca courts given the huge budget allocated to the ICTR Tribunal which has dealt with less than one hundred perpetrators in a period of eighteen years, while the Gacaca courts have tried more than 1.9 million genocide cases in a period of ten years. The national courts which have tried not many cases, slightly more than 15,000 trials will also stand in contrast to the rest of the mechanisms.

G. Definitions of Concepts used within the Chapters

It is almost impossible to write on the subject under study without inadvertently being ambiguous or causing uncertainty in the understanding of some words. This is why some terms and notions will need clarification as to their precise meaning in this particular study.

a) The phrase ‘complementary approaches/mechanisms’ or ‘multifaceted approach’ in this thesis refers to the three judicial responses to the crime of genocide at both national and international level: The ICTR, Rwandan national courts and Gacaca courts. It is important to note that the use of the word ‘complementary’ is different from the ‘complementarity principle’ of the ICC as envisaged in article 17 of the Rome Statute. The words ‘complementary mechanisms’ and ‘multifaceted approach’ are used interchangeably in this thesis.

b) Semi-restorative Gacaca court, refers to the traditional accountability mechanism adopted by Rwanda to deal with individuals accused of genocide. It combines retributive and restorative strategies. The major point of difference between Gacaca and the two other mechanisms (the ICTR and national courts) lies in the fact that the latter two are exclusively retributive, unlike Gacaca which blends restorative measures with retribution. The term Gacaca or Gacaca courts are used interchangeably in this study.

c) National mechanisms of Rwanda refer to the ordinary domestic courts while national mechanisms/approaches within the meaning of this particular research embrace both the national courts of Rwanda and Gacaca courts.
d) The use of the word ‘Tribunal’ shall refer to the International Criminal Tribunal for Rwanda (ICTR). The word ‘Tribunal’ and ‘ICTR’ are used in this study to mean the same.

e) The use of the phrase ‘Rwandan genocide of 1994’ equally refers to the ‘genocide against Tutsi’ as variously used in this thesis. And for research delimitation, it is the major focus of this study. Whereas, the judicial approaches met the criteria to deal with war crimes and crimes against humanity committed in 1994, detailed emphasis is left to prosecution of the crime of genocide.

f) Preference is given to the use of ‘Hutu’, ‘Tutsi’ and ‘Twa’ instead of the plural forms of ‘Bahutu’, ‘Batutsi’ and ‘Batwa’ to illustrate the three ethnic groups within Rwanda. Moderate Hutus refer to those who had interest in power-sharing with Tutsi and opposed the hostility against the Tutsi.

g) Finally, in this study, a victim is someone who was harmed\textsuperscript{14} or killed during the genocide, while a survivor is someone who continued to live despite being a victim. In this research, the term victim shall refer to both ‘those killed’ or ‘survivors’, depending on the context of the discussion, and in particular instances, both terms are used separately in the context of their strict definitions.

\textsuperscript{14} To be harmed can mean a lot of different things: raped, molested, insulted, demeaned, abused, assaulted, and many other options.
CHAPTER TWO: HISTORICAL BACKGROUND TO THE INTERNECINE CONFLICT IN RWANDA

A. Introduction

Rwanda, the landlocked ‘land of a thousand hills’, consists of only 26,338 square kilometers, making it one of Africa’s smallest countries. Its size is comparable to that of Burundi or Belgium. In 1994, Rwanda had a population of 7.5 million, comprising of Hutu, Tutsi and Twa ethnic groups, with the Hutu being the majority. Accordingly, the Hutu comprised roughly 85% of the population, the Tutsi, 14%, and the Twa a mere 1%. The Hutu and Tutsi often had differences for many decades as will be expounded in this study.

In 1994, Rwanda burst onto the world’s headlines as the site of one of the worst genocides in human history where Hutu massacred Tutsi. The question that arises is what could have been the causes of this killing and was there any possibility of justice in the aftermath of genocide. Responding to this problem requires a close examination of the Rwandan history and the context in which the genocide came to be a reality.

In attempting to gain an understanding of the 1994 genocide, it is important to explore the varying relationships between Tutsi and Hutu and the perspective within which those

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17 A. Twagilimana, Hutu and Tutsi, (1998), at 9. The ethnic percentage of the 1933 census was still applicable in Rwanda.
relationships developed. Therefore, this chapter provides a detailed examination of the often disputed and controversial history of Rwanda and its ethnic groups with emphasis on the two dominant ethnic groups, classes, races, and tribes as they have been variously termed. Such an inquiry is essential to unveiling the reasons underlying the tribal discrimination, ethnicity and hatred that have come to characterise Rwandans. Particular attention will be paid to the historical background of the ethnic conflict, right from pre-colonial, to the colonial and post-colonial period.

B. Pre-Colonial Accounts of Rwandan History

The history of Rwanda prior to German penetration in the late 19th century is not well known. Those providing an account of Rwandan history generally have not claimed to have reliable knowledge of pre-colonial Rwanda, largely due to the lack of historical records and due to conflicting oral narratives or accounts. One of the most contested issues concerns the origin and relationship of the Twa, Hutu and Tutsi ethnic group.

I. Origin of the Twa, Hutu and Tutsi

According to the first account, it is not known when the territory of Rwanda was first inhabited, but it is considered that early settlers moved into the area following the last age, either in the Neolithic period, 10th millennium BC or long before the Stone Age. Historians believe that the area’s first known inhabitants were a pygmyoid people, the ancestors of the present-day Twa, Abasangwa butaka. These were primarily forest dwellers, hunters and potters, characterised as

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pygmy-type people who were the sole inhabitants of Rwanda from 2,000 BC until the period of the coming of Hutu 3,000 years later.\textsuperscript{24}

The Bantu-speaking Hutu agriculturalists arrived, probably from the east, and began clearing and settling the hills.\textsuperscript{25} The Hutu, with their sedentary farming lifestyle, soon outnumbered the Twa and began to take over their traditional hunting grounds, forcing the Twa to retreat into the forests.\textsuperscript{26} Around 1500 A.D, in the fifteenth century, the Tutsi, a pastoral people with herds of cattle, moved into the region, most likely from southern Ethiopia, where other pastoralists such as the Oromo lived.\textsuperscript{27} The Tutsi, upon their arrival in Ruanda land, elevated themselves above the already present groups and established both a monarchy and a feudal system.\textsuperscript{28} The Hutu, who were largely farmers, entered into contract (\textit{ubuhake}) with the Tutsi, in terms of which the Hutu promised services to the Tutsi in exchange for the use of cattle and land.\textsuperscript{29}

The second accounting of Rwanda’s history is based on the myth that long before colonisation, Hutu and Tutsi acknowledged the same ancestor called Gihanga Kanyarwanda, father of Gahutu, Gatutsi and Gatwa.\textsuperscript{30} The three children of Kanyarwanda were believed to have been the

\begin{itemize}
\item \textsuperscript{29} One way in which Hutu sought protection was through \textit{ubuhake}, a form of clientage in which a patron grants a cow and usufruct rights to a client who in turn would provide some form of labour for the patron. See F. X Bangamwabo \textit{et al.}, \textit{Les Relations Interethiniques au Rwanda à la Lumière de l’Agression d’Octobre 1990}, (1991), at 31.
\end{itemize}
predecessors of three ethnic groups in Rwanda, as the names suggest. The groups therefore have
the same founding myth, the same traditional religion, the same social and political organisation,
the same language and the same agro-pastoral vocation with the prevalence of herding for the
Tutsi, agricultural farming for the Hutu and hunting or pottery for the Twa.\(^{31}\) This is the view
currently advanced by the Rwandan government.\(^{32}\)

In support of this narrative, in pre-colonial Rwanda, the primary identity was with the clan,
where Hutu, Tutsi and Twa constructed their identities, in part, through their clan membership
rather than tribal or ethnic identity.\(^{33}\) Rwandans belonged to one of the eighteen clans, regardless
of whether they are Hutu, Tutsi or Twa.\(^{34}\) However, neither the clans nor the ethnic groups
predominated or inhabited exclusive geographic areas. The interrelationships between the
various groups even extended to the most intimate of marital and familial relationships, a fact
made possible by the emphasis on clan rather than ethnic distinctions.\(^{35}\)

II. The Relationship between Tutsi and Hutu
This section begins with an account of significant historical events in the socio-political
relationships of Hutu and Tutsi in Rwanda. As argued by Jones, the distinction between the two
groups was not as rigid as, commonly stressed.\(^{36}\) The difference between Hutu and Tutsi is not a

\(^{35}\) P. Gourevitch, We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda, (1998), at 47-49.
\(^{36}\) N. A. Jones, The Courts of Genocide, Politics and the Rule of Law in Rwanda and Arusha, (2010), at 5 et seq.
typically ethnic one but a class or caste distinction. In fact, at first glance, ethnic differences between Tutsi and Hutu seem rather minor or non-existent. Mamdani notes that while there may have been some differences in physical characteristics or genotype, it can largely be attributed to natural or social selection. For example, insofar as the Tutsi maintained a privileged position in society, diets rich in meat and milk could be responsible for the differences in stature in comparison with other groups. As noted by Maguire, the divergence between the groups was based on economic and socio-political status rather than ethnicity.

Besides, history more generally has demonstrated the absence of boundaries between the different groupings in Rwanda. It is suggested that boundaries between Hutu and Tutsi before the colonial era were ‘flexible and permeable’ and that the more significant division historically was between pastoralists and cultivators, which coincided to some degree with the later developed designation of Tutsi and Hutu. Depending on owned property, an individual could at a given moment be a Hutu or a Tutsi. A successful Hutu could become a Tutsi and the reverse was also possible. Tutsi nobles or royalty could essentially classify another Tutsi to the social rank of Hutu based primarily on a reduction in the number of cows owned or reduction in wealth. Yet, both Hutu and Tutsi considered the Twa as an inferior class and any marriage with them was considered as an insult. However, it was not a choice to belong to a particular group but a matter of birth or change of social status.

39 For example, the average stature of the Tutsi was said to be 1.75 meter; the Hutu 1. 66 meter; and the Twa 1 meter but this did not apply collectively to all members, see M. Mamdani, When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda, (2001), at 45.
In regard to the relationship between the groups, the Hutu and Tutsi lived peacefully, and attended the same schools and churches, worked in the same offices, and drank in the same bars. From a historical and anthropological perspective, they shared similar religious and cultural values, and spoke the same language, Kinyarwanda, without differences in dialect or vocabulary. Similar names were given indiscriminately to Tutsi or Hutu and the lines between them were blurred by intermarriage.

Therefore, these groups comprised the ‘Banyarwanda’ people of Rwandan origin with an accepted and organised monarchy ruled by the king. A small region settled by all groups comprised of chiefdom under Hutu or Tutsi chiefs who were headed by a Tutsi king (Umwami). The Umwami considered all Rwandans as his children and the relationship between the ordinary Bahutu and Batutsi was one of mutual benefit, mainly through the exchange of their labour and services.

However, during the reign of the Tutsi king, Kigeri Rwabugiri (1860-1895), there was increased polarization when he instituted a regime that explicitly favoured the Tutsi population. Most of the king's agents were Tutsi and more Tutsi chiefs controlled the rural areas. The Hutu, who

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48 By 1959, Tutsi were 43 out of 45 chiefs and sub chiefs were 549 out of 559. In addition, majority of posts in all sectors were dominated by Tutsi. See details in A. Destexhe, Rwanda and Genocide in the Twentieth Century, (1995), at 40; D. Kamukama, Rwanda Conflict: Its Roots and Regional Implications, (1997), at 21; see as well, African Rights, Rwanda: Death, Despair, and Defiance, (1995), at 4.
were largely farmers, were permitted by the Tutsi chiefs to occupy the land in return for donating their labour.\textsuperscript{49} The Tutsi became the political elite, with their hereditary monarchy under a Tutsi king from the Abanyiginya clan.\textsuperscript{50}

Despite this hierarchical yet relatively harmonious monarchy, Alvarez highlights that the record of pre-colonial Rwanda is mostly lacking in any evidence pointing to a history of hatred or violence between these groups.\textsuperscript{51} Modern historians also stress that during the pre-colonial period, there were no major Tutsi-Hutu conflicts as such.\textsuperscript{52}

Early research confirms that in the Rwandan tradition, the criterion of defining Hutu or Tutsi was never a racial or ethnic reference, but rather a socio-economic status.\textsuperscript{53} However, as noted by various authors, when the colonialists came to Rwanda, they established the policy of indirect rule according to which they relied on the monarchy to administer their colony. This reliance exacerbated ethnic segregation and divisions.\textsuperscript{54} Gradually, the mutual relationship between the two dominant groups, Tutsi and Hutu, was destroyed, later culminating in ethnic hatred.

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C. The Colonial Period

Under colonial rule, the relationship between Hutu and Tutsi identities changed considerably. The link established between the two groups was essentially one of serfdom (*uburetwa*) and the majority of those who suffered were Hutu.\(^{55}\) The process of patron-client relationship embittered the Hutu bitter because of the favouritism Europeans showed towards the Tutsi minority.\(^{56}\) This ultimately resulted in the first explosion of violence between Hutu and Tutsi in the late 1950s, under Belgian colonial rule, which had taken over the territory of Ruanda from the German colonialists.\(^{57}\)

I. The German Colonial Rule

European colonisation of Rwanda began with the arrival of Germans as the first explorers in Rwanda.\(^{58}\) The first European to set foot in Rwanda was Count Gustav Adolf von Götzen, a German, who from 1893 to 1894 led an expedition to claim the hinterlands of the Tanganyika colony.\(^{59}\) Götzen entered Rwanda at Rusumo Falls, and then travelled right through Rwanda, meeting the king at his palace in Nyanza, and eventually reaching Lake Kivu, the western edge of the kingdom. From 1897 until the end of the First World War, Rwanda, along with Burundi

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and present-day Tanzania were part of German-East Africa under Germany’s colonial policy.\textsuperscript{60}

The first Europeans who arrived in Rwanda were generally impressed with the ruling Tutsi, perhaps, due to their seemingly taller stature which resembled that of Europeans, their more honorable manner, and their willingness to convert to Roman Catholicism.\textsuperscript{61} Colonial anthropology associated the Tutsi with the Hamitic race, while the Hutu were associated with the Negroes or Bantu group.\textsuperscript{62} The German colonisers regarded Tutsi as superior to other native groups in Rwanda, since they ruled over the Hutu and Twa. The Germans, therefore showed more favour to the Tutsi than to other groups.\textsuperscript{63} Richard Kandt\textsuperscript{64} wrote in 1905 as follows:

If I can analyze and define honestly my feelings, I can say that Tutsis impressed me very much. I have even today the same feelings (…) those people are barbarian with an intellectual level abit lower than mine.’ Similarly, the Duke of Mecklenburg wrote in 1909, ‘The manner in which Batutsi use their language is very distinctive. We have the impression to have another class of people who have nothing in common with ‘blacks’except the color of their skin.’\textsuperscript{65}

During their colonial tenure, the Germans chose to govern Rwanda indirectly through the existing Tutsi monarch (Mwami) and his chiefs.\textsuperscript{66} The Germans controlled the Tutsi chiefs who,


\textsuperscript{64} Richard Kandt as a representative of the ‘\textit{Deutsch Ostafrika}’ in Rwanda.

\textsuperscript{65} See details in B. Lugan, Sources écrites pouvant Servir à L’histoire du Rwanda: Etudes Rwandaises, No special, 5, XIV, (1980), at 132.

in turn, controlled the rest of the population. The benefit was mutual and advantageous for relations between Tutsi and colonialists, to the detriment of Hutu subordinates. As a result of the indirect rule, the Germans used the Tutsi King Musinga to establish their authority in the colony, and in return Musinga relied on the Germans to strengthen his own position in Rwanda, then called Ruanda. Tutsi were put in charge of the Hutu in the newly formed principalities, and were given basic ruling positions. The German colonialists elevated the Tutsi in political and social life, including advancing them to positions of prestige and trust. This favouritism was subscribed to by other institutions like the Catholic Church, which tended to support Tutsi children in admission to schools, thereby further entrenching the inequality between Tutsi and Hutu.

The Tutsi were also given the responsibility of civilizing the Hutu and supervising labour works, which had the effect of creating enmity between the groups. Thus the Hutu hatred toward the Tutsi was characteristic of direct rule where the oppressed directed their anger towards the visible oppressor.

Until the end of the Germany colonial rule in 1916, the Germans held Rwanda and Burundi as provinces, lauding favour upon the Tutsi, thereby widening the separation between the Hutu and Tutsi, which made Hutu to develop an inferiority complex. However short lived the German rule was in Rwanda, their policy of indirect rule established a pattern that would come to characterise the relations between Europeans and Africans on one hand, and between Rwanda’s

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67 U. P. Behrendt, *Die Verfolgung des Völkermordes in Ruanda durch internationale und nationale Gerichte*, (2005), at 9-10. The indirect rule system also contributed to centralisation of Tutsi power and conquest of existing Hutu chiefdoms.


two most numerous groups, Tutsi and Hutu on the other hand. Nevertheless, the indirect governance used by Germans involved a considerable degree of liberty for the Rwandan chiefs, unlike the Belgian colonial rule which followed.

II. The Belgian Colonial Rule
In 1916, Belgium successfully claimed Rwanda from the German control and was officially given the League of Nations mandate to govern Rwanda as the territory of Ruanda-Urundi, along with its existing Congo colony in the west in 1924. Belgium administered Rwanda pursuant to Article 22 of the Covenant and, then following the dissolution of the League of Nations on 18 April 1946, as a United Nations Trust territory until 1962.

During their colonial rule, the Belgians continued the German strategy of indirect rule, but over time direct intervention became more frequent when they introduced a policy of divide and rule. The Belgians initially promoted Tutsi supremacy, and took Hutu as their subordinates. This created differential treatment ranging from social matters to justice matters in respect of which the colonialists included mostly Tutsi in those posts for purposes of controlling them easily. For instance, in regard to justice matters, the Belgian colonial government intervened in appointing Gacaca judges within the traditional local justice system which predominated in much of the territory. The chiefs, who were also arbiters for those cases that were submitted to them, were allowed to continue to govern as long as they reported serious infractions to the colonial

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government and were obliged to act in conformity with colonial expectations and legal mores. This magnified the indirect rule between the coloniser and colonised and the direct rule among the colonised themselves because the chiefs had to enforce the will of the colonialists on the mass population.

The Tutsi became a brutal taskmaster of the Hutu who were subjected to forced labor, such as construction of catholic churches, public roads, and colonial residences, without any payment. If the Tutsi supervisors did not get the job done, their colonial masters whipped or replaced them. Work demands were so cumbersome that they could consume a half day of a native’s time, a process which aggrieved many Hutu who provided the manpower under supervision of the powerful Tutsi.

The process of ethnicisation was further reinforced in the 1933-1934 census conducted by Belgians, which officially categorised the Hutu as indigenous and the Tutsi as non-indigenous. Also, during the 1934 census, the Belgians further promoted separation of the groups when they required the ethnicity of each citizen to be stated on state issued identity cards. It is this census that determined 85% of the population as Hutu, 14% Tutsi and 1% Twa out of a population of 1.8 million Rwandans in 1933. Accordingly, the Belgians used ownership of cows as the key

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79 The 1933-1934 General Census in Rwanda conducted by Belgians.
criterion for determining which group an individual belonged. The criterion for determining which group an individual belonged. Those with 10 cows and above were Tutsi, together with all their descendants in the male lineage. Those with fewer cows were Hutu, who were mainly farmers. The rest were given the status of Twa due to their craftswork and pottery. Nevertheless, the criterion used here had a pre-colonial precedent, according to which Rwandans were classified in different social economic classes based on wealth and occupation.

Nevertheless, the explicit mention of ethnicity in public documents created both short-term and long-term consequences. In the short-term, mentioning ethnicity in identity cards attached a sub-national identity to all Rwandans, and enhanced divisions between the ethnicities. The Belgian colonialists conferred privileges upon the Tutsi in education, employment, and in the civil service basing on identification. The long-term consequence was that, 60 years later, the identity cards ultimately made it easy for the Hutu to identify and kill Tutsi at roadblocks and checkpoints. These identity cards were, therefore instrumental in identifying who had a right to life and who did not during the 1994 genocide. Therefore, Belgian’s colonial administration was detrimental to the unity of Rwandans because it always stressed ethnic distinctions, while conferring superiority to the Tutsi and their monarchical rule which was nonetheless abolished with the support of the same Belgian colonial authority.

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84 Children of Tutsi chiefs were favored and admitted to ‘Astrida Secondary School’ to prepare them for decent service in the colonial administration at the expense of Hutu. For instance Hutu pupils in 1932 were only (9 out of 45 Tutsi pupils), in 1945 (3 Hutu pupils out of 46 Tutsi), in 1954 (19 Hutu inclusive of 13 from Burundi out of 63 Tutsi), and in 1959 (143 Hutu pupils out of 279 Tutsi), in R. Lemarchand, *Rwanda and Burundi: Politics and Government*, (1970), at 460 et seq; G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 33.


III. The Fall of the Tutsi Monarchy

United Nations decolonisation missions began as early as 1949 and during the 1950’s, Belgium began to promote democracy.\(^87\) However, the Tutsi, who viewed such reforms as a threat to their dominance, opposed this trend because the Hutu saw democracy as tantamount to majority rule, and they constituted the majority in Rwanda.\(^88\) Nonetheless, Hutu efforts to become involved in the democratisation were ultimately thwarted by the power retained by the Tutsi.

From these experiences, the Hutu realised that Tutsi could be overthrown only in a struggle for political power and by putting an end to the monarchy. Consequently, a Hutu counter-elite group was formed that eventually led the revolt.\(^89\) Although political activists had formed a series of pro-Tutsi and pro-Hutu political parties, the political struggle in Rwanda was never really a quest for equality; the issue was who would dominate the ethnically bipolar state.\(^90\)

In 1957, a group of nine Hutu intellectuals published the ‘Hutu Manifesto,’ which complained of the political, economic, and educational monopoly of the Tutsi race and characterised them as invaders.\(^91\) The manifesto called for promoting Hutu in all fields and argued for the maintenance of ethnic identity cards so as to monitor the race monopoly. Tutsi royalty rejected the manifesto and blamed colonial administrators for any interethnic problems. The monarchy also advocated

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for the eviction of the trust authorities at the earliest possible date so as to reassert their control over the destiny of the country.92

Nevertheless, on 28 July 1959, the King (Mwami) was deposed in a coup in which the Mwami died without an heir and his half brother, a Tutsi aristocrat, was immediately placed in the position as the new king without consulting the colonial powers.93 This escalated tensions and set off an outbreak of violence between the Tutsi dominated political party, Union Nationale Rwandaise (UNAR), and the Hutu party, Parti du Mouvement de l’Émancipation Hutu (PARMEHUTU). In November 1959, PARMEHUTU led a revolt that resulted in a bloody ethnic conflict and collapse of the kingdom of Mwami Kigeri V.94

Belgium ultimately intervened to bring calmness and order in the society. However, rather than merely restore order, the colonialists reversed their support to the Hutu majority, promoting the need for stability.95 The Belgians, who initially favoured the Tutsi over the Hutu even more than the Germans had, then turned their favour to the Hutu.96 Possibly, this was because the Tutsi minority had pressurised Belgians for independence in the late 1950s and had also abandoned the

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93 E. L. Nyankanzi, Genocide: Rwanda and Burundi, (1998), at 8. Childless, Mwami Mutara Rudahigwa died mysteriously in 1959 in Bujumbura and his half brother Prince Jean Ntahindurwa was crowned Mwami Kigeri V. It is Rudahigwa who abolished ubuhake and ordered sharing or portioning of cows between abagaragu and ba shebuja. See Iteka N° 1/54 ry’Umwami Mutara Rudahigwa rikuraho ubuhake, ritegeka igabana ry’inka hagati y’abagaragu na ba shebuja.
94 Kayibanda’s speech at a political meeting, (1959), was ‘Our movement is for Hutu group. It has been offended, humiliated by Tutsi invaders. We have to light the way for the mass. We are there to restitute the country to its owners. It is the country of Bahutu...’ see P. Erny, ‘Catégories Spatiales et Structures Mentales au Rwanda,’ Cahiers de Sociologie Economique et Culturelle, (24 December 1994), at 58.
95 Foreseeing the inevitable dominance of the Hutu majority, Belgian colonial administrators sided with them, claiming to promote a democratic revolution.
Catholic Church beliefs. Instead, in addition to obedience shown to colonial rule, the Hutu majority had proved much more receptive to the gospel spread by the missionaries.

In 1960, Belgian administrators organised communal elections where the PARMEHUTU and other Pro-Hutu parties won the vast majority of civic posts. Of 229 mayors (Bourgmesters), only 19 were Tutsi. This immediately facilitated the persecution campaigns against the Tutsi living in the neighbourhoods, which were now under Hutu control. On 28 January 1961, Hutu officials declared the end of the monarchy and established a republic during a public gathering in Gitarama, a town in the southern province. Their coming to power became known as the ‘coup of Gitarama.’ This period marked the end of a five-century monarchy in Rwanda and the beginning of the continuous Tutsi harassment by Hutu-led governments.

The ensuing violence left more than 20,000 Tutsi dead and sent more others fleeing to neighbouring countries. Actually, it was concluded that approximately over 160,000 Rwandans, most of whom were Tutsi, had become refugees in the bordering countries, mainly, Uganda, Burundi, Tanzania, and Zaire (now Democratic Republic of Congo). The land and

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98 I. Linden, *Church and Revolution in Rwanda*, (1977), at 235 et seq.


cattle that the fleeing Tutsi left behind were promptly taken by Hutu. The state of insurgence was also the first ever documented case of systematic political violence between the Hutu and Tutsi.

**D. Post-Colonial Period**

As a result of the national election held under UN supervision in 1961, Gregoire Kayibanda, the author of the *Hutu Manifesto*, became Rwanda’s first president designate. And on 1 July 1962, Rwanda was granted independence after the General Assembly ended the trusteeship of Belgium. Important to note is that even after independence, tensions among the Tutsi and Hutu did not stop because Hutu were resentful of the unequal treatment they had been subjected to for a long time although they were the majority.103 This inequality was manifested in the oppressive rule against Tutsi by both republics.

**I. The First Republic**

After obtaining independence on the 1 July 1962, the first republic, headed by president, Gregoire Kayibanda from the PARMEHUTU party, adopted the first Constitution which was based on the Romano-Germanic legal tradition.104 Primarily, the Constitution abolished the Mwami regime (monarchy) and established the so called ‘democratic, social and sovereign republic.’105 The Constitution also included a limited equality clause, ensuring the equality of all its citizens without distinction as to race, origin, sex or religion.106

Notwithstanding the equality clause in the Constitution, Kayibanda did little to resolve ethnic imbalances or establish peace in Rwanda.107 In fact, from the time, after he came to power,

ethnic violence erupted periodically against the Tutsi. For instance, after the 1959 insurgence, more suffering, oppression and killing of Tutsis occurred in 1963, 1966, and 1973.\textsuperscript{108} However, no one was ever prosecuted or otherwise held accountable for those acts.\textsuperscript{109} Instead the systematic isolation of the Tutsi was intensified and many Tutsi were continuously forced to flee the country. Also, in the period following the decolonisation of Rwanda, the new republic made no attempt to calm the people or repatriate the refugees.

As the head of the state, Kayibanda fostered the notion of Tutsi and Hutu identities as being dissimilar races, with the Hutu being indigenous to Rwanda and the Tutsi non-indigenous.\textsuperscript{110} By identifying the Tutsi as foreigners in Rwanda, their relationship with Hutu was manipulated. This was maintained by retaining the view of racialisation put forth by the Belgian colonialists that Tutsi were aliens, with a different race, which justified their treatment as foreign inhabitants.\textsuperscript{111} However, despite efforts of the first republic to favour the Hutu and establish a Hutu republic, there was a growing dissatisfaction with the regime, mainly due to the economic decline, regionalism and secterianism of southern Hutu,\textsuperscript{112} which eventually led to a \textit{coup d'état} in 1973 by Juvenal Habyarimana, the army chief of staff at the time.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{112} D. Sebaganwa, ‘Ntimukitane Ba Mwana’ in \textit{Kinyamateka N° 29}, August 1966, at 3.
\end{itemize}
II. The Second Republic
In July 1973, Major-General Juvenal Habyarimana, a northern Hutu, overthrew Kayibanda, a southern Hutu, and declared himself President of the Second Republic under the party, Mouvement Révolutionnaire National Pour Le Développement (MRND).\textsuperscript{114} The second republic also adopted a new Constitution on 17 December 1978. Among its specific provisions, was the inclusion of fundamental liberties identified in the Universal Declaration of Human Rights.\textsuperscript{115} Compared to its predecessor, the equality clause was further expanded to include, race, colour, origin, ethnic group, clan affiliation, sex, opinion, religion, or social position.\textsuperscript{116}

Contrary to the above provisions, during the Habyarimana regime, Tutsi people endured different human rights violations at various instances though, initially, not widespread. Similar to the previous republic, state-inspired violence was often directed against innocent citizens in the form of loss or destruction of property, persecution, torture, imprisonment, death, and banishment into exile.\textsuperscript{117} Therefore, the policy of Tutsi discrimination was promoted by both republics under the leadership of Gregoire Kayibanda and Juvenal Habyarimana respectively.\textsuperscript{118} Through the denial of fundamental rights and freedoms to certain citizens, the political structures of both republics violated various national and international laws.\textsuperscript{119} Moreover, no attempts were ever made to bring perpetrators of such violations to justice, and as a result, a culture of impunity was

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\textsuperscript{115} Rwandan Constitution of 17 December 1978, chapter II, Art. 12; see also Art. 2 of the Universal Declaration of Human Rights (UDHR).

\textsuperscript{116} Rwandan Constitution of 17 December 1978, at chapter III, Art. 16; see also title II, Arts. 17-20.


\textsuperscript{118} E.L. Nyankanzi, \textit{Genocide: Rwanda and Burundi}, (1998), at 8-12; F. Rutembesa na E. Mutwarasibo, ‘Amateka Ya Jenoside Yakorewe Abatutsi Muri Mugina,’ \textit{CNLG}, (April 2009), at 37 et seq. The Hutu-dominated government established a strict quota system in schools, businesses, and employment, e.g. During the 1982/83 academic year, there was a total number of 424 students at Butare University; and out of these there were only 28 Tutsi. See MRND, ‘Amatwara y’u Rwanda mu y’Uburezi, Umuco n’Ubushakashatsi,’ \textit{Politique de l’éducation, de la culture, de la recherché scientifique et technique au Rwanda}, N° 1 (Octobre 1984), at 32-35.

\textsuperscript{119} Republic of Rwanda, ‘National Unity and Reconciliation Commission (NURC),’ \textit{Rwanda Reconciliation Barometer}, UNDP, (October 2010), at 11.
implanted in Rwandan society.¹²⁰

Habyarimana further reinforced the separation of the dominant groups in Rwanda by putting emphasis on the ethnic identity of each citizen to be stated on state issued identity cards subsequent to the Belgian colonial policy.¹²¹ This was intended to marginalise Tutsi in political, social, and public life.¹²²

Therefore, for many years, politicians in Rwanda used ethnicity as a political tool to prevent power-sharing and democracy, while promotion of ethnic hatred was used as a means of power consolidation.¹²³ For instance, since 1959, the Hutu elites and politicians always abused various human rights provisions by arbitrarily arresting and killing Tutsi so as to exclude them from leadership positions, and many others were sent into exile and denied repatriation to Rwanda.¹²⁴

Meanwhile, by the late 1980s, the number of Tutsi in exile had increased to over 400,000 refugees, undergoing difficult situations in exile and unfair treatment as aliens.¹²⁵ And

¹²⁴ Habyarimana refused to allow return of refugees, insisting that Rwanda was already too crowded and had too little land, jobs and food for them all; see V. Peskin, ‘Rwandan Ghosts Eight Years after the Genocide, an International Tribunal is failing to Sort the Criminals from the Victims,’ Legal Affairs, (2002), at 21 et seq.
consequently, as their numbers expanded, the Tutsi in exile were concerned about returning to Rwanda.\footnote{126 For figures of refugees see, F.X Bangamwabo et al., Les Relations Interethiniques au Rwanda à la Lumière de l’Agression d’Octobre 1990, (1991), at 185.}

E. Formation of the Rwandese Patriotic Front (RPF)


On 1 October 1990, the Tutsi-led RPF began an invasion into Rwanda from the Northern region in order to overthrow the dictatorial government and bring the refugees back.\footnote{131 G. Rwaka, ‘Imvo n’Imvano y’Urugamba rwo Kubohora u Rwanda, (1 Ukwakira 1990)’ Igihe News, 1 October 2012; R. Van der Meeren, ‘Three decades in Exile: Rwandan Refugees 1960-1990’ 9 Journal of Refugee Studies, (1996), at 252-267.} The formation of the RPF, with its own armed forces, the Rwandan Patriotic Army (RPA), was a direct threat to
Hutu power. Also, the military costs associated with repelling the RPF invasion in 1990 placed great demands upon the regime of Habyarimana. The then Rwandan government took steps to preserve its power in the face of the Tutsi infiltration.

As a response to the RPF invasion, various parties were formed, mainly comprising of Hutu extremists who consolidated themselves and advocated for their unity in order to fight the Tutsi common enemy within and outside Rwanda. Also, the ‘akazu’, meaning the circle of people around president Habyarimana’s wife, found the ideal opportunity to spread the genocide ideology. As a result, they issued the Hutu ‘ten commandments’, forbidding Hutu from interacting or entering into a wide range of relations with the Tutsi enemy, whether in marital affairs, business, or state affairs.

Meanwhile, the war between the RPF rebel group and the Rwandan armed forces (FAR) continued. After intermittent fighting between the forces, the battle lasted until 31 July 1992, when a cease-fire halted the war that had cost many peoples’ lives. The Rwandan government

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136 H. Ngeze, 6 issue of Kangura Newspaper (December 1990), vilified the Tutsi in the Hutu Ten Commandments which were inflammatory and discriminatory, for instance any Hutu who married a Tutsi or engaged in business with a Tutsi was a traitor; see also J.P Chrétien, ‘Presse Libre et Propagande Raciste au Rwanda,’ 42 Politique Africaine, (1992), at 119 et seq., available at <http://www.politique-africaine.com/numeros/pdf/042109.pdf>, accessed October 2012.
137 Republic of Rwanda, ‘National Unity and Reconciliation Commission (NURC),’ Rwanda Reconciliation Barometer, UNDP, (October 2010), at 11.
and the RPF then began to engage in political talks which culminated in the signing of the 1993 Arusha peace agreement, guaranteeing power-sharing between the two factions.\(^{138}\)

To monitor the implementation and enforcement of the agreement, the UN Security Council unanimously authorised the formation of the United Nations Assistance Mission for Rwanda (UNAMIR), in October 1993.\(^{139}\) The United Nations mission and the accords, however, did not result in peace.\(^{140}\) Many Hutu extremists who did not believe in making any compromises between the Hutu and Tutsi, disagreed with the peace process and were thus at odds with its implementation.\(^ {141}\) They instead decided to torture Tutsis in Rwanda identified as traitors. Towards the end of 1993, the human rights bodies and non-governmental organisations (NGOs) began reporting serious human rights violations against the Tutsi and political opponents, but the international community did little to stop the violence,\(^ {142}\) until it erupted into the genocide of April 1994.\(^ {143}\)

F. The Genocide Period

On the night of 6 April 1994, Habyarimana was shot down in his private plane by a missile while returning to Kigali from a peace conference in Tanzania, together with president Ntaryamira of

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\(^{139}\) UNAMIR, UN Security Council Resolution 872 of 5 October 1993.

\(^{140}\) These included accords for a ceasefire, power-sharing, return of refugees to Rwanda and integration of the armed forces. After enjoying exclusive power for over 30 years, Hutu Power leaders were reluctant to accept these changes peacefully because if the Accords were implemented, many of them would lose their privileged positions. See P. J. Magnarella, Justice in Africa: Rwanda’s Genocide, its Courts, and the UN Criminal Tribunal, (2000), at 27-28.


Burundi. The board was killed. The Hutu extremists immediately began slaughtering Tutsi and moderate Hutu in Kigali. The pertinent question is whether these massacres were planned or whether they were ignited by the death of Rwanda's president.

According to Behrendt, genocide was the culmination not only of a four year civil war that took place during the 1990s, but also of a conflict between the Hutu and Tutsi populations that had been escalating for decades, if not centuries. Historically, apart from frequent arbitrary arrests, the government of Rwanda regularly sponsored the broadcast of hate propaganda against the Tutsi and government opponents in preparation for the genocide.

Indeed, long before the massacres began, the government had drawn up lists of people to be killed, and established a training camp for Hutu militia to indoctrinate them in ethnic hatred and methods of mass killing. For instance, in 1992, groups affiliated with the Rwandan army forces had already established two militias, the *Interahamwe* and *Impuzamugambi*. These militias, which were trained by the army, periodically attacked Tutsi and eventually played an instrumental role in the 1994 atrocities. In fact, despite the discrimination and torture directed against the Tutsi from 1959-1989, accumulation of killings occurred in 1990, through to 1993.


145 See V. Peskin, ‘Rwandan Ghosts Eight Years after the Genocide, an International Tribunal is failing to Sort the Criminals from the Victims,’ Legal Affairs, (2002), at 21 et seq.


Nevertheless, the most serious and massive killings, did not occur until 7 April 1994.\textsuperscript{151}

After Habyarimana was killed in a plane crash on 6 April 1994, a radical group of Hutu militants succeeded him in the interim government and started the genocide on 7 April 1994. While in power, they immediately put in place the previously designed plans for genocide, using the plane crash as a pretext to stir anger of Hutu against the Tutsi.\textsuperscript{152} Therefore, the assassination of president Habyarimana was undoubtedly the spark which triggered the immediate commission of genocide and crimes against humanity by the presidential guard, military, militias and civilians in the government.\textsuperscript{153}

Although the persons responsible for the assassination of Habyarimana were never identified, it is postulated that extremist Hutu were behind it.\textsuperscript{154} Upset with Habyarimana’s decision to share power with the Tutsi, they assassinated him and executed the already planned massacres.\textsuperscript{155} Within a few hours after the plane crash, Hutu militias and the gendarmerie set up roadblocks and checkpoints, and state-issued identification cards were demanded. Those identified as Tutsi were murdered immediately. The next morning, the prime minister, Agathe Uwilingiyimana, a moderate-Hutu, was killed in her home.\textsuperscript{156} This was evidence that not only Tutsi were killed or disappeared, but also moderate Hutu in favour of the peace process were targeted.


\textsuperscript{152} A. Des Forges, Leave None to Tell the Story: Genocide in Rwanda, (1999), at 153-158.


\textsuperscript{156} R. Brauman, Devant le Mal: Rwanda, Un Génocide en Direct, (1994), at 21 et seq.
Later the same day, after killing the prime minister, ten Belgian peacekeepers were murdered by government soldiers at Camp-Kigali. 157 Although the U.S. had safely evacuated its entire people, Belgium asked for cover from the U.S while it sought to remove its troops. By 19 April, the Belgian withdrawal of its troops was complete, and two days later, instead of authorising additional peacekeeping measures, the United Nations Security Council withdrew the majority of the UNAMIR forces, reducing them from 2,100 to a mere 270 troops. 158 And the remaining peacekeepers could do only little to stop the widespread genocide. 159

During the following days and weeks, the killing spread, throughout the country. The targets were the Tutsi ethnic group and moderate Hutu. Hospitals, churches and schools were turned into killing sites. 160 The massacres were extremely horrific due to the cruel way in which they were carried out. Often victims were put to death by simple and brutal means, such as by the use of machetes, axes, knives, sticks, tools, iron bars and sometimes firearms. 161 Several victims were systematically raped, tortured and many of them were killed as well, while males were subjected to torture and extreme degradation before being killed. Children, particularly males, were also

159 Though he was supposed to reduce the size of his force to 270, Romeo Dallaire, the commander of UN forces in Rwanda ended up retaining 503 Peace Keepers. See C.M. Carroll, ‘An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994,’ 18 Boston University International Law Journal, (2000), at 163; L. Melvern, A People Betrayed: The Role of the West in Rwanda's Genocide, (2000), at 25 et seq.
161 Accordingly, machete was the most used means of murder of victims (37.9%), followed by killing by club (16.8%), and followed by killing by firearm (14.8%), République Rwandaise (2002), at 26; J. Hatzfeld, A time for Machetes: The Rwandan Genocide, the Killers Speak, (2010), at 5 et seq.
singled out and murdered. Also, children were extensively used as instruments for committing genocide, either as civilians or as soldiers. In addition to violating the most fundamental human right, the right to life, the perpetrators of these crimes violated various international human rights laws as well as international humanitarian norms.

Many ordinary Hutu participated voluntarily, indeed enthusiastically, in the massacres. Besides the active role played by leaders and the elite people in the genocide, the Interahamwe and Impuzamugambi militias tended to recruit mostly among the uneducated and even poor people, like street boys, and unemployed citizens. For these people, genocide was the easiest thing to do because they could loot the property of victims, get drunk for free, rape Tutsi women and kill with no legal consequence as the government propaganda urged every single Hutu to become involved, whether rich or poor in killing all Tutsi. This was revealed in the Kayishema and Ruzindana case before the ICTR, where the trial chamber observed:

Not only were Tutsi killed in tremendous numbers but they were also killed regardless of gender or age. Men and women, old and young were killed without mercy. Children were massacred before their parent’s eyes, women raped in the sight of their families. No Tutsi was exonerated, neither the weak nor the pregnant.

About 100 days after the genocide had begun, the RPA army stopped the massacres that were

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162 Discussion on the genocide in Rwanda can be seen in G. Werle, Principles of International Criminal Law, 2nd edn (2009), at 253, MN 694.
164 See Art. 77 (2) of the Protocol Additional to the Geneva Convention of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977; Art. 4 (3(c)) of the Protocol Additional to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977; see also Art. 38 (2) of the Convention on the Rights of Child of 20 November 1989.
167 Rape was used as a weapon of genocide and inflicted upon 250,000-500,000 victims. S. Power, ‘Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen,’ Atlantic Monthly, September 2001, at 67; see extensive discussion on rape and sexual violence in G. Werle, Principles of International Criminal Law, 2nd edn, (2009), at 266, MN 728 et seq.
being carried out by Interahamwe, obviously leaving bitter consequences and deep wounds behind.\textsuperscript{169} The international community did not prevent the genocide, nor did it stop the killing when the violence had begun, but instead withdrew even the troops it had in Rwanda.\textsuperscript{170} It is this failure to halt the genocide that initially strained the relationship between Rwanda and the United Nations,\textsuperscript{171} and created tensions with countries like France which had generously funded and supported the génocidaires.\textsuperscript{172}

As put by Dallaire,\textsuperscript{173} each one of the mere 2,100 troops would have been crucial to saving lives if the international community had not withdrawn them. This is because Hutu killers were being deterred from committing acts of genocide in front of UN peacekeepers. In fact, Samantha Power shows how at the Hotel des Mille Collines, ten peacekeepers and four UN military observers helped to protect several hundreds of civilians sheltered there for the duration of the crisis.\textsuperscript{174} Nevertheless, the UN forces that remained in Rwanda were too few to save the massive number of victims that were targeted in 1994.\textsuperscript{175}

\textsuperscript{173} Romeo Dallaire, then a Major General in the Canadian army was the commander of the UN Assistance Mission in Rwanda at the time of the genocide. See R. Dallaire, Shake Hands with the Devil: The Failure of Humanity in Rwanda, (2003), at 5 et seq.
\textsuperscript{175} See discussion in, I. Carlsson, ‘The UN Inadequacies,’ 3 Journal of International Criminal Justice, (2005), at 837.
It has not been possible to give an exact number of how many people were exterminated, but it is estimated that between 800,000 to 1,000,000 victims out of a population of 7.5 million were killed in the three months period following the plane crash. This means that approximately 11% of Rwanda’s total population had been killed.\footnote{K.C Moghalu, ‘Prosecute or Pardon? Between Truth Commissions and War Crimes Trials’ in C.L. Sriram and S. Pillay (eds.), Peace versus Justice? The Dilemma of Transitional Justice in Africa, (2009), at 69 et seq; Prunier, notes that within a period of only three months, approximately 800,000 Tutsi and between 10,000 and 30,000 moderate Hutu were killed. G. Prunier, The Rwanda Crisis: History of a Genocide, (1995), at 265.} This tragedy may have set a historic record for the largest number of people put to death in such a short time.\footnote{M. A. Drumbl, ‘Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda,’ 75 New York University Law Review, (2000), at 1245-1246; R. Deqni-Séqui, 1995 Summary Report of the Special Rapporteur on the Situation of Human Rights in Rwanda (UN E/CN.4/1995/12), at 38; see also Organisation for African Unity (June 1998-July 2000), Special Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, at 21.} Nevertheless, by 18 July 1994, the RPF had already gained control over the whole country and declared a unilateral ceasefire. Then, on 19 July, the Government of National Unity was sworn in for a transitional period of five years. It included both Hutus and Tutsis in the leadership.\footnote{R. Bonner, ‘Rwanda's Leaders Vow to Build a Multiparty State for Hutu and Tutsi,’ New York Times, 7 September 1994, at A10. The government publicly committed itself to building a multiparty democracy and to discontinuing the ethnic classification system utilized by the previous regime. See Human Rights Watch, ‘Rwanda: Human Rights Developments,’ at <http://www.hrw.org/wr2k/Africa-08.html>, last visited August 2012.} After the genocide, the RPF-led government outlawed identification of Rwandans according to historical ethnic groups and ruled that everyone is to be identified as a Rwandan not as a Hutu, Tutsi or Twa.\footnote{Government of Rwanda, available at <http://www.rwanda1.com/government> accessed in September 2012}

and Gacaca courts\textsuperscript{184} were established to dispense justice and to deal with the enormous number of genocide suspects.\textsuperscript{185} The following chapters will therefore critically explore each level of the judicial response in post-conflict Rwanda and the associated problems or discrepancies.

\begin{itemize}
  \item Organic Law N° 08/96 of August 30, 1996, on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.
\end{itemize}
CHAPTER THREE: THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

A. Introduction

Article VI of the Convention for the Prevention and Punishment of the Crime of Genocide provides for the prosecution of the crime of genocide before a competent tribunal of the State in the territory of which the act was committed or by such interested international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.\(^{186}\) The Convention establishes no hierarchy or preference between the two regimes. In a sense, Article VI was also a mandate to the international community, to the states parties and to the United Nations, to ensure the creation of an international jurisdiction.\(^{187}\)

In compliance with the above, and following the genocide in Rwanda,\(^ {188}\) the International Criminal Tribunal for Rwanda was established in November 1994 by the United Nations in Resolution 955\(^ {189}\) in order to judge people responsible for the genocide and other serious violations of international law in Rwanda\(^ {190}\) or by Rwandan citizens in nearby states, between 1

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\(^{189}\) UN Security Council Resolution 955, (8 November 1994).

January 1994 to 31 December 1994.\textsuperscript{191} The subject matter jurisdiction of the ICTR incorporates genocide,\textsuperscript{192} crimes against humanity\textsuperscript{193} and war crimes.\textsuperscript{194} The creation of the \textit{ad hoc} Tribunal was a landmark move by the international community premised on the core goals of justice, accountability, deterrence, and ending impunity.\textsuperscript{195} This Chapter evaluates the legacy of the Tribunal with regard to its achievements and shortcomings in prosecuting mainly the crime of genocide.

B. Generalities about the Tribunal

I. Genesis of the ICTR

The genesis of the ICTR followed several investigations with regard to the civil war in Rwanda. Following an earlier Security Council Resolution, then Secretary General Boutros Boutros-Ghali named a commission of experts to go to Rwanda to investigate and assess evidence of grave violations of international humanitarian law, including possible acts of genocide.\textsuperscript{196} This commission of human rights experts found that genocide and violations of international


\textsuperscript{193} Art. 3 of ICTR Statute; see J.RW.D Jones, \textit{The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda}, (1998), at 48 et seq.

\textsuperscript{194} Art. 4 of ICTR Statute; J.RW.D Jones, \textit{The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda}, (1998), at 34 et seq; G. Mettraux, \textit{International Crimes and the \textit{Ad hoc} Tribunals}, (2005), at 22 et seq.


humanitarian law had occurred.\textsuperscript{197} In addition, the UN Commission on Human Rights convened an emergency session in May 1994 and appointed a special rapporteur who was also charged with investigating and verifying claims of massive human rights violations, including genocide.\textsuperscript{198} The special rapporteur, Ivorian lawyer René Degni-Ségui, submitted two reports to the commission in June and August 1994, both of which found that grave violations of humanitarian law and genocide had been committed in Rwanda in what was clearly an internal and not an international armed conflict.\textsuperscript{199}

The UN, following the pattern of the already established International Criminal Tribunal for the former Yugoslavia,\textsuperscript{200} decided that the genocide in Rwanda required a similar effort to ensure prosecution for the most serious crimes, such as genocide, war crimes and crimes against humanity.\textsuperscript{201} The definitions of the crimes laid down in the Statute are supposed to reflect customary international law existing at the time of the genocide. Therefore, the fact that the Statute was enacted after the perpetration of the crimes in question does not mean that the Statute imposes retroactive criminalisation.

II. Legal Basis of the ICTR
In the wake of the genocide in Rwanda, the UN Security Council passed Resolution 955, creating the ICTR on 8 November 1994.\textsuperscript{202} The ICTR is governed by its Statute, and by its rules

\textsuperscript{197} Letter Dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/1125, transmitting the Commission of Experts' Preliminary Report (1 October, 1994).
\textsuperscript{198} Commission on Human Rights, Resolution S-3/1 (May 25, 1994).
\textsuperscript{202} On the creation and work of the Tribunal, see V. Morris and M. Scharf, \textit{The International Criminal Tribunal for Rwanda}, Vol. 1, (1998), at 638 \textit{et seq}; L. Gradoni, ‘You will receive a Fair Trial Elsewhere,’ The Ad hoc
of procedure and evidence, which were adopted by the judges and which were subject to continual adaptations and amendments.\textsuperscript{203}

The Statute of the ICTR establishes its jurisdiction, the types of crimes to be investigated and prosecuted, the Tribunal’s relationship with national courts, the organisation of the Tribunal, the Prosecutor’s and Registrar’s offices, the conduct of investigations, the rights of the accused, witness protection, rules of procedure, appeals and enforcement of sentences, which are largely similar to the ICTY provisions.\textsuperscript{204} In its Article 2, the Statute incorporates the customary law crime of genocide as laid down in identical wording in the Genocide Convention.\textsuperscript{205} The definition of crimes against humanity in Article 3 dispenses with the requirement that crimes must be committed in armed conflict, an element found in the classical definition of crimes against humanity in the Nuremberg Charter.\textsuperscript{206} In this regard, the ICTR Statute reflects the status of customary international law at the time. Instead, Article 3 of the Statute requires that crimes against humanity be committed ‘on national, political, ethnic, racial or religious grounds.’

However, this element is not supposed to limit the scope of the crime as compared to the customary definition. Rather, the element describes the form that crimes against humanity took in Rwanda.\textsuperscript{207} Regarding the individual crimes against humanity, the Statute, just like the ICTY


\textsuperscript{206} Art. 6 (c), Charter of the International Military Tribunal (Nuremberg Charter).

Statute and the Control Council Law N° 10, incorporates the crime of rape, which played an important role in the Tribunal’s jurisprudence.\textsuperscript{208} The war crimes definition in Article 4 of the Statute is limited to violations of common Article 3 and of the 1977 Protocol II to the Geneva Conventions, and thus to war crimes committed in non-international armed conflict, which is consistent with the UN special rapporteur’s characterization of the conflict as an internal one.

The Tribunal’s rules of procedure and evidence adopted on 29 June 1995 develop the fundamental fair trial guarantees specified in Article 20 of the ICTR Statute. Article 20 of the Tribunal’s Statute contains international fair trial standards found in the International Covenant on Civil and Political Rights (ICCPR), such as the presumption of innocence, the right to counsel, the right to remain silent and the right to confront and call witnesses.\textsuperscript{209} The Tribunal has always been required to adhere to general principles of criminal law in its prosecutions and trials.

The ICTR jurisdiction is limited to natural persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994.\textsuperscript{210} The maximum penalty imposed by the trial chamber is limited to life imprisonment.\textsuperscript{211}

\textsuperscript{208} See the discussion of the Akayesu case law below.
\textsuperscript{209} Art. 14 of the International Covenant on Civil and Political Rights (ICCPR); Art. 20 of the ICTR Statute; L. Gradoni, ‘You will receive a Fair Trial Elsewhere’ The Ad hoc International Criminal Tribunals Acting as Human Rights Jurisdictions, Netherlands International Law Review, (2007), at 1 et seq.
III. Organization of the Tribunal
The ICTR, modeled after the ICTY, has three principal organs; the chambers, office of the prosecutor and the registry. The Tribunal’s chambers comprise three trial chambers in Arusha and an appeals chamber in The Hague. The office of the prosecutor is in charge of investigations and prosecutions. While initially, the ICTR and ICTY had the same prosecutor, the ICTR has had its own prosecutor since 2003. The prosecutor is based in Arusha and has a sub-office in Kigali. The registry is responsible for providing overall judicial and administrative support to the chambers and the office of the prosecutor. The geographical dispersal of the Tribunal’s activities obviously impedes the activities of the Tribunal and makes difficult communication and coordination between the different offices and organs.

In total, the chambers consist of sixteen permanent judges and nine ad litem judges, all elected by the United Nations General Assembly. There are three permanent judges for each of the three trial chambers, and seven permanent judges for the appeals chamber. However, only five of these seven permanent judges sit in the appeals chamber at any given time. To ensure legal consistency between the two tribunals, the appeals chamber of the ICTY also serves as the appeals chamber of the ICTR and is therefore based in The Hague. Having been set up by a

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214 Art. 15 (1) ICTR Statute; see W. A. Schabas, Genocide in International Law, (2000), at 578.


binding Resolution of the UN Security Council, the ICTR has concurrent jurisdiction with national courts but asserts primacy over the latter, and has the ability to force the surrender of an accused, whether a Rwandan citizen or not, located in Rwanda or any third State.\(^{218}\)

### IV. Relationship between Rwanda and the Tribunal

Rwanda, being a member of the Security Council at the time, was the only state to vote against Resolution 995 creating the ICTR,\(^{219}\) even though it had initially requested the establishment of an international tribunal.\(^{220}\) What prompted its negative vote was its disapproval of the likelihood of enforcing ICTR sentences outside Rwanda,\(^{221}\) the Tribunal’s limited temporal jurisdiction,\(^{222}\) the inability to impose capital punishment,\(^{223}\) the poor equipment of the Tribunal,\(^{224}\) and finally its location outside Rwanda. All these proposals were rejected by the Security Council. Despite

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\(^{218}\) Thus the full force of Chapter VII underlies the Tribunal’s authority and compliance with its decisions is mandatory, see Art. 8 of the ICTR Statute; see Art. 25 of the United Nation Charter; see Rule 9 of the Rules of Procedure and Evidence of both the ICTY and the ICTR; A. Cassese, *International Criminal Law*, 2nd edn, (2008), at 341.


\(^{220}\) Letter dated 28 September 1994 from the permanent representative of Rwanda to the United Nations addressed to the president of the Security Council,’ (S/1994/1115, 29 September 1994), at annex Para 6 (c)and Para 10 (c).


\(^{222}\) The Tribunal’s jurisdiction was limited to crimes committed between 1 January and 31 December 1994. This would not cover the lengthy period, during which preparations were made for the genocide, see UN Doc. S/PV.3453 1994, at 14-16.

\(^{223}\) At the time, National courts applied death penalty in their laws, see *Public Prosecutor v. Charles Karorero et al.*, Judgment of 31/03/2000 (R.M.P 78.752/S2/KRL), (R.P 26/96), Urugikorera mbere rwa Cyangugu, Western province. Karorero and others were sentenced to death penalty; see also Art. 23(1) ICTR Statute) Security Council Res. 955 (1994) of 8 November 1994, as amended to date; Also ‘Statement to the Security Council by the Rwandan Representative on 8 November 1994’ at the Tribunal’s website, [http://www.unictr.org/default.html](http://www.unictr.org/default.html), accessed in March 2012.

the rejection of all its suggestions, Rwanda nevertheless expressed its support and willingness to cooperate with the Tribunal.225

At the start, the country’s interaction with the ICTR during the Tribunal’s first years of existence was minimal until its first arrests. Rwanda was probably surprised that the Tribunal was serious about prosecuting génocidaires. Also, the presence of a special representative of Rwanda in Arusha to follow up the activities of the Tribunal since 1999 facilitated communication between Kigali and Arusha in matters of transfer of witnesses and the like. However, the relationship between Rwanda and the Tribunal remained unstable.

In November 1999, disagreement arose over the release of Jean-Bosco Barayagwiza, after the appeals chamber had ordered his release because of violations of his due process rights in connection with his arrest and transfer to the ICTR.226 The Rwandan authorities, clearly dissatisfied with the decision, threatened to cut their relations with the Tribunal. Following a request for review filed by the ICTR prosecutor, the Tribunal’s appeals chamber reversed its previous decision, allowing the trial to proceed.227 The appeals chamber noted that the due process violations would be remedied by reducing the sentence in the case of conviction, or providing compensation in the case of an acquittal. After that, Rwanda resumed cooperation with the Tribunal.

In 2002, the relationship between the ICTR and Rwanda deteriorated once again, leading to partial suspension of cooperation by Rwanda.228 This was fuelled by two prominent genocide survivors’ organizations229 which severed cooperation with the ICTR, accusing it for mistreating witnesses before the court. This referred to an incident where the judges had reportedly laughed

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229 IBUKA and AVEGA genocide survivors’ associations decided not to cooperate in rendering witnesses until the ICTR corrected the situation.
at a rape victim.\textsuperscript{230} In addition, they accused the Tribunal of employing genocide suspects,\textsuperscript{231} and denounced the slow pace of the Tribunal.\textsuperscript{232} Due to these reasons, two powerful genocide survivors’ associations IBUKA and AVEGA boycotted ICTR proceedings by instructing their members not to testify before the Tribunal.\textsuperscript{233} This undoubtedly prevented the Tribunal from gaining public legitimacy in Rwanda. From then on, the relationship between the Tribunal and Rwandan government remained tense.\textsuperscript{234} However, following several reciprocal visits by ICTR and Rwandan officials in 2003, the relationship improved.

Nevertheless, the relationship remained unstable. In 2004, tension between Rwanda and the ICTR arose over the Tribunal’s acquittal of former préfet Emmanuel Bagambiki and André Ntagerura, former minister of transport and telecommunications, on charges of genocide and crimes against humanity. The acquittal enraged the Rwandan government and population, who accused the préfet of responsibility in the killings of the Tutsis in the Bugesera region. As a result, a communiqué from the ministry of justice firmly denounced the decision to acquit Bagambiki and Ntagerura. In addition, an estimated 10,000 people turned up on the streets of the town of Cyangugu in the defendants’ home province to demonstrate against the acquittal.\textsuperscript{235} It is important to note that this was only the second time that the ICTR had delivered an acquittal. The first suspect to be acquitted was former mayor of Mabanza commune, Ignace Bagilishema, in 2001. The Rwandan government on that occasion appeared to accept the decision of the ICTR. Another incident which heightened the tensions revolved around Rwanda’s accusations in 2006.


\textsuperscript{233} The boycott was respected by many Rwandan genocide survivors. It followed, among other events, an incident where ICTR judges laughed while a witness testified about being raped by the accused. For a description of the 2002 breakdown in cooperation between the ICTR and Rwanda, see International Federation for Human Rights (FIDH), ‘Victims in the Balance-Challenges ahead for the International Criminal Tribunal for Rwanda,’ (November 2002).


\textsuperscript{235} Information, Documentation and Training Agency, Arusha (Tanzania), ‘Thousands Demonstrate Against UN Tribunal,’ (29 February 2004).
that the ICTR appointed a Rwandan genocide suspect as a defence counsel. In fact, the ICTR was often accused of scandalous acts of employing genocide suspects. This affected the public trust and in turn seriously minimized the ICTR’s role in the reconciliation process in Rwanda.

A relatively recent case that shocked the Rwandan public as well as the government was the acquittal of Protais Zigiranyirazo. In December 2008, the trial chamber of the ICTR had sentenced Zigiranyirazo to twenty years’ imprisonment for genocide and extermination as a crime against humanity. However, in November 2009, the verdict was overturned by the appeals chamber of the ICTR, which acquitted him of all charges, ordering his immediate release. In the view of the appeals chamber, his acquittal was based on the fact that his involvement in the crimes charged could not be proven. This was criticized on the Rwandan national radio by the Rwandan minister of justice, Tharcisse Karugarama, and by the national press, as well as by victims’ associations who regard Zigiranyirazo as one of the masterminds of the genocide.

The most recent case that has attracted criticism in Rwanda was the acquittal of former ministers Justin Mugezeni and Prosper Mugiraneza by the appeals chamber in 2013. On 30 September 2011, the trial chamber had found both men guilty and sentenced them to 30 years in prison for conspiracy to commit genocide, and direct and public incitement to commit genocide. The appeals chamber overturned the conviction on 4 February 2013 and ordered their release, an act

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242 See ‘ICTR Acquittal of Zigiranyirazo Shocked Rwanda,’ Agence France Presse (AFP), 18 December 2009.
which was not well received by the Rwandan victims associations and which was criticized by
the prosecutor general Martin Ngoga.\textsuperscript{243}

Arguably, the reasons for these regular tensions with the Tribunal can be attributed to Rwanda’s
general distrust of UN institutions, following the failure of the international community to
prevent the genocide,\textsuperscript{244} and Rwanda’s desire to be self-sufficient, by having its own institutions
to prosecute génocidaires.

Notwithstanding such tensions, Rwanda has been cooperative with the Tribunal and vice versa.
In fact, the Tribunal has had an enormous impact on the reform of the judiciary within Rwanda,
especially since the adoption of the Tribunal’s completion strategy in 2004.\textsuperscript{245} Under the
completion strategy, the Tribunal may refer cases to national jurisdictions for trial if the Tribunal
has satisfied itself that the accused will receive a fair trial.\textsuperscript{246} This has created an incentive for
Rwanda to improve relations with the Tribunal and to improve due process standards, which also
included the abolition of the death penalty in 2007 and the sentence of life imprisonment under
solitary confinement being inapplicable for ICTR transferees. Currently, eight cases have been
referred to Rwanda by the Tribunal.\textsuperscript{247}

Furthermore, there has been a steady flow of witnesses, as well as regular access to documents in
Rwanda by the officials of the Tribunal. This has undeniably been crucial for the Tribunal’s
functioning. It is noted that Rwanda assists the ICTR usually through its prosecution authorities.

\textsuperscript{244} P. Uvin and C. Mironko, ‘Western and Local Approaches to Justice in Rwanda,’ \textit{9 Global Governance}, (2003), at
2 and 19; see W. A. Schabas, \textit{Genocide in International Law} (2000), at 578.
\textsuperscript{245} Human Rights Watch, \textit{Law and Reality: Progress in Judicial Reform in Rwanda}, (July 2008).
\textsuperscript{246} Rules of Procedure and Evidence, 11 \textit{bis}; UNDP, ‘Turning Vision 2020 into reality: from recovery to sustainable
human development,’ (UNDP, 2007).
\textsuperscript{247} Cases referred by the Tribunal to Rwanda include that of Jean-Bosco Uwinkindi, Charles Ryandikayo, Fulgence
Kayishema, Aloys Ndimbati, Charles Sikubwabo, Ladislas Ntaganzwa, Pheneas Munyarugarama, and Bernard
Munyagishari (transfer pending appeal); see E. Musoni, ‘ICTR Transfers another Case to Rwanda,’ \textit{The New Times
Rwanda}, 09 October 2012; see ‘Status of ICTR cases,’ available at
Developments at the Ad hoc International Criminal Tribunals,’ \textit{6 Journal of International Criminal Justice}, (2008),
at 606; For the first transfered case, see ICTR Hands over Uwinkindi File to Rwanda Government (ICTR/INFO-9-2-
699.EN), 18 January 2012; \textit{Jean Uwinkindi v. The Prosecutor}, Case No \textsuperscript{\textendash} ICTR-01-75-AR11bis, 16 December 2011.
For instance, when the ICTR seeks information on a certain case, it usually passes through the Rwandan prosecution authorities, which, in turn, request the information from the relevant ordinary or Gacaca courts with parallel jurisdiction over the crime of genocide. On the other hand, the ICTR organizes seminars and workshops to train Rwandan judges and prosecutors in criminal justice matters which, is important in building the Rwandan judiciary.

C. Status of the ICTR Cases

While the ICTY is widely regarded as a ‘war crimes’ Tribunal, the ICTR is commonly known as a ‘Genocide Tribunal.’ This is because it has taken a notable status as the first international criminal tribunal to prosecute many suspects for genocide.

Currently, eighteen years after its establishment, the ICTR has indicted ninety two individuals and arrested eighty three of them accused of genocide and other crimes. The Tribunal has finalised proceedings of seventy-five individuals, among whom eleven have been released after serving their sentences and three died while serving prison sentences. Seventeen are appealing their sentences and ten have been acquitted. Proceedings against four individuals were terminated after two died and after indictments against two were withdrawn. Nine individuals

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250 The ICTR is known as a genocide court because the Tribunal focuses more on pursuing suspects of genocide rather than crimes against humanity and war crimes. Almost all defendants have been accused of genocide; see D. Magsam, ‘Coming to Terms with Genocide in Rwanda: The Role of International and National Justice,’ in W. Kaleck et al. (eds.), International Prosecution of Human Rights Crimes, (2007), at 161; see L. Van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law, (2005), at 263.

remain at large as fugitives.\textsuperscript{252} The cases against ten individuals have been referred or transferred to national jurisdictions mainly Rwanda\textsuperscript{253} and France,\textsuperscript{254} following Rule 11 bis of the Tribunal’s rules of procedure and evidence on transfer of cases. Noting that the penalty imposed by the Tribunal is limited to imprisonment,\textsuperscript{255} the majority of convicts are currently serving their prison sentences in Mali and Benin. The Tribunal is bound to close its work on 31 December 2014, according to the ICTR completion strategy,\textsuperscript{256} and will transfer its responsibilities to the International Residual Mechanism which already began functioning for the ICTR branch in July 2012.\textsuperscript{257}

\textsuperscript{252} So far among the indicted persons, 9 fugitives remain at large; Bizimana Augustin, Kabuga Félicien, Kayishema Fulgence, Mpiranya Protais, Munyagishari Bernard, Munyarugarama Pheneas, Ndimbati Aloys, Ntaganzwa Ladislas, Ryandikayo Charles, Sikubwabo Charles.


\textsuperscript{254} Cases referred by the Tribunal to France include, Bucyibaruta Laurent, Former Préfet of Gikongoro; Munyeshyaka Wenceslas a Catholic Priest but French courts have remained inactive since the referral; see H. Brady and B. Goy, ‘Current Developments at the Ad hoc International Criminal Tribunals,’ 6 Journal of International Criminal Justice, (2008), at 606; see ‘Status of ICTR cases,’ available at <http://www.unictr.org/Cases/tabid/204/Default.aspx>, accessed October 2012.


\textsuperscript{257} Statute of the International Residual Mechanism for Criminal Tribunals; The Mechanism for International Criminal Tribunals (the MICT) was established by the United Nations Security Council on 22 December 2010. The Tribunal became a residual UN Court On 1July 2012 with mandate to carry out essential functions and to maintain the legacy of the ICTY and ICTR. In fact the case file of Pheneas Munyarugarama was referred to Rwandan courts by the Appeals chamber of the International Residual Mechanism for Criminal Tribunals in October 2012; see details on the Residual mechanism in G. Acquaviva, ‘Was a Residual Mechanism for International Criminal Tribunals Really Necessary?’ 9 Journal of International Criminal Justice, (2011), at 789-796; T. Pittman, ‘The
D. Analysis of Important Jurisprudence before the ICTR

The entire case law of the ICTR cannot be examined in the context of this study. However, some exemplary cases of high profile defendants shall be dealt with in order to demonstrate the contribution of the Tribunal’s jurisprudence to bringing justice to Rwanda. The selected cases are groundbreaking either for their contribution to the development of international criminal law or for their role in clarifying the organization and the execution of the genocide. Their jurisprudential legacy is the principal subject discussed below.

I. Prosecutor versus Akayesu

On 9 January 1997, the ICTR commenced one of the most historic cases in international law, prosecutor versus Jean-Paul Akayesu. During the 1994 Rwandan genocide, Akayesu was the mayor of Taba, a district where many Tutsi were systematically raped, tortured and murdered. In 1998, the Tribunal set a precedent by convicting the defendant of genocide, for acts of rape, direct and public incitement to commit genocide, and crimes against humanity, namely, extermination, murder, torture, rape, and other inhumane acts. He was acquitted of complicity in genocide and war crimes. On 2 September 1998 Akayesu was sentenced to a single sentence of life imprisonment, which was upheld on appeal on 1 June 2001. He is at the time of writing serving his sentence in Mali.


259 Akayesu aided and abetted acts of sexual violence by allowing them to take place on or near the premises of the communal bureau while he was present on the premises and by facilitating the commission of these acts through his words of encouragement. See Prosecutor v. Akayesu, Case N° ICTR-96-4-T, September 1998, Paras 32, and 416.

260 Between April and June 1994, atleast 2,000 Tutsis were slaughtered in Taba commune headed by Akayesu. For a commentary on the case see, A. Cassese et al., International Criminal Law: Cases and Commentary, (2011), at 201 and 220 et seq. See G.W Mugwanya, The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda, (2007), at 85 et seq.


This case is important because it was the first trial in which an international tribunal was called upon to interpret the definition of genocide contained in the Genocide Convention. The court based its findings on Article 2(2) of the ICTR Statute which is drawn verbatim from Articles II and III of the Genocide Convention. In the Akayesu case, the ICTR had to do pioneering work in interpreting the elements of the crime of genocide.

Apart from elucidating the elements of this offence, this case was also groundbreaking for its affirmation of rape and other forms of sexual violence which were common during the genocide as constituent acts of genocide. The trial chamber found that rape and sexual violence constitute serious bodily or mental harm which, if committed with the requisite intent to destroy a protected group, amount to the crime of genocide. In the Akayesu trial, the ICTR, expressly mentioned that sexual assault formed an integral part of the process of destroying the Tutsi ethnic group and that rape was systematic and had been perpetrated against Tutsi women only, manifesting the specific intent required for those acts to constitute genocide. In particular, it

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266 The Prosecutor v. Akayesu, Case N° ICTR-96-4-T, Judgement (TC), 2 September 1998, Para 731. Prior to this case, there was no internationally accepted definition of the crime of rape. In the Akayesu case, rape was defined as ‘a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive.’ The Akayesu definition was adopted by the ICTY in the Celebici trial chamber Judgment. See Prosecutor v. Delalic, Judgment (Trial Chamber), Case N° IT-96-21-T, Para 394. Furthermore, the Tribunal has prosecuted rape and sexual crimes in various cases. For instance, in the case of Prosecutor v. Musema, Prosecutor v. Semanza and Prosecutor v. Muhimana (Judgement and Sentence) ICTR- 95-1B-T, 28 April 2005; M. Gasheegu, ‘UNIFEM, RDF Decry Gender Violence,’ The New Times Rwanda, 29 September 2007, it was estimated that about 500,000 women were raped during the genocide; C. W. Mullins, ‘We are Going to Rape you and Taste Tutsi Women: Rape during the 1994 Rwandan Genocide,’ 49 The British Journal of Criminology, (2009), at 719-735.


was found that sexual violence causes serious bodily and mental harm. This finding was widely commended and was adopted in the subsequent jurisprudence of the Tribunal. It may be regarded as well-established case law today.

II. Prosecutor versus Kayishema

Clément Kayishema was the former préfet of Kibuye province. He was charged with various counts of genocide, crimes against humanity and war crimes, together with his co-accused. When he was préfet of Kibuye, he committed different acts of genocide, where he involved himself as a superior in various sets of massacres which occurred at various sites, the Catholic Church and Home St. Jean complex, the stadium, the church in Mubuga, and in the area of Bisesero. He allegedly encouraged more than 10,000 Tutsi to seek shelter in the stadium and church by promising protection, then fired the shot that launched their mass murder. On 21 May 1999, Kayishema was found guilty of four counts of genocide, and acquitted of crimes against humanity and war crimes. He was sentenced to imprisonment for the remainder of his life.

274 Kayishema, was accused of Genocide, pursuant to Art.2 (3) (a) of the ICTR Statute, Crimes against humanity, pursuant to Arts. 3 (a), 3 (b) and 3 (i) of the Statute; Violations of Art.3 common to the Geneva Conventions of 1949, and Violations of Additional Protocol II, pursuant to Art.4 (a) of the Statute. See also Art. 6 (1) and (3) of the ICTR Statute; *The Prosecutor v. Kayishema and Ruzindana*, Case N° ICTR-95-1-A, 1 June 2001, Para 5 et seq.
and the sentence was upheld on his appeal on 1 June 2001. At the time of writing, he is serving his sentence in Mali.  

This case law is significant because it helps to define Tutsi as an ethnic group protected by the Genocide Convention, despite the fact that Hutu and Tutsi shared the same language and culture. The Kayishema case, defined an ethnic group more broadly as one whose members share a common language and culture, or a group which distinguishes itself as such, ‘self identification,’ or a group identified as such by others, including perpetrators of the crimes ‘identification by others.’ The chamber then found that the Tutsis were an ethnic group, which is supported by the fact that since 1933, Rwandans were required to carry identification cards which indicated the ethnicity of the bearer as Hutu, Tutsi or Twa as was confirmed by various laws. Subsequent to this case, different chambers’ decisions, took judicial notice of the existence of the Tutsi as an ethnic group falling under protected groups within the Genocide Convention, based on a mixture of objective and subjective criteria.

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III. Prosecutor versus Kambanda

In 1994, Kambanda was prime minister of the interim government in which he actively participated in the genocide as a head of government. Kambanda pleaded guilty to all the charges and acknowledged that he had failed to prevent or even punish his subordinates for committing the crimes. He was found guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (murder, and extermination).

Kambanda’s guilty plea and subsequent conviction marked not only the first time under international law that a former head of government was convicted of genocide, but also that an accused person acknowledged his guilt for genocide before an international criminal tribunal. Notwithstanding his guilty plea which, importantly, recognised that genocide had occurred in Rwanda, the Tribunal sentenced him to life imprisonment on 4 September 1998. The sentence was upheld on appeal on 19 October 2000. The judges in the case described genocide as the ‘crime of crimes.’ Like Akayesu, Kambanda is at the time of writing, serving life imprisonment in Mali.

This judgment that was pronounced on such a high ranking official is significant because it reaffirmed the principle under international law that no individual enjoys immunity for such crimes on account of their official position. The Kambanda case thus indisputably backs up

283 By Kambanda’s acts or omissions, he was accused of Genocide, Conspiracy to Commit Genocide, Direct and Public Incitement to Commit Genocide, Complicity in Genocide, Crimes against Humanity (Murder, Extermination). The Prosecutor v. Jean Kambanda, Case No ICTR-97-23-S, (TC), 4 September 1998, Para 3.
the motives in establishing the Tribunal. It expressed a profound condemnation of the overwhelming scale of atrocities committed in Rwanda and established the certainty that impunity for such crimes was no longer tolerable, hence the replacement of a culture of impunity with accountability.\footnote{288}

IV. Prosecutor versus Nahimana, Barayagwiza and Ngeze

Also noteworthy were the ICTR prosecutions of Ferdinand Nahimana, the former director of the ‘hate-radio’ station, Radio Television Libre des Mille collines (RTLM),\footnote{288} Hassan Ngeze, the former owner and editor-in-chief of the ‘extremist’ Kangura newspaper\footnote{289} and Jean-Bosco Barayagwiza, the former director of political affairs in the Rwandan ministry of foreign affairs, RTLM official and founding member of Coalition pour la Défense de la République (CDR).\footnote{291}

The ICTR consolidated the indictments of these three men into a single trial, commonly referred to as ‘The Media Case.’\footnote{292}

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\textit{Barayagwiza was accused of many acts including public incitement to genocide and was among the steering committee of RTLM which broadcasted ethnic hatred messages. Also CDR and its youth wing, the Impuzamugambi, which he controlled, created a political framework for the killing of Tutsi. They established roadblocks, distributed weapons, and carried out the killings. See, D.A. Mundis and F. Gaynor, ‘Current Developments at the Ad hoc International Tribunals,’ 2 Journal of International Criminal Justice, (2004), 642-698.}\footnote{291}

The trial chamber found that Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze were guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, as well as the crimes against humanity of persecution and extermination.\textsuperscript{293} Nahimana and Ngeze received a life sentence, while Barayagwiza was convicted to a term of 35 years in prison. On appeal, some of the trial chamber’s findings were overturned and the sentences reduced to 30 years for Nahimana, 35 years for Ngeze and 32 years, for Barayagwiza respectively.\textsuperscript{294} At the time of writing, Nahimana and Ngeze are serving their sentence in Mali, where Barayagwiza, died on 25 April 2010.

Since the conviction of Julius Streicher at Nuremberg,\textsuperscript{295} the ICTR media case was the first ever conviction concerning hate speech in the media before an international tribunal.\textsuperscript{296} It was also the first time an international tribunal convicted defendants for the crime of incitement to genocide. The ICTR set a test for distinguishing statements protected by virtue of freedom of expression, from incitement to genocide, which is not protected by freedom of expression.\textsuperscript{297} Put differently,
this famous case addressed the boundary between the right guaranteed under international law to freedom of expression and incitement to serious international crimes. Hate speech is not protected speech under international law. In fact, states have an obligation under international law to prohibit any advocacy for national, ethnic, racial or religious hatred that constitutes incitement of discrimination, hostility or violence.

In 1994, RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population and explicitly called for the extermination of the enemy. The enemy was defined to be the Tutsi and Hutu political opponents. Both before and after the death of Habyarimana, the RTLM radio used to broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents who supported the Tutsi ethnic group. In the same vein, the editorials and articles published in Kangura activated hatred for Tutsi as was portrayed in the publication of the ten Hutu commandments. The cover of Kangura newspaper N° 26 promoted violence by conveying the message that the machete should be used to kill the Tutsi.

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303 Hutu Ten Commandments were published in Kangura N° 6, in December 1990.

304 The photograph of machetes was spread over the cover page of Kangura as the next tool to eliminate Tutsi.
This case raises important principles concerning the role of the media which have not been addressed at the level of international criminal justice since Nuremberg. Mainly, the Tribunal clarified the scope of the elements of incitement to genocide.\textsuperscript{305} This case law also clarified that hate speech can amount to persecution where it is done on discriminatory grounds or targeting a population on the basis of ethnicity.\textsuperscript{306} The power of the media to create and destroy fundamental human values thus calls for accountability.\textsuperscript{307} Reasonably, the chamber ruled that ‘without a firearm, machete or any physical weapon, these media statements caused the deaths of thousands of innocent civilians.’\textsuperscript{308}

\textbf{V. Prosecutor versus Ntagerura, Bagambiki, and Imanishimwe}

The accused persons held high positions in during the genocide period. Ntagerura was the minister of transport and communications in the interim government. Bagambiki was the préfet of Cyangugu, and Lieutenant Imanishimwe was the acting commander of the Cyangugu military camp.\textsuperscript{309} The prosecutor accused Ntagerura and others of genocide under Article 2 of the Statute, complicity in genocide, killing and causing serious bodily or mental injuries to members of the Tutsi group, crimes against humanity like murder, extermination, imprisonment, and torture in Article 3 of the Statute.\textsuperscript{310}


However, the trial chamber found that the operative paragraphs underpinning the charges against Ntagerura and Bagambiki, as well as the charges themselves, were unacceptably vague. It further found that the formulation of the counts in the Bagambiki case were problematic because the counts did not clearly identify whether Bagambiki and co-accused were being charged as principals or as accomplices, nor did they specify what particular form of complicity was charged. And as a result they were acquitted on all counts in the indictments, mainly genocide, complicity in genocide and crimes against humanity, and the court ordered for their immediate release from detention on 25 February 2004, with judge Williams dissenting in the Bagambiki case. Yet, the co-accused Imanishimwe was found guilty of genocide, crimes against humanity of extermination, murder, torture, imprisonment, and war crimes and was sentenced to 27 years’ imprisonment, later reduced to 12 years on appeal on 7 July 2006. On 8 August 2011, he was released after serving his sentence in Mali.

This case of acquittal serves as a lesson for states and the international community not to regard all acquittals as partiality or failure of the Tribunal but instead to consider the Tribunal to have succeeded in dispensing justice. The case sends a message that an impartial court must seek fair justice for both victims and suspects and not only convict defendants. Although the acquittal triggered controversy in Rwanda, the case law demonstrates the ICTR’s independence and attentiveness to matters of due process and the procedural rights of defendants. Importantly,

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311 The Prosecutor v. André Ntagerura et al., Case No ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, Para 64, 2, 9, 769.
even if the trial resulted in an acquittal, the case law still remains relevant because it established considerable facts regarding the genocide and still creates a significant historical record.\textsuperscript{318} It is important to note that acquittals do not mean that crimes were not committed in the alleged provinces or areas where the accused persons operated; actually the detailed judgments could establish many facts about the human rights violations in those areas.

\section*{VI. Prosecutor versus Colonel Bagosora}

Colonel Bagosora, the alleged military mastermind of the genocide, was \textit{directeur de cabinet} in the Rwandan ministry of defence, and later acting minister of defence.\textsuperscript{319} The colonel failed in his duty to prevent or punish his subordinates for the crimes that were directed mainly against Tutsi civilians and moderate Hutu.\textsuperscript{320} In the judgment, he was convicted of crimes committed during the genocide, based on both direct and superior responsibility.\textsuperscript{321}

Actually, the trial chamber held Bagosora responsible as a superior for genocide, crimes against humanity (murder, extermination, persecution, rapes and other inhumane acts), as well as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (violence to life and outrages upon personal dignity).\textsuperscript{322} Therefore, he was held responsible for the killings, acts of rape, and sexual violence committed by Rwandan army soldiers and militiamen under his command.\textsuperscript{323} This was pursuant to the fact that he exercised effective control over the armed forces and had the requisite knowledge of his subordinates’ crimes.\textsuperscript{324}

\textsuperscript{319} \textit{Prosecutor v. Théoneste Bagosora et al.}, Case N° ICTR-98-41-T, 18 December 2008, Para 1 and 49.
\textsuperscript{324} \textit{The Prosecutor v. Bagosora et al.}, Case N° ICTR-98-41-T, 18 December 2008, Paras 2015 et seq; ‘In all cases, the decisive factor is the military commander’s actual capability to effectively influence the conduct of the persons
Controversially, although he was indicted for conspiracy, the ICTR trial chamber acquitted Bagosora, often depicted in the media as the architect of Rwanda’s genocide, of the charge of conspiracy to commit genocide.\(^{325}\) On 18 December 2008, Bagosora was sentenced to life imprisonment which was reduced to 35 years on appeal on 14 December 2011, with Judges Pocar and Liu dissenting.\(^{326}\) At the time of writing, he is serving his sentence in Mali.

The relevance of this case is that it confirms the notion of ‘command responsibility’, particularly of superiors who often hide away from the scene of the crime, yet use other people as human instruments or who commit crimes through their surbodinates.\(^{327}\) The fact that the acts were committed by the surbodinates does not relieve the commander of criminal responsibility if he knew or had reason to know that the surbodinates were about to commit such acts or did not punish the perpetrators thereof.\(^{328}\) Nevertheless, command responsibility is entrusted not solely to persons with a military background but civilians too can be accused and convicted of superior


\(^{328}\) Art. 6(3) of the ICTR Statute; see B. Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftsystem: Eine Untersuchung zur Rechtsprechung der internationalen Strafgerichte für das ehemalige Jugoslawien und Ruanda*, Berlin, Berliner Wissenschafts-Verlag, (2008).
responsibility\textsuperscript{329} as evidenced in the case of Nyiramasuhuko, a female civilian who held a high post in the government.\textsuperscript{330}

\textbf{VII. Prosecutor versus Nyiramasuhuko}

Pauline Nyiramasuhuko was the former minister of women and family welfare. She was the first woman to be prosecuted before the ICTR for both direct and superior responsibility.\textsuperscript{331} Nyiramasuhuko, as an authority in the government, extended the genocide to her home prefecture of Butare, which had initially been resistant to carry out killings. Tutsis and Hutus in Butare had co-existed for years without any ethnic violence that was common in other prefectures. Nyiramasuhuko and five other accused allegedly became the main instigators of genocide in Butare\textsuperscript{332} by distributing weapons to the Hutu and publicly inciting the population for the extermination of Tutsi.\textsuperscript{333}

In particular, the evidence established that Nyiramasuhuko, indeed, had superior responsibility over interahamwe militia at the Butare prefecture office, principally those who committed rape


\textsuperscript{331} The Prosecutor v. Nyiramasuhuko et al., Case N° ICTR-98-42-T, 24 June 2011, Paras 6050, 6051, 6052, and 6182 et seq.

\textsuperscript{332} Pauline Nyiramasuhuko and his son Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje; The Prosecutor v. Nyiramasuhuko et al., Case N° ICTR-98-42-T, 24 June 2011, Paras 6050, et seq.

\textsuperscript{333} The Prosecutor v. Nyiramasuhuko et al., Case N° ICTR-98-42-T, 24 June 2011, Paras 6200, 6098, 6099 and 6177 et seq. She was found guilty of conspiracy to commit genocide, genocide, the crimes against humanity of extermination, rape and persecution, and the war crimes of violence to life and outrages upon personal dignity.
on Tutsi women. She was then sentenced to life imprisonment on 24 June 2011 for conspiracy to commit genocide, genocide, the crimes against humanity of extermination, rape, persecution, and the war crimes of violence to life as well as outrages upon personal dignity. Her case commonly referred to as the ‘Butare trial’ is pending on appeal.

The significance of this case specifically lies in the fact that it was an important clarification of the doctrine of superior responsibility outside the military context, extending its reach to the civilian work place too. Given that the defendant was in position of authority at the time the crimes were committed, she failed to observe the duty to protect the population and ensure its security. As a result, she was convicted of superior responsibility for the core crimes in accordance with the Statute of the Tribunal which provides that a person, who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of genocide, crimes against humanity and war crimes, shall be held individually responsible. Nyiramasuhuko was therefore held liable as a superior for the acts carried out by the subordinates over whom she was found to have had legal control.

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335 The court found Nyiramasuhuko not guilty of direct and public incitement to commit genocide and other inhumane acts as a crime against humanity.
340 See V. Nerlich, ‘Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?’ 5 *Journal of International Criminal Justice*, (2007), at 669 et seq; C. Eboe-Osuji, ‘Superior or
E. Achievements of the Tribunal

From the above analysis of representative cases, it is evident that amongst the Tribunal’s main achievements, was the arrest and prosecution of high-ranking persons with a view to deciding their guilt or innocence, the creation of important historical records and the establishment of judicial precedents. Additionally, in performing its tasks, the Tribunal has conformed to fair trial standards envisaged under international instruments.

I. Development of International Criminal Law

As demonstrated in the jurisprudence above, the ICTR has made an enormous contribution to the clarification of international criminal law. The judgments have clarified important aspects and principles of international law. This is true, in particular, for the elements of the crime of genocide. Thus, the Tribunal has single-handedly developed the criteria for group


classification that may now be regarded as widely accepted. It has also made clear that the psychological consequences of rape can amount to serious mental harm in terms of the genocide definition. Therefore, the Tribunal has characterized rape as a possible means of committing genocide. In addition, the Tribunal has elaborated on the legal qualification of incitement to genocide among media personalities. The trial chamber has confirmed that racist propaganda can amount to the crime against humanity of persecution. Finally, the Tribunal has refined the criteria for determining superior responsibility of both civilian and military leaders.

II. Accountability for Leaders
In an effort to punish those responsible for genocide, the ICTR was established in 1994 by the UN Security Council to try people who bear the greatest responsibility for the genocide. From the outset, the prosecutor focused on investigating and prosecuting individuals who had held important positions in Rwanda in 1994. The Tribunal’s focus on leadership is illustrated by the fact that the accused who were apprehended included the former prime minister, fourteen ministers, seven prefects, twelve bourgmestres (mayors), high media personalities and several high-ranking military personnel.


345Prosecutor v. Kayishema and Ruzindana, Case No ICTR-95-1-A, 1 June 2001, Paras 274 et seq
346Prosecutor v. Akayesu, Case No ICTR-96-4-T, Judgement (TC), 2 September 1998, Paras 731 et seq.
This implies that, had it not been for the Tribunal’s investigations, insistence upon their arrest and subsequent requests for transfer to Arusha, many of the master minders of the genocide who fled Rwanda would not have been brought to justice. After all, most countries have long been unwilling to extradite suspects to Rwanda due to fear of violation of fair trial rights. There can be no doubt that the Tribunal’s proceedings relating to persons in very high positions have sent a strong signal to the world, including the African continent, that the international community will not accept impunity for serious crimes. In this sense, the ICTR helps to promote accountability for human rights abuses and combating impunity at both national and international level.

In fact, two decades back, most of those accused of international crimes could seek refuge in other countries, quite convinced that that they would not be required to stand trial for their conduct. So, the establishment of the ICTR, along with that of the ICTY, has revived the idea of individual criminal responsibility as applied in the trial of German war criminals. Such a view is adequately supported by the statement of the Nuremberg International Military Tribunal (IMT) that ‘crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’ One can therefore credit the Tribunal for the international recognition of the crime

352 For example, Bagosora was requested by both Rwanda and the ICTR, but Cameroon, where he was arrested, extradited him to the ICTR. This is by virtue of its binding authority under Chapter VII of the United Nations Charter which individual states do not have. See B. Crossett, ‘Rwanda Atrocity Inquiries Focus on Former Officer,’ New York Times, 28 March 1996; see also O. Ben-Naftali, ‘The Obligations to Prevent and to Punish Genocide’ in P. Gaeta (ed.), The UN Genocide Convention: A Commentary, (2009), at 54.


of genocide committed in Rwanda, and for prosecuting some of the ‘big fish’ who could not have been apprehended by Rwanda.\textsuperscript{357}

III. Creation of a Historical Record
The ICTR has been important in creating a historical record through its trials. The most comprehensive archives accessible today on the internet about the conflicts which engulfed Rwanda in 1994, and the consequences that resulted, are those held by the ICTR.\textsuperscript{358} The whole of the ICTR’s jurisprudence is therefore a significant component of the country’s history.

Establishing a historical record of what occurred during the conflict is an important contribution of the Tribunal in order to prevent historical revisionism.\textsuperscript{359} The ICTR has repeatedly determined that the crimes committed in Rwanda against the Tutsi were in fact genocide. This authoritative finding has set a clear course for the way the history of the conflict has been and will be written. This is particularly important given the very common perception in the late 1990s among large parts of the ‘negationists’ that the conflict was nothing more than a civil war.\textsuperscript{360}

Many judgments contain long discussions of the historical context in which the genocide was organised and executed.\textsuperscript{361} These judgments, especially of high ranking officials and politicians, have huge potential to help victims and the public in general to know the facts of massive crimes, and to contribute to mankind’s collective memory of mass atrocity.\textsuperscript{362} Therefore, even when the


\textsuperscript{358} B. Sisk, ‘The Role of the UN Archives in the Long-Term Legacy of the ICTY,’ in R. Steinberg (ed.), Assessing the Legacy of the ICTY, (2011), at 73; Also all trial decisions, cases and appeals are available at the ICTR website, at <http://www.unictr.org/Cases/tabid/204/Default.aspx>, accessed in October 2012.


\textsuperscript{362} W. A Schabas, Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals, (2012), at 200 et seq; R.A. Wilson, Writing History in International Criminal Trials, (2011), at 121 et seq; R.A.Wilson,
defendants are acquitted, the facts regarding the massacre itself remain intact, demonstrating that trials can help to create a significant historical record.\textsuperscript{363}

Therefore, the jurisprudence of the ICTR has clarified the framework of genocide as a core crime.\textsuperscript{364} And as put by Bornkamm, ‘although the actual number of trials conducted in Arusha has been negligible; they have played a major part in shedding light on the anatomy of genocide. When taken as a whole, the judgments provide the most comprehensive account of the machinery of genocide.’\textsuperscript{365}

F. Major Shortcomings of the International Criminal Tribunal for Rwanda

This part explores the main shortcomings faced by the ICTR in attempting to deliver international justice. Some of the weaknesses were inevitable, given the complexity of investigating and prosecuting serious crimes like genocide.

I. Delayed Justice

Certainly, one of the criticisms faced by the Tribunal was the amount of time it took to bring those responsible for the 1994 genocide to justice. The first trial, which was the Akayesu case, took place only in 1997, three years after the genocide.\textsuperscript{366} While some of the causes of the delay could have been avoidable, the major cause of the delay resulted from the need to build an entire


\textsuperscript{366} Yet the accused is entitled to be tried without undue delay, see Art. 14(3) (c) of the International Covenant on Civil and Political Rights; see also ICTR Statute, Art. 20(4) (C); E. Neuffer, ‘Amid Tribal Struggles, Crimes Go Unpunished,’ The Boston Globe, 8 December 1996, at A 34.
international institution from the ground up.\textsuperscript{367} Actually, before any investigations could begin, the ICTR had to sort out one problem after another, from fitting out premises and recruiting qualified staff to defining a strategy and negotiating a framework of cooperation with the Rwandan government and other states.\textsuperscript{368} Officials had to be elected or appointed, staff had to be recruited and trained, funds had to be appropriated, offices, courtrooms, and detention facilities had to be put in place, and legal documents had to be promulgated before investigations, indictments, and trials could commence.\textsuperscript{369} Yet the delay to bring perpetrators to trial could have been avoided altogether if there had existed a permanent international criminal court at the time of the genocide. Such an institution could have immediately launched investigations in 1994 and begun prosecutions within months, not years.\textsuperscript{370}

However, even after its establishment, the ICTR has been slow in dispensing justice.\textsuperscript{371} In eighteen years of operation, it has arrested and tried less than 100 persons.\textsuperscript{372} Compared to its counterpart courts in Rwanda, this small proportion of genocide suspects tried in relation to the


number of perpetrators is one of the major weaknesses of the Tribunal.\footnote{A. Des Forges and T. Longman, ‘Legal Responses to the Genocide in Rwanda,’ in E. Stover and M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (2005), at 53-55; R. Zacklin, ‘The Failings of the Ad hoc Tribunals,’ *2 Journal of International Criminal Justice*, (2004), at 541-543.} For a period of almost two decades, the Tribunal has tried only seventy-five suspects despite the huge budget allocated to it, where an annual budget of US$270 million (RWF 167.4 billion).\footnote{See ‘ICTR Website,’ available at <http://www.unictr.org/Default.aspx>, accessed in January 2013.} Therefore, in terms of dealing with the problem of the large number of genocide suspects that needed to be arrested, there was need for national courts to supplement the international Tribunal.\footnote{E. Møse, ‘The International Criminal Tribunal for Rwanda,’ in R. Belleli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review*, (2010), at 84; V. Nerlich, ‘The Confirmation of Charges Procedure at the International Criminal Court Advance or Failure?’ *10 Journal of International Criminal Justice*, (2012), at 2; C.Wibabara, ‘The Applicability and Execution of International Warrants,’ *National University of Rwanda*, LLB Research Dissertation, (2007), at 25 et seq.} International trials have proved to be more protracted and lengthy than trials conducted at the national level.\footnote{While single accused judgments usually consist of 100 pages or more, the judgments in multi-accused cases amount to several hundreds of pages. The complexity of the multi-accused can be illustrated by figures: Media (judgement of 361 pages, 240 trial days.), Military I (606 pages, 408 trial days), Government (404 trial days), Military II (392 trial days before closing arguments); E. Møse, ‘The International Criminal Tribunal for Rwanda’ in R. Belleli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review*, (2010), at 89.} For instance, hearings in the Nyiramasuhuko case commonly known as the ‘Butare trial,’\footnote{The Butare Trial was extremely very long with six accused persons; Pauline Nyiramasuhuko and his son Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje; see discussion in G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 100, MN 282.} began on 12 June 2001 and ended on 24 June 2011.\footnote{Prosecutor v. Nyiramasuhuko et al, Case No ICTR-98-42-T, 24 June 2011.} The trial was on-going for ten years with over 189 witnesses. The judgement, excluding the annexes, is approximately 1500 pages long.\footnote{Prosecutor v. Nyiramasuhuko et al, Case No ICTR-98-42-T, 24 June 2011; ICTR Annual Report 2001, Para 14 et seq.} In the Bagosora case, much of the material was translated or interpreted into three languages.\footnote{Prosecutor v. Théoneste Bagosora et al, Case No ICTR-98-41-T, 18 December 2008, Para 1 et seq.} Investigations were conducted and many witnesses were brought from all over the world.\footnote{For instance, witnesses from the Prosecution and Defence side were 242 in total; see Prosecutor v. Théoneste Bagosora et al., Case No ICTR-98-41-T, 18 December 2008, Paras 2015 et seq.} As noted by Schabas, the Tribunal’s proceedings are more

complex and lengthy because of the higher due process standard applied in international tribunals in comparison to the standards before the national courts of many countries.\textsuperscript{382}

\textbf{II. Location of the ICTR}

The ICTR was situated outside the territory of Rwanda, far from the scene of the crime, meaning that genocide trials were to be conducted in the absence of the society that suffered the violence.\textsuperscript{383} Though Rwandans are generally aware of the existence of the ICTR in Arusha, the knowledge about its trials is limited because the Tribunal is too far removed geographically.\textsuperscript{384} Media coverage of ICTR trials is very scarce.\textsuperscript{385} Even if the ICTR is internationally reputable, it remains unpopular among ordinary Rwandans and is considered ineffective.\textsuperscript{386} This is due to the fact that Rwandans are unable to physically follow the proceedings of key perpetrators of genocide from their home areas, which is arguably problematic for the legitimacy of the Tribunal.


\textsuperscript{384} UN Report, ‘Rwanda Questions Usefulness of UN Genocide Court’ (24 July 2002); see comment on the Article by E.R Karake ‘Right to Host ICTR Archives,’ \textit{The New Times} Rwanda, September 2012, A commentor writes, ‘...In a rational world not only the archives, but also the Tribunal itself should have been located in Rwanda right from the beginning. That is if justice was in fact the purpose of its being established; after all justice needs not only to be done, but also to be seen done, most especially to those for whom it was supposedly intended. And ‘supposedly’ is the key word here, because the way the Tribunal was set up and the way it has operated leave Rwandans in justifiable doubt whether it was ever intended to help them get justice and achieve some measure of closure for the abominable crime of crimes inflicted on so many of their loved ones.’


in Rwanda.\textsuperscript{387} Therefore there is a need to disseminate information about proceedings in Arusha to the Rwandan population.\textsuperscript{388}

In 2000, the Tribunal opened up an information and documentation centre in Kigali, commonly known as ‘Umusanzu mu Bwiyunge ’or ‘contribution to reconciliation’, as part of the ICTR’s outreach programme.\textsuperscript{389} The center offers a variety of books and documents on genocide and international criminal justice which are highly informative to academics, members of the judiciary, and legal practitioners, but insufficient in disseminating knowledge about the Tribunal’s activities to the rest of the population. Therefore the Tribunal runs a less effective outreach programme, which concentrates on a library centre in Kigali that is not widely relevant in a country with a big illiterate population.

The far away distance of the Tribunal also affects the operation of the ICTR. Thus, the slow pace of the trials and excessive use of funds could partly be attributed to operating from a triple geographical location, The Hague, Arusha and Kigali.\textsuperscript{390} However, the location of the Tribunal outside Rwanda may at times portray its independence from influence of the Rwandan government and earns international credibility in this regard.


III. Limited Impact on Rwanda
The ICTR Statute states that prosecuting Rwandan genocide suspects is intended to contribute to the process of reconciliation and to the restoration and maintenance of peace. However, different authors question the ICTR’s genuineness in achieving this key objective of reconciliation. The term national reconciliation appears just once in the ICTR Statute, with no definition or description of how punishing high-ranking génocidaires might contribute to reconciliation, which requires delivering justice that has a direct, tangible impact on the parties involved.

It is reported that there is an overall lack of knowledge regarding the Tribunal’s work within the respective communities concerned. As mentioned earlier, the ICTR is detached from day-to-day realities in Rwanda and provides limited outreach in Rwanda. So, the ICTR does not have an impact on the life of most Rwandans and thus contributes little to the process of reconciliation. Instead, it is argued by different authors that the Arusha Tribunal focuses more

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391 See Preamble of the ICTR Statute
on legal processes and contributions to international law than on its potential impact within Rwanda. However, this research does not allow the conclusion that criminal trials can never facilitate reconciliation, because any decent trial even if purely retributive, has positive aspects towards reconciliation, as will be discussed in Chapter six of this study.

While the Tribunal has primacy of jurisdiction over national courts, it does not have exclusive jurisdiction over genocide suspects, as seen in the following chapter which examines the role and status of domestic genocide prosecutions in Rwanda.


CHAPTER FOUR: PROSECUTION OF GENOCIDE IN NATIONAL COURTS

A. Introduction

On the basis of the 1948 Convention on the Prevention and the Punishment of the Crime of Genocide, perpetrators of genocide must be prosecuted by the courts of the state where the crime took place or by a competent international criminal court.\(^{401}\) Whereas various international criminal courts have emerged to prosecute the crime, it remains the duty of states to prosecute international crimes.\(^{402}\)

In recent years, Rwandan national courts have engaged in prosecution of the atrocious human rights abuses committed in Rwanda.\(^{403}\) The prosecution of genocide, crimes against humanity and war crimes was organised in accordance with three international conventions, to which Rwanda is a signatory, that is, the 1948 Genocide Convention on Prevention and Punishment of Genocide, the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War and the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.\(^{404}\) This chapter explores the current practice and developments in the prosecution of core crimes at the national level.\(^{405}\)


\(^{404}\) See Art. 2, Organic Law № 08/96 of 30 August 1996; M.A. Drumbl, *Atrocity, Punishment and International Law*, (2007), at 21-30; D. De Beer, Ikurikiranwa mu Nkiko Ry’Ilbyaha by’Itsembabwoko n’Itsembatsemba:
B. Generalities on Rwanda National Courts

I. Genesis of Genocide Prosecutions
The 1994 genocide devastated the justice system in Rwanda. Most judges, prosecutors and lawyers fled the country or were killed. Courts, records, and all types of equipment were destroyed or looted. At the same time, there was a dire need for well-trained investigators and judges in order to investigate what had happened and render justice to victims and perpetrators.

In 1995, the government convened an international conference in order to develop ideas for dealing with the tens of thousands of suspects, approximately over 120,000 in prisons. The idea of setting up a special court was rejected but instead specialised chambers were established in ordinary and military courts to deal with the crimes related to genocide.

In 1996, while still short of some necessities, the government, with the support of international donors, had managed to provide most of its legal personnel with the required minimum of necessities, such as equipment, furnishings, and a decent work place. Towards the end of 1996, national courts began prosecuting genocide suspects.


It is important to note that the 1996 Organic Law did not distinguish Genocide and Crimes against Humanity; it covered the crimes as if it was one group. However, in 2003, Art. 2 of Law N° 33bis/2003 was cited virtually identical to Art.II of the Genocide Convention. The only difference is that it adds regional groups as protected groups. See Law N° 33bis/2003 of 6 June 2003 repressing the Crime of Genocide, Crimes against Humanity and War Crimes, O.G.R.R. N° 21 of 1 November 2003.


II. Organisation of Ordinary Courts

To begin with, this study shows how Rwandan law was wholly unequipped for the situation after the genocide.\(^\text{410}\) Rwandan domestic law in 1994 did not provide for the crime of genocide despite the fact that Rwanda had acceded to the Genocide Convention in 1975.\(^\text{411}\) As in many other countries, the Genocide Convention cannot be applied directly in domestic law and in order to fully operate, it needs to be completely implemented into national law.\(^\text{412}\)

In a bid to plug this gap, and given the overwhelming demands created by the genocide and the ensuing arrests of thousands of suspects, the legislative national assembly passed a law in 1996 creating specialized chambers within the first instance courts to try people accused of genocide.\(^\text{413}\) The chambers were competent to try genocide, crimes against humanity, and war crimes.\(^\text{414}\) To avoid retroactivity, the organic law did not introduce new crimes but based its prosecutions on ordinary crimes in the penal code\(^\text{415}\) which were carried out in relation to the events surrounding the genocide or the crimes against humanity committed.\(^\text{416}\) Such crimes

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\(^{413}\) Organic Law N° 08/1996 of 30 August 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity.


\(^{415}\) The Penal Code however did not expressly punish genocide or crimes against humanity but the courts instead relied on ordinary crimes committed with genocidal intent.

included murder, inflicting physical injury, rape, deprivation of liberty as well as theft and other offences against property.\textsuperscript{417}

The organic law established four categories based on the accused’s acts during the conflict, which formed a basis for determining the penalties.\textsuperscript{418} The penalties ranged from imprisonment to the death penalty until its abolition in 2007. Articles 14 and 17 of the 08/96 organic law give detailed provisions of the sentencing regime of the ordinary courts where the highest penalty was death penalty for those falling under Category One. Persons whose acts placed them in category Two were liable to life imprisonment. Acts committed by persons placed in Category Three would give rise to varying imprisonment terms, whereas Category Four crimes led to civil damages.

The organic law further described the confessions procedure, which offered defendants a reduced sentence in return for a detailed account of the offences committed.\textsuperscript{419} However confession and guilty plea was only applicable and beneficial to Category Two and Three defendants which would lead to a substantial reduction of the sentences they would normally receive.

Organic law N° 08/96 was repealed in 2004 in the context of the reform of the Gacaca system.\textsuperscript{420} Subsequently, national trials were governed by general criminal law as complemented by the specific provisions of the Gacaca law which will be discussed in the chapter on Gacaca. The Gacaca law significantly reduced the caseload for the ordinary courts which remained with only

\begin{itemize}
\item \textsuperscript{418} Art. 2, of the Organic Law N°08/1996 of 30 August 1996; see also P.C. Bornkamm, \textit{Rwanda’s Gacaca Courts: Between Retribution and Reparation}, (2012), at 41.
\item \textsuperscript{419} Art. 6, of the Organic Law N°08/1996 of 30 August 1996.
\item \textsuperscript{420} Art. 105 of Organic Law N° 16/2004.
\end{itemize}
Category One suspects after merging the categories and extending the competence of the Gacaca courts to deal with Category Two and Three suspects.\textsuperscript{421} Some of vital elements in the 1996 organic law were retained in the Gacaca laws, mainly the confession procedure and the categorization of suspects according to the gravity of their crimes.\textsuperscript{422}

The temporal jurisdiction of the ordinary courts covered the period from the beginning of the civil war in October 1990 to the end of December 1994. This chapter discusses genocide trials by national courts that took place both before and after the reform.\textsuperscript{423}

\textbf{III. Reparations}

Specialised chambers were given competence to hold trials for victims’ reparations in criminal trials.\textsuperscript{424} The 1996 organic law provided that convicted persons whose acts placed them within Category One would be held liable for all damages caused in the country by their acts of criminal participation, regardless of where the offences were committed. Persons whose acts placed them within other categories, were to be held liable for damages for the criminal acts they committed, hence civil responsibility for criminal acts.\textsuperscript{425} However, practice shows that the reparation of victims was less effective as will be discussed in the course of this study. Apart from limited property reparations for Category Three crimes in Gacaca, many victims did not receive

\begin{itemize}
\item \textsuperscript{421} Categories were merged and reduced to only three depending on the gravity of committed crimes i.e Category one, two and three were established.
\item \textsuperscript{423} The reform in genocide trials came with the introduction of Gacaca courts.
\item \textsuperscript{424} For a detailed discussion on reparations in Rwanda, see P.C. Bornkamm, \textit{Rwanda’s Gacaca Courts: Between Retribution and Reparation}, (2012), at 132 \textit{et seq}.
\item \textsuperscript{425} Art. 30 Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990.
\end{itemize}
reparations for violent crimes committed by perpetrators in other categories, particularly those tried by ordinary courts.\textsuperscript{426}

\textbf{C. Status of Case Law within the Ordinary Court System}

In 1996, there were only thirteen courts of first instance in the country, each with a specialised chamber to try genocide crimes in Rwanda from all the four categories of suspects.\textsuperscript{427} Out of the 120,000 people awaiting trial in the prisons, the courts managed to accomplish 7,181 cases between December 1996 and June 2002.\textsuperscript{428} And by the end of 2004, a total of 10,026 individuals had been tried by the ordinary courts.\textsuperscript{429} So, the task was still daunting given that the courts had to deal with daily ordinary cases too. However, when Gacaca courts started trials in the pilot phase in 2005,\textsuperscript{430} ordinary courts continued prosecuting only Category One genocide cases, but at a significantly lower rate\textsuperscript{431} and no longer by the specialised chambers.\textsuperscript{432} From January 2005 to March 2008, the courts merely tried 222 genocide suspects.\textsuperscript{433} Thus, the total number of

\textsuperscript{426} For a detailed discussion on reparations in Rwanda, see P.C. Bornkamm, \textit{Rwanda’s Gacaca Courts: Between Retribution and Reparation}, (2012), at 131 and 133 \textit{et seq.}


\textsuperscript{429} B. Ingelaere, ‘The Gacaca Courts in Rwanda,’ in L. Huyse and M. Salter (eds.), \textit{Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences}, (2008), at 45; Schabas also estimated that around 10,000 cases were dealt with by the end of 2004, see W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ \textit{3 Journal of International Criminal Justice}, (2005), at 888.

\textsuperscript{430} Gacaca trials were initially conducted in 752 pilot cells but from 15 July 2006, trials were held in over 9,000 cells throughout the whole country.

\textsuperscript{431} In 2002, Amnesty International reported that with exception of Category 1 cases that still remained under the exclusive jurisdiction of ordinary courts, all other suspects were transferred to the jurisdiction of Gacaca courts. However, by 2008, about 9,000 cases, amounting to over 90% of all remaining Category I cases were also transferred to Gacaca courts as a result of the 2008 Amendment, Para. 7. Around 1,000 suspects remained under the jurisdiction of ordinary courts. See Rwandan Development Gateway, ‘Gacaca Courts to get more powers’ 7 March 2008, available at <http://www.rwandagateway.org/Art...php3?idArt.=8283>, accessed November 2011.

\textsuperscript{432} Art. 96(1) of Organic Law N° 40/2000. The Specialized Chambers competent for genocide trials under Organic Law N° 08/96 were repealed; see Arts.2 and 96 of 2001 Gacaca Law.

\textsuperscript{433} According to Human Rights Watch, 62 persons were tried by ordinary courts in Rwanda in 2005, then 73 persons were tried in 2006, more 83 persons were tried in 2007, and 4 persons were tried in the first quarter of 2008. See
persons tried for genocide-related crimes in Rwanda’s ordinary courts from December 1996 to March 2008 was 10,248. After March 2008, very few genocide trials were heard in ordinary courts since most of the cases had been transferred to Gacaca courts to reduce the caseload. With this alternative model, a few accused remained to be prosecuted by the ordinary criminal courts for category one offences, while the rest of the backlog in Category Two and Three was to be tried by the community in Gacaca. For statistics of all genocide trials that took place from 1996 to 2012, the Rwandan ministry of justice provides a total of 15,286 genocide cases that were handled by the ordinary courts in Rwanda.

D. Analysis of the National Court Case Law

Currently, within the national court system of Rwanda, the alleged leaders and high profile perpetrators of the genocide are tried in either the ordinary courts or military tribunals, based on the territoriality and nationality principles of jurisdiction. The Supreme Court is the highest court of jurisdiction that has competence to deal with appeal cases from both the high court of the republic and the military high court. The discussion below will thus assess a number of statistics compiled by the ‘Supreme Court of Rwanda, Urukiko rw’Ikirenga, ‘Raporo y’Urwegw’Ubucamanza 2006, 2007, and 2008.

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434 See Arts.2 and 51 of the 2004 Gacaca Law as modified by Arts. 1 and 9 of Organic Law N° 13/2008; Also any genocide cases transferred to Rwanda from the ICTR or a third states were to be prosecuted in ordinary courts whereas low profile suspects in Rwanda were tried by Gacaca. However, after the closure of Gacaca courts, on 18 June 2012, new genocide cases are to be prosecuted by ordinary courts irrespective of the category of suspects.


437 Ordinary court system comprises of Primary courts, Intermediate courts, High court of the Republic and then the Supreme Court which is the highest court of jurisdiction that mainly deals with genocide cases on appeal level.


440 Crimes committed by military personnel are tried by the Military Tribunal and appealed before the Military High Court. An appeal or second appeal can be lodged with the Supreme Court, Art. 137(2), 138(2), 140 of Organic Law N° 51/2008, Art. 43(2) of Organic Law N° 01/2004 as modified by Art. 3 of Organic Law N° 58/2007.
of these genocide cases that reached the jurisdiction of the Supreme Court on the second appeal, in order to reveal some of their strengths and weaknesses. The author selected leading cases that were before the Supreme Court of Rwanda.

**Table showing an Overview of Genocide Trials within the Supreme Court**

<table>
<thead>
<tr>
<th>ACCUSED</th>
<th>SUMMARY OF ACCUSATIONS</th>
<th>DATE AND JUDGMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Cpt Twagiramungu Theophile</td>
<td>Planned and incited interahamwe to kill Tutsis, non assistance of persons in danger, and criminal group formation.</td>
<td>24/02/2006: Overturned the previous death penalty and was acquitted on appeal.</td>
</tr>
<tr>
<td>2 Gataza Noel</td>
<td>Murder of many people, torture, dehumanizing acts, and violent crimes resulting in death of many Tutsis.</td>
<td>12/01/2007: Same imprisonment of 30 years as the previous court but was to pay higher reparations of 57.117.296 FRW.</td>
</tr>
<tr>
<td>3 Gatorano Didace</td>
<td>He was in position of authority, supervised and led criminal attacks, notorious murderer, and looting.</td>
<td>12/01/2007: The case was inadmissible on appeal in the Supreme Court but the prior court had sentenced him to death penalty.</td>
</tr>
<tr>
<td>4 Gd Anne Marie Nyirahazimana and Ngitinshuti Athanase</td>
<td>Instigated others, committed and encouraged genocide, gave orders to kill, complicity, aiding and abetting, voluntary destruction of Tutsi houses, criminal group formation, promoting divisions, and violation of domicile.</td>
<td>27/06/2008: On appeal, the case was sent to Gacaca appeal court yet previously he had been sentenced to death penalty and reparations.</td>
</tr>
<tr>
<td>5 Harelimana Etienne, Rudodo Joseph, Mutabaruka Joseph, Harindwintwali Antoine and Bimenyimana Emmanuel</td>
<td>Genocide in Butare, systematic attacks and violent crimes resulting in death of Tutsis in the Southern Province.</td>
<td>20/06/2008: Inadmissible case on appeal but the prior court had sentenced Harelimana and 3 others to death while Bimenyimana to life imprisonment.</td>
</tr>
<tr>
<td>6 Nzirabatinyi Felecien</td>
<td>Torture, notorious murderer, looting, participated in attacks and committed violent crimes resulting in deaths.</td>
<td>18/04/2008: Same sentence of life imprisonment as the former appeal court.</td>
</tr>
<tr>
<td>7 Nzisabira Jean Baptiste</td>
<td>Murder of many Tutsis, dehumanising acts, and participated in criminal attacks.</td>
<td>04/05/2007: Overturned life sentence to 19 years sentence on appeal.</td>
</tr>
<tr>
<td></td>
<td>Case Description</td>
<td>Committed various genocide acts leading to deaths of several Tutsis and moderate Hutus in the Northern Province (Ruhengeri).</td>
</tr>
<tr>
<td>---</td>
<td>----------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>8</td>
<td>Pandasi, Bugeri J. Baptiste and Nzajyibwami Eugene Alias Gahini</td>
<td>17/04/2006: Application for review of judgment was inadmissible while the earlier court had sentenced Pandasi and Bugeri to death then life imprisonment to Nzajyibwami.</td>
</tr>
<tr>
<td>9</td>
<td>Rurangirwa Hycinthe, Bimenyimana and Ntawangaheza</td>
<td>20/06/2008: The case was inadmissible on appeal but the prior court had sentenced them to death penalty and deprival of civil liberties.</td>
</tr>
<tr>
<td>10</td>
<td>Sibomana J.M Vianney</td>
<td>13/06/2008: Inadmissible on appeal but before he had been sentenced to death and reparations of Frw 42,527,900.</td>
</tr>
</tbody>
</table>

**RELEVANT CASES WITHIN THE SPECIALIZED CHAMBERS PRIOR TO ESTABLISHMENT OF GACACA**

<table>
<thead>
<tr>
<th></th>
<th>Case Description</th>
<th>Judgment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Banzi Wellars et al., Genocide within the Western Province (Gisenyi).</td>
<td>25/05/2001: Death sentence and reparations.</td>
</tr>
<tr>
<td>2</td>
<td>Hanyurwimfura Epaphrodite Genocide within the Southern Province (Butare).</td>
<td>08/08/2001: Not guilty.</td>
</tr>
<tr>
<td>3</td>
<td>Kalisa Ignace et al., Genocide within the Northern Province.</td>
<td>31/01/2002: Not guilty.</td>
</tr>
<tr>
<td>4</td>
<td>Karorero Charles et al Genocide within the Western Province (Cyangugu).</td>
<td>31/03/2000: Death and loss of civic rights.</td>
</tr>
<tr>
<td>5</td>
<td>Muzatsinda Emmanuel Genocide within Kigali (Kigali City).</td>
<td>17/03/1998: Not guilty.</td>
</tr>
<tr>
<td>6</td>
<td>Mvumbahe Denys Genocide within the Western Province (Kibuye).</td>
<td>16/07/2000: Life sentence and loss of civic rights.</td>
</tr>
<tr>
<td>7</td>
<td>Nyilishema Andre Genocide within Kigali Province (Nyabisundu).</td>
<td>14/11/1997: Life imprisonment but the case was inadmissible on appeal.</td>
</tr>
<tr>
<td>8</td>
<td>Sibomana J.B et al., Genocide within the Southern Province (Gitarama).</td>
<td>08/04/2002: Not guilty.</td>
</tr>
</tbody>
</table>
As is apparent from the above cases, various defendants were sentenced to capital punishment but Rwanda carried out executions of only 22 convicts. The abolition of the death penalty abolition in 2007 meant that people sentenced to death were spared to serve life imprisonment. Therefore, the analysis below will focus on these cases from various trial courts that reached the Supreme Court on their second appeal, and where applicable, references will be made to related cases by the specialised chambers in ordinary and military courts which tried genocide cases prior to the establishment of Gacaca courts.

I. Prosecutor versus Cpt Twagiramungu

The case started from the military court in Kigali where the defendant was acquitted on all the prosecution’s charges of planning genocide, non-assistance to persons in danger, formation of a criminal group and inciting Interahamwe to kill Tutsis and moderate Hutus. The lawyer for the civil parties appealed against the decision but the prosecution did not appeal. The military high court then found the defendant guilty and sentenced him to the death penalty and deprival of

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441 The above cases are all in Kinyarwanda, and translation was done by the author.
443 Art. 2 of Organic Law N° 31/2007 of 25 July 2007 relating to the abolition of the death penalty, O.G.R.R. N° special of 25 July 2007. According to LIPRODHOR, 606 convicts were sentenced to capital punishment, and only twenty-two of them were executed. The rest were sitting on death row awaiting execution which was later converted to life imprisonment after the 2007 abolition of death penalty, see LIPRODHOR, Situation des droits de la personne en 2005, Kigali, December 2006, at 112, available at <www.liprodhor.org.rw/rapports.html>, accessed September 2011.
444 Accordingly, Art.19 of the 08/96 Organic Law, established Specialized Chambers within the Tribunals of first instance and the military courts, with exclusive jurisdiction over genocide and other core crimes; For a detailed discussion of the crimes under the Penal Code in the jurisprudence of the specialized chambers under Organic Law N° 08/96, see Avocats Sans Frontières (ASF), Vade-Mecum: Le Crime de Génocide et Les Crimes Contre L’Humanité Devant Les Juridictions Ordinaires du Rwanda, Kigali/Bruxelles, (2004), at 109 et seq.
446 See Arts. 256 of the Rwandan Penal Code which imposes an obligation on every Rwandan citizen to provide assistance to persons in danger where it would not cause risk to oneself, and failure to do so is a criminal offense
all civil liberties. In regard to the civil claim, the defendant was to pay to the victims an amount of 142,000,000 Rwandan francs (RWF), equivalent to (215,151 USD).

The convict was not content with the first appeal decision and as a right, he appealed to the court of cassation for cancellation of the decision. However due to modifications of laws and the competency issues related to the other courts, the matter was referred to the Supreme Court. Both the defendant and victims were present and represented by their lawyers as well as the prosecution. The defendant’s request was also in compliance with the procedures of appeal. This law gave the right to convicted persons to request for cassation of the judgment in case they had been sentenced to death penalty on appeal although they had been acquitted at first instance.

Like in the cases of Hanyurwimfura, Kalisa, Muzatsinda, and Sibomana trials before the specialized chamber, Twagiramungu was acquitted by the Supreme Court which ordered the immediate removal of former charges and sentence.

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449 Before the judicial reform in 2004, the Supreme Court was made up of several chambers: the Department of Courts and Tribunals, the Court of Cassation, the Constitutional Court, the Council of State, and the Public Accounts Court, but reform removed some departments like court of cassation and merged others. For details, see W.A Schabas and M. Imbleau, Introduction to Rwandan Law, (1997), at 23.


Just like the norm in ordinary courts, the case demonstrates that criminal appeals can be lodged by any party to the conflict, that is, the defendant, a civil party and the prosecution. The case is important because it demonstrates observance of the rights of defendants, where Twagiramungu appealed and was consequently acquitted by the Supreme Court despite the prior death sentence pronounced on the defendant.

Though Twagiramungu was not subjected to any prison term, the case reveals facts about the death of the Tutsi during the genocide and the high participation of the militia, civilians and soldiers which is significant for history studies. In analysing the case law, it is noted that the national court trials do not generally deal with legal issues, but rather focus mostly on factual issues which nevertheless provide an insight into the dynamics of the genocide.

**II. Prosecution versus Pte Gataza**

Gataza was accused of various genocide crimes between April and July 1994, and the first court sentenced him to death and to pay reparations of 57,117,296 RWF (86,541 USD) to victims. Then he appealed to a higher court and was sentenced to 30 years and reparations of 5,000,000 RWF (7,575 USD) to be paid jointly with the government of Rwanda. Not satisfied with the decision, the defendant and the prosecution as well as the civil claimant Muhimpundu Lillian appealed the decision.

The Supreme Court retained the sentence of 30 years’ imprisonment and the amount of reparations was 57,117,296 FRW (equivalent to 86,541 USD) as had been prescribed by the first

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457 Prosecution v. Gataza Noel (RPA/GEN 003/04/HCM), judgment of 05/10/2005.
court and was to be jointly paid with the Rwandan government. With this judgment, all parties lost their demands, for instance the prosecution lost its demand for a heavier sentence, while the defendant remained guilty and the civil plaintiff did not get the whole amount of reparations claimed.

However due to extreme poverty in Rwanda, reparations are often not paid in practice. Though each case had to always identify the property of the defendants in order to cover any claims for reparations, there is often no available property or too little of it to compensate the victims. Of course, there can be no enough reparation for the value or loss of a loved one, apart from symbolic payments as mentioned by the judges in this case, where they emphasized that reparations should be claimed and accorded in accordance to the country’s economy.

To be allocated reparations, there is need to sue for them and the court has to examine whether the complainant merits them. Simply put, without a civil case, no reparations are made as manifested in this case of Gataza where Mukamurenzi was not allocated compensation despite the fact that the defendant had killed her husband, yet other victims were entitled to reparations. Even so, there is always need for victims to show the link and loss suffered to be entitled to reparations.

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459 For details see, Icyegeranyo cy'Ibyemezo by'Urukiko rw'Ikirenga, Imanza z'Inshinjabyaha n'iza Jenocide (2007), *Ubushinjacyaha na Gataza Noel*, Urupapuro 1-11.


461 Similarly, see *Prosecutor v. Pandasi, et al.*, (RS/Rev 0007/06/CS). In this case, it is indicated that Nzajyibwami had only two goats while Pandasi and Bugeri J. Baptiste had no property at all.

This jurisprudence is significant because it shows Rwanda’s responsibility for genocide which in most cases is a state-sponsored crime organized by governments. The failure of the state to observe its duty to protect the citizens may lead to payment of damages or reparations for the victims as seen in Gataza’s case. Though the government was reluctant to comply with these judgments, this case indicates that the state and the accused were liable in solidum to pay damages, accepting the state’s general responsibility for the genocide. Actually, the government of Rwanda, through the minister of justice has always stated that the government did accept political responsibility for the genocide, but not criminal liability for the genocide because the current government did not commit genocide but instead took the political responsibility of the government it replaced. It is noted that the crime of genocide against a protected group can be the responsibility of a state or state-like organization.

Another contribution of this case, at least at the level of domestic law enforcement, is the ruling made by the judges where the prosecution accused the defendant of command responsibility, but the judges acquitted him of this responsibility because the prosecution failed to establish the power of influence or control that Gataza had on the alleged subdinate known as Innocent, who had killed Tutsi during the genocide. The Prosecution also failed to prove that Innocent had killed the victims because of obeying orders. The court was hence unable to find that the defendant knew or should have known about the acts of the alleged subdinate.

\[463\] Following the Rome Statute of the International Criminal Court (ICC Statute), The ICTY and ICTR Statutes, The four Geneva Conventions, The 1948 Genocide Convention, The Universal Declaration of Human Rights Conventions, and The International Covenant on Civil and Political Rights; all these instruments recognise the rights of innocent people to be free from atrocities conducted either in armed conflicts or under more covert circumstances where states lend support to illegal acts or crimes, or at times are unable and unwilling to protect their population from such occurrences.

\[464\] The government had given up the idea of individualized compensation awards by courts and was now rather inclined towards a solution involving administrative compensation distributed by a fund, P.C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Reparation, (2012), at 155 et seq.

\[465\] Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, ‘Rwanda should celebrate Gacaca legacy-Karugarama,’ The New times, on the 18, June 2012.

\[466\] See G. Werle, and B. Burghardt, ‘Do Crimes against Humanity Require the Participation of a State or a ‘State-like’ Organisation?’ 10 Journal of International Criminal Justice, (2012), at 1158 et seq; see Art. 6 of the ICC Statute.
III. Prosecutor versus Corporal Gatorano

The prosecution accused Gatorano of killing a large number of Tutsis during the genocide and of various other crimes in furtherance of the genocide plan.\textsuperscript{467} And on the 17 November 2001, the first instance hearing found the defendant guilty and sentenced him to death. \textsuperscript{468} On his first appeal, the court upheld the same death sentence and thereafter he took the matter to the court of cassation for re-examination. However following modifications in the law, the matter was referred to the Supreme Court which declared the appeal inadmissible.\textsuperscript{469}

The inadmissibility of the case was due to the violation of the procedural requirements stipulated in Article 25 of the 08/96 organic law which only allowed defendants to submit their case to the court of cassation, and only if the defendant had received death penalty on appeal while the first court had declared the suspect innocent. This was not the case with the defendant in question because the first appeal court simply confirmed the death sentence as had been ruled by the previous court. So the judges found that the case was not in the competence of the court and consequently could not be examined by the Supreme Court which then had jurisdiction over cases that were previously handled by the Cassation court that was no longer in existence.\textsuperscript{470}

Therefore, this judgment shows the defendant’s ignorance about procedural and substantive matters since he did not have legal counsel. For this reason, since 1997, Amnesty International often criticized the fact that state-funded counsel was not made available to defendants.\textsuperscript{471}

\textsuperscript{467} Art. 2 Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity; Arts.89, 90, 911, 312, 317 of the 1977 Rwanda Penal Code.

\textsuperscript{468} As already noted, death sentences were converted to life imprisonment sentences with special provisions. Life imprisonment with special provisions was challenged before the Supreme Court of Rwanda in 2008, but was found not to be unconstitutional.

\textsuperscript{469} Prosecutor v. Gatorano Didace on the 17/11/2001 (lower court), 07/1/2002 (higher court), 01/06/2007 (Supreme Court).

\textsuperscript{470} For details, Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko rw’Ikirenga, Imanza z’Inshinjabyaha n’iza Jenocide (2007), Ubushinjacyaha na Gatorano Didace, Urupapuro rwa 1-4.

Although ignorance of the law is no excuse, this has been manifested in various cases, in the form of making late appeals, and suing for the wrong cause in contradiction to the law. As will be seen below, the Sibomana, Rurangirwa, and Harelimana’s cases were similarly inadmissible because of submitting claims that were contrary to the law, specifically in contradiction with Article 25 of the 08/96 organic law.472

IV. Prosecutor versus Major Nyirahazimana and Pasteur Ngirinshuti
The prosecution accused the above defendants of various genocide acts, such as superior responsibility, given that Nyirahazimana had the rank of a major in the military where he engaged in genocide and encouraged others to kill Tutsi. As for Ngirinshuti, he was a pastor and acted as an accomplice in killing victims. Both defendants were accused of incitement to commit genocide, voluntary destruction of Tutsi houses, criminal group formation, violation of domicile and complicity in the killings.473 Just like Banzi Wellars et al., in the specialized chamber,474 and based on Articles 2, 14, 89, 90, 91, 312, 166, and 444 of the Rwandan penal code,475 the court found the above defendants guilty.476 They were sentenced to death and ordered to pay reparations equivalent to 12,483,317 FRW (18,915 USD) to be paid jointly with the government of Rwanda.477 Not content with the decision of the court,478 the defendants appealed the

472 Art. 25 of the 08/96 Organic Law allowed examination for cassation, only if the defendants had been sentenced to death penalty on appeal yet at first instance they were declared innocent.
476 For details, see Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko rw’Ikirenga, Imanza za Jenocide (2008), Ubushinjacyaha na Major GD Anne Marie Nyirahakizimana na Ngirinshuti Athanase, Urupapuro rwa 20.
477 Arts. 89, 90, 91, 166, 444, 1, and 12 of the 1977 Rwandan Penal Code; Arts.1 and 14 of the Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity.
However, due to subsequent changes in the law and after the Supreme Court found that there was yet no definitive decision on the matter, the Supreme Court referred the case to the competent Gacaca court of appeal. Gacaca courts of appeal were endowed with competence to resume appeal cases awaiting trial before the high court of the republic, the military high court and the Supreme Court.

Although this case shows certain instability and regular modifications of laws, it nevertheless, illustrates how national courts solved the problem of retroactive punishment as seen in the previous trial within the high court. The 08/96 organic law organised prosecution and punishment of genocide suspects based on existing crimes under domestic criminal law. Different paragraphs in the judgement refer to articles within the penal code as the motivation for the accusations and basis for decisions rendered.

Therefore genocide suspects were tried for ordinary crimes in the penal code if they were carried out with intention to commit genocide or crimes against humanity. The special intent degree is what distinguishes for instance the ordinary crime of murder from the crime of genocide. In

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479 Prosecutor v. Gd Anne Marie Nyirahazimana and Ngirinshuti Athanase (RPA.003/GEN/06/CS) 27/06/2008), judgment of 27/06/2008.
480 This was in reference to Organic Law No 13/2008 of 19/05/2008 modifying Organic Law No 16/2004 of 14/06/2004 determining the competence of Gacaca courts in its Art.26 which allowed national courts to transfer genocide cases to Gacaca courts of the place where the crimes were committed as long as no final judgment had been made.
481 P.C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Reparation, (2012), at 44; Art. 9(2) and (3) of Instructions No 16/2008.
fact it is considered that the perpetrators’ intent is a central requirement to commit genocide.\textsuperscript{486} Another important element seen in this case, though not elaborate, is the notion of superior responsibility under domestic law and complicity where the accomplice may incur the same punishment as the perpetrator.

\textbf{V. Prosecutor versus Harelimana et al.}

All the defendants\textsuperscript{487} were accused of various genocide acts as indicated in the table above. Harelimana, Rudodo, Mutabaruka, and Harindwintwali were sentenced to death whereas Bimenyimana was sentenced to life imprisonment.\textsuperscript{488} On appeal, in the Nyanza appellate court, the defendants having a lawyer from Avocats Sans Frontiers received the same sentence as in the prior court.\textsuperscript{489} Still not content with the decision of the court, the defendants applied for cassation of the case at the supreme level. Nevertheless, the Supreme Court found the case inadmissible.\textsuperscript{490}

As pointed out earlier, this case like many others examined in this study denotes how ignorance of the law by defendants and their lawyers would lead to inadmissibility of cases. Particularly, in the context of the issue at hand, the defendants could have perhaps applied for review other than

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\textsuperscript{487} Harelimana Etienne, Rudodo Joseph, Mutabaruka Joseph, Harindwintwali Antoine and Bimenyimana Emmanuel


\textsuperscript{489} However, it should be recalled that at one stage Avocats Sans Frontiers (ASF) provided foreign defense attorneys to represent genocide suspects in court, W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 \textit{Journal of International Criminal Justice}, (2005), at 886.

\textsuperscript{490} For details, Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko rw’Ikirenga, Imanza za Jenocide (2008), Ubushinjacyaha na Harelimana, urupapuro rwa 31.
appeal as suggested by the judges, for the reason that the appellants claimed that one of the panel members in the previous appellate court was no longer a judge. 491

In regard to penalties by the courts, this case shows how national courts often handed down maximum penalties for the convicts, unlike the ICTR where most convicts got prison terms. For instance, the higher court had sentenced Harelimana and three others to death and Bimenyimana to life imprisonment. In comparison to international trials conducted by the ICTR, it is found that the sentences imposed by national courts were more severe, i.e life imprisonment or the death penalty, though the latter was abolished in 2007. 492 The suspects tried by national courts were not as prominent as the high profile perpetrators tried in Arusha, but when it came to sentences, they received either equal or higher sentences than their commanders or superiors who instigated and encouraged them to commit genocide. Most of the accused in national prosecutions were mere counsellors, military personnel and civil servants, but not the master minders or conspirators.

VI. Prosecutor versus Nzirabatinyi

When the case of Nzirabatinyi reached the jurisdiction of the Supreme Court, 493 the judges prescribed the same sentence of life imprisonment as the other first two inferior courts. 494 The defendant, who was a medical assistant, was accused of instigating and encouraging genocide, giving orders to kill, complicity, aiding and abetting. Witnesses testified that he used to reveal Tutsis in hiding places, attended roadblocks and would accompany killers by guarding the victims so that no one would escape the killing, thus aiding others to commit crimes. After

491 See Prosecutor v. Harelimana Etienne et al., judgment of 15/05/2003 (Nyanza appeal court), 20/06/2008 (Supreme Court).
494 Prosecutor v. Nzirabatinyi Felecien (RPAA 0044/GEN/06/CS), judgment of 20/06/2006; Arts.1, 2, 14, 15, 16, 89, 90, 91 and 312 of the 1977 Rwandan Penal Code; Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity.
hearing many prosecution witnesses and arguments by his lawyer, the Supreme Court judges found that, although the defendant did not himself hold a gun to shoot, he nevertheless greatly aided and abetted the criminal group which attacked some Tutsi families, through accompanying and assisting them in killing, and so must be punished like anyone who killed. In this way, the defendant is not necessarily required to kill with his own hands in order for him to be held criminally liable.\textsuperscript{495} Therefore the court maintained the prior court’s sentence of life imprisonment against Nzirabatinyi, which is comparable to Mvumbahe law in the former specialised chambers.\textsuperscript{496}

A lesson from this case is that any role played in committing genocide should be considered and criminalised. As a criminal law norm, criminal responsibility does not require an offender himself to have executed the killing but any form of participation incurs liability. In such a scenario, the case depicts the need to establish the individual criminal responsibility of each accused person. The focus on the individual rather than the group removes the possibility for collective blame.\textsuperscript{497} This case further clarifies and brings to light various important notions, such as, incitement to genocide, complicity, aiding and abetting as well as superior responsibility.

This case also shows a close relationship of Gacaca courts with national genocide trials where the judges sought Gacaca files to get information on the defendant that was collected during the Gacaca information gathering phase.\textsuperscript{498} In several cases there was much reference to Gacaca witnesses and alleged accomplices, as manifested in Pandasi’s trial.


\textsuperscript{496} See, case in the Specialized Chamber, \textit{Prosecutor v. Mvumbahe Denys} (R.M.P 56.204/S4/NA/KBY, R.P. Ch.Sp.005/01/2000), judgment of 16/07/2000 (Urugereko rwihariyiye rwa Kibuye). The accused was as well sentenced to life imprisonment for genocide charges. See also Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko Rw’Ikirenga, Imanza za Jenocide, (2008), Ubushinjacyaha na Harelimana Etienne, Urupapuro rwa 31.


A problem that is evident in a number of national court cases is that several witnesses used to give hearsay evidence and sometimes contradictory witness testimony. This affected the value of available evidence before the courts. This is also apparent in Gataza’s case, where there was hearsay testimony and contradictory statements in regard to dates, victims and perpetrators.

VII. Prosecutor versus Nzisabira

Nzisabira Jean Baptiste was charged with genocide crimes that occurred in various places in Rwanda.\textsuperscript{499} He participated in criminal groups and committed genocide against a great number of people because they belonged to the Tutsi ethnic group.\textsuperscript{500}

The prosecution’s accusations against the defendant were confirmed and the court sentenced him to life imprisonment and ordered that, reparations be paid jointly with the government of Rwanda. When the defendant appealed to the higher court he received the same punishment of life imprisonment with deprival of civil liberties. After the matter was taken to the Supreme Court, the claim was found to be in compliance with the legal requirements for appeal. Nevertheless, after examining the matter and hearing many witnesses, the judges confirmed the genocide charges against the defendant and overturned the sentence to 19 years’ imprisonment. Although there were more incriminating or prosecution witnesses than defense witnesses, the judges emphasized that it is not about the number of witnesses but the substance of evidence given.\textsuperscript{501}


\textsuperscript{500} Arts.1, 2, 14, 15, 16, 312 Organic Law 16/2007 of 01/03/2007 modifying Organic Law N° 16/2004 determining the Organisation, Functioning, and Competence of Gacaca Courts; see also Arts. 89, 90, 91, 281, 282, and 283 of the 1977 Rwandan Penal Code.

Quite clearly, this case shows that there is a significant level of independence of the judges from the prosecution and vice versa.\textsuperscript{502} The prosecution does not influence the judges, as seen in several denials of their requests towards the accused like in the Pandasi case.\textsuperscript{503} Likewise, the prosecution can appeal against any decision of the judges as seen in Nyirahazimana case.\textsuperscript{504} Also, as evidenced in all the cases, the number of judges to adjudicate a matter is three. This helps in fostering impartiality of the court and makes the decision more democratic.\textsuperscript{505}

Thus, this case portrays the fairness of the national court system where it provides for a triple degree jurisdiction for parties to the case. The defendant, prosecution or civil parties have a right to appeal in the various competent courts following their hierarchy, of course depending on the subject matter at hand.\textsuperscript{506} As seen in this case, the same subject matter was examined in three various courts at different periods and at the end, the sentence of life imprisonment was overturned to 19 years’ imprisonment. It is important to note that the final decision of the last superior court always remains binding on all parties.

The trial also manifests the tedious and slow nature of the ordinary process of justice. The trial was postponed several times due to the fact that the defendant had to look for a lawyer. Later, the appointed lawyer also requested a postponement in order for him to read his client’s dossier and in another scheduled hearing, the trial did not take place due to the absence of one of the judges adjudicating the matter because of other official functions. Postponement of hearings has been a


\textsuperscript{504} \textit{Prosecutor v. Gd Anne Marie Nyirahazimana and Ngirinshuti Athanase} (RPA.003/GEN/06/CS) 27/06/2008), judgment of 27/06/2008.

\textsuperscript{505} For characteristics of impartiality see, P.C. Bornkamm, \textit{Rwanda’s Gacaca Courts: Between Retribution and Reparation}, (2012), at 104 et seq; Art.1 of Organic Law N° 20/2006 of 22/04/2006 provides that criminal judgements must be held in public audience, be fair, impartial, comply with the principle of self defence, cross examination, treat litigants equal in the eyes of the law, base on evidences legally produced and be rendered without any undue delay.

\textsuperscript{506} Art. 24 Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity.
common feature of the ordinary court process. This is disadvantageous particularly for victims who want to see justice done.

VIII. Prosecutor versus Pandasi, Bugeri and Nzajyibwami
Like other national court cases, the judgment began by mentioning full identification of the defendants, the property of the defendants, seized court as well as the accusations.\(^5^0^7\) In the Ruhengeri court, the defendants were accused of genocide, where the first two accused persons were sentenced to death and Nzajyibwami was sentenced to life imprisonment.\(^5^0^8\) They appealed to the appellate court of Ruhengeri which upheld the previous sentence. Then they applied for review of the case but the case was dismissed.\(^5^0^9\) The defendants claimed to be declared innocent because their alleged accomplices in Gacaca had not mentioned them in their confessions.\(^5^1^0\)

However, on the 17/04/2006, the Supreme Court ruled that the motivation of the request for review was baseless,\(^5^1^1\) because it was just writing errors in the judgment where the former court mistakenly included the civil plaintiff among the people killed by defendants. In regard to the claim that Gacaca defendants did not mention them as accomplices, the court advanced that this was not enough evidence or probable truth to make them innocent. The defendants hence lost the case and were therefore bound by the prior court’s decision where Pandasi and Bugeri were sentenced to death and Nzajyibwami was to serve life imprisonment.

Apparently, this case shows the retributive nature of classical justice within the national court system. A lesson from several national court cases as the one at hand is that such cases can

\(^5^0^7\) Urukiko rw’Ikirenga, Icyegeranyo cy’Ibyemezo by’Urukiko rw’Ikirenga, Imanza za Jenocide iz’Ibyaha byakozwe n’Abana n’iz’Inshinjabyaha (2006).


hardly contribute to reconciliation because of the adversarial way in which they are conducted.\textsuperscript{512} In fact, the defendants are always seeking to be declared innocent rather than revealing their role in the genocide, while the victims are longing for punishment of the perpetrators for the losses suffered. There is little confession of defendants because they want to avoid punishment and win the case other than telling the truth. This is different from Gacaca, where the process is more oriented to truth telling, confession and reduced sentences with aim of reconciliation. It is thus submitted that the kind of justice achieved through national courts has fostered limited reconciliation for Rwandans.\textsuperscript{513}

As already seen in a few other cases, the defendants in this trial suffered from lack of legal representation, yet the state was always represented by the prosecution. This contradicts the principle of equality of arms where the prosecution and defendant must be on equal footing. Though Rwandan law clearly allows for defence counsel in criminal matters but not at the expense of the government, most suspects were too poor to afford lawyers. For instance Pandasi and Nzajyibwami were mere subsistence farmers, and Bugeri was a guard in the National Park. In other instances, some lawyers were personally unwilling to represent genocide defendants in courts of law.

**IX. Prosecutor versus Rurangirwa, Bimenyimana, and Ntawangaheza**

These defendants were accused of various acts of genocide, like criminal group formation,\textsuperscript{514} destruction of Tutsi houses, rape, torture, unlawful gun possession, and non-assistance of persons in danger among other crimes.\textsuperscript{515} On the 23/03/1998, the above defendants were sentenced to death and deprival of civil liberties as was done by the specialized chamber in Karorero Charles

\begin{itemize}
\item \textsuperscript{514} See Arts. 281, 282, 283, Decree-Law N° 21/77 of 18 August 1977 instituting the Penal Code as completed, Official Gazette of the Republic of Rwanda, Special N° 13 \textit{bis} of 1 July 1978.
\item \textsuperscript{515} See Arts. 256, Decree-Law N° 21/77 of 18 August 1977 instituting the Penal Code as completed, Official Gazette of the Republic of Rwanda, Special N° 13 \textit{bis} of 1 July 1978. The Penal Code imposes an obligation on every Rwandan citizen to provide assistance to persons in danger.
\end{itemize}
Then they lodged an appeal in the appellate court of Nyanza which removed some charges like unlawful gun possession and non-assistance of persons in danger, but still pronounced the same death sentence as the inferior court. Subsequent to the modification of laws and competence of the Supreme Court, the defendants’ second appeal was inadmissible.

Like many other cases discussed, this particular case shows how retributive justice is characterized by prolonged cases, for instance, it started on the 23 March 1998 from the first trial in the Butare court in the south, and the final decision was pronounced by the Supreme Court on the 20 June 2008, which is really a lengthy period before justice can be fully obtained. Therefore retributive justice in the national courts seems to be a slow and tedious process, perhaps due to the fact that, it is the same courts which have to deal with ordinary crimes too.

In this specific case, the accused persons were tried for rape, among other crimes because it was a Category One crime, but after 2008 those accused of the crime remained in Category One but were transferred to the jurisdiction of Gacaca. So rape cases before the 2008 amendment fell within the jurisdiction of national courts. This shows constant alteration of genocide laws and suspects in various jurisdictions, sometimes affecting the credibility of the courts.

As noted earlier, this case shows that absence of civil claims meant no reparation to victims by offenders. Although the defendants mentioned above destroyed Tutsi houses, there were no civil parties to the case, and hence no judgment on reparations.

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518 See *Prosecutor v. Rurangirwa Hyacinthe, Bimenyimana, and Ntawangaheza* (RPAA 003/GEN/06/CS), judgment of 23/03/1998, (First trial), judgment of 25/07/2001(First appeal), judgment of 20/6/2008 (Second Appeal). The appeal violated Art. 25 of the 08/96 Organic Law which required the defendants to have been sentenced to death penalty on appeal yet innocent at first trial.

X. Prosecutor versus Sibomana

The prosecution accused the defendant of genocide and other crimes against humanity as indicated in the table above. Upon examination of both incriminating and exonerating evidence by the judges, the Kigali specialised chamber, declared the defendant guilty of the charges and sentenced him to death and deprival of all civil liberties. The defendant was also to pay 4,257,900 RWF (6,451 USD) as reparation to the civil plaintiff or victims because of his criminal acts, which were perpetrated with the intention to destroy Tutsis in whole or in part as defined by the Genocide Convention, ICTR Statute and the 08/96 organic law.

The defendant appealed to the court in Kigali, which then confirmed the charges and imposed the same sentence as the former specialised chamber. When the matter was taken to the Supreme Court on the 13 June 2008, it was found inadmissible because the matter could not be examined in more than two instances as provided by the 08/96 organic law. So the parties were still bound by the judgment of the previous court.

In viewing genocide sentences, this particular case, like many others in the national courts, shows that there is possibility of a secondary punishment added to the principal one, as ruled by the appeals court in Kigali. In addition to the main sentence, a genocide convict may incur loss of civic rights.

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522 Art. 25 of the 08/96 Organic Law provided an exception of persons that were found innocent at first instance then received death penalty at appeal level would then have a right to examine their matter in the Supreme Court.
523 Art. 66 of the Rwandan penal code includes the loss of civic rights as an accessory penalty to the main sentence., see Decree-Law N° 21/77 of 18 August 1977 instituting the Penal Code as completed, Official Gazette of the Republic of Rwanda, Special N° 13 bis of 1 July 1978. Similarly, those convicted under the Gacaca Law may incur accessory punishment where they are deprived of their rights to be elected to public office and to serve in certain official functions. However in the course of the 2007 amendment of the Gacaca Law, this sanction was mitigated. Instead the new Article 76(5) stipulates a more extensive and detailed publication of the identity of those convicted and their crimes.
supplementary sentences.\textsuperscript{524} This also applies in the case of defendants transferred by the ICTR or extradited by third states to Rwanda, which eventually shows some inequality in the treatment of genocide convicts.\textsuperscript{525}

Also, from this judgment, it is evident that the judges have always to motivate the court decisions and sentences through reference to various laws dealing with the crime of genocide. In other words, the case illustrates how the judges have to always give a legal motivation for each finding, right from admissibility or inadmissibility of the case to the final judgment, relying on both national and international law.\textsuperscript{526} Hence every accusation goes along with a legal provision to avoid violation of the principle of legality, which provides that there can be no crime without law, and no punishment without law (\textit{nullum crimen nulla peona sine lege}). The same requirement applies to the prosecution which is always required to provide the legal basis of each accusation.

Finally, despite reference to various national and international legal provisions within the judgments, there is little reference to international case law, particularly ICTR case law.\textsuperscript{527} In clear instances, the national court cases have not drawn much inspiration from existing international jurisprudence, which could have facilitated harmonisation of case law on related

\textsuperscript{524} Life imprisonment is the maximum sentence given to ICTR convicts according to the ICTR Statute, see \textit{The Prosecutor v. Jean Kambanda}, Case N° ICTR-97-23-S, Judgment and Sentence (TC), 4 September 1998.


\textsuperscript{527} W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 \textit{Journal of International Criminal Justice}, (2005), at 889. He views the Tribunal’s jurisprudence to have had such a limited impact on the national court trials which could be explained by the fact that most genocide-related judgments in Rwanda do not generally deal with legal issues, but rather focus mostly on factual issues which nevertheless provides an insight into the dynamics of the genocide.
matters. Even so, cases from national courts present various lessons that can be drawn from their achievements and shortcomings as presented below.

E. Achievements of National Court Trials

Since the 1994 genocide which devastated the national judicial system, Rwanda has worked hard to rebuild its judiciary. In the aftermath of the genocide, the Rwandan government has developed the courts’ human and material resources, as well as court structures. More importantly, the ordinary courts have tried a significant number of genocide suspects, punished convicts, acquitted those not guilty and reintegrated vast numbers of genocide perpetrators within the society, thereby ensuring justice for both victims and perpetrators. So far, over 15,000 genocide suspects have been tried by the ordinary courts from the time when the genocide law was adopted in 1996.

The genocide trials held since 1996 have produced an important body of case law on core crimes which provides information on the dynamics of genocide. These judgments will be of significance to researchers and criminal lawyers who deal with an assessment of factual issues. They are therefore of great practical use to Rwandan judges and lawyers engaged in the ongoing

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528 A. Des Forges, Leave None to Tell the Story: Genocide in Rwanda, (1999), at 748.
prosecutions, and the cases establish principles for interpretation of the national legislation dealing with genocide prosecutions.\footnote{W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 Journal of International Criminal Justice, (2005), at 880 \textit{et seq.}}

Moreover, though not as lengthy as the ICTR judgments, the case law reports of national courts will be without doubt of interest to historians because some of the more lengthy judgments provide informative and detailed accounts of specific episodes during the months of April, May and June 1994.\footnote{The Kigali Military Court, \textit{Prosecutor v. Cpt Twagiramungu Theophile} (RP 0045/CG-CS/2000), judgment of 20/06/2000. \textit{Prosecutor v. Gd Anne Marie Nyirahazimana and Ngirinshuti Athanase}, (RPA.003/GEN/06/CS) 27/06/2008), judgment of 27/06/2008; W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 Journal of International Criminal Justice, (2005), at 889.} Some judgments have gone to over fifty pages, providing useful facts and information on the crime of genocide, as seen in the case of Banzi Wellars.\footnote{Prosecutor v. Banzi wellars et al., (R.M.P 61099/S5/ML/KRE/KD, R.P. 221/R2/2000), Decision of the Gisenyi Court of 1st Instance in 2001, provides detailed information and evidence which later leads to conviction of the defendants after analysing the sufficient evidence provided by the prosecution on the individual role of suspects in the genocide. See Urubanza rwaciwe n’Urukiko rwa mbere rw’Iremezo rwa Gisenyi ku wa Gicurasi 2001, Ubushinjacyaha burega Banzi Wellars n’abagenzi be, Igitabo cy’imanza zaciwe N’inkiko Z’u Rwanda Zerekeranye N’Icyaha Cy’Itsembabwoko N’itsembatsemb, Umutumba wa Gatandatu, Urupapuro 67-136.} However, all the judgments and documents in the archives are in the national language, Kinyarwanda. This constitutes a barrier for researchers from outside Rwanda.

Importantly, as far as national trials are concerned, domestic case law forms part of state practice and could thus influence future prosecutions.\footnote{J. Wouters and S. Verhoeven, ‘The Domestic Prosecution of Genocide,’ Leuven Centre for Global Governance Studies and Institute for International Law, (2010), N° 55, at 1 \textit{et seq.}} On a broader note, national legislation and genocide case law may give effect to the obligations enclosed in the 1948 Genocide Convention.\footnote{Art. IV of the Genocide Convention provides an express obligation to prosecute with regard to genocide.} Therefore, the Rwandan domestic practice has not only clarified a number of issues of the crime of genocide, but it has further shaped domestic application of the Genocide Convention. What seems most reasonable is the fact that national application of the Convention leads to a better understanding of the Convention itself, more specifically, what genocide means and how to deal with the crime domestically.\footnote{M. Inazumi, \textit{Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law}, (2005), at 22 \textit{et seq.}} Based on the experience of Rwanda, it can be asserted that by incorporating the crime of genocide into the domestic legal system and applying
it, the scope of the crime will be fixed.\textsuperscript{539} The courts have therefore promoted the domestic application of international criminal justice and legislation.

Another crucial lesson to be learnt from this process is that mounting large scale prosecutions in the post-conflict environment ensures accountability, deterrence and justice at the national level, thus meeting the justice demands of victims and suspects.\textsuperscript{540} The Rwandan experiment thus is contributing a new element, namely that there is no tolerance or compromise in dealing with impunity that characterised the past decades.\textsuperscript{541} This is because domestic systems principally stand as primary forums for prosecution of international crimes rather than international mechanisms. Authors like Cassese argue that these international mechanisms are just back-up institutions which will be unable to prosecute all perpetrators.\textsuperscript{542} Even after the creation of the ICC, direct enforcement of international criminal law is primarily for domestic jurisdictions and the ICC will intervene only in case of inability or unwillingness of states to prosecute.\textsuperscript{543} States with their own police forces, structured court system, adequate legislation offer better places for this task, at least if they are willing to use their potential in combating international crimes.\textsuperscript{544}

This factor, combined with greater access to evidence, witnesses, victims and perpetrators, makes national courts indispensable in developing international criminal justice. It is therefore

\textsuperscript{539} J. Wouters and S. Verhoeven, ‘The Domestic Prosecution of Genocide,’ \textit{Leuven Centre for Global Governance Studies and Institute for International Law}, (2010), No 55, at 1-3.


submitted that even where a prosecution is brought to an international tribunal, national courts will retain a fundamental role in the process of arresting defendants, taking testimony under oath, authorizing searches and seizures, and freezing the proceeds of crimes, in cooperation with international courts.\textsuperscript{545}

Furthermore, as already said, trials held in the affected country may have greater relevance to victims and the society than distant trials conducted far abroad.\textsuperscript{546} Therefore Rwanda’s experience in dealing with the legacy of the genocide and other human rights abuses offers lessons to other societies that may have to deal with the aftermath of atrocity.

In sum, one cannot neglect the function of national courts in determining international criminal law. This is due to the fact that their practices may confirm or create customary law and contribute to the formation of general principles of law. Their judgments can also serve as aids in recognising international criminal law, helping to determine the content of the norms of international criminal law.\textsuperscript{547}

\textbf{F. Major Shortcomings of Domestic Prosecutions}

Generally, national trials also feature many legal inconsistencies in the application of international law and practical pitfalls in dealing with the core crimes. The case of Rwanda presents its own weaknesses, perhaps due to the horrific nature of the violence, large-scale participation in the genocide, complexity of the crime itself, inability of the courts and


unprecedented experience in the region. Therefore state prosecution of the crime was prone to face different shortcomings as discussed below.

I. Congested Prisons and Insufficient Infrastructure
Given the fact that prior to April 1994, the national judicial system had many serious flaws, one wonders about the standard of the judicial system after the massacres. Without delving into detail, it is much easier to figure out that, in a country where the massacres ceased without a peace agreement but with the use of force, and where the war had annihilated the judiciary's human and material resources, state structures, including courts had also been destroyed.

When the current government took over power in July 1994, the judicial system was totally shattered through the killing of judges and administrative staff, the flight of others usually due to their involvement in acts of genocide, the destruction of working materials and equipment, loss of archives, collapse of the state machinery and judicial police. The urgent task in the area of justice was to train judges, prosecutors and support staff.

For instance, before the genocide started on 7 April 1994, there were 758 judges but only 44 among them had a law degree. The prosecution had 70 prosecutors in total, but only 22 had a law degree. Following the genocide, of the 758 judges, only 244 remained, and of the 70 prosecutors, only 12 were in the country. With support from various donors and countries, the country had to

train judicial staff. After the training, judges increased to 841, whereas the prosecutors numbered 210 and the support staff numbered 910.\textsuperscript{553}

What was more challenging is that the 120,000 suspects in prison after the genocide implied thousands of prosecutions which would then require a judge, prosecutor, legal defence, and court infrastructure.\textsuperscript{554} Quite obviously, the ordinary courts could not deal with the backlog of cases and keeping the vast majority of the suspects in prison without a trial proved to be simply difficult due to various reasons such as prison overcrowding, the demands for justice by the victims and suspects.\textsuperscript{555}

Five years after commencement of the genocide trials, an assessment of their progress showed that only 6,000 cases had been tried.\textsuperscript{556} Therefore, trying all the genocide detainees would have taken more than 100 years according to different estimates, and probably no trials would have taken place because suspects and eye witnesses would no longer be living.\textsuperscript{557} At this pace,
national courts would not be able to deal with all the genocide suspects in the overcrowded prisons hence the need for an alternative mechanism such as Gacaca.\textsuperscript{558}

\section*{II. Violation of Fair Trial Rights}
Another principal shortcoming of national court trials is inadequate guarantees of due process and fair trial rights, largely due to poor economic capacity and inefficiency\textsuperscript{559} that characterizes developing countries. The courts have sometimes failed to meet not only international standards but also national law on fair trial guarantees.

\subsection*{1. The Right to Speedy Trial}
This is perhaps not easy to address because there are no fixed days, weeks or years to establish the duration of a trial or determine a delayed proceeding.\textsuperscript{560} So the time is determined depending on each particular case, based on the complexity of the matter, conduct of the defendant and performance of the judicial personnel.

For example, to date, it has taken more than eighteen years to try genocide suspects in Rwanda. Prior efforts to address some of these defects through programs including pre-trial detention hearings and the vast release of extremely old, young, or ill detainees have been applied but without notable success of speeding up trials for the remaining detainees.\textsuperscript{561} In fact, before the


\textsuperscript{560} See Avocats Sans Frontières (ASF), \textit{Ingendanyi, Imiburanishirize y’Icyaha cy a Jenocide n’Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z’u Rwanda 2004}, (2005), at 48.

\textsuperscript{561} Presidential Communiqué of 1 January 2003, at 20. The beneficiaries of the provisional release were detainees who had already confessed and risked spending more time in prison than their presumed sentence, those who had been minors at the time of their crimes, and those who were old or seriously ill. Despite protests from victim organizations, 25,000 detainees were provisionally set free in January 2003 after the Communiqué was issued. In
transfer of suspects to Gacaca, a number of them had been detained for years without being tried, while others had already served more time than the maximum prison sentence they would receive if they had been convicted earlier, and others were found innocent after long periods of detention. However, it is sufficient to note that this is comprehensible, given the caseload, economic constraints and the fact that conventional justice is limited capacity wise.

2. The Principle of Presumption of Innocence

In regard to the genocide cases within the competence of ordinary courts, the principle relating to the presumption of innocence is adequately provided for under the law; in other words ‘a suspect is innocent until proven guilty.’ However, after the genocide, pre-trial detention had become a principle rather than an exception. This was because of the inability of the national system to either carry out extensive investigations or render hearings to all suspects.

After subsequent complaints, the situation was rectified during trials, and when the prosecution did not give sufficient evidence on the criminal suspect, it became a reason for acquitting the suspect as indicated in the case of Kabirigi Anastase et al, where the specialized chamber of Kibuye court of first instance found the co-accused Muhayimana Cyprien not guilty of the alleged crimes because of lack of sufficient evidence from the prosecution as cited below.

‘Rusanze Muhayimana Cyprien ibyaha aregwa bya Jenocide, Ubuhotozzi, Gusahura no Kurema Umutwe w’Abagizi banabi byose bijyana n’igitero yagiyemo kwa Dansira Kamberuka ntabimenyetso ubushinjacyaha bwagaragariye Urukiko.’

The specialized chamber of Kibuye court of first instance found Muhayimana Cyprien not guilty of the alleged crimes because the prosecution could not prove beyond reasonable doubt that the defendant committed the alleged accusations. However, such investigations and proceedings to


establish a fair verdict have sometimes led to protracted hearings in violation of the right to speedy justice.  

3. The Right to Counsel of One's Choice
The right of defendants to call upon a lawyer of their choice in order to protect their interests and defend them against charges is guaranteed under various instruments such as the ICCPR and African Charter. This right is a central feature of the principle of equality of arms, which ensures that the defence will have a reasonable opportunity to prepare its case on an equal footing with the prosecution. Also, as in most matters of criminal law, Rwandan law does provide for the participation of counsel at any stage of the proceedings in ordinary courts.

However, although there were enough laws on the right to legal representation, it was never easy to put it into practice for genocide suspects. The law acknowledges the right to counsel of one’s choice but specifies that he/she cannot be paid by the government. The right affected here is not so much the right to counsel, but a defendant's right to have access to a lawyer of his choice even when he is indigent, without any cost. This is contrary to the ICTR system which provides lawyers even to its so-called indigent defendants. Even though both systems are not without problems and neither are they expected to handle suspects in the same manner; there is however, a disparity between the courts’ treatment of defendants, which necessitates addressing the hinderance in an all-inclusive way.

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564 Art. 14(3) (b) and (d), The International Covenant on Civil and Political Rights (ICCPR); Art. 7(1) (c), The African (Banjul) Charter on Human and Peoples’ Rights (African Charter); Parquet General du Rwanda (PGR) and ASF, Compilation of International Instruments relating to Human Rights and the Administration of Justice, at 13-86; see D. De Beer, Ikurikiranwa mu Nkiko Ry’ibyaha by’itsembabwoko n’itsembatsemba: Amategeko Rishingiyeho, Editions RCN, (1995), at 4-12.


566 See Art. 75(1), Rwandan Code of Criminal Procedure (CCP) which guarantees the accused, the right to counsel.


Owing to the weak judicial infrastructure and little means of the government, suspects have been subjected to feeble legal representation in the aftermath of the genocide. This is visible from the decided cases, where certain courts would deny defendants their right to legal representation. In the early years of genocide trials, judges would not allow adjourning cases to another day, as requested by defendants still seeking lawyers, asserting that it was reason for delaying cases. It was after several criticisms and continuous training of the judiciary that the situation was improved. Various appellate courts reversed decisions that violated the defendant’s right to have legal counsel.

A case in point is the judgment of Ndikubwimana Leonidas who had been sentenced to capital punishment, and on appeal, the Kigali appeals court ruled that, the sentence given to the defendant without observance of his right to have a lawyer was contrary to the 1991 Rwandan Constitution, and Article 36 of the 1996 organic law. Later the appeals court found the defendant not guilty and he was acquitted. Literally translated from the court ruling in Kinyarwanda, the court put as follows the acquittal:

‘Rusanze urubanza rwahanishijwe uryegwa cyo kwi cya yemererwa kunganirwa na Avoka we runyuranyije n’Itegeko Nshinga y’ry’ku wa 10 kanaka 1991 n’yingingo ya 36 y’Itegeko Ngenga y’ry’ku wa 30 kanaka 1996.’

Also the Cyangugu appeals court found that the previous court had violated Munyangabe Theodore’s right to have counsel of his own choice when the court denied his request to

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571 Art. 14 of the Constitution of 10 June 1991; see also the 2003 Rwandan Constitution as modified by Art.27 of 13 August 2008 Amendment.

572 Urukiko rw’Ubujurire rwa Kigali 30/05/1997, Urubanza rwa Ndikubwimana Leonidas, Igitabo cy’imanza zaciwe n’inkiko z’u Rwanda zerekeranye n’icyaha cy’itsembabwoko n’itsembatsemba cyatangajwe na ASF n’urukiko rw’Ikirenga rw’Urwanda, Umutumba II, urupapuro rwa 257, urubanza N° 15, at 7.

573 Ndikubwimana Leonidas, v. the Prosecutor, the Kigali Appeals Court (RPA N° 04/97/R1/KIGALI, 30/05/1997); P. Clark and Z. D. Kaufman (eds.), After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond, (2008), at 125 et seq.
postpone or adjourn the trial so that he finds a lawyer. Upon examination of the case, Munyangabe was declared not guilty. Literally translated from the court ruling in Kinyarwanda;


In fact, it appears that the quality of the trials kept improving over the years as aptly observed by Michel Moussalli, the special representative for the U.N Commission on Human Rights, that most defendants had advocates in 1999. And in 2000, he found that the trials conformed to international standards. This is the reason why the Rwandan legislator in 2001 decided to entrust high category suspects to ordinary courts which, are supposed to respect due process rights of fair trial with regard to individuals who coordinated the genocide while transferring lower level offenders to a local mechanism.

Although certain fair trial standards have been recognized as forming part of international customary law, it has been a challenge for societies emerging from conflict to observe the duty to prosecute former human rights violators in conformity with international fair trial standards, and due process guarantees. Owing to such criticisms over fair trial standards in Rwanda, several countries have refused to extradite genocide suspects, and in certain instances, opted for prosecution of the suspects.

574 Munyangabe Theodore v. the prosecutor, Urukiko rw’Ubujurire rwa Cyangugu mu rubanza rwa Munyangabe Theodore, (RPA 003/R1/97 06/07/1999).
578 Art. 2(2) of the the International Covenant on Civil and Political Rights (ICCPR), provides for the obligation of fair trial implementation.
G. Excursus: Prosecution of Genocide Suspects by Third States

I. Extradition Matters
As it is apparent from practice, several countries have refused the extradition of Rwandan genocide suspects due to concerns over fair trial and the independence of the judiciary in Rwanda. A case in point is the United Kingdom (UK) high court which so far is not alone in turning down extradition requests to Rwanda. As the UK high court judgment itself asserted, French and German courts have declined extradition requests. 581

On 23 October 2008 the Toulouse court of appeal refused to order extradition to Rwanda in Bivugabango, due to concerns over the administration of fair proceedings and safeguards for defence witnesses. A similar decision of refusing extradition was rendered in Mbarushimana on 3 November 2008 by Frankfurt-am-Main court of appeal. Then, was the case of Senyamuhara in the appellate court of Mamoudzou on 14 November 2008 and Kamali in the Paris court of appeal on 10 December 2008 where extradition was denied. Additionally, on 9 January 2009 in the Kamana case, the Lyon appeals court turned down the extradition request of the defendant on same grounds.

A contrary decision was arrived at in the Swedish Supreme Court in the 2009 case of Sylvere Ahorugeze, 582 where the court cited weaknesses in the Rwandan justice system but decided to extradite the suspect to Rwanda. 583 Sweden did not find that extradition was in violation with Article 6 of the European Convention for the Protection of Human Rights (ECHR) or domestic

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582 Ahorugeze who was the Director General of the Civil Aviation Authority, during the Genocide is allegedly accused of committing Genocide and crimes against humanity in Gikondo Nyenyeri, Kigali City.
Swedish law. However, following Ahorugeze’s application, the European Court of Human Rights (ECtHR) interceded in the case to solve the issue of extradition. The ECtHR demanded that the extradition be stayed until the application can be resolved. And in 2011, the Supreme Court in Sweden ruled that Ahorugeze should be released due to the time spent in detention, a decision that was not well received by the government of Rwanda.\footnote{Article by J. Karuhanga in \textit{The New Times-Rwanda’s First Daily} (29 July 2011), ‘Martin-Ngoga: Release of Genocide Suspect Controversial,’ see also E. Kayiranga, \textit{Kurekura Ahorugeze akidegembya ni ugupfobya Jenoside–IBUKA}, available at \url{http://www.izuba.org.rw/i-i-583-a-24381.izuba}, accessed in June 2012.}

However, an added layer of complexity is that Ahorugeze is at the time of writing, living in Denmark. This means that the Rwandan authorities will have to turn to the Danish and not the Swedish judicial system if they want Ahorugeze extradited.\footnote{The local Sweden news in English ‘Genocide suspect’s appeal denied in Europe,’ available at \url{http://www.thelocal.se/41430/20120614/}, published on 14/06/2012 and accessed in July 2012.}

A challenging case on extradition concerns the UK high court of justice which on the 8 April 2009 settled an appeal of four Rwandan genocide suspects.\footnote{With exception of Dr Vincent Bajinya (Brown), the other suspects, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Ugashebuja were all Bourgmasters (Mayors).}

They appealed against the decision of an extradition judge to send their cases to the UK secretary of state and, in turn, to Rwanda for prosecution in the high court of Rwanda, asserting that they would not receive a fair trial in Rwanda.\footnote{\textit{Brown, Munyaneza, Nteziryayo, and Ugashebuja v. The Government of Rwanda}, at § 1-33.}

As a result, the high court expressed concerns regarding difficulties the suspects might experience in securing witness testimony in proceedings held in Rwanda and concluded that the four suspects would suffer a real risk of violating their fair trial rights if they were to face prosecution in their home country.\footnote{Amnesty International and Human Rights Watch issued statements calling upon the UK not to extradite genocide suspects to Rwanda because of their concerns about fair trials. They argued the UK to exercise universal jurisdiction as an alternative but which was not possible under the laws of the country at the time; see Amnesty International, ‘Donaspostropet Extradite ‘Rwanda Suspects,’ 2 November 2007; Human Rights Watch Press Release: ‘UK: Put Genocide Suspects on Trial in Britain: UK Prosecution Preferable to Extradition,’ 1 November 2007; M.A. Drumbl, ‘Prosecution of Genocide \textit{versus} the Fair Trial Principle,’ 8 \textit{Journal of International Criminal Justice}, Vol. 8, (2010), at 290.} The high court did not contest the evidence that incriminated the suspects for genocide acts in 1994 but instead put emphasis only on the issue of
Schabas argues that the refusal to extradite should be raised in the clearest of cases and not, for example to deny underdeveloped countries the right to try genocide suspects simply because of problems of resources meaning that their courts lack the accessories of those in developed countries.

What is problematic however is that at the time of writing the suspects are free in the UK, which cannot prosecute them domestically because of concerns over the principle of non-retroactivity where its legislation does not provide jurisdiction that goes back to the time of the Rwandan genocide. This is because the UK International Criminal Court Act allows domestic prosecutions for acts of genocide, war crimes or crimes against humanity committed in a foreign country only after the time of its enactment in 2001; in other words, the legislation does not cover crimes committed in 1994. Consequently, this may yield impunity for genocide criminals where certain states refuse to extradite and neither carry out prosecutions themselves, which would be a violation of the aut dedere aut judicare principle.

Indeed, in assessing the above issues, the effects of impunity that arise when courts refuse to extradite suspects could be avoided where domestic laws in the refusing jurisdictions do permit

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prosecution. Then, the pursuit of international human rights regarding fair trials would not mean impunity for genocide suspects. Alternatively, states such as the UK could extradite to other countries with competence to prosecute such international crimes. A case in point is Germany, one of the forerunners in the world concerning national prosecution of international crimes by its adoption of universal jurisdiction laws.

II. Third State Prosecutions: Case of Rwabukombe in Germany

Germany denied the extradition request of Rwabukombe to Rwanda because there were doubts as to whether he would receive a fair trial and decided to carry out the trial in its domestic courts. The refusal to extradite Rwabukombe, a former mayor of the Muvumba commune followed the ICTR precedent where the Tribunal had refused to transfer cases to Rwanda, raising doubts on the independence of the Rwandan judiciary from political influence, the possibility of life imprisonment with solitary confinement, and concerns over the protection of defence witnesses in Rwanda.


595 See § 1 Völkerstrafgesetzbuch (2002) and before this code, § 6 No. 1 StGB was applicable. § 7 II No. 2 StGB, provides that where there is non-extradition, German courts may prosecute; C. Ryngaert, Jurisdiction in International Law, United States and European Perspectives, (2007), at 564 et seq.

596 Rwabukombe was a mayor of Muvumba commune in the Eastern province during the 1994 genocide.

597 The Tribunal was not convinced that the accused would receive fair trial if transferred to Rwanda despite the abolution of death penalty; see Prosecutor v. Kanyarukiga, ICTR (Referral Bench), Decision of 6 June 2008; Prosecutor v. Hategekimana, ICTR (Referral Bench), 19 June 2008.
Following his arrest on 26 July 2010, Rwabukombe was placed in pre-trial custody. On 29 July 2010 he was charged under the German penal code with genocide, murder and abetting murder before the higher regional court of Frankfurt am Main. On 8 December 2010, the court confirmed the charges against Rwabukombe. His trial was opened on 18 January 2011, and at the time of writing, is still underway. It is submitted that this anticipated lengthy trial further indicates the complexities involved in dealing with international crimes cases. However, this is understandable given the difficulties involved, such as the travelling of investigators to Rwanda, interviews in different languages, translation of available documents into German, the need for witnesses from Rwanda to travel to Germany, interpretation in court from Kinyarwanda to German or the reverse, and so many other obstacles, such as accommodation, which actually render the trial very expensive in nature. Other inconveniences and shortcomings faced include the fact that a number of witnesses from Rwanda sometimes face a cultural shock of the court proceedings and structure with which they are not familiar, which, in the end, may hamper their confidence and consequently the credibility of their testimony due to intimidation or fear and uncomfort in testifying. Also, the standards of proof in developed countries’ judicial systems are sometimes different from the available evidence. For instance in regard to standards in the Rwabukombe case in Germany, eye witnesses are regularly unable to provide required documents as evidence of the suspect’s crimes, or to give exact dates and time when the crimes were committed by the suspect. It is very hard to get minutes of meetings or video clips of all facts regarding the accusations, as often demanded by the court, which is perhaps right in the context of Europe standards but not practical in Africa, where it is rare to find recorded and well-preserved evidence other than the oral testimony of witnesses and hearsay evidence.

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598 See § 220a of the German Criminal Code (Strafgesetzbuch, StGB).
599 See §211 of the German Criminal Code (Strafgesetzbuch, StGB).
Another challenge faced is the uncertain protection from danger or ill treatment of defence witnesses in Rwanda. And finally, the translation of documents is a difficult process because sometimes coded language is used or words in Kinyarwanda that cannot be translated within the context of their actual meaning.⁶⁰²

On a positive note, there are several advantages of third state prosecutions. In particular, the case at hand affirms the international criminal law principle that there shall be no tolerance of impunity of persons who committed grave human rights abuses, no matter where they may be or where the crimes were committed.⁶⁰³ Also, due to credible justice systems, third state prosecutions, especially in developed countries, have a reputation of respecting fair trial rights of defendants as provided for under international law and national law. Specifically, in addition to full observance of the due process rights of defendants, the German system is characterised by an independent judiciary where the trial itself would be an exemplary lesson to several other countries in conducting prosecutions under the principle of universality.⁶⁰⁴

Unlike several countries, Germany has a pure universal jurisdiction statute, which is called the code of crimes under international law, (Völkerstrafgesetzbuch-VStGB).⁶⁰⁵ Germany has

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prosecuted suspects of international crimes based on this code which covers crimes committed after its entry into force on 30 June 2002.\textsuperscript{606} For crimes committed before the entry into force of the \textit{Völkerstraftgesetzbuch}, Section 220a of the \textit{Staatsgesetzbl.}, (StGB) was used in the case of genocide. According to the more recent \textit{Völkerstraftgesetzbuch}, German national courts are competent to prosecute and try alleged perpetrators of genocide, crimes against humanity and war crimes regardless of where the crimes were committed. Therefore, it is important for other states to learn from German practice in order to comply with the \textit{aut dedere aut judicare} principle.\textsuperscript{607}

Apart from Germany, there are several countries that have carried out prosecutions for genocide of Rwandans who had sought refuge in countries such as the Netherlands, France, Belgium, Denmark, Norway, Finland, Sweden, Canada and the US.\textsuperscript{608} According to information provided by the genocide fugitive tracking unit, such tremendous strides against impunity would not give breathing space to genocide fugitives.

\begin{itemize}
\item \textsuperscript{606} C. Ryngaert, \textit{Jurisdiction in International Law, United States and European Perspectives}, (2007), at 564-566; J. Wouters and S. Verhoeven, ‘The Domestic Prosecution of Genocide,’ \textit{Leuven Centre for Global Governance Studies and Institute for International Law}, (2010), No 55, at 32.
\item \textsuperscript{608} Information from the Rwandan National Prosecution Office in Charge of the Genocide Fugitives Unit, June 2012; see examples of such prosecutions in G. Werle, \textit{Principles of International Criminal Law}, 2nd edn, (2009), at 113, MN 302; see also L. Reydams, \textit{Universal Jurisdiction}, (2003), at 196 \textit{et seq}; Amnesty International, \textit{Universal Jurisdiction}, (2001), at 86 \textit{et seq}. After the recent transfer of ICTR suspects to Rwanda, several countries have either deported or extradited suspects to Rwanda for prosecution, see Charles Bandora, a genocide suspect extradited by Norway and Léon Mugesera Case currently in the High Court of the Republic of Rwanda from Canada; see also W.A Schabas, ‘International Decisions, Mugesera v. Minister of Citizenship and Immigration, November 1998,’ \textit{93 American Journal of International Law}, (1999), at 529 \textit{et seq}.
\item \textsuperscript{609} Rwandan National Prosecution Office in Charge of the Genocide Fugitives Unit, June 2012; see I. R. Mugisha, ‘Obama Ki-moon Pay Tribute to Rwandans,’ \textit{The New Times} Kigali, 08 April 2013.
\end{itemize}
Importantly, by virtue of third state prosecutions, the international community shows that there is no safe haven for those who commit international crimes. This is necessary for deterrence and for ending impunity at the national and international level because heinous crimes which go unpunished tend to encourage continued violations of human rights. Therefore, the issue that remains is the need for increased cooperation among states in prosecution of perpetrators of international crimes. The surrender and arrest of fugitives represents a vital form of state cooperation but a state’s unwillingness to surrender or prosecute suspects of grave crimes can become a big barrier to accountability. As put by the UN Secretary General, ‘The fact that the ICTR continues to deliver justice, with the cooperation of some states shows the reality of the new age of accountability and that international criminal justice is a testament to the collective determination to confront the most heinous crimes.’

Notwithstanding the above, states, investigators, prosecutors, judges, and courts of countries whose legislation incorporates this broad concept of universality, should apply it with great prudence, and only if they are certain that convincing evidence is available against the accused, moreover that states with a close link to the case are not about to prosecute. In case states with a closer nexus to the crime are able and willing to prosecute as provided by the ICC complementarity principle, third states should refrain from any prosecution to avoid conflicting jurisdictions by virtue of the subsidiarity principle.

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CHAPTER FIVE: THE TRADITIONAL GACACA COURT SYSTEM

A. Introduction

The word Gacaca originates from the Kinyarwanda word meaning ‘grass’ as a reference to the early conduct of hearings in open places aimed at resolving minor conflicts in society and reconciling the parties.\textsuperscript{616} It is this old Gacaca culture that was transformed to deal with the crime of genocide in the aftermath of war.\textsuperscript{617} The official opening of the Gacaca jurisdiction process took place on the 18 June 2002 and the activities of the courts were officially closed on 18 June 2012.\textsuperscript{618} During their time of service, the courts were coordinated by the national service of Gacaca jurisdictions (NSGJ), an agency which was under the ministry of justice.\textsuperscript{619}

Gacaca courts worked in different phases which operated one after the other. The initial phase, which took place from mid 2002 to July 2006, investigated the facts surrounding the genocide in


\textsuperscript{618} Organic Law N° 04/2012/0L of 15/06/2012 terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction; The activities of the courts were officially launched and closed by President Paul Kagame on 18 June (2002 and 2012).

\textsuperscript{619} Art. 152, Constitution of Rwanda of 4 June 2003 provided for the establishment of the National Service of Gacaca Courts (NSGC); see A. Meyerstein, ‘Between Law and Culture: Rwanda’s Gacaca and Postcolonial Legality,’ 32 \textit{Law and Social Inquiry}, (2007), at 467 et seq.
regard to crimes, victims and perpetrators in every cell through confessions and accusations. At the end of the information gathering or investigative phase, the lay judges presiding over the Gacaca court of the cell at the lowest administrative level, carried out the categorization of suspects, followed by trials in the pilot jurisdictions. Then in July 2006, the trial phase was spread to the whole country. The information collected in the previous phase was used to conduct the trials of the accused and those who had confessed. Trials for those placed in the second category took place at the sector level and those placed under Category Three were tried at the cell level, whereas Category One suspects were forwarded to the ordinary courts.

**B. Generalities on Grassroot Courts**

As will be explained below, the court system was conceived during the Urugwiro meetings and went through several modifications in the course of time, based to a certain extent on the findings from the pilot studies in 751 localities which started in 2002.

**I. The Evolution of Gacaca Courts**

Gacaca jurisdictions were established in addition to the standard tribunals to try cases arising from the genocide. At the international level, the U.N had set up the International Criminal Tribunal for Rwanda in November 1994 with jurisdiction to prosecute genocide and other serious crimes. The Organic Law No. 40/2000 of 26/01/2001 governing the creation of Gacaca Courts and organizing the prosecution of genocide crimes and other crimes against humanity committed in Rwanda; A. Molenaar, *Gacaca: Grassroots Justice after Genocide, the Key to Reconciliation in Rwanda?*, (2005), at 112 et seq; P. Harrell, *Rwanda’s Gamble: Gacaca and a New Model of Transitional Justice*, (2003), at 35 et seq; Recommendations of the Conference Held in Kigali from 1 to 5 November 1995 on, ‘Genocide, Impunity and Accountability: Dialogue for a National and International Response,’ Kigali, (December 1995), at 16-24.

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violations of international law in Rwanda. On the national level, the Rwandan government had also created special chambers in 1996 within the existing thirteen tribunals of first instance to try genocide related cases. As years elapsed, the ICTR and specialized chambers were unable to address the overwhelming number of genocide cases.

With the existing judicial system incapable of dealing with the massive numbers of suspects, a more dramatic solution to the problem of accountability for the 1994 genocide was needed. Subsequent to the 1995 international genocide conference and following the 1998 ‘Saturday debates’ held at Urugwiro presidential offices, a series of meetings of leading figures proposed the modification of traditional Gacaca system to deal with genocide criminal proceedings. The participants in the Urugwiro meetings involved members of the government, members of important state institutions, representatives of the army and the police, representatives of the political parties, members of the judiciary and lawyers. It is important to note that initially, there


625 The ICTR had only completed a handful of cases out of the many accused.

626 In March 1995, 7,000 prisoners were living in the prison of Gitarama in the Southern province which normally has capacity for 2,070 inmates. See <http://www.ofm.org/3/news/assasin5.html>, accessed July 2012; More so prisons across Rwanda were built to hold 45,000 detainess but the genocide suspects in detention had escalated to over 120,000. See, Information Center for Prison Studies, Prison Brief For Rwanda , London, International Center for Prison Studies, (2002); Uwurugo rw’Igihugu rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), Isomo ku Itegeko Ngenga N° 16/2004 ryo Kuva 19/06/2004 rigena Imiterere, Ububasha n’Imikorere by’Inkiko Gacaca, (2004), at 2; Urukiko rw’Ikirenga, Umutwe Ushinzwe Inkiko-Gacaca, Infashanyigisho Ku Nkiko-Gacaca, (2001), at 1-2.


was no consensus, with academics, prosecutors, lawyers, and judges rejecting the Gacaca system entirely. Gacaca was also rejected by human rights bodies and the intelligencia.  

However, in response to the social, political and legal problems in the post-genocide period, the Rwandan government launched Gacaca to try lower-level genocide suspects, deriving the idea from a traditional dispute resolution mechanism.

II. Traditional Roots of Gacaca

In Kinyarwanda, the word Gacaca is a culture where Rwandans would traditionally sit on grass, in open places under trees when talking or solving disagreements between neighbours. A related mechanism is found in the Old Testament, where Deborah used to judge cases under a palm tree. To fully understand the origins and purposes of the ancient practice of Gacaca, it needs to be traced around the 17th century, when Rwanda consisted of several smaller territories governed by kings (Abami). The king embodied justice, wisdom and political power. He was the ultimate arbitrator, assisted by the abiru, the guardians of tradition. However, before a conflict was heard by the king, it needed to be brought before the wise men at the lowest units of society, known as inyangamugayo. These community elders would hear grievances of conflicting parties, and finally find solutions. Women and teenagers were only entitled to participate in the audience as defendants or witnesses.

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629 Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, ‘Rwanda Should Celebrate Gacaca Legacy-Karugarama,’ The New times, on the 18, June 2012.


631 Read Judges 4:5 et seq, New International Version Bible (NIV), It provides that Deborah held court under the Palm tree in the hill country where Israelites came to her to have their disputes decided.

The matters handled by the elders included family disputes, fighting, theft, land use, live stock, property damage, inheritance, marriage or adultery.\textsuperscript{633} The objective of Gacaca was to sanction the violation of rules that were shared by the community in order to reconcile the different parties in conflict.\textsuperscript{634} In ancient Gacaca, the inyangamugayo judges never imposed prison terms on those found guilty although in some instances they did banish individuals from the community for a short period but always with the option for them to return eventually and be integrated in the society.\textsuperscript{635}

In an ideal Gacaca hearing, after hearing from the inyangamugayo elders, defendants would first confess their crimes, express remorse and ask for forgiveness from those whom they had injured. Gacaca judges would then demand that confessors provide restitution to their victims and the process would culminate in the sharing of beer or food, usually provided by the guilty party to symbolize the reconciliation of the parties involved.\textsuperscript{636} Where the offending party was unable to pay the total reparation ordered, the other villagers helped him/her to execute the Gacaca decision.

During the colonial period, a western-style legal system was introduced in Rwanda but the Gacaca tradition kept its function as a customary conflict resolution mechanism at the local level. During this time, Gacaca meetings were allowed in rural areas and modern classical courts were mainly utilised by the civilized Rwandans, or foreigners living in Rwanda. So the Gacaca


\textsuperscript{634} A.S. Mbonyintege, Gacaca Ishobora ite kongera kuba Inzira y’Ubwiyungwe bw’Abanyarwanda, Urumuri rwa Kristu, (15 August 1995), at 15.


mechanism continued to function but was inferior to the new system. Serious cases such as work contracts and manslaughter were then to be handled in the formal courts.\footnote{F. Reyntjens, ‘Le Gacaca ou la Justice du Gazon au Rwanda,’ 40 \textit{Politique Africaine}, (1990), at 37-40.}


The main focus of the ‘ancient Gacaca’ was offences related to property and civil disputes, until after the 1994 genocide when the focus changed to include serious crimes like genocide due to the huge number of suspects. The relation between the ‘old’ and the ‘new’ Gacaca portrays a difference in nature as illustrated below in the establishing laws.

III. Legal Basis of Gacaca Courts
In accordance with the 2001 organic law, four categories of genocide suspects were established and Gacaca courts were introduced at all administrative levels of the country i.e cell, sector, district, province and Kigali city. The 2001 organic law was repealed by the 2004 organic law which merged the old categories, reducing the overall number to three categories to be heard on two administrative levels only, the cell and sector. This law also known as the Gacaca law was amended in 2006 after the reform of administrative levels in the country and was aimed at maintaining the territorial jurisdiction of Gacaca courts. Subsequently in 2007, it was again amended in order to reduce the number of cases in the first category by reclassifying some of them into the second category. This would permit some of these cases to be tried by Gacaca courts while maintaining their gravity. The second category covered not only the perpetrators it already contained but also came to include high profile murderers, torturers, and those who had degraded the dead bodies of victims.

Finally, in 2008 the Gacaca law was modified in response to the problem expressed by the public regarding suspects of the first category who had incited the killings but were not being tried by the courts, like orchestrators at the sub prefecture and commune level. The amendment was also created as a response to the problem expressed by victims of rape and sexual violence who complained that they were being neglected by not receiving justice, yet they are the ones who had suffered lasting consequences such as infection with HIV/AIDS, which was still claiming their lives. This law further gave Gacaca courts the authority to take over the trial of cases in its jurisdiction that were being tried in ordinary courts and had not yet been definitively concluded.

While the 2001 organic law that established Gacaca was not applied in practice, the 2004 Gacaca law was put into operation by organising the prosecution of genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994. This Gacaca law also re-classified suspects into three categories based on the gravity of the charges as indicated below.\textsuperscript{647}

\begin{enumerate}
  \item \textbf{First category}
    \begin{enumerate}
      \item Any person who committed or was an accomplice in the commission of an offence that puts him or her in the category of planners or organizers of the genocide or crimes against humanity;
      \item Any person who was at the national leadership level and that of the prefecture level; public administration, political parties, army, gendarmerie, religious denominations or in the militia group, and committed genocide or crimes against humanity or encouraged others to participate in such crimes, together with his or her accomplice;
      \item Any person who committed or was an accomplice in the commission of the offence that puts him or her among the category of people who incited, supervised and became ring leaders of the genocide or crimes against humanity;
      \item Any person who was at the leadership level at the sub-prefecture and commune; public administration, political parties, army, gendarmerie, communal police, religious denominations or in the militia, who committed any crimes of genocide or crimes against humanity; or encouraged others to commit similar offences, together with his or her accomplice;
      \item Any person who committed the offence of rape or sexual torture together with his or her accomplices.
    \end{enumerate}
  \item \textbf{Second category}
    \begin{enumerate}
      \item A notorious murderer who distinguished himself in his or her location or wherever he or she passed due to the zeal and cruelty employed, together with his or her accomplice;
      \item Any person who tortured another even though such torture did not result into death, together with his or her accomplice;
      \item Any person who committed a dehumanizing act on a dead body, together with his or her accomplice;
      \item Any person who committed or is an accomplice in the commission of an offence that puts him or her on the list of people who killed or attacked others resulting into death, together with his or her accomplice;
      \item Any person who injured or attacked another with the intention to kill but such intention was not fulfilled, together with his or her accomplice;
    \end{enumerate}
\end{enumerate}

\textsuperscript{647} Art. 51 the Gacaca Law of 19/6/2004 as modified by Art. 9 Organic Law N\textdegree 13/2008.
f) Any person who committed or aided another to commit an offence against another without intention to kill, together with his or her accomplice

**Third category**

The person who only committed offences related to property. However, when the offender and the victim come to a settlement by themselves, settle the matter before the authorities or before the witnesses, the offender shall not be prosecuted.  

The different categories of suspects were heard nationwide at two administrative levels, the cell and sector level. The Gacaca courts of the cell only heard cases of suspects in Category Three whereas cases of suspects in Category Two were heard at the sector level. The sector also had an independent jurisdiction for appeal cases from Category Two. And as for Category One, they were forwarded to the national courts with exception of some category one suspects that were transferred to Gacaca jurisdiction by the 2008 amendment. Most grassroots cell level Gacaca courts, however, alone exercised the key function of initial investigation and categorization of cases and forwarded them to their respective jurisdictions hence carrying out the function of the prosecution.

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648 Art. 95, the Gacaca Law of 19/6/2004; Arts. 1(2), 2 of Instructions N° 14/2007 of 30 March 2007 of the Executive Secretary of the National Service of Gacaca Courts concerning compensation of property destroyed during the genocide and the commission of other crimes against humanity between 1 October 1990 and 31 December 1994; Amicable settlement was also provided for in Art. 14(d) of Organic Law N° 08/96; see details in Y. De Wolf, R. De Wolf, and C. Ntampaka, *Itsembabwoko n’Itsembabtesemba mu mategeko y’Rwanda, ASSEPAC Editions*, (1997), at 29-31.


650 There were a total of 9,013 cell level courts and there were 1,545 sector level Gacaca courts in total, however, because some of them had heavy case loads, 1,803 additional benches were created to complement these courts.

651 Art. 85 of the Gacaca Law of 19/6/2004. The means of appeal recognized by this organic law are: Opposition, Appeal and Review of judgement. Gacaca courts of appeal were 1,545 in total, however because some of them had heavy case loads, 412 additional benches were created to complement these courts.

652 All the perpetrators of the first category prior to the 2008 amendment were tried by national courts; after that, only category one (a) and (b) of Art. 51 as modified by Art. 9 of Organic Law N° 13/2008 remained within the competence of the ordinary and military courts and rest were transferred to Gacaca.

since sentences depended on the category of the defendant. Classification of genocide suspects into categories based on the gravity of the charges helped in determining the respective court with jurisdiction over the matter.

Both levels of Gacaca cell and sector, consisted of a general assembly which comprised of residents over eighteen years, with elected inyangamugayo judges facilitating the process. The inyangamugayo had to be a Rwandan national over the age of twenty-one, and an honest, trustworthy person, free from the spirit of sectarianism and without any previous criminal conviction or having even been considered a genocide suspect. Despite this criterion, at the beginning of the data collection at the national level, the Gacaca process was disrupted by genocide accusations against 46,000 elected inyangamugayo representing 27.1% of the total number of the initially elected lay judges which led to their dismissal from the inyangamugayo. The numbers of judges nationwide were around 17,000 with women constituting around 34.3%, and men 65.7%. The judges usually sat once a week before a required quorum of 100 members of the general assembly. Sessions often had to be postponed when the quorum was

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not reached. The modus operandi of Gacaca courts was popular participation, involving the community in all activities of the institution.\textsuperscript{659}

By turning from classical courts to the traditional system of Gacaca with its elements of reconciliation, punishment and the involvement of the population, suspects were encouraged to confess both before they had been accused and again following their hearing in return for a reduced sentence.\textsuperscript{660} Victims were equally encouraged to forgive perpetrators.\textsuperscript{661}

Gacaca judges could sentence those found guilty to imprisonment, community service,\textsuperscript{662} or order them to make reparations to victims.\textsuperscript{663} Whereas Category Three suspects were sentenced to restitution for damages caused, Category One and Two sentences varied depending on whether suspects were guilty with or without confession, or with confession during trial and whether they were minors between 14-18 years when the offence was committed.\textsuperscript{664}

Sentences for those guilty without confession included life imprisonment with special provisions for Category One while Category Two (a-e), could incur a 10-15 years’ imprisonment, then category two (f) faced 7-5 years’ imprisonment with the possibility of commuting half of the sentence to community service. Sentences for those guilty with confession during trial included, 25-30 years’ imprisonment for Category One, and with possibility of commuting half of the


\textsuperscript{660} Art. 54 of the Gacaca law of 19/6/2004.

\textsuperscript{661} According to Art.34 of the Gacaca Law of 19/6/2004, A victim, is anybody killed, hunted to be killed but survived, suffered acts of torture against his her or her sexual parts, suffered rape, injured; or victim of any other form of harassment, and whose house and property were destroyed or plundered because of his or her ethnic background or opinion against the genocide ideology.


\textsuperscript{663} Art. 72, 73, 78 of the Gacaca Law of 19/6/2004 as amended to date; see discussion in R. Cryer et al., An Introduction to International Criminal Law and Procedure, (2007), at 35.

sentence to community service, while Category Two (a-e), would incur 6.5-7.5 years’ imprisonment, with the possibility of commuting half of the sentence to community service and having one third suspended. Category Two (f) incurred 3-5 years’ imprisonment and with the possibility of commuting half of the sentence to community service and having one third suspended. Minors who were below 14 when they committed genocide crimes were not punished, they were ordered to follow a rehabilitation program in a correctional centre (Gitagata in Bugesera district), those who were 14 and over but still under 18 when they committed the crimes received smaller sentences in comparison with adults who had committed the same crimes.\textsuperscript{665}

Similar to the 1996 organic law, it is pertinent to note that the Gacaca law did not to include substantive criminal provisions, but relied on domestic criminal law that was applicable at the time of the genocide.\textsuperscript{666} Gacaca dealt with crimes in the penal code but which were committed with a genocidal intent.

IV. A Standard Gacaca Trial

Gacaca proceedings started by issuing summons to all parties concerned, indicating the date of trial.\textsuperscript{667} Before the date of trial the accused was permitted to call his witnesses as he wished. On the day of the trial, the court would first read the provision of the Gacaca law that:

‘Any person who committed the offence of genocide and other crimes against humanity committed between 1 October 1990 and December 31, 1994, may confess, plead guilty, repent and ask for forgiveness before a duly constituted competent bench.’\textsuperscript{668}

In order to be accepted as confessions and benefit from reduced jail sentence, guilty plea, repentance and apologies required the defendant to give a detailed description of the confessed offence, ‘how he or she carried it out and where, when he or she committed it, witnesses to the facts, persons victimized and where he or she threw their dead bodies and damage caused,

\textsuperscript{666} Art. 1 of the Gacaca Law; see also P. C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Reparation, (2012), at 24 et seq.
\textsuperscript{667} Art. 82 of the Gacaca Law of 19/6/2004. The summons are issued by the secretary of the Gacaca Court, through the grassroots organs of where the defendant resides or to the authority of where he or she is detained.
reveal the co-authors, accomplices and any other information useful to the exercise of the public action, and apologize for the offences that he or she had committed.\textsuperscript{669}

If the accused did not plead guilty, the Gacaca court judges mentioned the accusations and then welcomed witnesses supporting the charges.\textsuperscript{670} After that, the suspect was given the opportunity to defend himself since there were no lawyers and provide evidence or witnesses to his account. Then the floor was opened to the general assembly to provide testimonies and express their views on the trial. At this stage new witnesses from the audience would engage in the discussions to give their opinions about the case.\textsuperscript{671} On average, trials would last around eight hours in open spaces in full view of the community and in certain instances, a case would take the whole day, from morning to evening and, if it was not complete, then, it would proceed on another day determined by the court, until the case was concluded.\textsuperscript{672}

Once the court found that enough information had been obtained, the president of the court asked the secretaries, who were also among the lay judges, to read to the audience what had been written during the day. If there was a complaint about precision or missing information, the secretaries made relevant correction, and asked parties and witnesses to sign what they had said. Everything said and done during the Gacaca session was recorded in the notebook of activities.\textsuperscript{673}


\textsuperscript{672} Urukiko rw’Ikirenga, Umutwe ushinzwe Inkiko-Gacaca, Imfashanyigisho ku Nkiko-Gacaca (2001), at 41-42.

Before the president closed the court, he announced the next session and what cases would be heard at that hearing. Sometimes the court adjourned or pronounced its sentence the same day, but usually the sentence was pronounced over the next few days. The final decision, rested with the inyangamugayo who had to weigh all the evidence available and pass judgment on the defendants after private deliberations. If the judges failed to reach a consensus, before deciding on the person’s guilt, a majority decision of the judges would suffice. This unique kind of court process led to swift trials in a relatively short time.

C. Status of Gacaca Case Law

Right from the first trials held in the pilot phase, Gacaca was very efficient in bringing genocide suspects to justice. In a period of ten years, Gacaca courts tried 1,958,634 cases, with approximately 37,000 convicts serving their sentences in various prisons. About 1.2 million cases fell in the third category, which involved suspects accused of crimes of a relatively lesser magnitude like looting and destruction of property. This helped in clearing the backlog of genocide cases, reduced prison overcrowding and delivered expeditious trials. These trials have resulted in acquittals, reparations, imprisonment and community service as an alternative to imprisonment.

In the ten years of Gacaca courts’ functioning, out of the 60,552 Category One case files, 53,426 suspects were convicted of genocide charges whereas the remaining 7,126 were acquitted. Also out of the 577,528 Category Two cases, 361,590 suspects were convicted and 215,938 suspects were acquitted. And out of the 1,320,554 Category Three cases, 1,266,632 defendants were acquitted.

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678 In 2012, less than 37,000 detainees were still in prison for crimes in relation to the genocide, others have been released to serve community service (TIG), and the rest were released after confession, while others were found innocent; see also LIPRODHOR, Rapport de monitoring des prisons au Rwanda, at 4 and 15, available at <www.liprodhor.org.rw/rapports.html>, accessed July 2012.
ordered to pay reparations and 54,002 of the suspects were regarded to be innocent of offenses against property. The decided cases therefore constitute important jurisprudence for this study as discussed below.

D. Analysis of the Gacaca Case Law

Whereas it was impossible to examine all the above Gacaca cases, the author focuses on representative cases from all the three categories describing how Gacaca functions. There was a selection of informative cases from Category One, Two and Three in order to demonstrate the achievements and weaknesses of the Gacaca process. The section below shows some of the decided cases from all categories and their corresponding verdicts.

I. Gacaca court of Gahunga Sector versus Turikumana
II. Gacaca Court of Rusebeya cell versus Gakumburwa
III. Gacaca Court of Rukoma sector versus Gatera
IV. Gacaca Court of Nyarubuye sector versus Habimana
V. Gacaca court of Rukoma sector versus Mbaraga
VI. Gacaca court of Nyakiliba/Kayove sector versus Munyagishari
VII. Gacaca court of Cyanyanza sector versus Nyirabarinda
VIII. Gacaca court of Nyakabanda sector versus Musangwa
IX. Gacaca court of Kirwa sector versus Twagirumukiza
X. Gacaca court of Kirwa sector versus Mbakenge
XI. Gacaca court of Nyarubuye sector versus Kageruka
XII. Gacaca court of Nyakabanda sector versus Mwamini
XIII. Gacaca Court of Ndaro sector versus Ntawuwuhunga
XIV. Gacaca court of Rusayo cell versus Sinaruhamagaye
XV. Gacaca court of Rusayo cell versus Simungua
XVI. Gacaca court of Gitega sector versus Kaneza

For statistical data, see National Service of Gacaca Courts, Summary Report on Gacaca Courts Activities, (June 2012), at 34.
<table>
<thead>
<tr>
<th>Accused</th>
<th>Summary of accusation and Category (Cat)</th>
<th>Date of Judgment/Sentence</th>
</tr>
</thead>
</table>
| Gakumburwa Martin (Western Province) | Accused of burning houses and looting property in 1990, like Murigo Berchimas’s house because he was Tutsi.  
                              Category (Cat): 3 (No confession)                                                              | 10/05/2008: Guilty of burning a house and looting its property and charged to pay 25,000 RWF francs. The defendant was dead and the representative was his wife. |
| Gatera Simon (Southern Province) | Aided to commit murder, complicity in the killing of Muderevu’s Children, Kamanayo, Niyonsaba, and Mukantaho, Participation in criminal attacks, (Cat 2). Category: 2 (No confession) | 05/06/2007: Guilty and sentenced to 19 years and no community service because he did not confess to the crimes. |
| Habimana Berenari (Eastern Province) | Participated in serious attacks, complicity, killing and rape accusations, (Cat 1) and (Cat 3) for looting. He killed, instigated and encouraged others to kill Tutsis in various cells like Rugarama and Kirhe (Cat 2). Category: 1, 2 and 3 (No confession) | 02/02/2009: Guilty and sentenced to life imprisonment. |
| Kageruka Tesfori (Eastern Province) | Committed rape (Cat 1), together with other suspects, he killed various victims and participated in criminal attacks, (Cat 2). He also looted and destroyed houses (Cat 3).  
                              Category: 1 (No confession)                                                                  | 27/06/2006: Sentenced to life imprisonment and on appeal on the 16/10/2008, he was given life imprisonment under solitary confinement (special provisions) and loss of civic rights. Though he did not confess at sector court, he confessed at appeal level. |
| Kaneza Hamudari (Kigali City)   | Genocide acts in 1994 in various cells (Cat 2), participated in attacks, accomplice to murder, going to roadblocks, unlawful gun possession, and rape (Cat 1)  
                              Category: 1 and later category 2 (Confessed)                                                      | 12/10/2009: Life imprisonment and loss of civic rights. On appeal on the 20/03/2010, the court sentenced him to 19 years and was also to pay the looted property. |
<p>| Mbakenge Laurent (former Kigali-Rural now Northern Province) | On the 18/04/1994, he committed property crimes and category 2 crimes by killing several Tutsis in 1994. Category: 2 but later put in Cat 1 because of rape (No confession) | 06/11/2008: On appeal, life imprisonment under solitary confinement because of rape. |
| Mbaraga Nahason (Southern Province) | Participation in gangs of killers, accomplice to Gatera Simon in the murder of Muderevu’s          | 05/06/2007: Not guilty because there were no incriminating witnesses for the killing of the |</p>
<table>
<thead>
<tr>
<th>Name</th>
<th>Category/Location</th>
<th>Details</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Munyagishari Bernari</td>
<td>(Western Province)</td>
<td>Supervised and led genocide acts in 1994 (Cat 1).</td>
<td>20/09/2007: Though he confessed, he was found innocent on all the charges.</td>
</tr>
<tr>
<td>Musangwa Hamissi</td>
<td>(Kigali City)</td>
<td>Accused of sexual violence and rape which infected the victim with HIV (Cat 1), also together with other suspects, they killed by torturing three children at the roadblock (Cat 2). After cutting off the children’s sexual organs and later thrown to the dogs, their bodies were left lying at the roadblock for a week. He also destroyed Kigenza's house (Cat 3). Category: 1 and later 2 (Confessed)</td>
<td></td>
</tr>
<tr>
<td>Mwamini Nyirandegeya Esperance</td>
<td>(Kigali City)</td>
<td>Planned, organised and encouraged others to commit genocide, supervised, led and acted as an accomplice to the acts, committed dehumanising acts on dead bodies (Cat 1 and 2). She also looted property (Cat 3). Category: 1 (Confessed)</td>
<td>02/09/2009: Life sentence under solitary confinement. On appeal on the 17/10/2009, the court sentenced her to life imprisonment only.</td>
</tr>
<tr>
<td>Ntawuruhunga Celestin</td>
<td>(Western Province)</td>
<td>Accused of category 1 crimes, joining paramilitary group and a gang of killers (igitero), being an accomplice to murder where he participated in the attack which killed Sebatimbo Feredariko, thus an accomplice to his death and aided in the death of other nine victims (Cat 2), looting (Cat 3). Category: 1 but later 2 (Confessed)</td>
<td>10/08/2006: Guilty and thus sentenced to 25 years of imprisonment and no subjection to community service. On appeal on the 05/09/2006, he was sentenced to 15 years and was to serve community service for 4 years since he had been detained for 11 years. He had to pay the looted property too.</td>
</tr>
<tr>
<td>Nyirabarinda Evelyne</td>
<td>(Western Province)</td>
<td>Accused of aiding killers by revealing Nikobamera Adereyeni, to the criminal group which dumped him in river Nyabarongo where he died (Cat 2) Category: 2 (No confession)</td>
<td>09/10/2007: Not guilty of the accusations and was declared innocent.</td>
</tr>
<tr>
<td>Simpunga Theoneste</td>
<td>(Western Province)</td>
<td>Looting, and committed property crimes with other suspects (accomplice), Category: 3</td>
<td>11/04/2007: Restitution to the various civil claimants.</td>
</tr>
<tr>
<td>Sinaruhamagaye Lambert (Western Province)</td>
<td>Looted property, (Cat 3). He was in the attack that went to Nyabanyiginya Fideli’s home and looted his live-stock, domestic animals, household furniture and destruction of some other property. They also burnt Doleteya’s house. <strong>Category: 3</strong></td>
<td>25/01/2007: Guilty of looting and therefore had to pay back the civil parties.</td>
<td></td>
</tr>
<tr>
<td>Turikumana Emmanuel (Southern Province)</td>
<td>Committed crimes in many cells, and participated in attacks and gangs of killers which resulted in death of many Tutsis. <strong>Category: 2 (Confessed)</strong></td>
<td>07/08/2007: Guilty, and was then sentenced to 8 years imprisonment. It was a reduced sentence because of confession but no community service.</td>
<td></td>
</tr>
<tr>
<td>Twagirumukiza Alfred (Northern Province)</td>
<td>Rape accusation <strong>Category:1 (No confession)</strong></td>
<td>18/12/2008: Guilty of rape hence life imprisonment under solitary confinement and deprival of civic rights.</td>
<td></td>
</tr>
</tbody>
</table>

As seen in the table, life imprisonment with special provisions or solitary confinement refers to the sentence of imprisonment in an individual cell and the sentenced person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least 20 years of imprisonment.\(^\text{680}\)

1. **Detailed Assessment of the above Case Law**

The Gacaca law divided perpetrators into categories based on the gravity of the offence, and offered the incentive of dramatically reduced sentences in return for a confession or guilty plea.\(^\text{681}\) Confession was central to the process, both for the purpose of truth-findings as well as for reconciliation. It was in line with the need for Rwandan society to find by itself solutions to the genocide problems and its consequences through the innovation of a plea bargaining system that encouraged the notion of justice with restorative ends. Of the above-listed cases, that of Turikumana Emmanuel provides is particularly examplary.\(^\text{682}\)

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\(^{680}\) Art. 3, Law N° 32/2010of 22/09/2010 relating to serving Life Imprisonment with Special Provisons. To date it has not been applied despite the fact that it has been included in the new penal code of 2012. Life imprisonment under Solitary confinement was changed in 2010 to only life imprisonment with special provisions.


The establishing law gave Gacaca courts competence to try the offences of genocide and crimes against humanity committed since October 1990 to December 1994.\textsuperscript{683} The temporal jurisdiction of Gacaca was clearly different from that of the ICTR, whose jurisdiction is limited to try similar crimes committed in 1994.\textsuperscript{684} Though the mandate of the Gacaca courts goes as far back as the 1990, most of the charges were based on the 1994 crimes, and exceptionally for the 1990 offences.\textsuperscript{685} In the case of Gakumburwa Martin, for instance, the court was called upon to decide on events committed before 1994.

Also, in line with the Gacaca law, the judgments had to be motivated to avoid any abuses or partiality concerns.\textsuperscript{686} And in order to promote independence and impartiality as shown in all the cases identified above, the Gacaca session could only meet legitimately if at least the required number of the inyangamugayo judges were empanneled, and in the presence of the general assembly which constituted the community members.\textsuperscript{687} The community was entitled to give either incriminating or exonerating evidence concerning the suspects since the courts outlawed the involvement of prosecutors and defence lawyers, leaving the community where the crime was committed to play all the roles.\textsuperscript{688} The trial of suspects within the jurisdiction of the Gacaca court in the cell or sector where the crime was committed was to give the offender the chance to return to his community, face victims, be sanctioned, and be reintegrated into the community.\textsuperscript{689}


\textsuperscript{684} Art. 1 of the ICTR Statute.


\textsuperscript{686} Art. 25, the Gacaca Law of 19/6/2004.


\textsuperscript{689} National Unity and Reconciliation Commission (NURC), Opinion Survey on Participation in Gacaca and National Reconciliation, Kigali, NURC, (2003); C. Cacioppo, Report on Education and Reintegration of Former Prisoners in Rwanda: The Attempt of Ingando and Viewing Reconciliation as a Duty Instead of a Choice, \textit{Ligue des
Given the fact that crimes were committed in public, the same eye witnesses had to disclose the truth, recount the facts, and participate in prosecuting and trying of the alleged perpetrators. For example, in the cases of Gakumburwa Martin, Gatera Simon, and Habimana Berenari, the population gave incriminating testimony against the defendants who then were declared guilty. Apart from incriminating testimony, the population would as well give exonerating evidence in favour of suspects as evidenced in the cases of Mbaraga Nahason, Munyagishari Bernari, and Nyirabarinda Evelyne. These defendants were acquitted due to the fact that there was lack of credible witnesses and evidence from the general assembly.

As in the ordinary courts, the defendant was entitled to the presumption of innocence before a Gacaca court. This applied even when suspects had confessed as indicated in Munyagishari Bernari’s trial, who was acquitted even though he had initially confessed or pleaded guilty. Consequently, the presumption of innocence applied irrespective of a confession, guilty plea and expression of remorse. Confessions did not take away the duty of the inyangamugayo to examine whether the defendant committed the alleged crimes or not.

Although Gacaca courts are community courts, the panel of inyangamugayo acted as arbitrators or judges and were not obliged to follow the people’s views, they had to make independent decisions as is apparent in the cases of Habimana Berinari and Musangwa Hamissi. For instance...


693 Gacaca Court of Nyarubuye sector v. Habimana Berenari, judgment of 02/02/2009.


in Musangwa Hamissi’s case of rape, the community said that it was not him but another Hamissi, arguing that the accused was mistaken for another person. Nevertheless, the court scrutinised the credibility of the testimony and found the defendant guilty of rape and sexual violence.\textsuperscript{698} It is important to note that unlike in other cases, rape cases had to be conducted in camera and it was the victim who would decide whether to introduce the matter to Gacaca court for trial or not.\textsuperscript{699} This was to protect rape victims from trauma and public humiliation which was often caused by suspects intimidating them.\textsuperscript{700} Nevertheless, the specific suffering of victims of sexual violence was not addressed in Gacaca courts and victims would often perceive talking about their rape experiences as unbearable.\textsuperscript{701}

Offences relating to rape which Twagirumukiza Alfred,\textsuperscript{702} Mbakenge Laurent\textsuperscript{703} and Musangwa Hammis were guilty of, belonged to Category One and were normally supposed to be tried by ordinary courts. However, the 2008 modifications to the Gacaca law shifted some Category One cases to Gacaca, particularly suspects of sexual violence. That is why the defendants were convicted of rape at the Gacaca sector level. The judges subjected the above-mentioned defendants to the highest punishment under Rwandan law, which is life imprisonment with special provisions, meaning that the convict is held in solitary confinement with pardon being possible only after having served 20 years in prison.\textsuperscript{704} In addition, the defendants were deprived of certain civic rights.\textsuperscript{705}


\textsuperscript{699} Art. 38(3) of the Organic Law N° 16/2004 of 19/06/2004, as modified by Art. 6 of Organic Law N° 13/2008. The Inyangamugayo who violated the professional secrecy in rape cases would be sentenced to imprisonment between 6 months and 6 years.


\textsuperscript{701} It is important to note that not all rape cases were sued in Gacaca despite the available estimations. It is estimated that over 250,000 rapes occurred during the genocide, D. Magsam, ‘Coming to Terms with Genocide in Rwanda: The Role of International and National Justice,’ in W. Kaleck et al. (eds.), International Prosecution of Human Rights Crimes, (2007), at 161-162.

\textsuperscript{702} Gacaca court of Kirwa sector v. Twagirumukiza Alfred, judgment of 18/12/2008.

\textsuperscript{703} Gacaca court of Kirwa sector v. Mbakenge Laurent, judgment of 16/10/2008, case file, N° 94193.

\textsuperscript{704} Art. 72(1) of the 2004 Gacaca Law as modified by Art. 17 Organic Law N° 13/2008.

\textsuperscript{705} Art.76 of the Gacaca Law of 19/6/2004 provides that loss of civic rights may include, loss of the right to vote, being voted, being a soldier, teacher, police, civil servant, doctor, expert etc. However, this sanction was mitigated by Article 15 Organic Law N° 10/2007 amended by Art. 76 of the Gacaca Law of 19/6/2004. Instead, the amended
In Kageruka Tesfori’s case, the defendant was sentenced to life imprisonment with special provisions.\textsuperscript{706} Kageruka received this severe sentence due to his being classified in category one and due to his failure to confess to the charges despite clear evidence of his participation in the crimes.\textsuperscript{707} Life imprisonment with special provisions has been harshly criticized by human rights organizations for not meeting international standards.\textsuperscript{708}

As shown in the above jurisprudence and the Gacaca law, defendants who refused to have recourse to confession, guilty plea, repentance and apology, or whose confessions, guilty plea, repentance and apologies were rejected, incurred heavier sentences, for instance Category One convicts would incur life imprisonment with special provisions (solitary confinement).\textsuperscript{709} It appears that being guilty without confession would lead to strict application of the retributive sentencing regime.\textsuperscript{710} This is why Musangwa Hamissi’s multiple commissions of crimes and his failure to confess subjected him to the most severe sentence under Gacaca law.\textsuperscript{711}

Besides, the cases of Kageruka Tesfori, Mbakenge Laurent, Mwamini Esperance,\textsuperscript{712} and Ntawuruhunga Celestin’s\textsuperscript{713} demonstrate that when there was a material combination of offences, each of which graded the defendant in a different category, the higher category would be considered to be the placement of the defendant. For instance, Kageruka was classified in Category One for rape accusations but he had also committed, various crimes falling under

\textsuperscript{706} Gacaca court of Nyarubuye sector v. Kageruka Tesfori, judgment of 16/10/2008.


\textsuperscript{711} Even before, abolition of death penalty, Gacaca courts’ law could not impose death penalty. Their sentences were limited to imprisonment with a secondary severity of solitary confinement which so far has not been executed in practice though it has been conferred on several convicts. Also a perpetrator who was sentenced for multiple crimes served the most severe sentence; see Art. 18 of the 08/96 Organic Law.


\textsuperscript{713} Gacaca Court of Ndaro sector v. Ntawuruhunga Celestin, judgment of 10/08/2006, case file N° 5.
category Two and Three. So the category covering the more serious crimes took precedence in case of multiple commissions of criminal acts by the same defendant or accomplices.\footnote{Art. 51 of the Gacaca Law of 19/6/2004 modified by Art. 11 Organic Law N° 10/2007, equates the ‘person who committed’ a crime with ‘his or her accomplices.’ Art. 89 of the the 1977 Rwandan Penal Code.}

As for accomplices, they could sometimes fall under different categories and receive different verdicts regardless of their linked accusations.\footnote{For a discussion on complicity, See M.A. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity,’ 99 North Western University Law Review, (2005), at 539-610; L. May, ‘Complicity and the Rwandan Genocide,’ 16 Journal Res Publica, (2010), at 135.} This was also the case in Mbaraga’s Gacaca trial where the defendant was acquitted, while his accomplice Gatera Simon was sentenced to 19 years’ imprisonment and could not be subjected to community service because he did not confess to the crimes.

However, confession was not always followed by community service, as seen in Turikumana Emmanuel’s case. He confessed and in turn received a reduced sentence for his confession, but could not be subjected to community service because he had already finished his detention. Also, Mwamini Esperance could not be subjected to community service because of having received a heavy sentence of life imprisonment with special provisions.\footnote{It is important to note that as a legacy of Gacaca, the recent 2012 Penal Code included life imprisonment with special provisions as the highest penalty replacing the death penalty that was in the 1977 Penal Code. Also the sentence of community service has been included in the 2012 Penal Code for ordinary crimes other than genocide.} Nevertheless, when she appealed to the Nyakabanda sector appeals court, she was then sentenced to life imprisonment without special provisions.

Confessions need to be sincere and true in order to be accepted by the court.\footnote{See discussion in P.C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Reparation, (2012), at 69.} For instance, in the first hearing at sector level, Ntawuruhunga Celestin was sentenced to 25 years’ imprisonment without community service because he had given false testimony concerning his accomplices.\footnote{Art. 73, the Gacaca law of 19/6/2004 provides that it is contrary to the ruling of Gacaca proceedings, and shall be qualified as perjury to give a testimony ascertaining to be telling only the truth and hold evidences for that, take oath and sign it, but later on appears to be false and done on purpose.} Despite his prior sincere confession of killing Sebatimbo Feredariko and six other victims, he did...
not reveal his exact role or individual criminal responsibility in killing some other three
individuals which then aggravated his sentence.\textsuperscript{719}

Nevertheless, at the appeal level, Ntawuruhunga Celestin’s sentence was reduced to fifteen years’
imprisonment including community service. Given that he had already served eleven years in
pre-trial detention, he was released to take up his community service. The rule holds that those
who have been in prison benefit from subtraction of the years already spent in prison from their
final sentence and serve only the remaining years of imprisonment, if any.\textsuperscript{720} Since the
implementation of community service in 2005, there was a significant reduction in prison
overcrowding, as well reintegration of convicts in the community after confession.\textsuperscript{721}

It is crucial to highlight that confessions would at times remain without consequence, as seen in
Mbakenge Laurent’s confession which was rejected on appeal for the reason that it was
incomplete since he denied the rape accusation. Also, the sentence imposed on Kageruka Tesfori
remained the same because he confessed at a later stage on appeal level yet in the prior sector
court he had refused to confess and had denied all the accusations.

It is pertinent to note that appeals would be lodged by interested parties in the interests of
justice, as stipulated in the Gacaca law.\textsuperscript{722} Judgments passed by the Gacaca sector court at first
instance were appealed against to the Gacaca court of appeal at the sector, which would then give
a ruling in the last resort. Judgment pertaining to category three crimes cannot be appealed.\textsuperscript{723}

\textsuperscript{719} S. Straus, The Order of Genocide: Race, Power, and War in Rwanda, (2007), at 97 et seq.
\textsuperscript{720} See Art. 21 of Organic Law N° 13/2008 of 19/05/2008 modifying and complementing Organic Law N° 16/2004
of 19/06/2004 establishing the organization competence and functioning of Gacaca Courts. Also, see Art. 80 of
community service shall first serve community service and if it is proved that the work was exemplary executed,
then, the custodial sentence shall be commuted into community service. Therefore, a convict who pleaded guilty and
received a sentence of community service could actually avoid serving any time in prison.
\textsuperscript{721} See, M. A. Drumb, Atrocity, Punishment, and International Law, (2007), at 88 et seq.
The Category Three cases of Sinaruhamagaye Lambert, Simpunga Theoneste and Gakumburwa Martin reveal that in the absence of the defendant or in the event of his or her death, the offender still had to be held responsible and his successors would be required to pay for the damaged or looted property. This is why Gakumburwa Martin’s wife was ordered to pay 25,000 francs (equivalent to 37 USD) as a result of the fact that the deceased had participated in offences against property. If the offender was dead, reparations would be paid by the heirs of the deceased according to their hierarchy of succession.

The negligible sum or little amount charged shows that most Rwandans are too indigent to pay full damages. In fact, several decisions of Gacaca in regard to payment of damages were not executed. Nonetheless, Sinaruhamagaye Lambert’s case shows that when a convict refused to reimburse or failed to pay, there could be seizure and auctioning of his property, if at all he possessed any. However, the most essential property was not subject to seizure.

Moreover, those who merely committed offences against property were not subject to penal sanctions. They were only liable to pay damages as confirmed by the Gacaca law, which

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729 The most essential property that cannot be subject to seizure includes, inter alia, two thirds of the debtor’s crops, two thirds of his salary, one third of his pension, half of his land, his house, and tools he needs to earn his living. Art. 7 of Instructions N° 14/2007 of 30 March 2007 of the Executive Secretary of the National Service of Gacaca Courts; Similarly, see Code of Civil Procedure, Art. 260(2) of Law N° 18/2004.
states that defendants, who committed offences related to property, are only sentenced to civil reparation for what they have damaged.\textsuperscript{731} It is imperative to establish that paying back what was destroyed was not solely for Category Three defendants; it was imposed on anyone on whom property charges were confirmed regardless of his/her respective category.\textsuperscript{732} For instance, though Kageruka was convicted of crimes in Category One, he still had to pay back the victim families whose property he had looted.

Categorisation did not imply punishment; instead it was what the suspect was guilty of that confirmed punishment. Categorisation was different from sentences and was based on accusations yet sentences depended on convictions. For example, Mbakenge Laurent who was initially in Category Two was later put in Category One because of the rape blame. On the contrary, Munyagishari Bernari was first put in Category One but later placed in Category Two. Also, Kaneza Hamudani started as a Category One defendant but ended up in Category Two. Moving from one category to another meant prescribing different punishments. Specifically, Kaneza Hamudani was accused of rape, a Category One crime, but on appeal it was found out that he was not guilty of rape and then put in Category Two for aiding in the murder of Tutsis, joining gangs of killers or attacks that killed many people.\textsuperscript{733}

In principal, participation in attacks, unlawful gun possession and going to roadblocks did not necessarily lead to criminal responsibility. As a challenge, it was left for the uneducated Gacaca

\textsuperscript{731}Art. 95 Gacaca law of 19/6/2004. The law provides that reparation proceeds as follows; restitution of the property whenever possible or repayment of the ransacked property or carrying out the work worth the property to be repaired. However, if the authors of the offence and the victim have agreed on their own, or before a public authority or witnesses for an amicable settlement, the accused cannot be prosecuted in regard to offences against property as provided in Art. 51 the Gacaca law of 19/6/2004.


judges to define the individual criminal responsibility of the defendant in such accusations, even when the defendant had confessed.

An example of such cases includes Kaneza Hamudari who apologised for going to roadblocks, asserting that though he did not kill at the barriers, he neither assisted nor defended the Tutsis who were in danger at the roadblocks. He also confessed and apologised for unlawful gun possession as a civilian because it may have caused trauma to those victims who would see it, given the dangerous times in 1994 where Tutsis were often attacked in their homes to be killed or looted. On the 12/10/2009, after determining the defendant’s individual criminal responsibility, he was sentenced to life imprisonment and loss of civic rights but on appeal on the 20 March 2010, he was subjected to 19 years’ imprisonment and payment of the looted property as seen in the decision by Gitega sector court in Kigali city.

As noted in the above Gitega sector court, case files were made according to the place where the crimes were committed. Since several defendants had committed crimes in various places, each community at cell or sector level was left to make case files for its own suspects. In case a defendant was convicted in more than one place, he or she would then be charged to serve the heaviest sentence of those which had been pronounced by the various different jurisdictions. And if the various courts pronounced different verdicts of guilt and innocence against the same person, the defendant in question would be subjected to serve the sentence of the court that declared him guilty. The different files created in various jurisdictions explain why the Gacaca

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737 Art. 44(1) of the Gacaca Law of 19/6/2004 determines the territorial competence of Gacaca courts within the cell or sector where the crimes were committed; Ministeri y’Ubutabera (June 1999), *Inkiko Gacaca mu Manza z’Itsembatsemba ryabaye mu Rwanda kuva tariki ya 1 Ukwakira 1990 kugeza tariki ya 31 Ukuboza 1994*, at 6.
archives department has huge records, approximately 60,000,000 case files stored in 17,000 boxes.\textsuperscript{739}

In winding up, justice by Gacaca courts varied from case to case, session to session, and the inyangamugayo that chaired the meetings or sessions. This is because all Gacaca members and inyangamugayo did not have the same capacity in terms of knowledge in the law. In fact, although they were truly men of integrity, not all of them had the capacity to analyse complex legal issues in genocide cases, given the fact that most of them were uneducated. As a consequence, local trials sometimes moulded Gacaca to their own ends, contrary to the initial aims of setting up the courts.\textsuperscript{740} Additionally, the definitions of categories were broad, including such terms as ‘notorious murderers and those who killed with ‘zeal.’ Such imprecision, left substantial loopholes for the inyangamugayo and contributed to significant variation from one jurisdiction to another on how the terms were applied or interpreted.

Therefore, by analysing the above trials and their sentences, a question arises in regard to the real nature of the courts. Based on the relevant laws and available jurisprudence, the following discussion will analyse the exact nature of Gacaca courts in the context of transitional justice and international criminal law.\textsuperscript{741}

\textbf{E. The Nature of Gacaca Courts: Are they Retributive or Restorative?}

This part examines whether Gacaca was a purely retributive or restorative mechanism or whether it played both roles. Retributive justice emphasizes holding individuals accountable for their actions through appropriate punishment and individualizes responsibility to avoid the collective blaming of abstract groupings.\textsuperscript{742} On the other hand, restorative justice shifts the focus from

\begin{footnotesize}
\textsuperscript{739} For instance, genocide in Bisesero, in the Western Province was committed by people from Kigali, Gisenyi, Cyangugu etc which implied different files from various places where same suspects had spread their genocide acts.


\textsuperscript{741} UN Secretary-General, \textit{The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies}, UN Doc. S/2004/616, of 3 August 2004. Transitional Justice and International Criminal Law are seen as linked and mutually reinforcing.

\textsuperscript{742} For an elaborate meaning of Reconciliation, see Chapter Six of this Study.
\end{footnotesize}
individual punishment to the broader needs of the community in an attempt to foster reconciliation after large scale atrocities.\(^{743}\) As for Gacaca, it applied sentences on the one hand and also encouraged dialogue between victims and perpetrators on the presumption that the experience of accusation, confession, and forgiveness would have cathartic effects for the population.\(^{744}\) The table below summarises the nature of the Gacaca courts in the context of international criminal law and transitional justice.

Table: Showing main characteristics of Retributive and Restorative justice \textit{vis-a-vis} Gacaca

<table>
<thead>
<tr>
<th>N°</th>
<th>TYPE OF JUSTICE ITEM</th>
<th>RETRIBUTIVE</th>
<th>RESTORATIVE</th>
<th>GACACA JUSTICE</th>
<th>GACACA NATURE EVALUATION</th>
</tr>
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<tbody>
<tr>
<td></td>
<td></td>
<td>Aims</td>
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<tr>
<td>1</td>
<td></td>
<td>Retribution</td>
<td>Truth</td>
<td>Truth</td>
<td>Semi-restoreative</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Incapacitation</td>
<td>Healing</td>
<td>Speed trials</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>Deterrence</td>
<td>Reconciliation</td>
<td>Eradicate Impunity</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Restoration</td>
<td>Unity and reconciliation</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td>Sentences</td>
<td>Reparations</td>
<td>Life imprisonment and Imprisonment terms</td>
<td>Semi-restoreative</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Death penalty</td>
<td>Shaming</td>
<td>Imprisonment terms</td>
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<td></td>
<td></td>
<td>Life sentence and Imprisonment terms</td>
<td>Community service</td>
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</tbody>
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<table>
<thead>
<tr>
<th></th>
<th>No amnesty</th>
<th>Amnesty/Forgiveness</th>
<th>No amnesty</th>
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</thead>
<tbody>
<tr>
<td><strong>Incarceration</strong></td>
<td>Prisons</td>
<td>No prisons and</td>
<td>Prisons are the</td>
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<td></td>
<td></td>
<td>detention</td>
<td>detention places</td>
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<td></td>
<td></td>
<td>Rehabilitation</td>
<td>There is pre-trial</td>
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<tr>
<td></td>
<td></td>
<td>places</td>
<td>detention</td>
</tr>
<tr>
<td><strong>Main Stakeholders</strong></td>
<td>Judge, prosecutor, lawyer and defendant</td>
<td>Community, arbitrator, offender and victim</td>
<td>Community, Inyangamugayo judges, victims and defendant</td>
</tr>
<tr>
<td></td>
<td>Permanence of the court</td>
<td>Temporary meetings</td>
<td>Temporary in nature</td>
</tr>
<tr>
<td><strong>Role of Parties</strong></td>
<td>Active participation of legally trained judges, prosecution, lawyers and minimal role of defendant. Victim may act as witness.</td>
<td>Active role of non-trained arbitrators, community, victim and offenders. No lawyer and prosecutor</td>
<td>Active role of community, suspects, victims, and non-trained Inyangamugayo. No lawyers and prosecution</td>
</tr>
<tr>
<td><strong>Sub-poena power</strong></td>
<td>Judges have sub-poena powers</td>
<td>No sub-poena powers</td>
<td>Inyangamugayo had sub-poena powers</td>
</tr>
</tbody>
</table>

The characteristics of Gacaca courts as described above mainly emanate from the 2001 and 2004 organic laws.\(^{745}\) Having highlighted roughly the common features of restorative and retributive justice in the above table, the discussion below attempts to analyse the character or real nature of the courts based on their aims, sentencing regime, and stakeholders in more detail.

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I. Aims of Gacaca Courts
Unlike retributive justice which focuses mainly on deterrence and retribution of perpetrators,\textsuperscript{746} Gacaca justice combined both retributive and restorative aims.\textsuperscript{747} It addressed a number of aims, such as identifying the truth, speeding up trials, the eradication of impunity, facilitating unity and reconciliation as well as demonstrating the capacity of the Rwandan people to resolve their own problems.\textsuperscript{748}

Some of these aims depart from the common trend in ordinary courts to a semi-restorative nature of justice.\textsuperscript{749} Taken-alone, Gacaca was partly restorative because it appeared to complement retributive justice with its emphasis on truth and reconciliation, and partly retributive due to the fact that it stressed the need for punishment, deterrence and the eradication of impunity.\textsuperscript{750} By implementing the Gacaca jurisdictions under Rwandan law, the legislator intended to punish those responsible for the genocide, whilst encouraging reconciliation among Rwandans.\textsuperscript{751}

\textsuperscript{746} R. Cryer \textit{et al.}, \textit{An Introduction to International Criminal Law and Procedure}, (2007), at 18-20.
\textsuperscript{748} According to the 2012 Evaluation by the Centre for Conflict Management (CCM), Gacaca attained its set objectives at an average of 87.84%, i.e identifying the truth of what happened during the genocide, 83.5%; speeding up trials of genocide suspects, 87%; Fight against the culture of impunity, 86.4%; Contributing to the national unity and reconciliation process, 87.3%; Demonstrating the capacity of the Rwandan people to resolve their own problems 95%. See also \textit{Rwanda Reconciliation Barometer}, National Unity and Reconciliation Commission, (2010), at http://www.nurc.gov.rw/fileadmin/templates/Documents//rwanda_reconciliation_barometer.pdf, accessed February 2013; National Unity and Reconciliation Commission, (2012), Reconciliation tool, available at <http://www.nurc.gov.rw/reconciliation-tools/itorero.html>, accessed February 2013.
II. Sentences

Although capital punishment by ordinary courts was abolished in July 2007, even before this date, it could not be imposed by Gacaca courts. Common punishments under the formal criminal justice system include life imprisonment and imprisonment terms which were also regular in Gacaca. As a matter of fact, Gacaca courts cannot be considered as purely restorative based on the kind of punishments handed down to convicts. Various defendants were sentenced to life imprisonment and several others were to serve varying imprisonment terms up to 30 years. Therefore, sentences imposed by Gacaca courts were similar to those in conventional courts hence making the courts more retributive and less restorative in this regard.

However, the Gacaca judicial structure of sentences incorporated a system of confession and community service that is unfamiliar to retributive justice. Accordingly, suspects would receive reduced sentences if they confessed their crimes and prison terms would be combined with community service. Even though punishment of criminals was a necessary initial response, it was shaped towards reconciliatory goals for restorative functions, hence making the process semi-restorative. Also, contrary to other restorative processes like the South African TRC, no amnesty was given to perpetrators in Gacaca. Against this backdrop, it can be argued

756 Presidential Order N° 26/01 of 10 December 2001 relating to the Substitution of the Penalty of Imprisonment for Community Service as amended to date.
that sentences in Gacaca contained both retributive and restorative elements but with a slant towards retributive justice.

III. Stakeholders
To be credibly described as restorative justice, the mechanism in question has to involve the community in the whole process. Similarly, Gacaca showed greater resemblance to restorative justice because the resolution of cases mainly relied on large-scale participation of the community members, who were called to testify on what they had endured, done, seen or heard. The main stakeholders included offenders, genocide survivors (rescapés), inyangamugayo judges and community members. The public played a pivotal role, being the prosecution and the witnesses in accusing or discharging the suspects. The inyangamugayo would then pronounce a judgment on the basis of the evidence, witnesses and testimonies presented by the community.

However, the sub poena powers vested in the inyangamugayo assimilated them more to judges in the retributive system. For example, the inyangamugayo judges were empowered to carry out various tasks, including summoning witnesses to testify at hearings, issuing search warrants and imposing punishments on those found guilty. Even witnesses who did not live in the cell or sector would be summoned to appear before the court if needed to provide information.

IV. Evaluation

By analysing the selected characteristics of Gacaca system, it becomes clear that the courts were a mixture of restorative and retributive elements and consequently hybrid in nature. However, while the old Gacaca was a community meeting with powers to arbitrate and organise their own functioning at a local level, the new institution emerges more like a proper criminal court with a punitive function. In contrast with the sole conciliatory nature of indigenous Gacaca, the new mechanism appears different in structure save for its local and participatory character, thereby making Gacaca courts semi-restorative in nature.

In order to appreciate the particularities of this form of justice, there is need to first understand the rationale for adopting the mechanism and then examining the system’s contributions in a transitioning state like Rwanda, as discussed below.

F. Achievements of Gacaca Courts

I. Speedy Justice

From 2002, Gacaca system enabled speedy justice and accountability for genocide crimes by addressing a big number of perpetrators to give an account of their crimes. This reduced the overcrowding in prisons considerably and the caseload for the ordinary courts. In 1998, over 120,000 suspects were being held in congested prisons on genocide charges without any prospects for a trial. Gacaca dealt with the suspects in prison, and also handled the thousands

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765 M. Rettig, ‘Gacaca: Truth, Justice and Reconciliation in Post Conflict Rwanda?’ 51 African Studies Review, (2008), at 25 et seq; National Service of Gacaca Courts, Summary Report on Gacaca Courts Activities, June 2012, at 26. It was established from the start that the Rwandan Gacaca process should be applied and complemented by the necessary laws in order for its proceedings to be conducted as court trials.
more who were accused when the Gacaca courts started operating.\textsuperscript{769} Right from the pilot phase, Gacaca has registered tremendous success in dealing with 1,958,634 genocide cases in a period of ten years.\textsuperscript{770}

However, despite the huge number of cases tried by Gacaca, not all genocide perpetrators were identified and punished for their crimes. This is why the prosecution of genocide crimes continues in ordinary courts as provided by the organic law, which dissolved the Gacaca courts.\textsuperscript{771} After the closure of the Gacaca courts in June 2012, a total of 71,558 case files were transferred from Gacaca to ordinary courts.

The local Gacaca courts ran expeditious trials at the cost of fair trial rights such as lack of legal counsel. However, though several practices were often criticized as violating fair trial rights and creating doubts over the quality of justice dispensed, several other factors helped to protect the credibility and independence of Gacaca courts, such as the sheer number of judges on each panel which made it difficult to exercise any influence on them, especially when inyangamugayo judges had to be nineteen on the bench.\textsuperscript{772}

Related to this was that the sheer number of courts and community members sometimes made it hard for any individual or group to manipulate the entire process.\textsuperscript{773} The reality is that some people in the community knew the truth about who killed and who did not, and if there was a killing, how, why, and by what degree of ruthlessness it took place. This helped in establishing

\textsuperscript{770} National Service of Gacaca Courts, Summary Report on Gacaca Courts Activities, June 2012.
\textsuperscript{771} Organic Law No\textsuperscript{o} 04/2012 of 15/06/2012 terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction.
\textsuperscript{772} At the beginning, the 2001 Gacaca law set the number of judges at nineteen with five deputies, but the 2004 Gacaca law reduced that number to nine judges and five deputies, and eventually, after the reform of this law, to seven judges and two deputies and subsequently to five judges and two deputies. Nonetheless nineteen inyangamugayo might have been much safer to avoid external influence than only five judges that remained which could at times be manipulated.
\textsuperscript{773} Gacaca had over 12,000 jurisdictions which were set up on two administrative levels, cell and sector, with panels of locally elected Inyangamugayo judges hearing genocide cases before the community members.
the facts of the genocide and determining each individual’s criminal responsibility. And in cases where the laws were not observed during the first hearing, the defendants in Gacaca had the right to appeal against the judgment and to receive retrials.

The innovative aspect of Gacaca can surely be recommended in the great lakes region of Africa that has been plagued by wars characterised by gross violations of human rights on the basis of ethnicity, nationality, racial or religious grounds. It is suggested that these states, need to have an increased reliance on such truth and reconciliation mechanisms when it comes to rebuilding communities that have suffered mass atrocities. It is thus important to preserve the Gacaca records, to archive judgments, minutes as well as other documents and make them accessible to the public for education.

II. Reconciliatory Mechanism
The critical question about Gacaca is whether and how it played a role in the reconciliation process. Taking into account the home-grown character of the system to resolve issues arising from the genocide, the system was less formal and closely tied to the communities in which the crimes were committed. Any adult could participate, intervene and testify on either side, since everyone was there; survivors, perpetrators, judges and the general population over 18 years.

775 Arts. 86 et seq. of the Gacaca Law of 19/6/2004. At the level of appeal, Gacaca courts tried a total of 178, 741 cases representing 9% of all the cases tried by Gacaca courts.
This facilitated the process of reconciliation because the proceedings involved the people who experienced the genocide firsthand at every stage, thus encouraging direct engagement and exchange of facts between the accused and victims.\footnote{E. Daly and J. Sarkin, \textit{Reconciliation in Divided Societies: Finding Common Ground}, (2007), at 19 \textit{et seq}; D. Mendeloff, ‘Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice,’ \textit{31 Human Rights Quarterly}, (2009), at 592 \textit{et seq}.}

Positive elements of reconciliation started to manifest through confessions when a Hutu decided to plead guilty, then confess the truth about the Tutsis he had killed,\footnote{A total of 221,012 pleaded guilty and confessed to their crimes in the three categories.} and also identify where the corpses had been placed. As a result, many survivors managed to obtain information about the fate and graves of their loved ones, for a descent burial and the end, this contributed to the historiography of the system as well. Also, through these interactions, information exchange and individual convictions, it was believed that not all Hutu were \textit{génocidaires}.\footnote{For details on collective guilty, see H. Cobban, ‘The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law,’ \textit{27 Boston Review}, (2002), at 4-15; M.A. Drumbl, ‘Law and Atrocity: Settling Accounts in Rwanda,’ \textit{31 Ohio Northern University Law Review}, (2005), at 65 \textit{et seq}.}

However, reality indicates mixed results on the restorative effects of the Gacaca experience. To some participants, it was a feeling of relief and closure, but for others, participation implied uncertainty, re-traumatisation, and fear.\footnote{K. Brouénus, ‘Truth-Telling as a Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts,’ \textit{38 Security Dialogue}, (2008), at 55-76; J. Burnet, ‘The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda,’ \textit{3 Genocide Studies and Prevention}, (2008), at 173-193; A. Kubai, ‘Between Justice and Reconciliation: The Survivors of Rwanda,’ \textit{16 African Security Review}, (2007), at 53-66.} Perhaps, this explains why participation in Gacaca had declined steadily over the years or probably it could be attributed to frustration with the process for the time it consumed at the expense of their daily activities. Also, among those who attended the Gacaca proceedings, only a few were active participants. Those who actively engaged in discussions were predominantly the judges, the survivors and a small group of liberated prisoners.
Another way in which Gacaca attempted to foster reconciliation has been in the partial or complete commutation of prison sentences into community service for those who confessed. Arguably, this type of punishment is not only productive because it helps to practically rebuild the community, but because it also enables those found guilty to reintegrate into the community. However the confession procedure attracted much criticism on the grounds that it could be used as a trade off for reduced sentences other than remorseful feelings. Although a significant number of detainees made confessions, there is a contention as to whether all these testimonies were total or partial, admitting minor crimes, and blaming some people for complicity, mostly those who were already deceased and some testimonies were silent on the involvement of those still alive.

Nevertheless, it can be argued that the repeated act of coming together in the Gacaca sessions, irrespective of what was done there in the sense of content, practically had a transformative influence on social relations. The emotional experience survivors had to go through, narrating what happened or recalling events, could have contributed to inner healing. On the other hand, though it was a humiliating experience for the perpetrators to explain their role in the genocide, it facilitated their integration into the community. Taken as a whole, Gacaca hearings were safe and there was no reported violence in the meetings.

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783 The introduction of community service did not just create an incentive to tell the truth but helped in the quick reintegration of offenders into the society.
III. Affordable Justice

It is argued that the rewards of these courts clearly outweighed their disadvantages because they were informal, cheap, accessible, simple, and people were familiar with the laws and affairs of their community.789 Indeed, turning to the traditional model of Gacaca circumvented the resource constraints because the system was relatively inexpensive, easy to operate and run on a large scale by inyangamugayo volunteers. Furthermore, Gacaca was held in villages where the offence was committed, hence there were hardly any travel expenses and other logistic were minimized or none.790

The mechanism provided affordable justice in terms of funds used when compared with formal courts. For instance, Gacaca cost only 29,665,828,092 Rwandan francs (about USD 52 million) during its operation.791 Yet the international Tribunal for Rwanda has so far cost more than 1.5 billion USD since its inception, with an annual budget of 270 million USD and the ordinary courts have cost 17 million USD in the same period as the ICTR.

IV. Enhancement of Local Transitional Justice Approaches

Gacaca was a form of justice originating from and serving Rwandan culture and a demonstration of the local population’s ability to manage their own conflicts.792 As a result, the reality of reinventing home-grown strategies and adapting them to the Rwandan circumstances at the time facilitated Gacaca to leave behind important lessons in transitional justice.793 Based on aspects of

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791 The 29,665,828,092 Rwandan francs consisted of grants amounting to 18,612,253,199 RWF (62.74%) from the government of Rwanda and 11,053,574,893 (37.26%) from Partners. For an overview on partners see, National Service of Gacaca courts: Report of Gacaca Courts Activities (2012), at 42 et seq.
Gacaca experience, many studies and research have been conducted and will continue to be carried out in order to refine lessons from the process.

The experience of Gacaca provides other states with important lessons for the study of alternative dispute resolution mechanisms in transitional justice. For example, Gacaca has attracted discussions of localized transitional justice in Kenya, South Sudan, Burundi and Uganda, where the relevant officials regularly visited Rwanda to learn from the virtues of Gacaca and often refer to it in their advocacy of community-based trials. Rwanda’s practice may therefore be educative for other societies confronting the aftermath of mass conflict. There is thus much to learn from its achievements, as well as its shortcomings.

G. Shortcomings of Gacaca Courts

Apart from the above major achievements of Gacaca, the system has revealed its own weaknesses that could have undermined the institution’s legitimacy and optimal resolution of the genocide issues. Due to its unprecedented nature in pursuit of justice for genocide crimes, the system was unavoidably imperfect to dispense justice in a satisfactory manner.

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795 For other reconciliation mechanisms, see Bushingantahe in Burundi, in C. Deslaurier, ‘Le Bushingantahe, Peut-il Réconcilier le Burundi?’ 92 *Politique Africaine*, (2003), at 76 et seq.


I. Lack of Legal Representation

Gacaca’s major criticism has been the violation of fair trial rights under international law.\textsuperscript{799} Indeed, it is true that the Gacaca practice and laws did not observe several due process rights, the most noticeable being the right to legal representation and right to reparation.\textsuperscript{800} In the restorative spirit of the original Gacaca, the courts sacrificed many of the procedural safeguards of defendants in criminal trials in support of a more participatory process.\textsuperscript{801} Such issues reflect tensions among the goals of international criminal law and transitional justice.\textsuperscript{802}

In regard to the right to legal representation, lawyers were forbidden from assisting either suspects or victims at any stage of a hearing as their involvement would be considered as a potential threat to the open, non-adversarial approach of Gacaca.\textsuperscript{803} The accused, judge and victims were on equal footing and recourse to a lawyer would merely upset this balance, given the fact that there were no prosecutors and even the inyangamugayo judges were not lawyers themselves.\textsuperscript{804} This element deviates from the practice in formal retributive courts which involve prosecutors and legal counsel.\textsuperscript{805}


\textsuperscript{803} While Article 36 of Organic Law N° 08/96 acknowledged the right to counsel, but not at the expense of the state, the Gacaca Law of 19/6/2004 is silent on the matter.


On the other hand, according to Human Rights Watch, the absence of a public prosecutor placed the burden of proof on the accused.\textsuperscript{806} While the law provides for presumption of innocence, in practice the burden of proof sometimes fell on the accused to prove that he or she did not commit the alleged crime.\textsuperscript{807} In general, ‘The gacaca laws tried to strike a balance by protecting some rights, including the right to be presumed innocent until proven guilty; modifying others, such as the right to have adequate time to prepare a defense; and sacrificing other rights altogether, including the right to legal representation.’\textsuperscript{808}

II. Absence of Reparations
Concerning the right to reparation, the Gacaca law did not prescribe reparation to be given by the offender.\textsuperscript{809} Yet reparations are crucial for amending the harm caused by perpetrators to victims.\textsuperscript{810} Except for restitution of property by some Category Three perpetrators, no reparation was made to survivors. Gacaca courts thus failed in enhancing this right and cannot be considered restorative in this manner, since a key characteristic of restorative justice is that it prioritises reparation.\textsuperscript{811} Although, through the survivors fund, the government contributes 6\% of its annual budget to help survivors in education, health and improving the welfare of the needy genocide victims,\textsuperscript{812} still, this assistance does not tantamount to reparations.

\textsuperscript{806} Human Rights Watch, Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts, (2011), at 69 et seq.
\textsuperscript{807} Human Rights Watch, Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts, (2011), at 4 et seq.
\textsuperscript{808} Human Rights Watch, Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts, (2011), at 69 et seq.
\textsuperscript{812} Improving the welfare of the needy genocide victims is done through le Fonds d’Assistance aux Rescapés du Génocide (FARG); see D. Shelton, \textit{Remedies in International Human Rights Law}, 2nd edn, (2005), at 160 et seq.
As discussed earlier, Gacaca courts were able to award material damages for destroyed or stolen property, but when it came to determining damages for death or injury, this was overlooked. This situation where victims of looting would be compensated through Gacaca courts was unfair in relation to victims of violent crimes who did not receive any compensation.

Obviously, there can be no adequate compensation for the loss of a loved one or for severe injury. However, given the difficult socio-economic conditions of most survivors, the failure of Gacaca legislation to provide victims with appropriate mechanisms of compensation largely undermined the legacy of the institution. It is not always enough to punish only perpetrators of the genocide without compensating victims for the harm suffered in order to establish more harmonious relationships. Nevertheless, one cannot ignore the fact that this was largely due to economic constraints of the country and poverty of a large majority of those convicted who could not afford reparations to the victims.

III. Inadequate Protection of Witnesses
In Gacaca, witnesses were heard directly in public when testifying. This created uncertainty about their security after the testimonies. It was evident that the weak protection measures led

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815 P. C. Bornkamm, Rwanda’s Gacaca Courts: Between Retribution and Reparation, (2012), at 133; Unlike Gacaca, first category perpetrators before ordinary courts incurred civil liability for damages caused during the genocide in addition to their criminal sentences.
to violence of many kinds against genocide survivors, witnesses, and inyangamugayo, which sometimes resulted in murders.

As a result, by failing to provide adequate safety measures, there were biased witness statements on what really happened and some of the truth was left unrevealed, particularly concerning mass graves of genocide victims.\(^{819}\) This was further facilitated by conspiracy for not providing information on genocide commonly known as ‘ceceka,’ literally interpreted to mean ‘keep quiet’, and whoever went against it risked his security or carried the risk of being accused as well.\(^{820}\) Ceceka was a common practice in the region where none survived or with a small number of genocide survivors and it severely compromised the operation of Gacaca itself.\(^{821}\) However, these negative aspects were not widespread, as could reasonably be expected given the challenging situation in the aftermath of genocide.

**IV. Corruption within the System**

Gacaca’s main shortcomings included frequent cases of corruption, bribery of judges, and favouritism in decision making.\(^{822}\) Corruption was seen as a common occurrence which in turn, affected the rights of either suspects, or victims depending on who exercised the vice.\(^{823}\) Various factors have been identified as the cause, such as the poverty of the survivors, the desire of defendants to reintegrate in society, and the financial situation of many inyangamugayo judges, who sacrificed themselves, neglecting their subsistence farming for the expediency of Gacaca trials.\(^{824}\) The fact that Gacaca judges did not receive payment and hardly enjoyed any education,

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made them highly susceptible to corruption, thereby jeopardizing the independence of the courts.\textsuperscript{825}

Actually, about 400 inyangamugayo were dismissed from the Gacaca system on the basis of disgrace and corruption although they had been elected out of the population as men of integrity.\textsuperscript{826} As established by the Rwandan minister of justice, it is not certain how much wrong they had done before they were ejected out of the system because not all of the judges were disqualified on the same day; it was after a long period of service, thus it is difficult to assess the extent of wrong things done.\textsuperscript{827}

V. Instability of Gacaca Laws

Gacaca’s other setback is attributable to legislative weaknesses. For instance, owing to the unprecedented approach and absence of historical templates to refer to,\textsuperscript{828} there were numerous amendments of Gacaca law based on deficiencies identified by the public.\textsuperscript{829} As already highlighted, Gacaca courts were created by the 2001 organic law, which was repealed by the 2004 organic law, which was later amended several times, in 2006, 2007, and 2008.\textsuperscript{830} While some changes helped to improve the process and responded to particular problems that would


\textsuperscript{826} Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, ‘Rwanda Should Celebrate Gacaca Legacy-Karugarama,’ The New times, on the 18, June 2012.

\textsuperscript{827} Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, ‘Rwanda Should Celebrate Gacaca Legacy-Karugarama,’ The New times, on the 18, June 2012.


\textsuperscript{829} See P. Clark, The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda, (2011), at 48 et seq; A. Molenaar, Gacaca: Grassroots Justice after Genocide, the Key to Reconciliation in Rwanda? (2005), at 111 et seq.

\textsuperscript{830} As already cited, Gacaca courts were created by the 2001 Organic law, which was repealed by the 2004 organic law with the latter modified several times, in June 2006, March 2007, and in June 2008; see Organic Law N° 40/2000 of 26/01/2001 replaced by Organic Law N° 16/2004 of 19/06/2004 governing the structure, powers and functions of Gacaca courts relating to the prosecution of genocide crimes and other crimes against humanity committed between 1st October 1990 and 31st December 1994, which was amended by Organic Law N° 28/2006 of 27/06/2006, then Organic Law N° 10/2007 of 01/03/2007 and later modified by Organic Law N° 13/2008 of 19/05/2008.
arise, the constant alteration of fundamental aspects of Gacaca law often affected the population’s comprehension of the justice process.

For instance, suspects would time and again remain uncertain about the court in which to face trial when there was an ongoing amendment, such as alteration of categories, which would in turn affect their confidence in the procedure and process.\(^{831}\) It was also another workload for inyangamugayo to regularly adapt to requirements of new modifications in the laws due to their limited skills.

VI. Non-Prosecution of RPA Crimes

Similar to the ICTR,\(^ {832}\) various criticisms have been advanced on Gacaca for not having addressed Rwanda Patriotic Army (RPA) crimes committed against Hutu during the civil war and its aftermath.\(^ {833}\) Surely, some RPA soldiers shot and killed Hutu soldiers, interahamwe or civilians.\(^ {834}\) These were mainly isolated killings of Hutu by RPA soldiers, who largely took revenge for their relatives, who had been killed during the genocide.\(^ {835}\) Yet, these acts have not been qualified as genocide because RPA did not set out to kill Hutu as an ethnic group.\(^ {836}\)

\(^{831}\) M. J. Trebilcock and R. J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress, (2008), at 2 et seq.


Also, the said killings were not sufficiently systematic and widespread to be qualified as crimes against humanity.\textsuperscript{837} Apparently, these crimes were qualified as war crimes,\textsuperscript{838} consequently falling outside the material jurisdiction of Gacaca courts but under the jurisdiction ordinary courts. Actually, the current Rwandan government did acknowledge on several instances that occasional revenge killings occurred but reiterated that they were to be prosecuted by military courts having competence to try war crimes.\textsuperscript{839} Below are figures of RPA trials before the military courts in the context of the civil war.

**Table showing prosecutions of RPA soldiers**

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Despite these prosecutions,\textsuperscript{840} various criticisms, particularly from victims of RPA crimes have often condemned and regarded the absence of RPA prosecutions by Gacaca courts as victor’s justice,\textsuperscript{841} which to some extent has limited Gacaca’s contribution to reconciliation.\textsuperscript{842} According

\textsuperscript{837} For an elaborate discussion on differences among the different core crimes, see G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 250, 286 and 344, MN, 690, 778 and 928.

\textsuperscript{838} Art. 1(a) of the 2001 Gacaca Law provided for jurisdiction over war crimes which would allow for prosecutions of the RPF. This provision was however removed from the 2004 version.

\textsuperscript{839} The Preamble of Gacaca law of 19/6/2004 only makes reference to ‘the crimes of genocide and the crimes against humanity committed in Rwanda’ thereby excluding war crimes from Gacaca jurisdiction; see further discussions in P.C. Bornkamm, *Rwanda’s Gacaca Courts: Between Retribution and Reparation*, (2012), at 56 et seq; N. Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda*, (2004), at 106 et seq.

\textsuperscript{840} The numbers of RPA prosecutions are likely to increase because investigations are still ongoing.


to various authors, this might diminish the credibility of the justice process among Rwandans who lost their families or friends during those events.\footnote{\textsuperscript{843}}

However, the genocide against the Tutsi minority cannot be equated with the civil war crimes against the Hutu. The first violent behaviour was intended to exterminate, while the second was brutality to avenge.\footnote{\textsuperscript{844}} But the fact that the first was dealt with in Gacaca and the second was excluded from the jurisdiction of the local courts undermines reconciliatory efforts.\footnote{\textsuperscript{845}} Therefore after citing many flaws of the system, this study, finds that Gacaca did not meet all the enormous expectations in resolving genocide consequences.\footnote{\textsuperscript{846}}

\textbf{VII. Interim Remarks}

In the face of many Gacaca weaknesses, the process involved its own strengths that ordinary justice would not be able to attain. Gacaca was the necessary evil of resolving the problem of the case backlog that was in the country after the genocide, where ordinary justice could not be applied. There was no means at the time, no resources and no capacity, both material and human, to try all the cases.\footnote{\textsuperscript{847}} This justifies why it was better to do justice, albeit unsatisfactorily, than not to do justice at all.\footnote{\textsuperscript{848}} The establishment of Gacaca was inevitable since there was no other option, but still it is not recommended for conventional and international trials to be replaced by local-level responses such as Gacaca; instead all efforts should work as complementary

\begin{itemize}
\item \textsuperscript{844} D. Mason, ‘Structures of Ethnic Conflict: Revolution versus Secession in Rwanda and Sri Lanka,’ \textit{15 Terrorism and Political Violence}, (2003), at 83-113.
\item \textsuperscript{847} B. Asiimwe, ‘ Rwandans Refelect on Gacaca as Trials Come to an End’ \textit{The New Times} Kigali, 19 June 2012.
\end{itemize}
Therefore, after assessing the contributions, achievements and shortcomings of the courts, the next chapter will analyze the relationship of Gacaca courts with other retributive judicial mechanisms empowered to try genocide cases, particularly, the Rwandan national courts and the ICTR.

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CHAPTER SIX: A CRITICAL ANALYSIS OF THE RELATIONSHIP BETWEEN THE ICTR, NATIONAL COURTS AND GACACA COURTS

A. Introduction

Rwanda constitutes an important case study of the multiple legacies of a troubled past, which led to diverse levels of enforcement, the *ad hoc* Tribunal, national courts and Gacaca vested with concurrent jurisdiction to prosecute crimes under international law. Concurrent jurisdiction occurs when a particular set of facts gives rise to the jurisdiction of two or more courts.

The problem that this part addresses is how the three different courts trying similar crimes, use different procedures, laws and even prescribe different punishments, for perpetrators of the same situation. This scholarship, therefore seeks to analyze the relationship between the ICTR and national mechanisms (both ordinary and Gacaca courts) over genocide crimes committed in Rwanda. A section is also attributed to discussing the role of such parallel trials towards reconciliation.

B. Jurisdictional Relationship

Article 8(1) of the ICTR Statute provides that the ICTR and national courts shall have concurrent jurisdiction to prosecute persons for serious crimes under international law, and Article 8(2) whereas Article 2 of law N°33bis/2003 is virtually identical to Article 2 of the ICTR Statute and the Genocide Convention, there is a fundamental difference that Rwandan law includes regional groups as protected groups; P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 52 et seq.

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emphasizes that the ICTR shall have the primacy over the national courts of all states. This Article harbors huge tensions because it offers no guidance as to how concurrent jurisdiction is supposed to function in the face of potentially significant differences among the various competent judicial forums which may simultaneously claim jurisdiction on a specific suspect.

Although the ICTR may formally request national courts to defer to the competence of the international Tribunal, it has rarely exercised this right to take over domestic proceedings. Moroever no explicit principles exist for the distribution of suspects between the ICTR and national courts. An unofficial division between the jurisdictions assumes that the ICTR will hear the cases of suspects considered to be among the most important planners and perpetrators of the genocide, while leaving the remaining cases to the national courts.

Ramer argues that this emerging system of international criminal law consists of unclear lines and procedures which may potentially lead to competing claims to jurisdiction. Indeed, other

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authors, such as Werle, assert that the parallel existence of direct and indirect enforcement mechanisms can lead to situations in which national and international courts simultaneously claim jurisdiction to prosecute.\textsuperscript{858} This is because both jurisdictions have the potential to address in parallel, the same disputes involving the same parties and issues.\textsuperscript{859}

For example, Fro duard Karamira became the object of a brief ‘tug of war’ between the ICTR and the government of Rwanda.\textsuperscript{860} Discussions followed between the ICTR prosecutor and the government of Rwanda in 1996 regarding the ICTR pursuing prosecution of Karamira, citing the leadership positions of the latter as an essential criterion for the ICTR to exercise its primacy of jurisdiction in that case.\textsuperscript{861} However, the Rwandan minister of justice pointed out the importance of trying Karamira in domestic courts, and also argued that the government had invested extensive efforts in gaining that the Rwandan justice system had already invested in gaining custody of Karamira who had fled to India.

At last, the ICTR prosecutor withdrew his request for the detention of Karamira until the earlier request of the Rwandan government had been acted upon. When he attempted to leave the airport during a transit stopover in Addis Ababa, Karamira was subsequently deported from Ethiopia to Rwanda.\textsuperscript{862} The trial ended with his being sentenced to death and the sentence was executed in


1998, yet had he been transferred to the ICTR, the maximum penalty would have been life imprisonment.

This scenario shows one of the primary areas of conflict between the ICTR and national courts, namely the distribution of defendants between the two court structures. In cases where the ICTR and the government of Rwanda wanted custody of the same individual, the problem has often been which court to take custody.\(^\text{863}\) This is because the courts have overlapping jurisdictions despite their differences in structure and procedures. If the relationship is not coordinated, the gaps in the allocation of judicial competence to prosecute core crimes may lead to a situation where criminals may escape prosecution, first at the national level, and, if need be, at the international level.\(^\text{864}\)

**C. Disparities among the Different Approaches**

Numerous aspects and practices emanating from a comparative analysis of the Statute of the ICTR and Rwanda’s organic laws for the prosecution of genocide illustrate inequalities in the justice dispensed. Yet concurrent jurisdiction is not essentially meant to take away the equality of the accused persons appearing before the various courts.

The question raised here is whether concurrent jurisdiction has facilitated a process whereby the Rwandan national courts and the ICTR can both administer the minimum guarantees for a fair trial in full equality of the spirit of the ICCPR. In other words, are rights enshrined in article 14


such as the right to counsel guaranteed to accused persons in all courts? Or what discrepancies are in the standards of justice if any?

Article 14 of ICCPR provides that:

1) ‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law;

3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.’

In reference to the above provision, the right to a fair trial entails respect of ‘equality of arms,’ which aims at equal treatment of parties involved and securing them enjoyment of the same rights and guarantees, in terms of the right to defence counsel, expeditious trials, and presumption of innocence. Yet there is an apparent disparity in the implementation of fair trial

865 Art.14 of International Covenant on Civil and Political Rights which entered into force in 1976.
866 Also Art. 1, Organic Law N° 20/2006 of 22/04/2006 provides that criminal judgements must be held in public audience, be fair, impartial, comply with the principle of self defence, cross examination, treat litigants equal in the eyes of the law, base on evidences legally produced and be rendered without any undue delay; see S. Negri, ‘Equality of Arms-Guiding Light or Empty Shell?’ in M. Bohlander, International Criminal Justice: A critical Analysis of Institutions and Procedures, (2007), at 11-16.

\textbf{I. Right to Legal Counsel}

The ICTR defendants have the right to be assisted by counsel of their choice or to have legal assistance assigned to them without payment if the defendant in question does not have sufficient means to pay for it.\footnote{ICTR Rules of Procedure and Evidence (ICTR RPE A, (i), as amended in 1996; The Prosecutor v. Casimir Bizimungu et al., Case N° ICTR-99-50-T, Judgment of 30 September 2011; S. Negri, ‘Equality of Arms-Guiding Light or Empty Shell?’ in M. Bohlander, \textit{International Criminal Justice: A critical Analysis of Institutions and Procedures}, (2007), at 20.} Similarly, the Rwanda legislation recognizes the right to counsel for defendants tried by national courts, but does not provide defense counsel for indigent defendants.\footnote{Art. 36 of Organic Law N° 08/96; Amnesty International, ‘Rwanda Unfair Trials: Justice Denied,’ April 1997 (AI Index AFR 47/008/1997); W.A Schabas, ‘Genocide Trials and Gacaca Courts,’ \textit{3 Journal of International Criminal Justice}, (2005), at 879-895; Most defendants were indigent and could not afford lawyers but the courts could not provide counsel at government expense. See forexample \textit{Public Prosecutor v. Banzi Wellars et al.}, Judgment of 25/05/2001,(R.M.P 61099/S5/ML/KRE/KD, R.P. 221/R2/2000), Urukiko rwa mbere rw’iremezo rwa Gisenyi, Western Province.} On the contrary, the Gacaca law does not acknowledge the right to counsel,\footnote{While Article 36 of the Organic Law N° 08/96 acknowledged the right to counsel, albeit not at government expense, the Gacaca Law is silent on the matter.} which has been criticized as a violation of fair trial rights.\footnote{For various views on due process in Gacaca courts, see E. Daly, ‘Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda,’ \textit{34 New York University Journal of International Law and Politics}, (2002), at 35; J. Fierens, ‘Gacaca Courts: Between Fantasy and Reality,’ \textit{3 Journal of International Criminal Justice}, (2005), at 895 et seq; S. Sandesh, ‘Courts of Armed Opposition Groups,’ \textit{7 Journal of International Criminal Justice}, (2009), at 489-514; W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ \textit{3 Journal of International Criminal Justice}, (2005), at 879 et seq.} There is a defendant, sometimes a victim, but no defence lawyer and no prosecution.\footnote{P.C. Bornkamm, \textit{Rwanda’s Gacaca Courts: Between Retribution and Reparation}, (2012), at 110 et seq.} Proponents of the Gacaca system tend to argue instead that the absence of any form of legal representation, for both victims and perpetrators in Gacaca is another form of equality of arms in that the community that witnessed
the massacres gives both incriminating and exonerating evidence. However the absence of legal counsel for particular suspects creates inequality between defendants depending on which court they face trial and in the end contradicts the international fair trial standards.

II. Right to Silence
The right to remain silent is recognized by the ICTR, just as it is by the ordinary courts of Rwanda. According to Rule 63 of the rules of procedure and evidence of the ICTR, the accused is not obliged to say anything unless he wishes to do so and with proper caution. As for Gacaca, ‘no one, according to the law, had the right to remain silent on genocide matters; considering that the duty to testify was the obligation of every Rwandan citizen and that nobody was allowed to refrain from such an obligation whatever the reasons.’ These considerations are translated into the specific provisions that stipulate the duty to testify, and individuals refusing to do so may incur a prison sentence.

Another concern is that detainees were sensitized to confess to such an extent that several of them were no longer aware of their right to remain silent. The emphasis placed on confessions may have compromised the principle of presumption of innocence.

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873 Gacaca Court of Cyanyanza sector v. Evelyn Nyirabarinda, Judgment of 9/10/2007, the population gave exonerating evidence in favour of Nyirabarinda, a suspect of category 2 and she was found innocent; see also C. Mibenge, ‘Enforcing International Humanitarian Law at the National Level: The Gacaca Jurisdictions of Rwanda,’ 7 Yearbook of International Humanitarian Law, (2004), at 410-424.
876 P.C. Bornkamm, Rwanda's Gacaca Courts: Between Retribution and Reparation, (2012), at 111; However several cases show presumption of innocence in domestic trials where the defendants did not confess guilty to the accusations, and in the end were found not guilty. See Gacaca Court of Cyanyanza sector v. Evelyn Nyirabarinda, Judgment of 9/10/2007 (Western province); see also National court, Prosecutor v. Epaphrodite Hanyurwimfura, Judgment of 08/08/2001 (R.M.P 42.088/88, R.P 52/2/200), Urukiko rwa mbere rw’iremezo rwa Butare, (Southern Province).
III. Right to be tried without Undue Delay
Although the ICTR is the first international tribunal to try several genocide suspects, still the number of trials is small compared to the number of perpetrators implicated in the genocide.

For a period of almost two decades, the Tribunal has condemned only a handful of suspects despite the huge budget allocated to it where it has been operating on an annual budget of 270 million USD (167.4 billion RWF). Generally, in eighteen years after the establishment of the ICTR, it has indicted ninety-two individuals and arrested eighty three of them accused of genocide among other crimes. The Tribunal has finished the proceedings of seventy-five persons and seventeen are appealing their sentences. Eleven of the convicts have finished their sentences and have been released, three others died while serving prison sentences and ten defendants have been acquitted. Proceedings against four individuals were terminated after two died and after indictments against two were withdrawn. Nine individuals remain at large as fugitives. The cases against ten individuals have been transferred to national jurisdictions, mainly Rwanda and France following Rule 11 bis. The Tribunal is bound to close its work on 31 December 2014 according to the ICTR completion strategy, and will transfer its responsibilities to the international residual mechanism which already began functioning for the ICTR branch in July 2012.

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881 Rule 11 bis of the ICTR Rules of Procedure and Evidence on Transfer of Cases; It should be noted that French courts have been inactive in receiving cases since the referral of the two suspects who have not yet been tried to date.
In comparison, according to available statistics, the ordinary courts accomplished 7,181 cases between December 1996 and mid-2002,\(^883\) and by the end of 2004, a total of 10,026 individuals had been tried by the courts. And from January 2005 to March 2008, the courts merely tried 222 genocide suspects as indicated in previous chapters. Thus, the total number of persons tried for genocide related crimes in Rwanda’s ordinary courts from 1997 to March 2008 was 10,248.\(^884\)

After March 2008, very few genocide trials were heard in ordinary courts since most of the cases had been transferred to Gacaca courts.\(^885\) So far the courts have tried 15,286 cases in a period of eighteen years after the genocide. At this pace, and without undermining the remarkable role played by specialised chambers, national courts were too slow to deal with all the genocide suspects in the overcrowded prisons approximately 120,000 at the time without including those at large. There was need for an alternative mechanism such as Gacaca to deal with the huge backlog, in order to observe the right of suspects to be tried without undue delay.\(^886\)

Since their creation in 2002, Gacaca courts tried 1,958,634 cases\(^887\) in a period of ten years, with approximately 37,000 convicts serving their sentences in various prisons and about 1.2 million cases fell in the third category of property offences which consequently cleared the backlog of genocide cases and delivered swift justice.\(^888\). Some of these trials resulted into acquittals, property reparations, imprisonment and some sentences being commuted to community service as an alternative to imprisonment. During its operation, Gacaca courts only used 29,665,828,092

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\(^{885}\) See Arts.2 and 51 of the 2004 Gacaca Law as modified by Arts. 1 and 9 of Organic Law No 13/2008. At the time of research, neither the Supreme Court nor the Rwandan National Prosecution Service had separate statistics of genocide cases since 2008 in their reports. All criminal prosecutions were combined together.


\(^{888}\) Instead of over 120,000 detainees awaiting trial as already cited, 1,000,000 numbers in excess were added prior to the introduction of Gacaca courts. At present, less than 37,000 persons are still in prison for crimes in relation to the genocide, others were released; see also LIPRODHOR, Rapport de Monitoring des prisons au Rwanda, (2012), at 14 et seq.
Rwandan francs (about 52 million USD). Yet the international Tribunal for Rwanda has so far cost more than 1.5 billion US dollars since its inception with only 75 completed trials. A separate budget for national courts on genocide trials indicates that 17 million USD from the whole judiciary’s budget has been used in a period of seventeen years. On average, Gacaca trials cost 50 USD per suspect and tried almost two million cases, while the ICTR tried 75 in eighteen years at a cost over 20 million USD per suspect.

Consequently, the slow pace of the ICTR and national courts’ trials impacts on the right of suspects to be tried without undue delay. The effect created by this inconsistency in the laws directly impacts on the equality of all persons before a court of law as enshrined in article 14 of the ICCPR.

IV. Jurisdiction Disparities

Article 7 of the ICTR Statute provides that the temporal jurisdiction of the ICTR extends from a period beginning on 1 January 1994 and ending on 31 December 1994. On the other hand, similar to Gacaca courts, the organic law confers jurisdiction to national courts over offences committed from 1 October 1990 to 31 December 1994.

Though there is an overlap of jurisdiction regarding the 1994 crimes, both mechanisms perceive the time frame in which atrocities were committed very differently. The ICTR Statute does not

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889 The number of persons to cases was about 1.3 persons that were individually tried for the genocide crimes in all the three categories.
892 Gakumburwa was liable for acts he committed in 1990, Gacaca Court of Rusebeya Cell v. Martin Gakumburwa, Judgment of 10/05/2008, Case file, N° 048. The jurisdiction ratione temporis of Gacaca courts is defined in Article 1 of the Gacaca Law as including offenses ‘committed between 1 October 1990 and 31 December 1994.
893 See Charles Zirimwabagabo v. the Prosecution, (RPA/GEN 0002/10/HCS/Mus), Urukiko Rukuru, Urugereko rwa Musanze tariki ya 29/07/2010; Charles Zirimwabagabo v. the Prosecution, (RPAA 0002 GEN/10/CS), Supreme Court 20/05/2011. He was charged of genocide acts committed before and during 1994.
take into account the organizational and planning stages of the Rwandan genocide as it does not consider any criminal activities that took place before January 1994. On the other hand, the different organic laws governing national and Gacaca courts include what were called ‘pilot projects for extermination’ which took place as far back as 1st October 1990. In fact, it is often advanced by the Rwandan government that without the pilot phases of early 1990s, the genocidal massacres of 1994 would not have been so successfully implemented. Therefore, although the months of April to July 1994 are believed to mark the commission of genocide in Rwanda, it cannot be overlooked that a series of massacres had started in the late 1990 and continued thereafter.

Thus, the temporal jurisdiction of the ICTR precludes investigations into the responsibility born by the orchestrators for acts committed before January 1994. The leaders of the genocide are, in effect, more narrowly accountable than the low level offenders detained in Rwanda’s prisons. It cannot be said that there is equality before the law when there is such a wide divergence in the temporal jurisdiction of the ICTR and national mechanisms.

V. Discrepancy in Sentences
Despite the success in convicting many of the key individuals behind the genocide, there exists an apparent irony in the course of justice. It lies in the sentencing options that are available among the three courts. Although death penalty was abolished under Rwandan domestic law,

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this penalty was substituted with life imprisonment with special measures.⁸⁹⁸ Yet, the most responsible defendants before the ICTR face a maximum penalty of life imprisonment with the possibility of parole depending on the venue for their incarceration.⁸⁹⁹

More incongruent legislation between the ICTR and Rwandan courts is evidenced in Article 17 of the organic law which entails a secondary penalty in addition to the main sentence.⁹⁰⁰ According to this provision, the civil rights of persons found guilty of genocide are withdrawn. And for persons whose acts place them under Category One, the deprivation of their civil rights would be for life. However the ICTR Statute does not provide for such secondary punishments for its convicts. Similar to ordinary courts, the Gacaca law includes the loss of civic rights as an accessory penalty to imprisonment.⁹⁰¹ Those convicted may be deprived of their rights to be elected to public office and to serve in certain official functions.⁹⁰²

In line with this, there is explicit differential treatment of suspects referred by the ICTR or extradited by third states to Rwanda, since they cannot be subjected to such accessory punishments. The law stipulates:

‘[...] however, life imprisonment with special measures shall not be pronounced in respect of cases transferred to Rwanda from the International Criminal Tribunal for Rwanda and from other states [...]’.⁹⁰³

On the contrary, life imprisonment with special measures is imposed on other accused persons appearing before national courts, including those tried by Gacaca courts who were believed to

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⁸⁹⁸ Art. 4, Organic Law on Abolition of the Death Penalty provides details of life imprisonment with special measures. 1) a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment; 2) a convicted person is kept in isolation.
⁹⁰⁹ The MICT, which took over the mandate of former UN courts, granted early release to Paul Bisengimana, a former mayor, and Interahamwe leader Omar Serushago on 11 December 2012, who were detained in Mali. Michel Bagaragaza, Juvenal Rugambarara, Lieutenant Colonel Tharcisse Muvunyi, and Georges Ruggiu, were also granted early release.
⁹⁰⁰ Art. 17 of the 08/96 Organic Law.
bear the least responsibility.\textsuperscript{904} It is thus a legal paradox to see that the planners or commanders of the genocide are being treated with more leniency and full observance of fair trial rights than the subordinates who executed the superiors’ orders.

This chain of inconsistency under international and local trials has an impact not only on the quality of the sentences of the courts but also on the right of the accused to be treated equally.\textsuperscript{905} As a result, persons accused of the same genocide offence may be co-offenders, but face contrasting kinds of sentences for the mere fact that they appear before different courts. Nonetheless, even if all courts are not expected to give absolutely the same kind of decisions with regard to a given law, the inequality, however, should not be inflated.\textsuperscript{906} The disparity in the sentencing practices under the different approaches can be socially divisive and negative to the national reconciliation process.

\textbf{VI. Unequal Detention Facilities}

Rule 103 of the ICTR RPE provides that imprisonment shall be served in Rwanda or any state designated by the Tribunal from the list of states which have indicated their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the state concerned subject to the supervision of the ICTR. Yet convicts of regular courts and Gacaca serve their sentences in Rwanda, basically in overcrowded prisons.\textsuperscript{907}

\textsuperscript{904} For sentences of life imprisonment with special measures, see National court, \textit{Prosecutor v Ntamabyariro Case N°} (RP/Gen.0081/04/TP/KIG) of 19/01/2009; Also see Gacaca Case Law of Kageruka who was sentenced to life imprisonment with special measures, \textit{Gacaca court of Nyarubuye sector versus Kageruka Tesfori}, judgment of 16/10/2008.


According to the Rwandan justice approaches to the 1994 genocide, while architects of the genocide would have relative ‘comfort’ and ‘luxurious’ prison conditions in Arusha or foreign prisons, low level perpetrators tried by national and Gacaca courts, are incarcerated in congested prisons, sometimes under unhealthy conditions. This is not to imply that the ‘big fish’ should be incarcerated in an inhumane way, however, the disproportion of punishment and modalities of detention for those who are convicted and sentenced by the ICTR and persons convicted and sentenced by domestic courts differs radically. Therefore concurrent jurisdiction created inequality before the law for the accused detained in the Arusha detention facility, or third countries and those in Rwanda’s prisons.

For instance, in order for the ICTR to accept referral of Uwinkindi Jean to Rwanda, it had to first carry out an inspection of the prison conditions in Rwanda, and found that mainly Muhanga and Kigali central prison are the only ones that fulfil the international standards. Yet detention facilities of other genocide convicts in Rwanda are not subject to such prior inspections. In this case, perhaps if defendants were given a choice of which category to belong to, they would most likely choose to be classified under high profile offenders so as to benefit from the fair treatment of the international Tribunal. Different cases taken from both the national and international

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910 See Prosecutor v Ildéphonse Nizeyimana, Case N° ICTR-00-55C-T, at Para 29 et seq; The defense raised concerns on general detention conditions in Rwanda, characterised by overcrowding, unsanitary conditions and insufficient food for the inmates; P.C. Bornkamm, Rwanda's Gacaca Courts: Between Retribution and Reparation, (2012), at 36 et seq; J. Stromseth, D. Wippman and R. Brooks, Can Might Make Rights? Building the Rule of Law, after Military Interventions, (2006), at 360; It is important to note that prison conditions may not be so disproportionately harsh when compared with living conditions for the average Rwandan citizen.


mechanisms illustrate how concurrent jurisdiction can compromise the principle of equality before the law as enshrined in article 14 of the ICCPR.

The discussion above shows that although justice has been sought through a plurality of mechanisms, the disparity between judicial standards, procedures and even sentences among the courts can be detrimental to ensuring equality of parties before the courts.\textsuperscript{913} When it comes to penalties and due process rights in this system of concurrent jurisdiction, there is greater protection of high category génocidaires tried by the ICTR than in national prosecutions.\textsuperscript{914}

Apart from the inequality issues from the use of international, national and Gacaca mechanisms, there are suggestions that simultaneous trials on the other hand can have aspects of reconciliation in a post-conflict society. The next section examines these aspects and the impact of criminal trials to reconciliation.

D. The Contribution of Different Trials to Reconciliation

This section, deals with the concept of reconciliation and its objectives. It further analyses how each of the objectives is being realised in the different justice systems in Rwanda at both national and international level.\textsuperscript{915} The main focus will be put on the contribution of the trials towards reconciliation, as regards individualisation of guilt, acknowledgement of responsibility and the uncovering of the truth.

I. Meaning of Reconciliation
Black’s Law Dictionary defines the term reconciliation as “the renewal of amicable relations between two persons who had been at enmity or variance; usually implying forgiveness of injuries on one or both sides.” Reconciliation can also be defined as the repair and restoration of relationships and the rebuilding of trust. According to Staub, reconciliation is more than co-existence, of formerly hostile groups living near each other, or simply interacting and working together. Reconciliation requires that members of the two groups come to value the humanity of one another by breaking the cycle of violence. It means coming to accept each other and to develop mutual trust.

Reconciliation in simpler terms may refer to coming to an agreement over differences, whatever the magnitude, and it takes a long process rather than a quick one-time event. Reconciliation means going over previous disagreements, recognizing that there were rights and wrongs on both sides, recognizing that the mutual relationship is worth more than petty differences, and agreeing

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to forego the divisions in favour of unity.\textsuperscript{922} It does not guarantee that things will be put back where they were, but it does mean that hostilities and violence have ceased.\textsuperscript{923}

Reconciliation can be defined either positively or negatively; that is in respect of what should be done and what needs to be avoided in order for reconciliation to materialise.\textsuperscript{924} It should seek to avoid various aspects like absence of violence. On the positive note of the concept, reconciliation needs to contribute to restoration of relationships of both individuals and groups under conflict, which is reconciliation at an individual level and reconciliation at a group level of the society torn apart by conflict.\textsuperscript{925}

There are several other indicators of reconciliation in a post-conflict society, but these vary from one society to another depending on both internal and external factors,\textsuperscript{926} like the historical background to the conflict, the cultural context, nature of conflict and the political will of the government as well as external influences.\textsuperscript{927}

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Therefore, the notion of reconciliation is complex and consists of a wide array of elements. These elements include: acknowledgement of past violations, discovery of truth, restoration of relationships, healing, forgiveness, reparations, co-existence, accountability, individualization of responsibility, re-integration of perpetrators, absence of collective criminality, absence of violence, and absence of ethnic polarisation. Given that the focus of the present study is on justice approaches to the Rwandan genocide, the following discussion will focus on three particular aspects of reconciliation that are commonly associated with criminal justice, namely the official acknowledgement of the crimes committed, the individualisation of guilt, as well as truth recovery. It will be examined how the three justice approaches to the Rwandan genocide contribute towards these three distinct elements of reconciliation.

II. The ICTR, National Courts and Gacaca Contribution to Reconciliation

It is important to point out, that the existing body of research on criminal tribunals, centres a lot on punishment, seldom however, is the focus on their impact on reconciliation. Though there is no direct link between criminal trials, be it international, national and local courts with

reconciliation; the author examines the matter in the context of the established indicators of reconciliation in post-conflict societies.

1. Official Acknowledgement of the Crimes
The trials by both national and international trials have facilitated the official, public acknowledgement of gross violations of human rights in Rwanda and explored the causes of such violations. In so doing, they have restored the dignity of those who have been victims of the grave crimes. It is in this context that the role of acknowledgement must be emphasized, and any facts about violation of human rights abuses need to be fully and publicly exposed. This is because acknowledgement affirms that a victim’s suffering is a result of injustice and is worthy of attention through convicting offenders to avoid historical revisionism. Acknowledgement of genocide acts in trials sets a moral standard, which provides a basis for restoration of relations between victims and perpetrators.

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The government of Rwanda through the minister of justice has always acknowledged that the government did accept political responsibility for the genocide, but not criminal liability because the current government did not commit genocide but took the political responsibility of the government it replaced. However, the crime of genocide does not necessarily require that the intent to destroy a protected group must be held by a state or state-like organization.

In regard to Gacaca trials, suspects were given the opportunity to admit their responsibility so as to contribute to the shaping of a new Rwandan society (Umuryango Nyarwanda). There has been acknowledgement of responsibility for genocide through massive confessions by the perpetrators. This has happened during public gatherings where the perpetrators personally apologised to the victims, in front of the community, acknowledging their role in killing Tutsis. This has helped former antagonistic parties to reconstruct their society through reintegration of the criminals amongst themselves, forgiving those that wronged and ensuring that they are living together as a community of one Rwandan identity, and not ethnic groupings or divergent groups.

At a more practical level, the significant step towards reconciliation is that the former antagonistic groups are still living side by side in harmony, sharing the welfare and good things...
of their community, as well as solving the problems of society together. The Rwandan victim and perpetrator groups are trying not to identify themselves by their presumed ethnic differences but as one complementary group that has a lot in common beyond their divergences.

Similarly, the national courts have acknowledged the occurrence of genocide in Rwanda by convicting the perpetrators. The national courts have acknowledged genocide through their judgments passed under the 08/96 organic law. However, although the national legislation and the courts themselves acknowledge genocide, the suspects have often denied taking part in the crime, despite the available mass of evidence and victims of the atrocities. This is an impediment to reconciliation manifested in the fact that the ICTR and national courts have had little confessions and guilty pleas by defendants compared to Gacaca defendants.

On a global level, the ICTR, which was set up by the UN Security Council Resolution, shows international acknowledgement of the human rights abuses committed in Rwanda amounting to genocide. Not all ethnic massacres amount to the definition of genocide. The international

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recognition of the acts committed in Rwanda as genocide helps in reconciliation of the society rather than if the international community had ignored or denied the genocide.  

To measure the ICTR’s impact on inter-ethnic reconciliation is a significant undertaking for international criminal justice research. The fact that the ICTR is an international Tribunal means that its judgments are globally recognised. So there has been acknowledgment of genocide against the Tutsi by the international community as a whole. Motivated by ICTR trials, the ongoing prosecutions of suspects by third states is evidence of an increasing recognition among states within the international arena of the responsibility to prosecute human rights violators, and this is a significant development in international law. To cite Antonio Cassese, ‘The role of the Tribunals cannot be overemphasized. Far from being vehicles for revenge, they are tools for promoting reconciliation and restoring peace.’

2. Individualization of Guilt
In criminal trials, emphasis is put on individualisation of guilt rather than the collective assumption that a particular group committed the atrocious crimes. This is important for reconciliation because those who did not engage in the crimes easily interact with the victims and help in the reconstruction of the society. In case of non-individualisation of guilt, the

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Also, in case of the non-individualised guilt, the victim group is not comfortable to associate with the perpetrator group for fear of being subjected to the same kind of violence and the latter are prone to fear revenge. There is much suspicion among the groups, that could hinder reconciliation. Determining the individual role of the accused persons is therefore, a necessary step for reconciliation through avoiding collective responsibility.\footnote{See E. Daly, ‘Between Punitive and Reconstructive Justice,’ 34 New York University Journal of International Law and Politics, (2002), at 388 et seq; M. Minow, Between Vengeance and Forgiveness, (1998), at 40; G. Werle, Principles of International Criminal Law, 2nd edn, (2009), at 36 MN 102.}

Taking a look at Gacaca, the process of justice engaged the participation of the victims, the offenders and their respective community members who determined the guilt or innocence of the suspect before them since it was the same community which had witnessed and participated in the killing of their own members. In other words, Rwandan themselves were responsible for dealing with suspects of crimes committed in Rwanda by Rwandans against fellow Rwandans.\footnote{P.C. Bornkamm, Rwanda's Gacaca Courts: Between Retribution and Reparation, (2012), at 49 et seq; V. Peskin, International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation, (2008), at 166; H. Kelman, ‘Conflict Resolution and Reconciliation: A Social Psychological Perspective on Ending Violent Conflict Between Identity Groups,’ 1 Landscapes of Violence, (2010), at 1-9.}

would receive a reduced sentence upon conviction.\footnote{Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, ‘Rwanda Should Celebrate Gacaca Legacy-Karugarama,’ \emph{The New times}, on the 18, June 2012.} On the other hand, the national courts and ICTR individualized guilt for the leaders and instigators of the genocide, which was not an easy task because some of the suspects had not personally or physically perpetrated crimes of genocide.\footnote{Proving personal perpetration in crimes by high ranking officials is difficult, see L. Fernandez, ‘Post-TRC Prosecutions in South Africa,’ in G. Werle (ed), \emph{Justice in Transition-Prosecution and Amnesty in Germany and South Africa}, (2006), at 80; L. Graybill, and K. Lanegran, ‘Truth, Justice, and Reconciliation in Africa: Issues and Cases,’ \emph{8 African Studies Quarterly}, (2004), at 1-18.} They had acted as commanders, architects and organizers, such that it was not certain to determine their share or individual responsibility in the crimes.\footnote{V. Peskin, \emph{International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation}, (2008), at 173 et seq.} The legally trained judges were able to establish the role of the leaders in the genocide, \textit{inter alia} by applying the notion of superior responsibility for both military and civilian leaders.\footnote{K. Ambos, ‘Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis-From Nuremberg to the Hague,’ in G. Kirk McDonald and O. Swaak-Goldman (eds.), \emph{Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts}. Vol. 1, (2000), at 408 et seq; F.X. Nsanzuwera, ‘The ICTR Contribution to National Reconciliation,’ \emph{3 Journal of International Criminal Justice}, (2005), at 944-949.} The case law of the ICTR and national courts shows that the indifference of a superior does not exonerate him from responsibility for crimes perpetrated by his subordinates because he is supposed to either prevent or punish the subordinates for any illegal acts.\footnote{See G. Werle, \emph{Principles of International Criminal Law}, 2nd edn, (2009), at 187, MN 499 et seq; \textit{Prosecutor v. Théoneste Bagosora et al.}, Case No ICTR-98-41-T, 18 December 2008, Paras 49 et seq.}

The ICTR did not collectively try former government leaders for genocide. There had to be a link between a given individual’s leadership with the committed crimes, and the consequence is that several high profile defendants have been acquitted. Nonetheless, such acquittals have often resulted in demonstrations in Rwanda, which blames the Tribunal for not rendering fair justice in
some instances. Victim associations have publicly denounced several acquittals of military officers and ministers as negation of the genocide and revisionism.\textsuperscript{960}

Based on the author’s own experience, while the local population often criticizes the ICTR, it is important to highlight that their knowledge of the case law is very little, with limited understanding of how the ICTR reached its verdicts. Although the ICTR’s judgments are available on its website, not all individuals can access the internet. The long and complex court judgments in foreign languages are not accessible to the population at large. There is a remarkable absence of information about the trials, with very little media coverage in Rwanda. Outreach activities have not been realized to a sufficient extent, despite the fact that outreach information is important in explaining the findings of the Tribunal.

This study asserts that in order to help create the good perception of justice, it is necessary for the victim and perpetrator community to feel part of the transitional justice process. In Rwanda, one of the fundamental problems is precisely that people on the ground are very disconnected from the Tribunal, by its location and insufficient outreach activities. This has direct implications on the community because, an essential step towards reconciliation through a criminal justice process is that of ownership, where people feel included.\textsuperscript{961} To achieve reconciliation fully, transitional justice mechanisms need not to be separated from local realities and needs,\textsuperscript{962} particularly victims’ interests. The distant location of the Tribunal and inadequate outreach activities created a significant gap between the ICTR and Rwandans for whom it was set up to render justice, and this in turn has ignited some perception, particularly among the victims that

\textsuperscript{960} E. Kwibuka, ‘Rwandan Rally against ICTR Acquittals,’ \textit{The New Times}, on the 12, February 2013. This was the most recent acquittal of two Ministers by the ICTR Appeals chamber, Justin Mugenzi and Prosper Mugiraneza which was opposed nationally in Rwanda; see also J. Karuhanga, ‘Release of Genocide suspect controversial,’ \textit{The New Times}, 29 July 2011; see as well, E. Kayiranga, Kurekura Ahorugeze Akidegembya Ni Ugupofoya Jenoside – IBUKA, available at \texttt{http://www.izuba.org.rw/i-i-583-a-24381.izuba}, accessed September 2012.


ICTR justice is flawed, which may be detrimental to reconciliation.\textsuperscript{963}

A response to the above issue is that the ICTR should engage much in mobile outreach programs that travel around the country to provide important information and answer people’s questions, particularly in the aftermath of very controversial judgments. For example, following a particular suspect’s release, members of the ICTR should explain the outcome and discuss the verdict to the community where the alleged massacres were committed. For facts on the ICTR’s role in building the affected community, the author’s previous chapter three demonstrated the ICTR’s limited contribution to outreach programs in Rwanda and its impact on the local population.\textsuperscript{964}

3. Truth
Practically, in examining what the three level approach means for truth finding and reconciliation, the author finds that under national and international law, victim families have a right to the full truth of the past violations.\textsuperscript{965} According to the South African TRC, there are various kinds of truth that would arguably help in reconciliation, such as factual or forensic truth, personal or narrative truth, social or dialogue truth as well as healing and restorative truth.\textsuperscript{966} For instance, formal courts are better geared to establish forensic truth than narrative or healing truth,


\textsuperscript{964} See Chapter Three of this Thesis under Study.


where the latter is most likely to emerge from restorative mechanisms, therefore making each of the courts powerful in this regard.\textsuperscript{967}

\textbf{a) Personal and Narrative Truth}

The Gacaca courts were open to the public to uncover the past by hearing individual accounts of everyone. By telling their stories, both victims and perpetrators exposed their subjective and multi-layered experiences.\textsuperscript{968} By providing an environment in which victims could tell their own stories, the hearing not only helped to uncover existing facts about past abuses, but also assisted in the creation of a narrative truth. Telling stories through narration had a healing potential and it is believed that Gacaca captured the widest possible record of people’s perceptions, stories, myths and experiences through its numerous trials.\textsuperscript{969}

Also, Gacaca’s road to reconciliation entailed confessions and apologies by individual persons, families and local leaders, resulting in forgiveness by those who had been victimised.\textsuperscript{970} The admission that one bears or shares responsibility for wrongs against others, and accepts liability in that context was an essential contribution of any reconciliation process.\textsuperscript{971} At the gatherings, the inyangamugayo judges and the community listened to everyone, unlike in the ICTR and national courts where witnesses were limited to testify on only relevant information that the judges needed to hear. In Gacaca, the conversation was open for all sides to narrate their stories and experiences in the presence of the society, and in their own local language, Kinyarwanda. This should not be underestimated since it was vital for healing, more specifically the


\textsuperscript{968} P. Clark, The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers, (2010), at 22 \textit{et seq}.


acknowledgement that others suffered,\textsuperscript{972} and for the revelation of the corpses of those killed to offer them a decent burial by their families.\textsuperscript{973}

\textbf{b) Factual and Forensic Truth}

The recognizable legal and scientific notion of bringing to light factual evidence, or obtaining accurate information through reliable, impartial and objective procedures featured prominently in the ICTR findings and judgments, more so than in the other concurrently running courts. The Tribunal’s record is impressive when it comes to establishing factual truth because its findings were based on factual and objective information, or evidence collected and received by the Tribunal.\textsuperscript{974} In pursuing this factual truth, the Tribunal had to bring together evidence from Rwanda, especially through its prosecution office in Kigali. Therefore, truth as a factual aspect with objective information cannot be totally divorced from contributing to reconciliation, which is a noteworthy role. The long and detailed judgments of the Tribunal are highly regarded in terms of finding facts about the genocide and these facts are no longer widely disputed.

Whereas the detailed judgments of the ICTR reveal the comprehensive truth about the facts regarding the genocide, the slow pace of trials undermines reconciliation within the society. The fact that guilt has not been individualised to any significant degree is questionable in the affected community. While some justice is better than no justice at all, one wonders whether incomplete justice could heal or reconcile. It is open to discussion that in some cases, the Tribunal laid a foundation for reconciliation through revealing large scale facts about the genocide.\textsuperscript{975}


In fact the ICTR has been much more constructive than the local mechanisms in establishing forensic truth that is necessary for clarifying the past and healing individuals. This is because the international Tribunal has the capacity of obtaining accurate information through its impartial and objective procedures. Therefore, although truth does not necessarily lead to healing, it is often a first step towards reconciling the damaged relations.

Concerning trials by the national courts, the pursuit for truth should be viewed as a contribution to a much longer-term goal of reconciliation. Its purpose lies in attempting to uncover the past for accountability purposes and retribution. By exposing the negative side of the past, those responsible for violations of human rights are held responsible for their actions in order to combat the culture of impunity and establish deterrence. Ordinary court trials helped in the reconciliation process, especially when the courts held itinerant hearings in Rwandan communities, where the crimes were committed, thereby revealing and obtaining important facts about the genocide. Such itinerant courts were temporarily designated to try genocide cases, and they periodically conducted hearings in areas outside the seat of the courts, and were presided over by judges of the ordinary courts. This was done with a view to enhance access to justice and to afford hearings to persons held on criminal charges in remote places.

The essence of the aforementioned discussion is that criminal trials provide an official truth that facilitates reconciliation by, inter alia, combating denial and documenting the core facts around which a broad consensus can be built. Ultimately, this provides a clear picture of facts which

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are widely not disputed as regards what happened, to whom, where, when and how, and who was involved in the conflict.\textsuperscript{979}

Though truth finding was perceived differently in the available mechanisms, the various kinds of truth obtained aimed at addressing the past violations in order to ensure restoration of human dignity.\textsuperscript{980} Therefore, the relationship between truth and reconciliation is important because truth contributes significantly to the process of reconciliation through clarification of what happened and prosecution of past human rights abuses.\textsuperscript{981} Trials conducted by international or national courts establish an indisputable, historical record of events, with legally binding consequences.\textsuperscript{982} The explanation for this is that trials contribute to reconciliation by documenting the truth, even if incomplete at times. The documentary material, transcripts of the hearings, videos and individual statements are all part of the invaluable record and archives which need to be availed to the public for education and future generations.\textsuperscript{983}

III. Interim Conclusion
The above discussion looked specifically at the extent to which the ICTR, national courts and Gacaca trials have aided reconciliation between Hutu and Tutsi in Rwanda. While one of the goals of the trials, in addition to justice and deterrence, is to contribute to reconciliation, there has always been a controversy in respect of how the trials might facilitate this complex


process. Obviously, since no justice mechanism is perfect, criminal trials cannot do everything in regard to retribution and restoration because there are several limitations, which call for a more creative and multi-dimensional approach to transitional justice. A two-track model is recommendable where truth commissions and penal prosecutions may be used in parallel as complementary tools to deal with past human rights violations.

Therefore, this research does not allow the conclusion that criminal trials can never facilitate reconciliation, because any decent trial, even if retributive, has aspects of reconciliation. Instead, what it suggests is that retributive justice should not solely be relied upon to bring reconciliation. In order to deal comprehensively with a legacy of grave crimes, it is necessary to look beyond criminal justice in order to consider the concept of restorative justice, too. Ultimately, a coordinated relationship between the various established measures forms an important basis for reconciliation.

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CHAPTER SEVEN: GENERAL CONCLUSIONS

Following the extensive study in each chapter, the following general conclusions were derived from the study.

A. General Conclusions

Chapter One highlighted that the administration of justice in post-genocide Rwanda was implemented by different entities; the ICTR, national courts and the Gacaca courts. As a result, there have been overlaps in some areas and friction due to the differences in procedural and substantive matters among the courts. For example, perpetrators who committed the same crime of genocide have been subjected to different procedures and laws, depending on which court tried them.

The author argues that relying on different justice approaches entailed the risk of treating equal situations unequally. This becomes particularly obvious when looking at the unbalanced sentencing practices under the different approaches. Besides, in the context of a state undergoing transition and reform after conflict, the disparity in judicial standards, procedures and sanctions within the international Tribunal and domestic courts can compromise various international and domestic principles. The challenge for these courts was the need to maximize their legitimacy, efficiency and effectiveness while balancing the tension between the moral demands of justice and the political requirements of reconciliation.

Chapter Two has shown that although distinctions between the Hutu and Tutsi ethnic groups existed throughout history, the dividing line between the two groups was not as rigid as commonly stressed. In Rwandese tradition, the criterion of defining Hutu or Tutsi was not based on ethnic reference, but on a socio-economic status that favoured the political promotion of the Tutsi or demotion of the Hutu, depending on one’s fortune at a given moment. The process of ethnicisation was institutionalised by the Belgian colonisers who had replaced the Germans and they relied on the Tutsi monarchy to administer their colony. Such reliance exacerbated divisions and tensions based on ‘a superior ethnicity’ belief which did not even disappear after Rwanda’s independence in 1962.
However, more destructive divisions had been reinforced in the 1934 census, when the Belgian colonialists required the ethnic identity of every citizen to be stated on state-issued identity cards. This latter measure tragically facilitated, some sixty years later, the identification of Tutsis by Hutu génocidaires during the 1994 genocide, especially at roadblocks, for it had become hard to differentiate Tutsis from Hutus since both groups spoke the same language, and shared many cultural traditions. Therefore these identity cards were instrumental in identifying who had a right to life in the 1994 genocide and who did not. Nevertheless, the culture of impunity that had existed in Rwanda was much more instrumental in facilitating the genocide.

Chapter Three, shows that at the international level, the establishment of the ICTR was a milestone under international law for dealing with core crimes of genocide, war crimes and crimes against humanity. The ICTR has also provided an indisputable recognition of the Rwandan genocide and recognized that Tutsi were an ethnic group falling under the protected groups of the 1948 Genocide Convention. Yet, perhaps even more significantly, by virtue of its very existence, the Tribunal shows that there is no safe haven for those who commit serious crimes like genocide, even at the highest level. This is necessary for deterrence and ending impunity because perpetrators of heinous crimes which end up not being punished tend to encourage continued violations of human rights.

The jurisprudence of the ICTR is another point in its favour, because it has greatly contributed to the development of international criminal law in various areas like observance of fair trial rights and due process requirements than national courts. In its judgments, the Tribunal established considerable facts regarding the genocide, thus creating a significant historical record. Various lessons can therefore be derived from the convictions and acquittals made by the Tribunal in establishing criminal accountability.

However, the location of the ICTR has been a hindrance for the Rwandan population to follow the proceedings physically. On the other hand this distance from Rwanda helped to foster
impartiality of the Tribunal and independence from influence of the government. Also, with an annual budget of around $270 million USD, the ICTR, has to date handed down judgments to only seventy-five individuals in eighteen years after its establishment yet the domestic courts, have tried more than 15,000 suspects in the same period as the Tribunal using $17 million USD, and more than 1.9 million trials have been accomplished by Gacaca in ten years with a total cost of $52 million USD. This divergence shows that classical justice is slow and limited capacity wise.

Consequently, the Tribunal has faced criticism and complaints from Rwanda for the huge budget in relation to Rwandan mechanisms while various genocide suspects, whether officially indicted by the ICTR or not, are able to live freely in many countries. Certainly, it is not possible for the ICTR to bring to trial all genocide suspects, but the most the Tribunal could do was to try only high level perpetrators just like other international mechanisms. The Tribunal’s legacy should therefore be evaluated not in terms of ‘numbers tried’ but in terms of the ‘important lessons’ from the trials. Actually, the ICTR trials have provided the most comprehensive account of the machinery of genocide and shed light on the anatomy of the crime. Moreover, the ICTR is credited for having been able to try most of the master-minders of the genocide that had fled Rwanda.

Chapter Four has shown that national court prosecutions are necessary for societies that have suffered mass atrocities. This is because such conventional courts are located at the scene of the crime and easy to manage. This chapter illustrated various advantages of upholding international criminal law at the domestic level and argues that it is the straightforward way to combat impunity and deterrence for the society, while at the same time complying with the state duty to prosecute.

Nonetheless, the chapter has identified the most common obstacles that hindered the effective trial of suspects in Rwandan domestic law, such as, adherence to minimum procedural
safeguards, limited resources, few qualified judges and the huge number of suspects. Domestic courts in post-conflict situations may be unable to guarantee fair and equal treatment to accused persons and to manage the high volume of cases. In fact, after the 1994 genocide, the ordinary courts of Rwanda had little capacity to try the 120,000 suspects in prisons at that time due to the collapsed judiciary and destroyed infrastructure.\footnote{Gérard Prunier, ‘Rwanda: The Social, Political And Economic Situation in June 1997’ (Report, Writenet (UK), July 1997).} Even though the Rwandan government tried to reconstruct the judiciary, only 6,000 suspects were prosecuted between 1996 and 2001. The process was very slow and violations of basic fair trial rights and other human rights standards were frequently reported, particularly the absence of lawyers for indigent defendants and the extremely overcrowded prisons. The Rwandan judicial system suffered from a serious shortage of resources, and the reality was that post-conflict justice needed to be reconstructed in order to deal with the situation in a fair and effective manner.

A fair and effective judiciary would therefore necessitate various essential conditions such as appropriate domestic legislation with well-drafted statutes of criminal law and procedure, qualified judges, prosecutors, defenders, and investigators, adequate infrastructure, such as investigative offices, courtroom facilities, record-keeping facilities, detention facilities, and most importantly, a culture of respect for the fairness and impartiality of the process. All of this was not possible for the ordinary courts in the aftermath of the genocide.

As a consequence of the ineffectiveness of the Rwandan judiciary, the government of Rwanda had to suggest other mechanisms, such as Gacaca to help reduce or remove the obstacles. With this traditional model, only high profile category one suspects remained to be prosecuted by the ordinary criminal courts, while the rest of the backlog was to be tried by the community in Gacaca. Thus a shared caseload was a reduced caseload for the national courts in Rwanda.

Chapter Five looked at how the current government in Rwanda chose to implement its own solution of semi-restorative Gacaca courts after many years of slow formal justice by the national
courts. The study also showed the importance of creating courts with a closer contact to the community. The lesson is that when a court is close to the affected community with less retributive elements, it has the potential to contribute significantly to reconciliation of former conflicting groups. Thus, the chapter views Gacaca’s potential to reconcile a community with its past, in addition to facilitating justice through punishment.

In order to promote justice and reconciliation, Gacaca faced the challenge of having too many goals such as, restoring relations, deterring atrocities, reducing overcrowded prisons, revealing the truth and providing speedy justice to both victims and perpetrators. Nevertheless, Gacaca has delivered fast justice in a way that no formal mechanism would have been capable of doing by trying 1,958,634 cases in ten years.

However, it must not be ignored that by having speedy trials, the Gacaca process violated a number of key fair trial principles, such as the right to legal representation recognised by various national and international instruments. Also, the courts were plagued by corruption of the inyangamugayo judges, as well as partiality concerns. The likelihood of biased judgments from the legally untrained judges that moderated the process was another shortcoming of the system. More so, the courts were criticised for not protecting witnesses and for victors’ justice. Victors’ justice was manifested by the fact that Gacaca only dealt with genocide crimes committed by Hutu perpetrators, leaving aside the war crimes that were committed by RPA Tutsi soldiers in the sole competence of military courts.

Ultimately, the winding up of the Gacaca judicial system left many challenges, especially the compensation of victims and several other unresolved problems. Although the remaining genocide case files were transferred to ordinary courts, it should be acknowledged that Gacaca still left many other issues unresolved, which is a challenge that needs to be addressed. A residual mechanism to settle legal issues and other disputes left by Gacaca after its closure would
be commendable. Such a legal mechanism would deal with certain errors that might have been committed or decide on situations where there is evidence that there was a miscarriage of justice.

Chapter Six examined the concurrent relationship between the international and national criminal jurisdictions in Rwanda. While the ICTR had primacy of jurisdiction, it did not have exclusive jurisdiction over genocide suspects. This inevitably meant that the bulky number of suspects would be prosecuted by domestic justice mechanisms, hence providing alternate courts to fight against serious criminality.

Although justice has been sought through a plurality of mechanisms, the study has identified a number of weaknesses in as far as the prosecution of the crime is concerned, such as the differential treatment of the accused, the violation of fair trial rights, the lack of cooperation and incoherent relationship between the courts. Actually, the Rwandan example showed that while national and international courts had much in common in terms of their overall objectives, conflict arose at particular times. This is because the courts existed concurrently and incoherently, with many disparities in treatment of suspects. Yet from a human rights perspective, jurisdictional relationships between domestic and international courts must not function as principles that conflict with each other or compromise the equality of the accused persons appearing before the different courts.

As a solution, the study suggests a comprehensive legal framework as the starting point towards a harmonised and coordinated relationship. Though the ICTR is closing down soon, its existence provides lessons that interactions between international and national courts in post-conflict societies should have well established legislation so that parallel jurisdiction does not lead to competing claims, but mutual partnership in the repression and prevention of serious crimes. This thesis asserts that even though having appropriate legislation may not be the only solution for justice and reconciliation in a post conflict society, however, when applied with other efforts, it can be transformative.

990 E.g the exchange of information, and evidence between the the legal systems was very little yet they dealt with perpetrators of the same situation.
B. Overall Concluding Remarks and Optimal Approach

In light of the findings reached above, the aforesaid study submits that although justice has been sought through a plurality of mechanisms, the disparity between judicial standards, procedures and sanctions within the international Tribunal and domestic courts can be socially divisive and detrimental to the national reconciliation process. When it comes to penalties and due process rights in this system of concurrent jurisdiction, there is greater protection of high category defendants tried by the ICTR than in national prosecutions. These controversies between international, national and Gacaca mechanisms have greatly undermined the principle of fair trial and equal treatment of the accused which is the cornerstone of criminal law.

The ICTR and national courts need to be examined against the backdrop of criminal law since they are purely retributive in nature. However, this was not necessarily the case with Gacaca courts which had a dual nature of retribution and restoration. It was practically not easy for the semi-restorative courts to balance retribution and reconciliation goals while complying with

994 The principle of fair trials is also laid down in two Conventions to which Rwanda is a party: the ICCPR, which contains a detailed listing of all important guarantees associated with that principle; Arts. 7 and 26, of the Banjul Charter, encompasses essentially the same guarantees. In addition, the Rwandan Constitution and the Code of Criminal Procedure contain various provisions to guarantee fair trials. See Arts. 16–20, 60(2), 1 (2) of the Code of Criminal Procedure as amended; see also Arts. 140, 141, and 142 of the Constitution of the Republic of Rwanda of 4 June 2003, O.G.R.R. N° special of 4 June 2003as amended to date.
the international fair trial standards. Nevertheless, as put by Bornkamm, the fact that customary traditional institutions mete out certain formalities does not necessarily render their decisions unfair. Therefore, although Gacaca courts shared competence with ordinary courts in trying genocide defendants, it is not necessarily evident that their trials be regarded entirely as a form of retributive criminal justice, since there were semi-restorative in nature.

In spite of the differences and inequalities resulting from the use of three accountability mechanisms under study, recourse to a single mechanism would still not have been the appropriate model to the post-genocide situation because of various reasons; a) the ICTR alone would not have been able to try all the genocide perpetrators given its slow speed; b) It was also uncertain that regular trials could be completed faster in a domestic system while guaranteeing all the fair trial rights of the accused; and c) Gacaca courts would have not been


able to deal with the complex genocide matters of high level perpetrators single-handedly, mainly due to the lack of legal training.\textsuperscript{1001}

Hence, one can assert that the specific focus on the complementary sample approach in solving Rwandan conflicts was the realistic way for Rwanda to establish reconciliation, accountability, and justice through the combined efforts of the ICTR, national courts and Gacaca processes.\textsuperscript{1002} However, their respective usefulness would have increased if they had a well-organised and coordinated relationship.\textsuperscript{1003}

In such a situation, the availability of a number of courts would assist in preventing violators of the 1948 Genocide Convention from escaping criminal liability, thus minimizing jurisdictional weaknesses. Therefore, based on the positive trends and transformations of parallel trials over Rwandan genocide suspects, a multifaceted approach is suggested for post-conflict societies with large scale perpetrators and broken relationships so as to foster accountability at the international level, and enhance reconciliation through local mechanisms.\textsuperscript{1004} In particular, such an approach can surely be recommended in the great lakes region of Africa that has been plagued by wars characterised by gross violations of human rights on the basis of ethnicity, nationality, racial or religious grounds.


\textsuperscript{1004} Concurrent jurisdiction provided a wider and safety net for ensuring the wide investigations and prosecutions.
In regard to the optimal relationship between the various courts, international tribunals need to complement rather than to supersede the jurisdiction conferred on national courts. This possibly explains why the complementarity principle of the International Criminal Court may be the recommended remedy where there is a prevalence of national courts other than the absolute primacy of the international court, which should intervene only in exceptional circumstances. Therefore, the basic operating presumption should be that the local domestic courts will have primary jurisdiction to prosecute a crime, where however, a given state is unwilling or unable to conduct a free and fair trial, alternate mechanisms of justice at the international level would need to be considered.

This research argues that when domestic mechanisms that are specifically established to deal with the post-conflict crimes are properly implemented, they might then offer a powerful new mechanism for the enforcement of international criminal law while at the same time contributing to reconciliation of the affected population. Therefore in establishing the accountability of low level offenders who are usually the majority, priority should be accorded to alternatives which put restorative justice at the center of the whole process, such as Gacaca, while the high profile offenders should be subjected to purely retributive courts and international tribunals which fully observe fair trial rights.

Admittedly, this limited research cannot provide a full analysis of the relevant international and national law issues and may thus leave some questions unanswered. The author therefore calls upon future researchers to direct their research efforts with the aim of filling the gaps which this work did not cover.


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