

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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Degree of Doctor of Law (LLD) in the Faculty of Law, University of the
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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



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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.

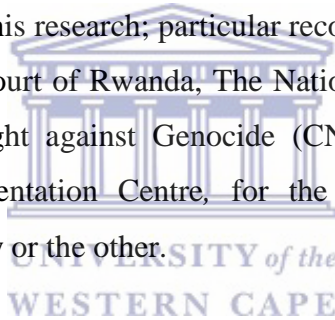
First and foremost, I wish to thank my supervisor, Professor Dr. Gerhard Werle, Head of the Transnational Criminal Justice and Crime Prevention Program and Professor of German and International Criminal Law, Humboldt-Universität zu Berlin. His wide knowledge, insightful comments and sage advice from the formative stages of this thesis, to the final draft aided me in innumerable ways. Just like in my LLM thesis, Prof Werle has been the ideal LLD supervisor for this study. Throughout the process he provided me with intellectual inspiration and exposed me to his wealth of theoretical and practical knowledge in the field of International Criminal Law. It is also with immense gratitude that I appreciate Prof Dr. Lovell Fernandez for his sound advice and constructive comments while in South Africa, particularly in regard to Transitional Justice.

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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.

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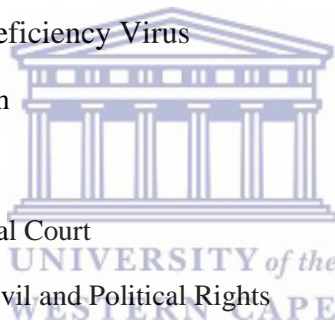
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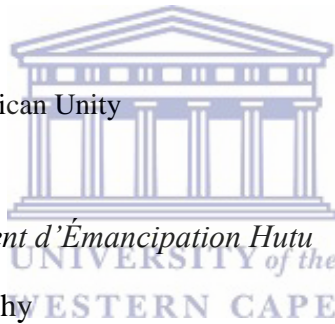
LIST OF ABBREVIATIONS

A.D	: After Death of Christ
AFP	: <i>Agence France Presse</i>
AIDS	: Acquired Immuno Deficiency Syndrom
Art.	: Article
ASF	: <i>Avocats Sans Frontières</i>
AVEGA	: <i>Association des Veuves du Génocide d'Avril</i>
BBC	: British Broadcasting Corporation
BC	: Before Christ
Cat	: Category
CCM	: Centre for Conflict Management
CCP	: Rwanda Code of Criminal Procedure
CDR	: <i>Coalition pour la Défense de la République</i>
CLADHO	: <i>Collectif des Ligues et Associations de Défense des des Droits de l'Homme</i>
CNLG	: National Commission for the Fight against Genocide
Cpl.	: Corporal
CPL	: Criminal Penal Law, aka Penal Code
Cpt.	: Captain
DAAD	: <i>Deutscher Akademischer Austausch Dienst</i> (German Academic Exchange Service)
Dr.	: Doctor
DRC	: Democratic Republic of Congo
e.g	: Example
ECHR	: European Convention for the Protection of Human Rights

ECtHR	: European Court of Human Rights
Ed(s).	: Editor(s)
Edn.	: Edition
<i>et al.</i>	: <i>et alii</i> (and others)
etc	: <i>et cetera</i>
FAR	: <i>Forces Armées Rwandaises</i>
FARG	: <i>Fonds d'Assistance aux Rescapés du Genocide</i>
FIDH	: <i>Federation Internationale des Droits de L'Homme</i>
FRW	: Rwandan Francs
G.A/Res.	: General Assembly Resolution
HIV	: Human Immuno-deficiency Virus
HRW	: Human Rights Watch
i.e.	: That is
ICC	: International Criminal Court
ICCPR	: International Covenant on Civil and Political Rights
ICG	: International Crisis Group
ICTR	: International Criminal Tribunal for Rwanda
ICTY	: International Criminal Tribunal for the former Yugoslavia
IDEA	: Institute for Democracy and Electoral Assistance
IHL	: International Humanitarian Law
IMT	: International Military Tribunal
<i>Inter alia</i>	: Among others
IRIN	: Integrated Regional Information Network
LIPRODHOR	: <i>Ligue Rwandaise pour la Promotion et la Défence Droits de l'Homme</i>
LLB	: Bachelor of Law (<i>Legum Baccalaureus</i>)
LLD	: Doctor of Law (<i>Legum Doctor</i>)



LLM	: Master of Law (<i>Magister Legum</i>)
MN.	: Marginal Number
MICT	: Mechanism for International Criminal Tribunals
MRND	: <i>Mouvement Révolutionnaire Nationale pour le Développement</i>
NGO's	: Non Governmental Organizations
N°	: Number
NSGC	: National Service of Gacaca Courts
NSGJ	: National Service of Gacaca Jurisdictions
NURC	: National Unity and Reconciliation Commission
O.G.R.R	: Official Gazette of the Republic of Rwanda
O.L	: Organic Law
OAU	: Organization for African Unity
Para.	: Paragraph
PARMEHUTU:	<i>Parti du Mouvement d'Émancipation Hutu</i>
Ph.D	: Doctor of Philosophy
Prof	: Professor
PRI	: Penal Reform International
RANU	: Rwandese Alliance for National Unity
RCN	: <i>Réseau des Citoyens Justice & Démocratie</i>
RDF	: Rwandan Defence Forces
Res.	: Resolution
RPA	: Rwandan Patriotic Army
RPE	: Rules of Procedure and Evidence
RPF	: Rwandan Patriotic Front
RTL M	: <i>Radio-Télévision Libre des Mille Collines</i>



TIG	: <i>Travaux d'Intérêt Général</i> (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	: <i>Union Nationale Rwandaise</i>
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 (<i>Völkerstrafgesetzbuch</i>)

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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



ABSTRACT

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.

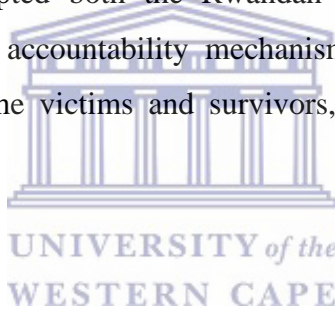
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However, having different courts for one and the same situation has had its own limitations. One of these issues is the legal and practical disparities that exist between the *ad hoc* International Tribunal and national justice mechanisms in the process 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 mechanisms⁴ 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.

² P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 16; A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 187 *et seq*; N. Jones, *The Courts of Genocide, Politics and the Rule of Law in Rwanda and Arusha*, (2011), at 22 *et seq*; J. M. Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation' 16 *Leiden Journal of International Law*, (2003), at 120 *et seq*.; M. P. Scharf and M. Day, 'The *Ad hoc* International Criminal Tribunals: Launching a New Era of Accountability' in W.A. Schabas and N. Bernaz (eds.), *Routledge Handbook of International Criminal Law*, (2011), at 58; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 17, MN 54.

³ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 1 *et seq*; 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 *et seq*; M.A Drumbl, 'Law and Atrocity: Settling Accounts in Rwanda,' 31 *Ohio Northern University Law Review*, (2005), at 41-74.

⁴ Art. IV of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (2008), at 66 *et seq*.

⁵ U.P. Behrendt, 'Dealing with the 1994 Genocide: A Comparative Analysis of Usefulness of the ICTR and Rwanda's National Prosecutions,' *University of Western Cape*, Thesis, (2001), at 1-3; see Preamble of the establishing instruments for the ICTR (1994), National Courts (1996), and Gacaca (2001).

At the international level, the UN established the ICTR to try those bearing the greatest responsibility,⁶ and the Rwandan national courts were to deal with Category One offenders,⁷ whereas Gacaca courts handled the bulk of cases under Category Two and Three,⁸ 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.⁹ 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,¹⁰ 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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⁶ In November 1994, the United Nations Security Council adopted Resolution 955 creating the International Criminal Tribunal for Rwanda (hereinafter the ICTR). See United Nations Security Council Resolution 955 S-RES-955 (1994) of 8 November 1994.

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.

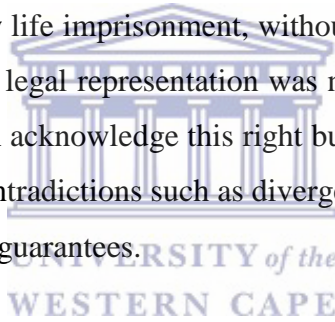
⁹ See, Art. 8 of the ICTR Statute; M. S. Ellis and R. J. Goldstone (eds.), *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, (2008), at 77; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 82, MN 226-227.

¹⁰ See detailed discussions in A. Cassese, *International Criminal Law*, 2nd edn, (2008), at 339 *et seq*; M. M Elzeidy, 'From Primacy to Complementarity and Backwards: (Re-) Visiting Rule 11 *bis* of the *Ad hoc* Tribunals,' 57 *International and Comparative Law Quarterly*, (2008), at 403-415; W.A. Schabas, *An Introduction to the International Criminal Court*, 3rd edn, (2007), at 171 *et seq*

allows the various systems to play complementary roles.¹¹ This has contributed to the overlap of international and domestic processes, and both formal and informal processes.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.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.



¹¹ U. P. Behrendt, 'Dealing with the 1994 Genocide: A Comparative Analysis of Usefulness of the ICTR and Rwanda's National Prosecutions' *University of Western Cape*, Thesis, (2001), at 3; B.S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals,' 23 *Yale Journal of International Law*, (1998), at 394 *et seq*; C. Mibenge, 'Concurrent Application of International, National and African Laws in Rwanda,' in R. Yepes-Enriquez and L. Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters*, (2002), at 95 *et seq*; R. Wedgwood, 'National Courts and the Prosecution of War Crimes' in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. 1, (2000), at 408 *et seq*.

¹² C. Lekha Sriram, 'Revolutions in Accountability: New Approaches to Past Abuses' 19 *American University International Law Review*, (2003), at 398; see also M. H. Morris, 'The Trials of Concurrent Jurisdictions: The Case of Rwanda,' 7 *Duke Journal of Comparative and International Law*, (1997), at 362 *et seq*.; L. Nadya Sadat, 'Understanding the Complexities of International Criminal Tribunal Jurisdiction' in W.A. Schabas and N. Bernaz (eds.), *Routledge Handbook of International Criminal Law*, (2011), at 206 and 197 *et seq*.

¹³ Froduard 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 *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,' *The Independent*, 13 March 1996, at 10; M. Bigg, 'UN Rwanda Genocide Tribunal Adjourns,' *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

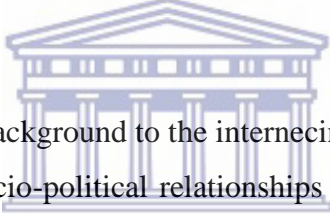
The research is mainly library-based, and will explore both primary and secondary sources. The primary sources include national laws, international law instruments, resolutions, reports, and case law emanating from international and domestic jurisdictions. Secondary sources include books by pre-eminent 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. 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.

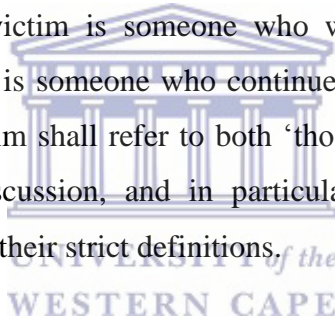
In sum, the study basically compares all the justice approaches to the 1994 genocide in Rwanda. Therefore, the status of the ICTR trials will stand in contrast to those of the Rwandan national courts and Gacaca courts. The study questions why the huge difference between the budget of the ICTR Tribunal 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 harmed¹⁴ 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.



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.¹⁵ In 1994, Rwanda had a population of 7.5 million, comprising of Hutu, Tutsi and Twa ethnic groups, with the Hutu being the majority.¹⁶ Accordingly, the Hutu comprised roughly 85% of the population, the Tutsi, 14%, and the Twa a mere 1%.¹⁷ 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.¹⁸ 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.¹⁹

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

¹⁵ G. Hankel, ‘Justice in Transition: The case of Rwanda,’ in G. Werle (ed) *Justice in Transition-Prosecution and Amnesty in Germany and South Africa*, (2006), at 175; P. J. Magnarella, ‘How could it happen? The Background and Causes of the Genocide in Rwanda’ 3 *Journal of International Criminal Justice*, (2005), at 801 *et seq.*

¹⁶ Republique Rwandaise, Recensement Général de la population et de l’habitat au 15 Août 1991, Décembre 1991, Rwanda had a population of 7,590,235; K. Ellicott (ed.), *Countries of the World and their Leaders Yearbook*, Vol. 2, (2006), at 1562.

¹⁷ A. Twagilimana, *Hutu and Tutsi*, (1998), at 9. The ethnic percentage of the 1933 census was still applicable in Rwanda.

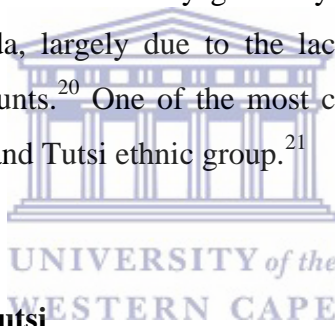
¹⁸ E. Daly, ‘Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda,’ 34 *New York University Journal of International Law and Politics*, (2002), at 35.

¹⁹ Newbury argues that ‘One can only understand the genocide through an understanding of Rwanda’s history,’ in D. Newbury and C. Newbury, ‘Bringing the Peasants Back in: Agrarian Themes in the Construction and Corrosion of Statist Historiography in Rwanda,’ 105 *American Historical Review*, (2000), at 832-877; see also D. Newbury, ‘Background to Genocide in Rwanda,’ 23 *A Journal of Opinion*, (1995), at 12-17.

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.²⁰ One of the most contested issues concerns the origin and relationship of the Twa, Hutu and Tutsi ethnic group.²¹



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 millenium BC or long before the Stone Age.²² Historians believe that the area's first known inhabitants were a pygmoid people, the ancestors of the present-day Twa, *Abasangwa butaka*.²³ These were primarily forest dwellers, hunters and potters, characterised as

²⁰ A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 31; P. Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda*, (1998), at 48-49; see also J. Pottier, *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century*, (2002), at 22 *et seq.*

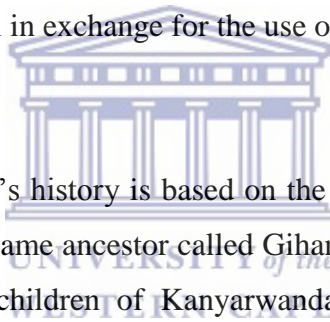
²¹ N. Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda*, (2004), at 12 *et seq.*; see also R. Lemarchand, 'Genocide in the Great Lakes: Which Genocide? Whose Genocide?' 41 *African Studies Review*, (1998), at 5 *et seq.*

²² J. Chrétien, *Rwanda: Les Médias du Génocide*, (1995), at 44; P. R. Schimdt, *A New Look at Interpretations of the Early Iron Age in East Africa: History in Africa*, (1975), at 127-136.

²³ J. Lewis and J. Knight, *Rapport d'évaluation de La Situation des Twa et Pour La Promotion des Droits des Twa dans Le Rwanda d'après Guerre*, (1996), at 35.

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.²⁴

The Bantu-speaking Hutu agriculturalists arrived, probably from the east, and began clearing and settling the hills.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.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.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.²⁸ The Hutu, who were largely farmers, entered into contract (*ubuhake*) with the Tutsi, in terms of which the Hutu promised services to the Tutsi in exchange for the use of cattle and land.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.³⁰ The three children of Kanyarwanda were believed to have been the

²⁴ F.X Bangamwabo *et al.*, *Les Relations Interethniques au Rwanda à la Lumière de l'Agression d'Octobre 1990*, (1991), at 26-31.

²⁵ P. J. Magnarella, 'How Could It Happen? The Background and Causes of the Genocide in Rwanda,' 3 *Journal of International Criminal Justice*, (2005), at 801-822.

²⁶ A.Twagilimana, *Hutu and Tutsi*, (1998), at 9; F. X Bangamwabo *et al.*, *Les Relations Interethniques au Rwanda à la Lumière de l'Agression d'Octobre 1990*, (1991), at 29-30.

²⁷ P.J. Magnarella, 'How Could It Happen? The Background and Causes of the Genocide in Rwanda,' 3 *Journal of International Criminal Justice*, (2005), at 801-822; E.R Sanders, 'The Hamitic Hypothesis, its Origin and Functions in Time Perspective,' 10 *Journal of African History*, (1969), at 521-532.

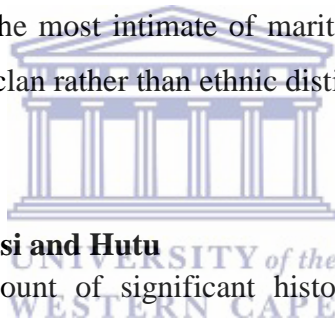
²⁸ J.J. Maquet, *The Premise of Inequality in Ruanda: A Study of Political Relations in a Central African Kingdom*, (1961), at 89-91, 170, 103-105; C. Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda, 1860-1960*, (1988), at 11; P. J. Magnarella, 'How Could It Happen? The Background and Causes of the Genocide in Rwanda,' 3 *Journal of International Criminal Justice*, (2005), at 801-822.

²⁹ One way in which Hutu sought protection was through *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 *et al.*, *Les Relations Interethniques au Rwanda à la Lumière de l'Agression d'Octobre 1990*, (1991), at 31.

³⁰ B. Lukan, *Histoire du Rwanda: De la Préhistoire à nos Jours*, (1997), at 79; B. Maniragaba, 'Le Mythe des fils de Gihanga ou l'histoire d'une Fraternité Toujours Manquée,' in FX Bangamwabo *et al.*, *Les Relations Interethniques au Rwanda à la Lumière de l'agression d'Octobre 1990*, (1991), at 61-129.

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

³¹ J. Mukimbi, 'The Seven Stages of the Rwandan Genocide,' 3 *Journal of International Criminal Justice*, (2005), at 824 *et seq.*

³² Government of Rwanda, 'The Relationship between the ordinary Bahutu, Batutsi and Batwa,' available at <<http://www.rwanda1.com/government>>, accessed in September 2012.

³³ L. Vansina, *Le Rwanda Ancien: Le Royaume Nyiginya*, (2001), at 178; P. E Nantulya, 'The Gacaca System in Rwanda,' 4 *Conflict Trends*, (2001), at 53 *et seq.*; B. Lugan, *Histoire du Rwanda: De la Préhistoire à nos Jours*, (1997), at 67-68; A. Purdeková, 'Building a Nation in Rwanda? De-ethnicisation and its Discontents,' 8 *Studies in Ethnicity and Nationalism*, (2008), at 502-523.

³⁴ 'Abasinga, Abasindi, Abazigaba, Abagesera, Abanyiginya, Abega, Ababanda, Abacyaba, Abungura, Abashambo, Abatsobe, Abakono, Abaha, Abashingo, Abanyakabama, Abasita, Abongera, Abanengwe'; For details, B. Lugan, *Histoire du Rwanda: De la Préhistoire à nos Jours*, (1997), at 68 *et seq.*; see also C. Ndikubwimana, *Agatabo k'imfanyanyigisho: Ingingo z'ingenzi mu Mateka y'u Rwanda kuva Rubayeho Kugeza mu Mwaka w'1994*, (2004), at 24.

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.³⁷ 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.³⁸ 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.³⁹ As noted by Maguire, the divergence between the groups was based on economic and socio-political status rather than ethnicity.⁴⁰

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.⁴¹ 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.⁴² Yet, both Hutu and Tutsi considered the Twa as an inferior class and any marriage with them was considered as an insult.⁴³ However, it was not a choice to belong to a particular group but a matter of birth or change of social status.

³⁷ P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 9.

³⁸ See M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, (2001), at 44-45.

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.

⁴⁰ L. Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi,' 2 *Buffalo Journal of International Law*, (1995), at 49-60; see M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, (2001), at 75-88.

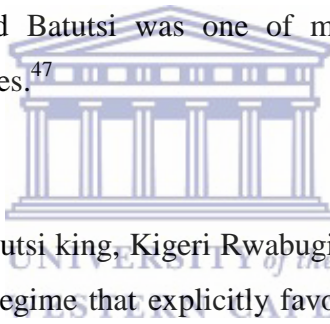
⁴¹ L. Rutagarama, 'Le Veil de la Conscience Politique des Masses Populaires au Mayaga de 1931-1957,' *Université Nationale du Rwanda*, Dissertation, (1988), at 15-16.

⁴² J. K. Rennie, 'The Precolonial Kingdom of Rwanda: A Reinterpretation' 2 *Transafrican Journal of History*, (1972), at 33.

⁴³ J. Vansina, R. Mauny, and L.V. Thomas, *The Historian in Tropical Africa*, (1964), at 21 *et seq.*; N. A. Jones, *The Courts of Genocide, Politics and the Rule of Law in Rwanda and Arusha*, (2010), at 5; C. Vidal, 'Colonisation et Décolonisation du Rwanda: La Question Tutsi-Hutu?' 91 *Revue Française d'Etudes Politiques Africaines*, (1973), at 32-47.

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.⁴⁴ Similar names were given indiscriminately to Tutsi or Hutu and the lines between them were blurred by intermarriage.⁴⁵

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).⁴⁶ 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.⁴⁷



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.⁴⁸ The Hutu, who

⁴⁴ M. A. Drumbl, ‘Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda,’ 75 *New York University Law Review*, (2000), at 1242-1243.

⁴⁵ See M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, (2001), at 4; J. J. Maquet, *The Premise of Inequality in Ruanda: A Study of Political Relations in a Central African Kingdom*, (1961), at 77-78.

⁴⁶ A. Kagame, *La Notion de Génération Appliquée à La Généologie Dynastique et à L'Histoire du Ruanda, des X-Xie Siecles à nos Jours*, (1959), at 57-59; J.J. Maquet, ‘The Kingdom of Ruanda’ in D. Forde (ed.), *African Worlds: Studies in the Cosmological Ideas and Social Values of African Peoples*, (1954), at 185; Residence du Ruanda, *Chefferies et Sous-Chefferies au 31 Decembre 1956*, at 11 *et seq.*

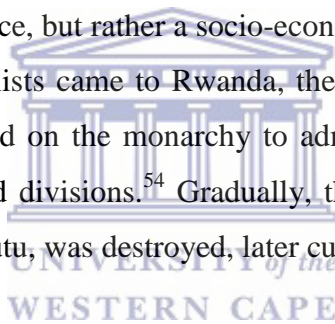
⁴⁷ Government of Rwanda, ‘The Relationship between the ordinary Bahutu, Batutsi and Batwa’ available at <<http://www.rwanda1.com/government>>, accessed in June 2012; P. Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda*, (1998), at 47-49; J.J. Maquet, ‘The Kingdom of Ruanda’ in D. Forde (ed.), *African Worlds: Studies in the Cosmological Ideas and Social Values of African Peoples*, (1954), at 164 *et seq.*

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.⁴⁹ The Tutsi became the political elite, with their hereditary monarchy under a Tutsi king from the Abanyiginya clan.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.⁵¹ Modern historians also stress that during the pre-colonial period, there were no major Tutsi-Hutu conflicts as such.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.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.⁵⁴ Gradually, the mutual relationship between the two dominant groups, Tutsi and Hutu, was destroyed, later culminating in ethnic hatred.



⁴⁹ P. J. Magnarella, 'How Could It Happen? The Background and Causes of the Genocide in Rwanda,' 3 *Journal of International Criminal Justice*, (2005), at 801-822; L. Vansina, *Le Rwanda Ancien: Le Royaume Nyiginya*, (2001), at 175; Residence du Ruanda, *Chefferies et Sous-Chefferies au 31 Decembre 1956*, at 10 *et seq.*

⁵⁰ J.J. Maquet, *The Premise of Inequality in Ruanda: A Study of Political Relations in a Central African Kingdom*, (1961), at 170; C. Newbury, 'Background to Genocide in Rwanda,' 23 *A Journal of Opinion*, (1995), at 17 *et seq.*

⁵¹ J. E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda,' 24 *Yale Journal of International Law*, (1999), at 365.

⁵² S. Byamukama and J.A. Kapranos Huntley, 'Criminal Justice in the Aftermath of the 1994 Rwanda Genocide,' in R. Henham and P. Behrens, *The Criminal Law of Genocide, International, Comparative and Contextual Aspects*, (2007), at 233 *et seq.*; C. Ndikubwimana, *Agatabo k'imfanyanyigisho: Ingingo z'ingenzi mu Mateka y'u Rwanda kuva Rubayeho Kugeza mu Mwaka w'1994*, (2004), at 46; G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 39.

⁵³ A. Kagame, *Les Organisations Socio-Familiales de L'ancien*, (1954), at 6-27; J.J. Maquet, *The Premise of Inequality in Ruanda: A Study of Political Relations in a Central African Kingdom*, (1961), at 89-91; E. Mujawimana, 'Le Commerce des Esclaves au Rwanda (1880-1918)' *Université Nationale du Rwanda, Memoire de Licence*, (1983), at 21 *et seq.*

⁵⁴ E. L. Nyankanzi, *Genocide: Rwanda and Burundi*, (1998), at 8; C. Ndikubwimana, *Agatabo k'imfanyanyigisho: Ingingo z'ingenzi mu Mateka y'u Rwanda kuva Rubayeho Kugeza mu Mwaka w'1994*, (2004), at 22; A. Shyaka *et al.*, 'Peace and Conflict Trends in Africa, The Great Lakes Region,' 1 *Journal of African Conflicts and Peace Studies*, (2008), at 6.

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

⁵⁵ Traditionally, ubuhake was not a universal practice in precolonial Rwanda but later increased during the period of Belgian colonial rule where it turned into uburetwa which required its clients to perform menial services as payment for the use of land. Unlike ubuhake, uburetwa offered no reciprocal benefits to the client. C. Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda 1860-1960*, (1988), at 111-140; see J. F. Saucier, 'The Patron-Client Relationship in Traditional and Contemporary Southern Rwanda,' *Columbia University*, PhD Thesis, (1974), at 44 *et seq.*

⁵⁶ A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' 103 *African Affairs*, (2004), at 73-89; L. Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi,' 2 *Buffalo Journal of International Law*, (1995), at 49-60; G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 35.

⁵⁷ A. K. Wing and M.R. Johnson, 'Promise of a Post-Genocide Constitution Healing Rwandan Spirit Injuries,' 7 *Michigan Journal of Race and Law*, (2002), at 257.

⁵⁸ See Graf von Gotzen, *Durch Afrika von Ost nach West*, Berlin: Dietrich Reimer, and Richard Kandt, *Caput Nili., Eine empfindsame Reise zuden Quellen des Nils*, Berlin: Dietrich Reimer, 1919 (1st edition 1905), 2 vols. in G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 3. Between 1907 and 1914 Kandt was the first German governor of Rwanda, affectionately known by the Rwandan people as Kanayoge.

⁵⁹ R. Bindseil, *Le Ruanda et l'Allemagne depuis le temps de Richard Kandt*, Berlin, (1988), at 122; P. J. Magnarella, *Justice in Africa: Rwanda's Genocide, its Courts, and the UN Criminal Tribunal*, (2000), at 21; C. Ndikubwimana, *Agatabo k'imfanyanyigisho: Ingingo z'ingenzi mu Mateka y'u Rwanda kuva Rubayeho Kugeza mu Mwaka w'1994*, (2004), at 27-28.

and present-day Tanzania were part of German-East Africa under Germany's colonial policy.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.⁶¹ Colonial anthropology associated the Tutsi with the Hamitic race, while the Hutu were associated with the Negroes or Bantu group.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.⁶³ 'Richard Kandt'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.'⁶⁵

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

⁶⁰ P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 10; R. Bindseil, *Le Ruanda et l'Allemagne depuis le temps de Richard Kandt*, Berlin, (1988), at 122; P. J. Magnarella, 'How Could It Happen? The Background and Causes of the Genocide in Rwanda,' 3 *Journal of International Criminal Justice*, (2005), at 801-822.

⁶¹ L. Mbanda and S. Wamberg, *Committed to Conflict: The Destruction of the Church in Rwanda*, (1997), at 47; J. Maquet, *The Premise of Inequality in Ruanda: A Study of Political Relations in a Central African Kingdom*, (1961), at 185; G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 6, 46 and 47.

⁶² H. Codere, 'Powers in Rwanda,' 4 *Anthropologica*, Canadian Anthropology Society, (1962), at 45-85; E. R. Sanders, 'The Hamitic Hypothesis, its Origin and Functions in Time Perspective,' 10 *Journal of African History*, (1969), at 521-532.

⁶³ P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (2012), at 10; J. Chrétien, 'Hutu et Tutsi au Rwanda et au Burundi,' in J. Amselle and E. M'Bokolo, *Au Coeur de l'ethnie: Ethnie, Tribalisme et état en Afrique*, (1985), at 137.

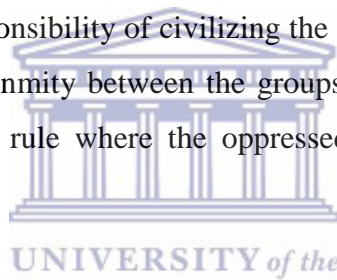
⁶⁴ Richard Kandt as a representative of the 'Deutsch Ostafrika' in Rwanda.

⁶⁵ See details in B. Lugan, *Sources écrites pouvant Servir à L'histoire du Rwanda: Etudes Rwandaises*, N° special, 5, XIV, (1980), at 132.

⁶⁶ A. Kagame, *Un abrégé de l'histoire du Rwanda de 1853 à 1972*, Vol. 2, (1975), at 174; P. J. Magnarella, *Justice in Africa: Rwanda's Genocide, its Courts, and the UN Criminal Tribunal*, (2000), at 9; C. Ndikubwimana, *Agatabo k'imfanyanyigisho: Ingingo z'ingenzi mu Mateka y'u Rwanda kuva Rubayeho Kugeza mu Mwaka w'1994*, (2004), at 49.

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.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰



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.⁷¹ 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

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.

⁶⁸ M. Moisel, *Die Urundi-Ruandabahn*, *Deutsche Kolonialzeitung*, XXX, 25, (1913), at 418-420, K. Roel, *Erinnerungen an Ruanda und Seinen Sultan Musinga*, *Das Hochland*, at 7, (1932), in B. Lugan, *Histoire du Rwanda: De la Préhistoire à nos Jours*, (1997), at 500 *et seq.*

⁶⁹ Bethe (Hauptmann,) *Bericht über einen Zug nach Ruanda*, *Deutsches Kolonialblatt* (1899), at 6-12, in B. Lugan, *Histoire du Rwanda: De la Préhistoire à nos Jours*, (1997), at 241 *et seq.*

⁷⁰ W.R. Louis, *Ruanda-Urundi, 1884-1919*, (1963), at 203; E. Mujawimana, *Le Commerce des Esclaves au Rwanda (1880-1918)*, *Université du Rwanda*, *Memoire de Licence*, (1983), at 21 *et seq.*

⁷¹ A. Des Forges, 'Defeat is the only Bad News: Rwanda under Musinga (1896-1931),' *Yale University*, PhD thesis, (1972), at 5 *et seq.*; see A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' *103 African Affairs*, (2004), at 73-89; M. Moisel, *Die Urundi-Ruandabahn*, *Deutsche Kolonialzeitung*, XXX, 25, (1913), at 418-420.

two most numerous groups, Tutsi and Hutu on the other hand.⁷² 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 1962.⁷³

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.⁷⁴ 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,⁷⁵ were allowed to continue to govern as long as they reported serious infractions to the colonial

⁷² Résidence du Rwanda, Réunion du Cadre des Chefs du Rwanda tenue à Nyanza, 2è Session du 15 au 18 Avril 1958, Pays du Rwanda, Réunion du Cadre des Autorités indigènes tenue à Nyanza le 20/4/195 in A. Kagame, *Un abrégé de l'histoire du Rwanda de 1853 à 1972*, Vol. 2, (1975); U. P. Behrendt, *Die Verfolgung des Völkermordes in Ruanda durch internationale und nationale Gerichte*, (2005), at 9-10.

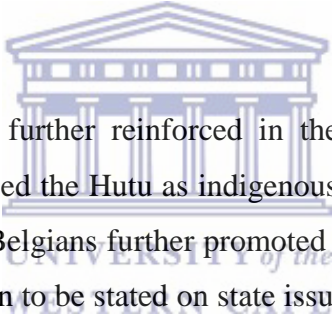
⁷³ A. Kagame, *Un abrégé de l'histoire du Rwanda de 1853 à 1972*, Vol. 2, (1975), at 174; C. Ndikubwimana, *Agatabo k'imfanyanyigisho: Ingingo z'ingenzi mu Mateka y'u Rwanda kuva Rubayeho Kugeza mu Mwaka w'1994*, (2004), at 36; P. J. Magnarella, *Justice in Africa: Rwanda's Genocide, its Courts, and the UN Criminal Tribunal*, (2000), at 9-15; L. S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, (1997), at 290.

⁷⁴ Ministère des Colonies, *Rapport Annuel du Territoire de Nyanza*, (1925), at 34 quoted in J. Rumiya, *Le Rwanda sur le Mandat Belge 1916-1931*, (1992), at 140 *et seq*; P. J. Magnarella, 'How Could It Happen? The Background and Causes of the Genocide in Rwanda,' 3 *Journal of International Criminal Justice*, (2005), at 801-822.

⁷⁵ C. Ndikubwimana, *Agatabo k'imfanyanyigisho: Ingingo z'ingenzi mu Mateka y'u Rwanda kuva Rubayeho Kugeza mu Mwaka w'1994*, (2004), at 20; C. M. Venter, 'Eliminating Fear through Recreating Community in Rwanda: The Role of the Gacaca Courts,' 13 *Texas Wesleyan Law Review*, (2007), at 577 *et seq*.

government and were obliged to act in conformity with colonial expectations and legal mores.⁷⁶ 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.⁷⁷ If the Tutsi supervisors did not get the job done, their colonial masters whipped or replaced them.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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 1933.⁸¹ Accordingly, the Belgians used ownership of cows as the key

⁷⁶ A. Destexhe, *Rwanda and Genocide in the Twentieth Century*, (1995), at 40-45; G. Rwaka, 'Imvo n'imvanyo y'urugamba rwo kubohora u Rwanda, (1 Ukwakira 1990)' *Igihe news*, 1 October 2012.

⁷⁷ P. Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda*, (1998), at 57 *et seq.* Also F. Rutembesa na E. Mutwarasibo, 'Amateka Ya Jenocide Yakorewe Abatutsi Muri Mugina,' *CNLG*, (April 2009), at 39-40.

⁷⁸ Itegeko N° 3/15 ryashizeho guhanishwa ibiboko, kuva kuri 1 kugeza kuri 14; C. Ndikubwimana, *Agatabo k'imfanyanyigisho: Ingingo z'ingenzi mu Mateka y'u Rwanda kuva Rubayeho Kugeza mu Mwaka w'1994*, (2004), at 37; B. Debre, *La Véritable Histoire des Génocides Rwandais*, (2006), at 21; G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 35.

⁷⁹ The 1933-1934 General Census in Rwanda conducted by Belgians.

⁸⁰ C. M. Venter, 'Eliminating Fear through Recreating Community in Rwanda: The Role of the Gacaca Courts,' 13 *Texas Wesleyan Law Review*, (2007), at 577 *et seq.*

⁸¹ C. M. Venter, 'Eliminating Fear through Recreating Community in Rwanda: The Role of the Gacaca Courts,' 13 *Texas Wesleyan Law Review*, (2007), at 578 *et seq.*

criterion for determining which group an individual belonged.⁸² 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 craftwork and pottery.⁸³ 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,⁸⁴ employment, and in the civil service basing on identification.⁸⁵ 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.⁸⁶ 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.

⁸² C. Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda 1860-1960*, (1988), at 112; see C. Newbury, (1998), 'Ethnicity and the Politics of History in Rwanda, Africa Today,' 45 *Indiana University Press*, at 7.

⁸³ African Rights, *Rwanda: Death, Despair, and Defiance*, (1995), at 9 *et seq*; see M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, (2001), at 98.

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.

⁸⁵ United Nations Department of Public Information, *The United Nations and Rwanda 1993-1996*, Vol. X, (1996), at 8; P. J. Magnarella, *Justice in Africa: Rwanda's Genocide, its Courts, and the UN Criminal Tribunal*, (2000), at 12; A. Purdeková, 'Building a Nation in Rwanda? De-ethnicisation and its Discontents' 8 *Studies in Ethnicity and Nationalism*, (2008), at 502-523.

⁸⁶ United Nations Department of Public Information, *The United Nations and Rwanda 1993-1996*, Vol. X, (1996), at 37 *et seq*.

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

⁸⁷ See M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, (2001), at 114-115.

⁸⁸ Bureau of African Affairs, 'U.S. Department of State, Background Note: Rwanda,' at <http://www.state.gov/r/pa/bgn/index.cfm?docid=2861>, last accessed September 2012; C. M. Venter, 'Eliminating Fear through Recreating Community in Rwanda: The Role of the Gacaca Courts,' 13 *Texas Wesleyan Law Review*, (2007), at 577-580; P. Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda*, (1998), at 58-60.

⁸⁹ See M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, (2001), at 106-116

⁹⁰ P. Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda*, (1998), at 58 *et seq*; S.C. Saha (ed.) *Perspectives on Contemporary Ethnic Conflict: Primal Violence or the Politics of Conviction?*, (2006), at 116; A. K. Wing and M.R Johnson, 'Promise of a Post-Genocide Constitution Healing Rwandan Spirit Injuries' 7 *Michigan Journal of Race and Law*, (2002), at 257.

⁹¹ C. Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda 1860-1960*, (1988), at 191; F. Rutembesa na E. Mutwarasibo, 'Amateka Ya Jenoside Yakorewe Abatutsi Muri Mugina,' CNLG, (April 2009), at 37 *et seq*.

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

⁹² R. Lemarchand, *Rwanda and Burundi: Politics and Government*, (1970), at 149-153.

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.

⁹⁶ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 11; P. J. Magnarella, 'How Could It Happen? The Background and Causes of the Genocide in Rwanda,' 3 *Journal of International Criminal Justice*, (2005), at 801-822; G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 47 et seq.

Catholic Church beliefs.⁹⁷ Instead, in addition to obedience shown to colonial rule, the Hutu majority had proved much more receptive to the gospel spread by the missionaries.⁹⁸

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.'⁹⁹ This period marked the end of a five-century monarchy in Rwanda and the beginning of the continuous Tutsi harassment by Hutu-led governments.¹⁰⁰

The ensuing violence left more than 20,000 Tutsi dead and sent more others fleeing to neighbouring countries.¹⁰¹ 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).¹⁰² The land and

⁹⁷ The mwami and many of the chiefs only converted to Christianity in the 1930s, see details in L. Mbanda and S. Wamberg, *Committed to Conflict: The Destruction of the Church in Rwanda*, (1997), at 47; see also P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 11 *et seq.*; E. L. Nyankanzi, *Genocide: Rwanda and Burundi*, (1998), at 8-9.

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

⁹⁹ See M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, (2001), at 124; G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 52.

¹⁰⁰ A. Mugesera, *Imibereho Y'abatutsi Kuri Repubulika Ya Mbere N'iya Kabiri 1959-1990*, (2004), at 87 *et seq.*; E. L. Nyankanzi, *Genocide: Rwanda and Burundi*, (1998), at 8 *et seq.*

¹⁰¹ Different figures are provided by Anastase Shyaka where he asserts that approximately 30,000 Tutsis were massacred between 1959 and 1966 and around 500,000 Tutsis found refuge in Uganda, Tanzania and Zaire now the Democratic Republic of Congo (DRC). See A. Shyaka *et al.*, 'Peace and Conflict Trends in Africa, The Great Lakes Region,' 1 *Journal of African Conflicts and Peace Studies*, (2008), at 6; United Nations Department of Public Information, *The United Nations and Rwanda 1993-1996*, Vol. X, (1996), at 8-9.

¹⁰² A. Shyaka *et al.*, 'Peace and Conflict Trends in Africa, The Great Lakes Region,' 1 *Journal of African Conflicts and Peace Studies*, (2008), at 6; BBC News Africa, 2008, 'Rwanda: How the Genocide Happened,'

<<http://www.bbc.co.uk/news/world-africa-13431486>>, accessed September 2012; A United Nations Report,

'Rwanda: A Brief History of the Country' available at

<<http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml>>, accessed August 2012.

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,

¹⁰³ A. Walter Dorn and J. Matloff, 'Preventing the Bloodbath: Could the UN have Predicted and Prevented the Rwandan Genocide?' 20 *Journal of Conflict Studies*, (2000), at 9 *et seq*; Ibarwa y'abagaragu bakuru b'ibwami, *Kinyamateka*, N° 22, (15 March 1958), at 2.

¹⁰⁴ The Rwandan Constitution of 24 November 1962.

¹⁰⁵ Arts. 1 and 2, The Rwandan Constitution of 24 November 1962.

¹⁰⁶ Art. 3, The Rwandan Constitution of 24 November 1962.

¹⁰⁷ P. Erny, 'Catégories Spatiales et Structures Mentales au Rwanda,' *Cahiers de Sociologie Economique et Culturelle*, (24 December 1994), at 58 *et seq*.

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 1973.¹⁰⁸ However, no one was ever prosecuted or otherwise held accountable for those acts.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.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.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 sectarianism of southern Hutu,¹¹² which eventually led to a *coup d'état* in 1973 by Juvenal Habyarimana, the army chief of staff at the time.¹¹³

¹⁰⁸ D. Bideri, *Le massacre des Bagogwe: Un Prélude au Génocide des Tutsi Rwanda 1990-1993*, (2008), at 40-41; A. Mugesera, *Imibereho Y'abatutsi Kuri Repubulika Ya Mbere N'iya Kabiri 1959-1990*, (2004), at 172 *et seq*; Final Report of the Commission of Experts UN Doc. S/1994/1405, (1994), at 55.

¹⁰⁹ Report on the Situation of Human Rights in Rwanda submitted by R. Degni-Séqui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution, E/CN.4/S-3/1 of 25 May 1994, at 25, UN Doc. E/CN.4/1995/71 (1995) (hereinafter R. Deqni-Séqui, 1995 Summary Report of the Special Rapporteur on the Situation of Human Rights in Rwanda, (UN E/CN.4/1995/12).

¹¹⁰ D. Bideri, *Le massacre des Bagogwe: Un Prélude au Génocide des Tutsi Rwanda 1990-1993*, (2008), at 40-41; J. Mukimbiri, 'The Seven Stages of the Rwandan Genocide,' 3 *Journal of International Criminal Justice*, (2005), at 823; National Commission for the Fight against Genocide (CNLG), 15 Years after the Genocide Perpertrated against Tutsi (1994-2009), Challenges and Prospects, (2010), at 53.

¹¹¹ A. K. Wing and M.R Johnson, 'Promise of a Post-Genocide Constitution Healing Rwandan Spirit Injuries,' 7 *Michigan Journal of Race and Law*, (2002), at 262.

¹¹² D. Sebanwa, 'Ntimukitane Ba Mwana' in *Kinyamateka* N° 29, August 1966, at 3.

¹¹³ F. Gatera., 'Stratégies de Développement: Analyse des Effets du Modèle de Développement Suivis Depuis L'indépendance du Rwanda,' in F. Rutembesa, *et al.* 'Rwanda, Identité et Citoyenneté' Série N° 7 des Cahiers du Centre de Gestion des Conflits, CCM, (2003), at 169-185.

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).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.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.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.¹¹⁷ Therefore, the policy of Tutsi discrimination was promoted by both republics under the leadership of Gregoire Kayibanda and Juvenal Habyarimana respectively.¹¹⁸ Through the denial of fundamental rights and freedoms to certain citizens, the political structures of both republics violated various national and international laws.¹¹⁹ Moreover, no attempts were ever made to bring perpetrators of such violations to justice, and as a result, a culture of impunity was

¹¹⁴ United Nations Department of Public Information, *The United Nations and Rwanda 1993-1996*, Vol. X, (1996), at 10; P. J. Magnarella, 'How Could It Happen? The Background and Causes of the Genocide in Rwanda,' 3 *Journal of International Criminal Justice*, (2005), at 801-822.

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

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

¹¹⁷ Federation Internationale des Droits de L'homme (FIDH), Rapport de la Commission Internationale d'enquete (7-21 Janvier 1993), Violations Massives et Systématiques des Droits de l'Homme depuis le 1er Octobre 1990 au Rwanda, Paris (1993).

¹¹⁸ E.L. Nyankanzi, *Genocide: Rwanda and Burundi*, (1998), at 8-12; F. Rutembesa na E. Mutwarasibo, 'Amateka Ya Jenocide Yakorewe Abatutsi Muri Mugina,' *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,' *Politique de l'éducation, de la culture, de la recherché scientifique et technique au Rwanda*, N° 1 (Octobre 1984), at 32-35.

¹¹⁹ Republic of Rwanda, 'National Unity and Reconciliation Commission (NURC),' *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

¹²⁰ M. Ngoga, 'The Institutionalisation of Impunity: A Judicial Perspective of the Rwandan Genocide,' in P. Clark and Z.D. Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, (2008), at 321 *et seq.*

¹²¹ See L. Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide*, (2000), at 25; C.Vidal, 'Colonisation et Décolonisation du Rwanda: La Question Tutsi-Hutu?' 91 *Revue Française d'Etudes Politiques Africaines*, (1973), at 22 *et seq.*; A. Purdeková, 'Building a Nation in Rwanda? De-ethnicisation and its Discontents,' 8 *Studies in Ethnicity and Nationalism*, (2008), at 502-523.

¹²² L. Uwizeyimana, 'La politique de l'équilibre ethnique et régional dans l'emploi,' in F.X Bangamwabo *et al.*, *Les Relations Interethniques au Rwanda à la Lumière de l'Agression d'Octobre 1990*, (1991), at 316.

¹²³ See L.A. Fujii, 'Origins of Power and Identity in Rwanda,' Annual Conference paper of the International Studies Association, 20-24 February 2001, Chicago, available at <<http://www.isanet.org/archive/fujii.htm>>, accessed March 2012; M.C Kabwete., *L'Idée de Démocratie au Rwanda de 1948 à 1994*, UNR Mémoire de Licence, (1997), at 21 *et seq.*

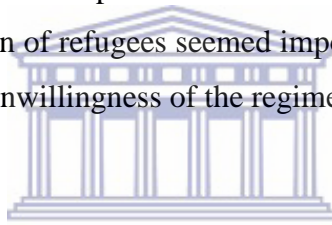
¹²⁴ Habyarimana refused to allow return of refugees, insisting that Rwanda was already too crowded and had too little land, jobs and food for them all; see V. Peskin, 'Rwandan Ghosts Eight Years after the Genocide, an International Tribunal is failing to Sort the Criminals from the Victims,' *Legal Affairs*, (2002), at 21 *et seq.*

¹²⁵ United Nations Department of Public Information, *The United Nations and Rwanda 1993-1996*, Vol. X, (1996), at 168; A. Shyaka *et al.*, 'Peace and Conflict Trends in Africa, The Great Lakes Region,' 1 *Journal of African Conflicts and Peace Studies*, (2008), at 6.

consequently, as their numbers expanded, the Tutsi in exile were concerned about returning to Rwanda.¹²⁶

E. Formation of the Rwandese Patriotic Front (RPF)

In response to the repression of Tutsi, in 1988, a group of mostly Rwandan refugees in Uganda formed the Rwandese Patriotic Front (RPF) which emerged from the former Rwandese Alliance for National Unity (RANU), the first organisation of these refugees.¹²⁷ The goals of RPF were to secure the return of all refugees to Rwanda and struggle for political power-sharing in the country where Habyarimana had established only a single party system.¹²⁸ By July 1990, in order to sabotage the RPF plans, Habyarimana declared that a multiparty system would be instituted in Rwanda and arranged an agreement on repatriation between Uganda and Rwanda.¹²⁹ However, practice showed that the repatriation of refugees seemed impossible given the negative economic constraints in Rwanda along with unwillingness of the regime at the time.¹³⁰



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.¹³¹ The formation of the RPF, with its own armed forces, the Rwandan Patriotic Army (RPA), was a direct threat to

¹²⁶ For figures of refugees see, F.X Bangamwabo *et al.*, *Les Relations Interethniques au Rwanda à la Lumière de l'Agression d'Octobre 1990*, (1991), at 185.

¹²⁷ O. Otunnu, 'Rwandese Refugees and Immigrants in Uganda,' in H. Adelman and A. Suhrhe (eds), *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, (1999), at 31-49.

¹²⁸ A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 37 *et seq*; United Nations Department of Public Information, *The United Nations and Rwanda 1993-1996*, Vol. X, (1996), at 12.

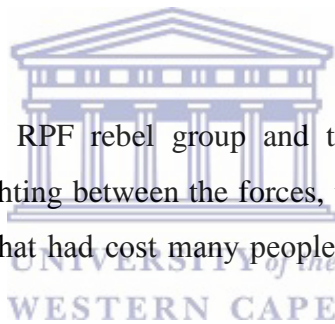
¹²⁹ United Nations Department of Public Information, *The United Nations and Rwanda 1993-1996*, Vol. X, (1996), at 12; Bureau of African Affairs, 'U.S. Department of State, Background Note: Rwanda,' at <http://www.state.gov/r/pa/bgn/index.cfm?docid=2861>, accessed September 2012.

¹³⁰ F. Reyntjens, *L'Afrique des Grands Lacs en Crise: Burundi, Rwanda 1988-1994*, (1994), at 28; A. Guichaoua, *Les Crises Politiques au Burundi et au Rwanda 1993-1994*, (1995); M. Mamdani, 'African States, Citizenship and War' 78 *International Affairs*, (2002), at 500 *et seq*.

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.

Hutu power.¹³² 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.¹³³

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.¹³⁴ Also, the ‘akazu’, meaning the circle of people around president Habyarimana’s wife, found the ideal opportunity to spread the genocide ideology.¹³⁵ 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.¹³⁶



Meanwhile, the war between the RPF rebel group and the Rwandan armed forces (FAR) continued.¹³⁷ 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

¹³² W.C. Reed, ‘Exile, Reform, and the Rise of the Rwandan Patriotic Front,’ 34 *The Journal of Modern African Studies*, (1996), at 484-485.

¹³³ Amnesty International (1992), ‘Persecution of Tutsi Minority and Repression of Government Critics 1990-1992,’ at <<http://www.amnesty.org/library/print/ENGAFR470021992>>, accessed May 2012; Bureau of African Affairs, ‘U.S. Department of State, Background Note: Rwanda,’ at <<http://www.state.gov/r/pa/bgn/index.cfm?docid=2861>>, last accessed September 2012; Minorities at Risk Project, ‘Chronology for Tutsis in Rwanda’ (2004), available at <<http://www.unhcr.org/refworld/docid/469f38d6c.html>>, accessed June 2012.

¹³⁴ Federation Internationale des Droits de L’homme (FIDH), Rapport de la Commission Internationale d’enquete (7-21 Janvier 1993), Violations Massives et Systématiques des Droits de l’Homme depuis le 1er Octobre 1990 au Rwanda, Paris (1993); O. Otunnu, ‘An Historical Analysis of the Invasion by the Rwanda Patriotic Army (RPA)’ in A. Howard and A. Suhrke (ed.), *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, (1999), at 3-29.

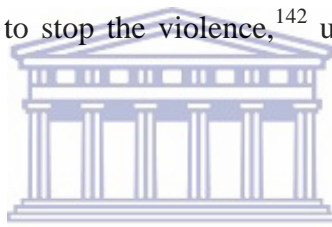
¹³⁵ G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 166-168.

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

¹³⁸ Arusha Peace Accords of 4 August 1993; Bureau of African Affairs, 'U.S. Department of State, Background Note: Rwanda,' at <<http://www.state.gov/r/pa/bgn/index.cfm?docid=2861>>, last accessed September 2012; L. Maguire, *Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi*, 2 *Buffalo Journal of International Law*, (1995), at 57.

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.

¹⁴¹ United States Institute for Peace, Special Report: Rwanda: Accountability for War Crimes and Genocide, January 1995; see Government of Rwanda, 'The Arusha peace agreement,' available at <<http://www.gov.rw/?lang=en>>, accessed May 2012.

¹⁴² For instance, see Special Rapporteur of the Human Rights commission, the Report of Bacre Waly Ndiaye on his mission to Rwanda from 8-17 April 1993, E/CN.4/1994/7/Add.1, 11 August 1993.

¹⁴³ See 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.

Burundi. In the board was killed.¹⁴⁴ The Hutu extremists immediately began slaughtering Tutsi and moderate Hutu in Kigali.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷

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.¹⁴⁸ For instance, in 1992, groups affiliated with the Rwandan army forces had already established two militias, the *Interahamwe* and *Impuzamugambi*.¹⁴⁹ These militias, which were trained by the army, periodically attacked Tutsi and eventually played an instrumental role in the 1994 atrocities.¹⁵⁰ In fact, despite the discrimination and torture directed against the Tutsi from 1959-1989, accumulation of killings occurred in 1990, through to 1993.

¹⁴⁴ L. Maguire, 'Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi,' 2 *Buffalo Journal of International Law*, (1995), at 60.

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.*

¹⁴⁶ U. Behrendt, 'The Prosecution of the Rwandan Genocide,' in G. Werle (ed), *Justice in Transition-Prosecution and Amnesty in Germany and South Africa*, (2006), at 227.

¹⁴⁷ A. Guichaoua, *Rwanda 1994: Les Politiques du Génocide à Butare*, (2005), at 22 *et seq.*; A. John Berry and C. Pott Berry (ed.), *Genocide in Rwanda: A Collective Memory*, (1999), at 116; A.G. Hankel, 'Justice in Transition-The case of Rwanda,' in G. Werle (ed), *Justice in Transition-Prosecution and Amnesty in Germany and South Africa*, at 175; A. Mugesera, *Imibereho Y'abatutsi Kuri Repubulika Ya Mbere N'iya Kabiri 1959-1990*, (2004), at 160 and 355; see UN Doc. S/1994/1405, (1994), Final Report of the Commission of Experts, at 64.

¹⁴⁸ L. Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi,' 2 *Buffalo Journal of International Law*, (1995), at 60; D. Sebanwa, 'Ntimukitane Ba Mwana' in *Kinyamateka* N° 29, (August 1966), at 3; C. Vidal., 'Les Politiques de la Haine' in *Les Temps Modernes*, Juillet-Août 1995, at 583.

¹⁴⁹ United States Institute for Peace, 'Rwanda: Accountability for War Crimes and Genocide,' (1995), available at <<http://www.usip.org/oc/sr/rwanda1.html>>, accessed April 2012.

¹⁵⁰ See Letter dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council, Annex, UN Doc. S/1994/1405, (1994), Final Report of the Commission of Experts, at 57-65.

Nevertheless, the most serious and massive killings, did not occur until 7 April 1994.¹⁵¹

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.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.¹⁵³

Although the persons responsible for the assassination of Habyarimana were never identified, it is postulated that extremist Hutu were behind it.¹⁵⁴ Upset with Habyarimana's decision to share power with the Tutsi, they assassinated him and executed the already planned massacres.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.¹⁵⁶ This was evidence that not only Tutsi were killed or disappeared, but also moderate Hutu in favour of the peace process were targeted.

¹⁵¹ 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 162-163.

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

¹⁵³ C. Braeckman, *Rwanda: Histoire d'un Génocide*, (1994), at 11 *et seq*; F. Nsengiyumva, *Ingoma Y'Amaraso*, (1995), at 220.

¹⁵⁴ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 15 *et seq*; A.K. Wing and M.R Johnson, 'Promise of a Post-Genocide Constitution Healing Rwandan Spirit Injuries,' 7 *Michigan Journal of Race and Law*, (2002), at 272; Mutsinzi report commissioned by the Rwandan government, Report of the Investigation into the causes and circumstances of and responsibility for the attack of 06/04/1994 against the Falcon 50 Rwandan presidential Aeroplane, Registration number 9XR-NN, (2010); The 10 January 2012 French Report Clearing Kagame Forces of Killing Former President, available at <<http://gov.rw/French-Judges-release-report-on-the-plane-crash-used-as-a-pretext-to-start-genocide-in-Rwan>>, accessed September 2012.

¹⁵⁵ L. Maguire, 'Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi,' 2 *Buffalo Journal of International Law*, (1995), at 60.

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 peace keepers 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

¹⁵⁷ A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (1999), at 187 *et seq*; S. Power, 'Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen,' *Atlantic Monthly*, September 2001, at 89.

¹⁵⁸ I. Carlsson, 'The UN Inadequacies,' 3 *Journal of International Criminal Justice*, (2005), at 838 *et seq*; see, R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 59; V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 319; see also UN Security Council Resolution 912, of 21 April 1994, at Para 8; Special Report of the Secretary-General of the United Nations Assistance Mission for Rwanda, UN Doc. S/1994/470 (1994), at 15-18; United Nations (1996), *United Nations and Rwanda: 1993-1996*, at 40.

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*.

¹⁶⁰ Organisation for African Unity, Special Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, (June 1998-July 2000), available at <<http://www.oau-oua.org/document/ipep/ipep.html>>, accessed June 2012; S. Straus, 'How many perpetrators were there in the Rwandan genocide? An estimate,' 6 *Journal of Genocide Research*, (2004), at 85-98, 'killing occurred in four main locations: (1) at central congregation points such as churches, schools, and government buildings; (2) at roadblocks; (3) during house-to-house searches; and (4) during searches through cultivated fields, wooded zones, and marshes.'

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.¹⁶² Also, children were extensively used as instruments for committing genocide, either as civilians or as soldiers.¹⁶³ 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.¹⁶⁴

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.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ No Tutsi was exonerated, neither the weak nor the pregnant.¹⁶⁸

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

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.

¹⁶³ African Rights, *Rwanda not so Innocent: When Women Become Killers*, (1995), at 2 *et seq.*

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.

¹⁶⁵ A. Des Forges, 'The Ideology of Genocide,' 23 *A Journal of Opinion*, (1995), at 44.

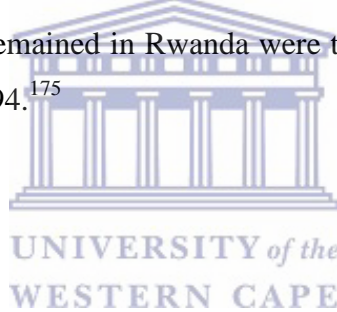
¹⁶⁶ A. Guichaoua, *Rwanda 1994: Les Politiques du Génocide à Butare*, (2005), at 22 *et seq.*; P. J. Magnarella, *Justice in Africa: Rwanda's Genocide, its Courts, and the UN Criminal Tribunal*, (2000), at 24. See also G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 232; G. Hankel, 'Justice in Transition-The case of Rwanda,' in G. Werle (ed), *Justice in transition-Prosecution and Amnesty in Germany and South Africa*, (2006), at 175.

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.*

¹⁶⁸ *The Prosecutor v. Kayishema and Ruzindana*, Case N°ICTR-95-1-T, Para 532, 21 May, 1999.

being carried out by Interahamwe, obviously leaving bitter consequences and deep wounds behind.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.¹⁷⁰ It is this failure to halt the genocide that initially strained the relationship between Rwanda and the United Nations,¹⁷¹ and created tensions with countries like France which had generously funded and supported the *génocidaires*.¹⁷²

As put by Dallaire,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.¹⁷⁴ Nevertheless, the UN forces that remained in Rwanda were too few to save the massive number of victims that were targeted in 1994.¹⁷⁵



¹⁶⁹ G. Gabiro: *Silent Victims of Rwanda's Genocide*, (2003), at <<http://www.hirondelle.org/hirondelle.nsf/0/e50bea4b77a0482bc1256763005ac92a?OpenDocument>>, May 2012.

¹⁷⁰ A.K. Wing and M.R Johnson, 'Promise of a Post-Genocide Constitution Healing Rwandan Spirit Injuries' 7 *Michigan Journal of Race and Law* (2002), at 272 *et seq*; S. Power, 'Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen,' *Atlantic Monthly*, September 2001, at 99.

¹⁷¹ See I. Carlsson, 'The UN Inadequacies,' 3 *Journal of International Criminal Justice*, (2005), at 837 *et seq*.; R. Lemarchand, 'Rwanda: The Rationality of Genocide' 23 *A Journal of Opinion*, (1995), at 8; G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 103 *et seq*.

¹⁷² See UN Security Council Resolution 929 (1994); The area of French influence, known as 'Zone Turquoise' within the Cyangugu, Kibuye, Gikongoro triangle, was meant to save lives and stop the mass killings, but on the contrary killings did occur under their supervision. See details in R. Dallaire and K. Manocha, 'The Major Powers and the Genocide in Rwanda' in R. Henham and P. Behrens, *The Criminal Law of Genocide, International, Comparative and Contextual Aspects*, (2007), at 62 *et seq*.

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*.

¹⁷⁴ S. Power, 'Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen,' *Atlantic Monthly*, September 2001, at 99.

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.¹⁷⁶ This tragedy may have set a historic record for the largest number of people put to death in such a short time.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹

In light of the magnitude and the nature of international crimes that had been committed in Rwanda, the new government inherited various problems, ranging from infrastructural annihilation to justice needs.¹⁸⁰ It had to institute the rule of law and consider reconciliatory efforts by eradicating, *inter alia*, the culture of impunity where no one had been punished for the periodic massacres.¹⁸¹ Therefore, in an effort to deal with the past, the ICTR,¹⁸² national courts¹⁸³

¹⁷⁶ 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.

¹⁷⁷ 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.

¹⁷⁸ 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.

¹⁷⁹ Government of Rwanda, available at <<http://www.rwanda1.com/government>> accessed in September 2012

¹⁸⁰ C.J. Ferstman, 'Rwanda's Domestic Trials for Genocide and Crimes against Humanity,' 1 *Washington College of Law*, (1997), at 1-15; J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 898 *et seq.*; G. Hankel, 'Justice in Transition-The case of Rwanda,' in G. Werle (ed), *Justice in Transition-Prosecution and Amnesty in Germany and South Africa*, (2006), at 179 *et seq.*

¹⁸¹ U. Behrendt, 'The Prosecution of the Rwandan Genocide,' in G. Werle (ed), *Justice in Transition-Prosecution and Amnesty in Germany and South Africa*, (2006), at 227-230; M. Uwobasa, 'Promesse d'éradiquer la Culture de L'impunité,' *Le Verdict* N° 60, April 2004, at 14 *et seq.*

and Gacaca courts¹⁸⁴ were established to dispense justice and to deal with the enormous number of genocide suspects.¹⁸⁵ The following chapters will therefore critically explore each level of the judicial response in post-conflict Rwanda and the associated problems or discrepancies.



¹⁸² The ICTR Statute as adopted by the Security Council Resolution 955, (1994), UN Doc. S/Res/955 of 8th November 1994; Ministry of justice, 1 *The Rwandan Law Review*, (2006), at 168; Details on the ICTR can be seen in G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 100, MN 280.

¹⁸³ 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.

¹⁸⁴ Organic law N° 16/2004 of 19/6/2004 establishing the Organisation, Competence and Functioning of Gacaca Courts.

¹⁸⁵ Similarly, see J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 898 *et seq.*; It is actually asserted that prosecution may be undertaken using domestic, international or hybrid courts, G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 74, MN 205-206.

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 955¹⁸⁹ in order to judge people responsible for the genocide and other serious violations of international law in Rwanda¹⁹⁰ or by Rwandan citizens in nearby states, between 1

¹⁸⁶ Art. VI of the UN Convention on the Prevention and Punishment of the Crime of Genocide adopted by G.A/Res/260 A (11) of 9 December 1948; For discussions, see A. Cassese, *International Criminal Law*, 2nd edn, (2008), at 325; O. Ben-Naftali, 'The Obligations to Prevent and to Punish Genocide' in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary*, (2009), at 53; M. Milanovic, 'State Responsibility for Genocide,' 17 *European Journal of International Law*, (2006), at 553-604; D.L. Nersessian, *Genocide and Political Groups*, (2010), at 11-12.

¹⁸⁷ D.D.N. Nsereko, 'Genocide: A Crime against Mankind,' in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. 1, (2000), at 123; W. A Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn, (2009), at 443, and 1st edn, (2000), at 345-346.

¹⁸⁸ See A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' 103 *African Affairs*, (2004), at 73; L.S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, (1997), at 295 *et seq.*

¹⁸⁹ UN Security Council Resolution 955, (8 November 1994).

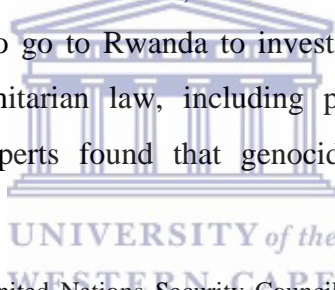
¹⁹⁰ M. Heikkilä, *International Criminal Tribunals and Victims of Crime*, (2004), at 166 *et seq.*; J. Natalya Clark, 'The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina,' 7 *Journal of International Criminal Justice*, (2009), at 463; C. Tomuschat, 'International Criminal Prosecution: The Precedent of Nuremberg Comfirmed,' 5 *Criminal Law Forum*, (1994), at 238 *et seq.*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 17, MN 54; Art. 28 of the ICTR Statute annexed to SC Res. 955, (1995).

January 1994 to 31 December 1994.¹⁹¹ The subject matter jurisdiction of the ICTR incorporates genocide,¹⁹² crimes against humanity¹⁹³ and war crimes.¹⁹⁴ The creation of the *ad hoc* Tribunal was a landmark move by the international community premised on the core goals of justice, accountability, deterrence, and ending impunity.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.¹⁹⁶ This commission of human rights experts found that genocide and violations of international



¹⁹¹ Art. 1 and 7 of the ICTR Statute; United Nations Security Council Resolution 955 S-RES-955, (1994) of 8 November 1994; On ex-post facto creation of the *Ad hoc* Tribunal see literature in, K. Ambos, 'International Criminal Law at the Crossroads: From *Ad hoc* Imposition to a Treaty-Based Universal System,' in C. Stahn and L. Van den Herik (eds.), *Future Perspectives on International Criminal Justice*, (2010), at 161.

¹⁹² Art. 2 of ICTR Statute; see United Nations Department of Public Information, 'The United Nations and Rwanda 1993-1996,' 10 *United Nations Bluebook Series*, (1996), at 61-64; see Commentary by J.R.W.D Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, (1998), at 43 *et seq.*

¹⁹³ Art. 3 of ICTR Statute; see J.R.W.D Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, (1998), at 48 *et seq.*

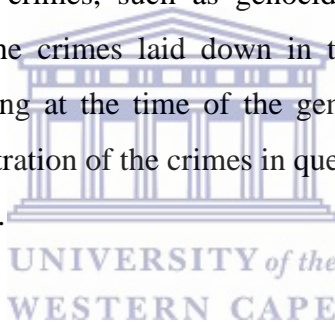
¹⁹⁴ Art. 4 of ICTR Statute; J.R.W.D Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, (1998), at 34 *et seq.*; G. Mettraux, *International Crimes and the Ad hoc Tribunals*, (2005), at 22 *et seq.*

¹⁹⁵ See Preambular Provisions of the ICTR Statute and UN Doc.S/RES/955 (1994); see also U.P. Behrendt, 'Dealing with the 1994 Genocide: A Comparative Analysis of Usefulness of the ICTR and Rwanda's National Prosecutions,' *University of Western Cape*, Thesis, (2001), at 97 *et seq.*; M.B. Harmon and F. Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings,' 2 *Journal of International Criminal Justice*, (2004), at 403; see details in W.A Schabas, *An Introduction to the International Criminal Court*, 1st edn, (2001), at 11 *et seq.*, 2nd edn, (2004), at 11-12; 3rd edn, (2007), at 12; 4th edn, (2011), at 12-13; similarly see W.A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 1st edn, (2006), at 69.

¹⁹⁶ Letter Dated 29 July, 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/906, (29 July 1994), at Para 4.

humanitarian law had occurred.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.¹⁹⁸ The special rapporteur, Ivorian lawyer René Degni-Ségué, 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.¹⁹⁹

The UN, following the pattern of the already established International Criminal Tribunal for the former Yugoslavia,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.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 1994.²⁰² The ICTR is governed by its Statute, and by its rules

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).

¹⁹⁸ Commission on Human Rights, Resolution S-3/1 (May 25, 1994).

¹⁹⁹ 'Report on the Situation of Human Rights in Rwanda,' UN Doc. E/CN.4/1995/7 (28 June 1994); and 'Report on the Situation of Human Rights in Rwanda,' UN Doc. E/CN.4/1995/12 (12 Aug. 1994); Lawyers Committee for Human Rights, *Prosecuting War Crimes in the Former Yugoslavia*, (1995), at 22 *et seq.*

²⁰⁰ J.R.W.D Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, (1998), at 116 *et seq.*; Lawyers Committee for Human Rights, *Prosecuting War Crimes in the Former Yugoslavia*, (1995), at 22 *et seq.*

²⁰¹ J.B. Quigley, *The Genocide Convention: An International Law Analysis* (2006), at 51 *et seq.*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 100, MN 280 *et seq.*; S. Williams, 'The Completion Strategy of the ICTY and ICTR' in M. Bohlander, *International Criminal Justice: A critical Analysis of Institutions and Procedures*, (2007), at 153 *et seq.*

²⁰² On the creation and work of the Tribunal, see V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 638 *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.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.²⁰⁴ In its Article 2, the Statute incorporates the customary law crime of genocide as laid down in identical wording in the Genocide Convention.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.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.²⁰⁷ Regarding the individual crimes against humanity, the Statute, just like the ICTY

International Criminal Tribunals Acting as Human Rights Jurisdictions, *Netherlands International Law Review*, (2007), at 1 *et seq.*

²⁰³ ICTR Rules of Procedure and Evidence, adopted on June 29, 1995, available at <<http://www.unicttr.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx>>, accessed September 2012; United Nations Department of Public Information, 'The United Nations and Rwanda 1993-1996,' 10 *United Nations Bluebook Series*, (1996), at 65; R.S. Lee, 'The Rwanda Tribunal,' 9 *Journal of International Law*, at 37 *et seq.*

²⁰⁴ Statute of the ICTR; see discussion in J.R.W.D Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, (1998), at 116 *et seq.*; C. Kress, 'The Crime of Genocide Under International Law,' 6 *International Criminal Law Review*, (2006), at 461 *et seq.*; C. Kress, 'The International Court of Justice and the Elements of the Crime of Genocide,' 18 *European Journal of International Law*, (2007), at 562 *et seq.*; A Lawyers' Committee Report on the ICTR and National Trials July 1997, 'Prosecuting Genocide in Rwanda' at <<http://www.unwatch.com/rwanda.html>>, accessed December 2012.

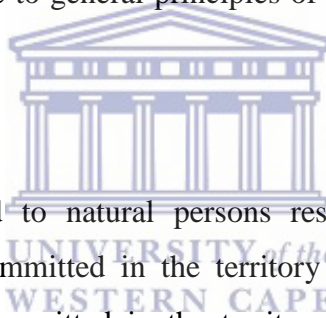
²⁰⁵ Art. II of the 1948 Genocide Convention; G. Verdirame, 'The Genocide Convention in the Jurisprudence of the Ad hoc Tribunals' 49 *International and Comparative Law Quarterly*, (2000), at 578 *et seq.*

²⁰⁶ Art. 6 (c), Charter of the International Military Tribunal (Nuremberg Charter).

²⁰⁷ G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 291, MN 787; see also E. Fronza, 'Genocide in the Rome Statute, in F. Lattanzi and W.A. Schabbas (eds), *Essays on the Rome Statute of International Criminal Court*, Vol. 1, (1999), at 105 *et seq.*; H.B Nina Jørgensen, 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice,' 1 *International Criminal Law Review*, (2001), at 285 *et seq.*

Statute and the Control Council Law N° 10, incorporates the crime of rape, which played an important role in the Tribunal's jurisprudence.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.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 1994.²¹⁰ The maximum penalty imposed by the trial chamber is limited to life imprisonment.²¹¹

²⁰⁸ See the discussion of the Akayesu case law below.

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.*

²¹⁰ Arts. 1-7 ICTR Statute; see H. Abtahi and G. Boas (eds), *The Dynamics of International Criminal Justice-Essays in Honour of Sir Richard May*, (2006), B. Lüders, L'incrimination de Génocide dans la Jurisprudence des Tribunaux Pénaux Internationaux pour l' ex-Yougoslavie et le Rwanda, in M. Chiavario (ed), *La Justice Pénale Internationale entre Passé et Avenir*, (2003), at 23 *et seq.*

²¹¹ Arts. 23 ICTR Statute; H. Brady and B. Goy, 'Current Developments at the Ad hoc International Criminal Tribunals,' 6 *Journal of International Criminal Justice*, (2008), at 606; A. Zahar, 'The ICTR's Media Judgement and Reinvention of Direct and Public Incitement to Commit Genocide,' 16 *Criminal Law Forum*, (2005), at 33 *et seq.*; M. Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty years Later,' 15 *Arizona Journal of International and Comparative Law*, (2005), at 515 *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.²¹² The Tribunal's chambers comprise three trial chambers in Arusha and an appeals chamber in The Hague.²¹³ The office of the prosecutor is in charge of investigations and prosecutions.²¹⁴ While initially, the ICTR and ICTY had the same prosecutor, the ICTR has had its own prosecutor since 2003.²¹⁵ 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.²¹⁶ 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 ICTR²¹⁷ and is therefore based in The Hague. Having been set up by a

²¹² R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 113 *et seq.*; Art. 10 ICTR Statute; M. Lippman, 'Genocide, in M.C Bassiouni (ed), *International Criminal Law*, Vol.1, 2 edn, (1999), at 589 *et seq.*; M. Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty years Later,' 15 *Arizona Journal of International and Comparative Law*, (2005), at 515 *et seq.*

²¹³ United Nations Security Council (1995), *Resolution 977 on the decision to designate Arusha as the seat of the International Tribunal for Rwanda*, available at <http://daccess-dds.ny.un.org/doc/UNDOC/GEN/N95/050/66/PDF/N9505066.pdf?OpenElement>, December 2010.

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

²¹⁵ V. Morris and M. Scharf, *An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, (1995), at 22 *et seq.*; V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 708 *et seq.*; G.W Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, (2007), at 85 *et seq.*

²¹⁶ Art. 16 (1) ICTR Statute; W. Rückert and G. Witschel, 'Genocide and Crimes Against Humanity in the Elements of Crimes,' in H. Fischer, C. Klaus and S. Rolf Lüder (eds.), *International and National Prosecution of Crimes under International Law-Current Developments*, (2001), at 59 *et seq.*; G.W Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, (2007), at 85.

²¹⁷ ICTR Statute, Art.15(3); Art. 10 ICTR Statute; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 113 *et seq.*; K. Prost, 'The ICTY and its Relationship with National Jurisdictions: Powers, Limits, and Misconceptions,' in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (2011), at 434 *et seq.*

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 955 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

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.

²¹⁹ UN Security Council Resolution 955 of 8 November 1994. For details on ICTR establishment, see M.C Bassiouni, *Introduction to International Criminal Law*, (2003), at 431 *et seq.*; V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 4; see also G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 17, MN 54 *et seq.*

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).

²²¹ J.A Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 5, (2001), at 260 *et seq.*; P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment,' 90 *American Journal of International Law*, (1996), at 501 *et seq.*

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), Urukiko rwa mbere rw'iremezo 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.unict.org/default.html>>, accessed in March 2012.

²²⁴ Initially, there were only two trial chambers until the 1998 amendment of the Statute which added a third trial chamber, UN Security Council Res. 1166 (1998) of 13 May 1998. See also 'Report of the Security Council on the Situation Concerning Rwanda,' (8 November 1994), UN Doc. S/PV. 3453, available at <<http://www.undemocracy.com/S-PV-3453.pdf>>, accessed July 2011, at 13-16.

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

²²⁵ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 29; M.H Morris, 'The Trials of Concurrent Jurisdictions: The Case of Rwanda,' 7 *Duke Journal of Comparative and International Law*, (1997), at 357.

²²⁶ *Barayagwiza v. Prosecutor*, Case N° ICTR-97-19, Decision (Appeals chamber), Judgment of 3 November 1999.

²²⁷ *Barayagwiza v. Prosecutor*, Case N° ICTR-97-19, (Appeals chamber), 31 March 2000.

²²⁸ A. Collins, 'State-induced Security Dilemma: Maintaining the Tragedy,' 39 *Cooperation and Conflict*, (2004), at 27-44;

²²⁹ IBUKA and AVEGA genocide survivors' associations decided not to cooperate in rendering witnesses until the ICTR corrected the situation.

at a rape victim.²³⁰ In addition, they accused the Tribunal of employing genocide suspects,²³¹ and denounced the slow pace of the Tribunal.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.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.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.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

²³⁰ V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (2008), at 172 *et seq*; V. Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme,' 3 *Journal of International Criminal Justice*, (2005), at 950 *et seq*.

²³¹ See International Crisis Group, *Tribunal Pénal International Pour le Rwanda*, (2002), at 10 *et seq*; Integrated Regional Information Network (IRIN), *UN Tribunal Investigates 12 on its Payroll*, (29 June 2006).

²³² P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 28 *et seq*; S. Horowitz, 'Rwanda: International and National Responses to the Mass Atrocities and Their Interaction,' Domac, (2010), at 30 *et seq*.

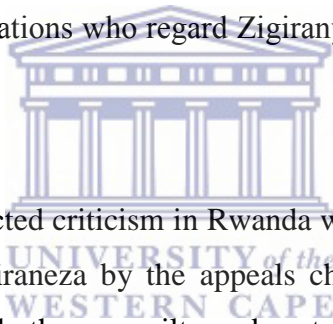
²³³ The boycott was respected by many Rwandan genocide survivors. It followed, among other events, an incident where ICTR judges laughed while a witness testified about being raped by the accused. For a description of the 2002 breakdown in cooperation between the ICTR and Rwanda, see International Federation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

²³⁴ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 29 *et seq*; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (2008), at 66 *et seq*.

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.²³⁶ In fact, the ICTR was often accused of scandalous acts of employing genocide suspects.²³⁷ This affected the public trust and in turn seriously minimized the ICTR's role in the reconciliation process in Rwanda.²³⁸

A relatively recent case that shocked the Rwandan public as well as the government was the acquittal of Protais Zigiranyirazo.²³⁹ 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.²⁴⁰ 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.²⁴¹ 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.²⁴²



The most recent case that has attracted criticism in Rwanda was the acquittal of former ministers Justin Mugenzi 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

²³⁶ Hirondelle News, 'Case of Rwandan Lawyer Revives Tensions between Kigali and the ICTR,' (7 March 2006), available at <<http://allafrica.com/stories/200603080400.html>>, accessed 28 November 2011.

²³⁷ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 30; see International Crisis Group, *Tribunal Pénal International Pour le Rwanda*, (2002), at 10 *et seq.*; Integrated Regional Information Network (IRIN), *UN Tribunal Investigates 12 on its Payroll*, (29 June 2006).

²³⁸ A. Akilimali, 'Le TPIR comme un élément du Retour à la Réconciliation Nationale, au Rétablissement et au Maintien de la paix,' *Revue juridique du Rwanda*, (2006), at 164 *et seq.*; E. Harpster, 'Rwanda and the Problem of Peace,' 2 *The American Undergraduate Journal of Politics and Government*, (2002), at 51 *et seq.*; J.M. Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation,' 16 *Leiden Journal of International Law*, (2003), at 120.

²³⁹ Hirondelle News Agency, 'Zigiranyirazo: Habyarimana's brother-in-law, now a free man,' *Agence France Presse* (AFP), 17 November 2009; 'ICTR Acquittal of Zigiranyirazo Shocked Rwanda,' *Agence France Presse* (AFP), 18 December 2009.

²⁴⁰ *The Prosecutor v. Protais Zigiranyirazo*, Case N° ICTR-01-73-T, 18 December 2008.

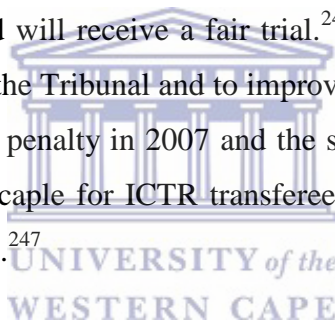
²⁴¹ *Protais Zigiranyirazo v. the Prosecutor*, Case N° ICTR-01-73-A, 16 November 2009, Para 79.

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.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,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 2004.²⁴⁵ 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.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.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.

²⁴³ M. Gashegu, 'Rwanda shocked by ICTR acquittals,' *The New Times Rwanda*, 05 February 2013.

²⁴⁴ P. Uvin and C. Mironko, 'Western and Local Approaches to Justice in Rwanda,' 9 *Global Governance*, (2003), at 2 and 19; see W. A. Schabas, *Genocide in International Law*, (2000), at 578.

²⁴⁵ Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda*, (July 2008).

²⁴⁶ Rules of Procedure and Evidence, 11 *bis*; UNDP, 'Turning Vision 2020 into reality: from recovery to sustainable human development,' (UNDP, 2007).

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,' *The New Times Rwanda*, 09 October 2012; see 'Status of ICTR cases,' available at <<http://www.unict.org/Cases/tabid/204/Default.aspx>>, accessed October 2012; H. Brady and B. Goy, 'Current Developments at the *Ad hoc* International Criminal Tribunals,' 6 *Journal of International Criminal Justice*, (2008), at 606; For the first transferred case, see ICTR Hands over Uwinkindi File to Rwanda Government (ICTR/INFO-9-2-699.EN), 18 January 2012; *Jean Uwinkindi v. The Prosecutor*, Case N° ICTR-01-75-AR11*bis*, 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.²⁴⁸ 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.’²⁴⁹ This is because it has taken a notable status as the first international criminal tribunal to prosecute many suspects for genocide.²⁵⁰

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.²⁵¹ Nine individuals

²⁴⁸ See B. Oomen, ‘Rwanda’s Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law,’ in R. Haveman and O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, (2006), at 169 *et seq.*

²⁴⁹ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 116; QC Geoffrey Nice and P. Vallières-Roland, ‘Procedural Innovations in War Crimes Trials,’ 3 *Journal of International Criminal Justice*, (2005), at 354-380; K. Prost, ‘The ICTY and its Relationship with National Jurisdictions: Powers, Limits, and Misconceptions,’ in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (2011), at 431 *et seq.*; L. Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, (2005), at 263 *et seq.*; see Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the ICTY and ICTR, Paras 91 *et seq.*, 22 November 1999, (UN Doc. A/54/634).

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.

²⁵¹ See ICTR, ‘Status of Cases,’ available at <<http://www.unictl.org/Cases/tabid/204/Default.aspx>>, accessed October 2012; T. Gallimore, ‘The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda,’ 14 *New England Journal of International and Comparative Law*, (2008), at 242-243; E.R Karake ‘Right to Host ICTR Archives,’ *The New Times Rwanda*, 18 September 2012.

remain at large as fugitives.²⁵² The cases against ten individuals have been referred or transferred to national jurisdictions mainly Rwanda²⁵³ and France,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,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,²⁵⁶ and will transfer its responsibilities to the International Residual Mechanism which already began functioning for the ICTR branch in July 2012.²⁵⁷

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 Ladislav, Ryandikayo Charles, Sikubwabo Charles.

²⁵³ Cases referred by the Tribunal to Rwanda include that of Jean-Bosco Uwinkindi, Charles Ryandikayo, Fulgence Kayishema, Aloys Ndimbati, Charles Sikubwabo, Ladislav Ntaganzwa, Pheneas Munyarugarama, and Bernard Munyagishari (transfer pending appeal); see E. Musoni, 'ICTR Transfers another Case to Rwanda,' *The New Times Rwanda*, 09 October 2012; see 'Status of ICTR cases,' available at <<http://www.unicttr.org/Cases/tabid/204/Default.aspx>>, accessed October 2012; for discussion on 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.

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.unicttr.org/Cases/tabid/204/Default.aspx>>, accessed October 2012.

²⁵⁵ Details on penalties are in Art. 23, ICTR Statute; Rule 101 ICTR Rules of Procedure and Evidence; M.C Bassiouni, *Introduction to International Criminal Law*, (2003), at 324; see also J. Philipp Book, *Appeal and Sentence in International Criminal Law*, (2011), at 29 *et seq.*; S. Szoke-Burke, 'Avoiding Belittlement of Human Suffering: A Retributivist Critique of ICTR Sentencing Practices' 10 *Journal of International Criminal Justice*, (2012), at 562.

²⁵⁶ T. Pittman, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals: From Completion to Continuation,' 9 *Journal of International Criminal Justice*, (2011), at 797-817; F. Pocar, 'Completion or Continuation Strategy?' Appraising Problems and Possible Developments in Building the Legacy of The ICTY, 6 *Journal of International Criminal Justice*, (2008), at 655 *et seq.*; S. Williams, 'The Completion Strategy of the ICTY and ICTR,' in M. Bohlander, *International Criminal Justice: A critical Analysis of Institutions and Procedures*, (2007), at 153 *et seq.*

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 1 July 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.²⁵⁸ During the 1994 Rwandan genocide, Akayesu was the mayor of Taba, a district where many Tutsi were systematically raped,²⁵⁹ tortured and murdered.²⁶⁰ 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.²⁶¹ 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 2001.²⁶² He is at the time of writing serving his sentence in Mali.

Road to the Establishment of the International Residual Mechanism for Criminal Tribunals: From Completion to Continuation,' 9 *Journal of International Criminal Justice*, (2011), at 797-817.

²⁵⁸ See, *Prosecutor v. Akayesu*, Case N° ICTR-96-4-T, September 1998; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 100, MN 282.

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, at least 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.*

²⁶¹ See Analysis in C. Aptel, 'The Intent to Commit Genocide in the Case Law of the International Criminal Tribunals,' 13 *Criminal Law Forum*, (2002), at 273 *et seq.*; D.D Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals,' 37 *Texas International Law Journal*, (2002), at 231 *et seq.*

²⁶² *Prosecutor v. Akayesu*, Case N° ICTR-96-4-A, 1 June 2001.

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.²⁶³ 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.²⁶⁴ In the Akayesu case, the ICTR had to do pioneering work in interpreting the elements of the crime of genocide.²⁶⁵

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.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸ In particular, it

²⁶³ See, *Prosecutor v. Akayesu*, Case N° ICTR-96-4-T, September 1998, Para 520 and 522; see G. Verdirame, 'The Genocide Convention in the Jurisprudence of the Ad hoc Tribunals,' 49 *International and Comparative Law Quarterly*, (2000), at 578 *et seq.*

²⁶⁴ G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 255, MN 698; for details on the Genocide Convention and Definition, see L. Kuper, *Genocide: Its Political use in the Twentieth Century*, (1981), at 19 *et seq.*; C.W. Isreal, 'Toward a Generic Definition of Genocide,' in J. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions*, (1994), at 75 *et seq.*; for the origin of the word Genocide, see R. Lemkin, 'Genocide as an International Crime,' 41 *American Journal of International Law*, (1947), at 145-147.

²⁶⁵ G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 18, MN 55.

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. Gashegu, '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.

²⁶⁷ C. Aptel, 'The Intent to Commit Genocide in the Case Law of the International Criminal Tribunals,' 13 *Criminal Law Forum*, (2002), at 273 *et seq.*; D.D Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals,' 37 *Texas International Law Journal*, (2002), at 231 *et seq.*

²⁶⁸ *The Prosecutor v. Akayesu*, Case N° ICTR-96-4-T, Judgement (TC), 2 September 1998, Paras 731-732; see also R. L. Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory,' 29 *Harvard Journal of Law and Gender*, (2006), at 201-221.

was found that sexual violence causes serious bodily and mental harm.²⁶⁹ This finding was widely commended²⁷⁰ and was adopted in the subsequent jurisprudence of the Tribunal.²⁷¹ It may be regarded as well-established case law today.²⁷²

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.²⁷³ When he was préfet of Kibuye, he committed different acts of genocide, where he involved himself as a superior in various sets of massacres²⁷⁴ 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.²⁷⁵ 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.²⁷⁶ 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

²⁶⁹ G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 266, MN 728.

²⁷⁰ *The Prosecutor v. Akayesu*, Case N° ICTR-96-4-T, Judgement (TC), 2 September 1998, Paras 706, 731; *The Prosecutor v. Muvunyi*, Case N° ICTR-2000-55-A-T(TC), 12 September 2006, Para 487. See discussions on sexual violence in K.D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles,' 21 *Berkeley Journal of International Law*, (2003), at 288; K.D Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' 93 *American Journal of International Law*, (1999), at 97 *et seq.*

²⁷¹ *The Prosecutor v. Akayesu*, Case N° ICTR-96-4-T, Judgement (TC), 2 September 1998, Paras 731-732; *The Prosecutor v. Muvunyi*, Case N° ICTR-2000-55-A-T(TC), 12 September 2006, Para 487; K.D Askin, 'Gender Crimes Jurisprudence in the ICTR: Positive Developments,' 3 *Journal of International Criminal Justice*, (2005), at 1007 and 1011; W. A. Schabas, *Genocide in International Law*, (2000), at 578; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 266, MN 728 *et seq.*

²⁷² See R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 173 *et seq.*; G.W Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, (2007), at 85; D.L. Nersessian, *Genocide and Political Groups*, (2010), at 28 *et seq.*; W. A Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn, (2009), at 117 *et seq.*

²⁷³ See *The Prosecutor v. Kayishema and Ruzindana*, Case N°ICTR-95-I-T, 21 May 1999.

²⁷⁴ W. Zhu, 'The Doctrine of Command Responsibility as applied to Civilian Leaders: The ICTR and the Kayishema Case,' in S. Yee and T. Wang (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001), at 373 *et seq.*; J.A Williamson, 'Command Responsibility in the case Law of the International Criminal Tribunal for Rwanda,' 13 *Criminal Law Forum*, (2002), at 365 *et seq.*

²⁷⁵ 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.*

²⁷⁶ *The Prosecutor v. Kayishema and Ruzindana*, Case N° ICTR-95-1-A, 1 June 2001, Para 274-275.

and the sentence was upheld on his appeal on 1 June 2001. At the time of writing, he is serving his sentence in Mali.²⁷⁷

This case law is significant because it helps to define Tutsi as an ethnic group protected by the Genocide Convention,²⁷⁸ despite the fact that Hutu and Tutsi shared the same language and culture.²⁷⁹ 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.’²⁸⁰ 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.²⁸¹ 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.²⁸²

²⁷⁷ Rule 101 of the ICTR Rules of Procedure and Evidence (RPE); *The Prosecutor v. Kayishema and Ruzindana*, Case N° ICTR-95-1-A, 1 June 2001, Paras 363, and 370.

²⁷⁸ F. Jessberger, ‘The Definition and the Elements of the Crime of Genocide,’ in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary*, (2009), at 118-119; D.D.N. Nsereko, ‘Genocide: A Crime against Mankind,’ in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. 1, (2000), at 130-131; G. Verdirame, ‘The Genocide Convention in the Jurisprudence of the Ad hoc Tribunals,’ 49 *International and Comparative Law Quarterly*, (2000), at 578 *et seq.*

²⁷⁹ *Prosecutor v. Akayesu*, Case N° ICTR-96-4-T, Judgement (TC), 2 September 1998, Paras, 701, 702 and 510; P. Akhavan, ‘The Crime of Genocide in the ICTR Jurisprudence,’ 3 *Journal of International Criminal Justice*, at 989-1006.

²⁸⁰ *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgement, Case N° ICTR-95-1-A, 1 June 2001, Para 98; see K. Askin (2001), ‘Legal Precedents in Rwanda, Crimes of War Project,’ available at <http://www.crimesofwar.org/tribun-mag/rwanda_print.html>, accessed April 2012; G.W Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, (2007), at 90-104; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 259, MN 712 *et seq.*

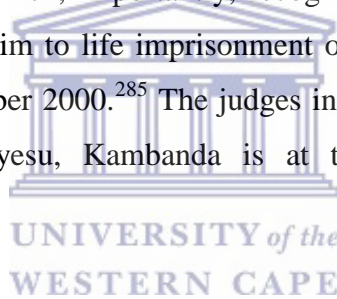
²⁸¹ See Arts.57 and 118 of the Rwanda Civil Code of 1988; see also Art. 16 of the Constitution of 10 June 1991. Rwanda’s 1991 constitution, identified all Rwandans by ethnic group, and then required every Rwandan to carry an identity card bearing his/her ethnic group; see UN Doc. S/1994/1405 (1994), Final Report of the Commission of Experts at 55 *et seq.*; see, *The Prosecutor v. Akayesu* (TC) Para 702 and 171; *Prosecutor v. Bagilishema* (TC), Para 65; C. Kreß, ‘The Crime of Genocide Under International Law,’ 6 *International Law Review*, (2006), at 461.

²⁸² R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 173 *et seq.*; G.W Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, (2007), at 85; D.L. Nersessian, *Genocide and Political Groups*, (2010), at 28 *et seq.*; W. A Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn, (2009), at 117 *et seq.*

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.²⁸³ 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.²⁸⁴ 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 2000.²⁸⁵ The judges in the case described genocide as the 'crime of crimes.'²⁸⁶ 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.²⁸⁷ 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 N° ICTR-97-23-S, (TC), 4 September 1998, Para 3.

²⁸⁴ The *Prosecutor v. Jean Kambanda*, Case N° ICTR-97-23-S, Judgement and Sentence (TC), 4 September 1998, Para 4-9; see also G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 100, MN 282.

²⁸⁵ *Kambanda v. The Prosecutor*, Case N° ICTR 97-23-A, 19 October 2000.

²⁸⁶ See *Prosecutor v. Kambanda*, Case N° ICTR-97-23-S, 4 September 1998, Para 16; M.C. Bassiouni, 'A Functional Approach to General Principles of International Law,' 11 *Michigan Journal of International Law*, (1990), at 768-818; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 114; W.A Schabas, 'Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?' 35 *New England Law Review*, (2001), at 300.

²⁸⁷ Art. IV of the the 1948 Genocide Convention; Art. 6 (2), ICTR Statute; K. Ambos, 'International Criminal Law at the Crossroads: From *Ad hoc* Imposition to a Treaty-Based Universal System,' in C. Stahn and L. Van den Herik (eds.), *Future Perspectives on International Criminal Justice*, (2010), at 195; Y.Q. Naqvi, *Impediments to*

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.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 (RTL),²⁸⁹ Hassan Ngeze, the former owner and editor-in-chief of the ‘extremist’ Kangura newspaper²⁹⁰ and Jean-Bosco Barayagwiza, the former director of political affairs in the Rwandan ministry of foreign affairs, RTL official and founding member of Coalition pour la Défense de la République (CDR).²⁹¹ The ICTR consolidated the indictments of these three men into a single trial, commonly referred to as ‘The Media Case.’²⁹²

Exercising Jurisdiction over International Crimes, (2010), at 243; see G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 237, MN 650 *et seq*; see N. Pillay, President of the ICTR, African Dialogue II, ‘Promoting Justice and Reconciliation in Africa: Challenge for Human Rights in Collaboration with the International Criminal Tribunal for Rwanda,’ available at <http://www.ictor.org/wwwroot/ENGLISH/africandialogue/papers/pillay.pdf>, accessed February 2012; *Prosecutor v. Kambanda*, Judgment and Sentence, Case N° ICTR 97-23-S4, September 1998, Para 61-62.

²⁸⁸ T. Gallimore, ‘The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda,’ 14 *New England Journal of International and Comparative Law*, (2008), at 239; E. Møse, ‘Appraising the Role of the ICTR, Main Achievements of the ICTR,’ 3 *Journal of International Criminal Justice*, (2005), at 920; O. Olusanya, *Double Jeopardy without Parameters: Re-Characterisation in International Criminal Law*, (2004), at 124.

²⁸⁹ The RTL extremist ‘hate-radio’ station encouraged Hutus to kill Tutsis. See D.A. Mundis and F. Gaynor, ‘Current Developments at the *Ad hoc* International Tribunals,’ 2 *Journal of International Criminal Justice*, (2004), at 642-698; D.A. Mundis and F. Gaynor, ‘Current Developments at the *Ad hoc* International Tribunals,’ 4 *Journal of International Criminal Justice*, (2006), at 623-658.

²⁹⁰ The Kangura newspaper published editorials and articles inciting ethnic hatred and violence against the Tutsi population in 1994. See, D.A. Mundis and F. Gaynor, ‘Current Developments at the *Ad hoc* International Tribunals,’ 2 *Journal of International Criminal Justice*, (2004), 642-698.

²⁹¹ Barayagwiza was accused of many acts including public incitement to genocide and was among the steering committee of RTL 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), at 642.

²⁹² *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003; *Nahimana et al. v. the Prosecutor*, Case N° ICTR-99-52-A, Judgement (AC), 28 November 2007; see commentary on the case in A. Cassese *et al.*, *International Criminal Law: Cases and Commentary*, (2011), at 405.

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.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.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,²⁹⁵ the ICTR media case was the first ever conviction concerning hate speech in the media before an international tribunal.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.²⁹⁷ Put differently,

²⁹³ *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003, Paras 1091 *et seq.* Despite the ICTR's innovative aspects regarding media in inciting genocide, there is concern that the jurisprudence has not been applied evenhandedly to deal with sexual crimes. In the *Nahimana et al.*, judgement, the accused were not held for the crimes, despite the existence of evidence of the accused's incitement to rape as genocide and sexual violence propaganda.

²⁹⁴ On 3 December 2003, Nahimana and Ngeze were acquitted of complicity in genocide, and murder as a crime against humanity but still sentenced to life imprisonment which was reduced on appeal in 2007 to 30 years for Nahimana and 35 years for Ngeze. The appeals chamber sentenced Barayagwiza in respect of all the counts on which he was guilty to 32 years' imprisonment. Barayagwiza was acquitted of complicity in genocide, murder as a crime against humanity and war crimes. See *Nahimana et al. v. the Prosecutor*, Case N° ICTR-99-52-A, Judgement (AC), 28 November 2007, Para 1115, Para 1052, and Para 1097.

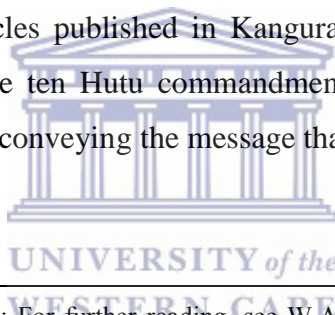
²⁹⁵ Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30 September and 1 October 1946. The International Military Tribunal in Nuremberg sentenced Julius Streicher for the virulently anti-semitic articles that he had published in his weekly news paper *Der Stürmer*. See T. Salomon, 'Freedom of Speech v. Hate Speech: The jurisdiction of Direct and Public Incitement to Commit Genocide,' in R. Henham and P. Behrens, *The Criminal Law of Genocide, International, Comparative and Contextual Aspects*, (2007), at 143.

²⁹⁶ G. Della Morte, 'De-Mediatizing the Media Case: Elements of a Critical Approach,' 3 *Journal of International Criminal Justice*, (2005), at 1019 *et seq.*; A. Zahar, 'The ICTR's Media Judgement and Reinvention of Direct and Public Incitement to Commit Genocide,' 16 *Criminal Law Forum*, (2005), at 33-48; *Nahimana et al. v. the Prosecutor*, Case N° ICTR-99-52-A, Judgement (AC), 28 November 2007, Paras 1033 *et seq.*

²⁹⁷ A. Cassese *et al.*, *International Criminal Law: Cases and Commentary*, (2011), at 193; G. Della Morte, 'De-Mediatizing the Media Case: Elements of a Critical Approach,' 3 *Journal of International Criminal Justice*, (2005), at 1019-1033; G.W Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the*

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.²⁹⁸ 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.²⁹⁹

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.³⁰⁰ The enemy was defined to be the Tutsi and Hutu political opponents.³⁰¹ 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.³⁰² 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.³⁰³ The cover of *Kangura* news paper N° 26 promoted violence by conveying the message that the machete should be used to kill the Tutsi.³⁰⁴



UN Tribunal for Rwanda, (2007), at 214; For further reading, see W.A Schabas, 'Hate Speech in Rwanda: The Road to Genocide,' 46 *McGill Law Journal*, (2000), at 141.

²⁹⁸ T. Salomon, 'Freedom of Speech v. Hate Speech: The Jurisdiction of Direct and Public Incitement to Commit Genocide,' in R. Henham and P. Behrens, *The Criminal Law of Genocide, International, Comparative and Contextual Aspects*, (2007), at 151; *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003, Para 116 *et seq.* *Nahimana et al. v. the Prosecutor*, Case N° ICTR-99-52-A, Judgement (AC), 28 November 2007, Para 692 and 995.

²⁹⁹ Art. 2(3), 18, 19 and 20 of the International Covenant on Civil and Political Rights; Arts. I and II of the 1948 Genocide Convention; see also M. Nowak, 'The Need for a World Court of Human Rights,' 7 *Human Rights Law Review*, (2007), at 254 *et seq.*

³⁰⁰ For a detailed exploration of media propaganda and the Genocide, see H. Lovdal Gulseth, 'The Use of Propaganda in the Rwandan Genocide: A Study of Radio-Télévision Libre des Mille Collines (RTLM), May 2004,' available at <<http://www.duo.uio.no/publ/statsvitenskap/2004/19095/19095.pdf>>, accessed June 2012; see also A. Thompson (ed.), *The Media and the Rwanda Genocide*, (2007), at 21 *et seq.*

³⁰¹ *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003, Para 445; *Nahimana et al. v. the Prosecutor*, Case N° ICTR-99-52-A, Judgement (AC), 28 November 2007, para, 765 and 1007 *et seq.*

³⁰² F. Chalk, 'Hate Radio in Rwanda,' in H. Adelman and A. Suhrke (eds.), *The Path of a Genocide: The Rwanda Crisis From Uganda to Zaire*, (1999), at 93; C.L. Kellow and H. Leslie Steeves, 'The Role of Radio in the Rwandan Genocide,' 8 *Journal of communication*, (1998), at 107.

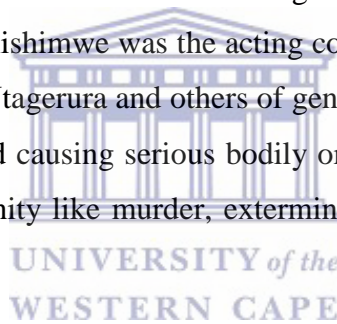
³⁰³ Hutu Ten Commandments were published in *Kangura* N° 6, in December 1990.

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.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.³⁰⁶ The power of the media to create and destroy fundamental human values thus calls for accountability.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.’³⁰⁸

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.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.³¹⁰



³⁰⁵ For details on the elements of incitement to genocide, see G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 282, MN 770-771.

³⁰⁶ A. Cassese *et al.*, *International Criminal Law: Cases and Commentary*, (2011), at 186 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 331, MN 897; *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003, Para 1070-1076; The Tribunal found that hate speech can fulfil the elements of persecution as a crime against humanity.

³⁰⁷ *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003, Para 8 *et seq*; *Nahimana et al. v. the Prosecutor*, Case N° ICTR-99-52-A, Judgement (AC), 28 November 2007, para 1102 and 599.

³⁰⁸ *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003; *Nahimana et al. v. the Prosecutor*, Case N° ICTR-99-52-A, Judgement (AC), 28 November 2007, Para 1102; see G. Della Morte, ‘De-Mediatizing the Media Case: Elements of a Critical Approach,’ 3 *Journal of International Criminal Justice*, (2005), at 1019 *et seq*.

³⁰⁹ *The Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe*, Case N° ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, Para 5, 12 and 13.

³¹⁰ *The Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe*, Case N° ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, Para 661 *et seq*, 696 *et seq* and 764 *et seq*.

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.³¹¹ 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.³¹² 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 2004,³¹³ with judge Williams dissenting in the Bagambiki case.³¹⁴ 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 2006.³¹⁵ 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.³¹⁶ 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.³¹⁷ Importantly,

³¹¹ *The Prosecutor v. André Ntagerura et al.*, Case N° ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, Para 64, 2, 9, 769.

³¹² *The Prosecutor v. Ntagerura et al.*, Case N° ICTR-99-46-T, 25 February 2004, Para 63, 48, 55, 680, 804.

³¹³ *The Prosecutor v. Ntagerura et al.*, Case N° ICTR-99-46-T, 25 February 2004, Para 829; *The Prosecutor v. André Ntagerura et al.*, Case N° ICTR-99-46-A, Judgement (AC), 7 July 2006, Para 7, and 10.

³¹⁴ *The Prosecutor v. Ntagerura et al.*, Case N° ICTR-99-46-T, 25 February 2004, Para 832.

³¹⁵ *The Prosecutor v. Ntagerura et al.*, Case N° ICTR-99-46-A, 7 July 2006, Para 827 and *The Prosecutor v. André Ntagerura et al.*, Case N° ICTR-99-46-A, Judgement (AC), 7 July 2006, Para 444.

³¹⁶ Rule 98 bis, ICTR Rules of Procedure and Evidence; *The Prosecutor v. Ntagerura et al.*, Case N° ICTR-99-46-T, 25 February 2004, Para 829; *The Prosecutor v. André Ntagerura et al.*, Case N° ICTR-99-46-A, Judgement (AC), 7 July 2006, Para 7.

³¹⁷ H. Brady and B. Goy, 'Current Developments at the *Ad hoc* International Criminal Tribunals,' 6 *Journal of International Criminal Justice*, (2008), at 581-582; M. A. Drumbl, *Atrocity, Punishment, and International Law*, (2007), at 21 *et seq*; K. Margetts and K. I. Kappos, 'Current Developments at the *Ad hoc* International Criminal Tribunals,' 10 *Journal of International Criminal Justice*, (2012), at 460 *et seq*; D.A. Mundis and F. Gaynor, 'Current Developments at the *Ad hoc* International Tribunals,' 3 *Journal of International Criminal Justice*, (2005), at 627 *et seq*; D.A. Mundis and F. Gaynor, 'Current Developments at the *Ad hoc* International Tribunals,' 4 *Journal of International Criminal Justice*, (2006), at 1143 *et seq*.

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.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.

VI. Prosecutor versus Colonel Bagosora

Colonel Bagosora, the alleged military mastermind of the genocide, was *directeur de cabinet* in the Rwandan ministry of defence, and later acting minister of defence.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.³²⁰ In the judgment, he was convicted of crimes committed during the genocide, based on both direct and superior responsibility.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).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.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.³²⁴

³¹⁸ F. Gaynor, 'Uneasy Partners and Evidence, Truth and History in International Trials,' 10 *Journal of International Criminal Justice*, (2012), at 15 *et seq*; R.A. Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the former Yugoslavia,' 27 *Human Rights Quarterly*, (2005), at 909 *et seq*.

³¹⁹ *Prosecutor v. Théoneste Bagosora et al.*, Case N° ICTR-98-41-T, 18 December 2008, Para 1 and 49.

³²⁰ *Prosecutor v. Théoneste Bagosora et al.*, Case N° ICTR-98-41-T, 18 December 2008, Para 25 *et seq*.

³²¹ For forms of superior responsibility, 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 667; for additional details see G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 187, MN 497; see also *The Prosecutor v. Bagosora et al.*, Case N° ICTR-98-41-T, 18 December 2008, Para 2135. Also the Appeals chamber found him guilty only on the basis of superior responsibility, for failing to prevent and punish crimes committed by subordinates, see *Bagosora and Nsengiyumva v. the Prosecutor*, Case N° ICTR-98-41-A, 14 December 2011, Para 658 *et seq*.

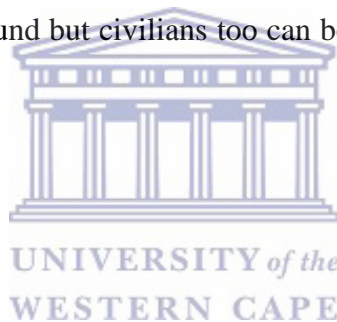
³²² *Prosecutor v. Bagosora et al.*, Case N° ICTR-98-41-T, 18 December 2008, Paras 2258, and 254.

³²³ *Prosecutor v. Théoneste Bagosora et al.*, Case N° ICTR-98-41-T, 18 December 2008, Para 25 *et seq*.

³²⁴ *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 subordinates.³²⁷ The fact that the acts were committed by the subordinates does not relieve the commander of criminal responsibility if he knew or had reason to know that the subordinates 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



or organisations subordinate to him or her.' See G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 191, MN 509; see also Art. 6 (3) of the ICTR Statute.

³²⁵ F. Gaynor, 'Uneasy Partners and Evidence, Truth and History in International Trials,' 10 *Journal of International Criminal Justice*, (2012), at 16.

³²⁶ *Prosecutor v. Théoneste Bagosora et al.*, Case N° ICTR-98-41-T, 18 December 2008, Para 2277; *Bagosora and Nsengiyumva v. the Prosecutor*, Case N° ICTR-98-41-A, 14 December 2011, Para 741.

³²⁷ 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.), *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,' 3 *Journal of International Criminal Justice*, (2005), at 944-949; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 178, MN 473 *et seq*.

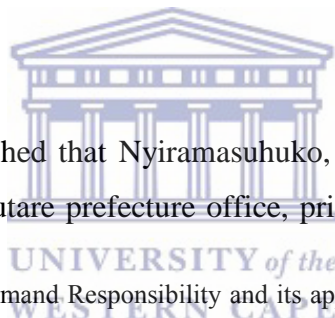
³²⁸ Art. 6(3) of the ICTR Statute; see B. Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem: Eine Untersuchung zur Rechtsprechung der internationalen Strafgerichte für das ehemalige Jugoslawien und Ruanda*, Berlin, Berliner Wissenschafts-Verlag, (2008).

responsibility³²⁹ as evidenced in the case of Nyiramasuhuko, a female civilian who held a high post in the government.³³⁰

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.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 Butare³³² by distributing weapons to the Hutu and publicly inciting the population for the extermination of Tutsi.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



³²⁹ J.D. Levine II, 'The Doctrine of Command Responsibility and its application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?' 193 *Military Law Review*, (2007), at 52 *et seq*; C. Meloni, 'Command Responsibility: Mode of Liability for the Crimes of subordinates or Separate Offence of the Superior?', 5 *Journal of International Criminal Justice*, (2007), at 619 *et seq*; 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 670 *et seq*; E. van Sliedregt, 'Command Responsibility at the ICTY-Three Generations of Case-Law and still Ambiguity,' in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (2011), at 377; G.R Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court,' 25 *Yale Journal of International Law*, (2000), at 113 *et seq*.

³³⁰ *The Prosecutor v. Nyiramasuhuko et al.*, Case N° ICTR-98-42-T, 24 June 2011; W. Zhu, 'The Doctrine of Command Responsibility as applied to Civilian Civilian Leaders: The ICTR and the Kayishema Case,' in S. Yee and T. Wang (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, (2001), at 373 *et seq*; see ICC Statute, Art. 25(3)(a); For related cases within the ICC, see *Prosecutor v. Lubanga*, ICC (Pre-Trial Chamber), Decision of 28 January 2007, Para 332, *Prosecutor v. Katanga and Ngudjolo*, ICC (Pre-Trial Chamber), decision of 30 September 2008, Para 497.

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

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*.

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.³³⁴ 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.³³⁵ Her case commonly referred to as the ‘Butare trial’ is pending on appeal.³³⁶

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.³³⁷ 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.³³⁸ 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.³³⁹ 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.³⁴⁰

³³⁴ Nyiramasuhuko played a direct role in ordering Interahamwe to rape Tutsi women at the Butare préfecture office, see *The Prosecutor v. Nyiramasuhuko et al.*, Case N° ICTR-98-42-T, 24 June 2011, Paras 6074, 6087, 6088, 6093.

³³⁵ The court found Nyiramasuhuko not guilty of direct and public incitement to commit genocide and other inhumane acts as a crime against humanity.

³³⁶ *The Prosecutor v. Nyiramasuhuko et al.*, Case N° ICTR-98-42-T, 24 June 2011, Para 6271.

³³⁷ 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 670; M.C Bassiouni, *Introduction to International Criminal Law*, (2003), at 318; E. E. van Sliedregt, ‘Command Responsibility at The ICTY-Three Generations of Case-Law and still Ambiguity,’ in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (2011), at 377 *et seq*; G.R. Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Court,’ 25 *Yale Journal of International Law*, (2000), at 113 *et seq*.

³³⁸ *Prosecutor v. Nyiramasuhuko et al.*, Case N° ICTR-98-42-T, 24 June 2011, Para 97; M.C Bassiouni, *Introduction to International Criminal Law*, (2003), at 327; G. Mettraux, *The Law of Command Responsibility*, (2009), at 11 *et seq*; S. Szoke-Burke, ‘Avoiding Belittlement of Human Suffering: A Retributivist Critique of ICTR Sentencing Practices,’ 10 *Journal of International Criminal Justice*, (2012), at 561-580.

³³⁹ Art. 6(1) of the ICTR Statute; see also Arts. 2 to 4 of the ICTR Statute referring to crimes; M.P. Scharf and M. Day, ‘The *Ad hoc* International Criminal Tribunals: Launching a New Era of Accountability,’ in W.A Schabas and N. Bernaz (eds.), *Routledge Handbook of International Criminal Law*, (2011), at 61. The Defendants are charged with being responsible for the actions of their subordinates in carrying out the genocide; *The Prosecutor v. Nyiramasuhuko et al.*, Case N° ICTR-98-42-T, 24 June 2011, Paras 5610 and 5590.

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.³⁴¹ Additionally, in performing its tasks, the Tribunal has conformed to fair trial standards envisaged under international instruments.³⁴²

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.³⁴³ This is true, in particular, for the elements of the crime of genocide.³⁴⁴ Thus, the Tribunal has single-handedly developed the criteria for group

Command Responsibility: A Doubtful Theory of Criminal Liability at the Ad Hoc Tribunals,' in E. Decaux, A. Dieng and M. Sow (eds.), *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist, the Late Kama*, (2007), at 311 *et seq.* G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 187, MN 499.

³⁴¹ M. Chidi Njaju, 'The Role of Judicial Institutions in the Restoration of Post-Conflict Societies: The Cases of Rwanda and Sierra Leone,' 16 *Journal of Conflict and Security Law*, (2011), at 365 *et seq.*; R. Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes,' 71 *British Yearbook of International Law*, (2000), at 259–315; R.A. Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the former Yugoslavia,' 27 *Human Rights Quarterly*, (2005), at 909.

³⁴² The right to a fair trial in an impartial court is stated in Art. 20 of the ICTR Statute; see discussion in H. Brady and B. Goy, 'Current Developments at the *Ad hoc* International Criminal Tribunals,' 6 *Journal of International Criminal Justice*, (2008), at 581-582; K. Margetts and K. I. Kappos, 'Current Developments at the *Ad hoc* International Criminal Tribunals,' 10 *Journal of International Criminal Justice*, (2012), at 460 *et seq.*; see Court discussions in J. D. Mujuzi, 'Steps Taken in Rwanda's Efforts to Qualify for the Transfer of Accused from the ICTR' 8 *Journal of International Criminal Justice*, (2010), at 242-245; see as well, L. Nadya Sadat, 'Understanding the Complexities of International Criminal Tribunal Jurisdiction,' in W.A Schabas and N. Bernaz (eds.), *Routledge Handbook of International Criminal Law*, (2011), at 206 *et seq.*; D.D.N. Nsereko, 'Genocide: A Crime against Mankind,' in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. 1, (2000), at 139 *et seq.*

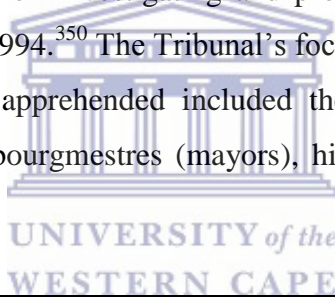
³⁴³ A. Cassese, *International Criminal Law*, 2nd edn, (2008), at 26 *et seq.*; S. Yee and T. Wang (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, (2001), at 77 *et seq.*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 57, MN 163.

³⁴⁴ For details, see P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' 90 *American Journal of International Law*, (1996), at 501-510; M.B. Harmon and F. Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings,' 2 *Journal of International Criminal Justice*, (2004), at 403; P. Gready, 'You are either with us or Against us: Civil Society and Policy Making in Post-Genocide Rwanda,' 109 *African Affairs*, (2010), at 638; G. Mettraux, *International Crimes and the Ad hoc Tribunals*, (2005), at 22 *et seq.*; I. Nizich, 'International

classification that may now be regarded as widely accepted.³⁴⁵ It has also made clear that the psychological consequences of rape can amount to serious mental harm in terms of the genocide definition.³⁴⁶ 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.³⁴⁷ The trial chamber has confirmed that racist propaganda can amount to the crime against humanity of persecution.³⁴⁸ Finally, the Tribunal has refined the criteria for determining superior responsibility of both civilian and military leaders.³⁴⁹

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 1994.³⁵⁰ 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.³⁵¹



Tribunals and their Ability to Provide Adequate Justice: Lessons From the Yugoslav Tribunal,' 7 *ILSA Journal of International and Comparative Law*, (2001), at 353 *et seq*; L. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, (2002), at 3; R. Zacklin, 'The Failings of the *Ad hoc* Tribunals,' 2 *Journal of International Criminal Justice*, (2004), at 541-543.

³⁴⁵ *Prosecutor v. Kayishema and Ruzindana*, Case N° ICTR-95-1-A, 1 June 2001, Paras 274 *et seq*

³⁴⁶ *Prosecutor v. Akayesu*, Case N° ICTR-96-4-T, Judgement (TC), 2 September 1998, Paras 731 *et seq*.

³⁴⁷ *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003; *Nahimana et al. v. the Prosecutor*, Case N° ICTR-99-52-A, Judgement (AC), 28 November 2007.

³⁴⁸ A. Cassese *et al.*, *International Criminal Law: Cases and Commentary*, (2011), at 186 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 331, MN 897; *The Prosecutor v. Nahimana et al.*, Case N° ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003, Para 1070-1076; The Tribunal found that hate speech can fulfil the elements of persecution as a crime against humanity.

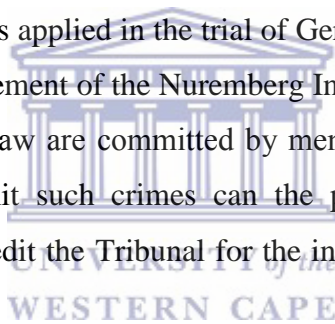
³⁴⁹ *The Prosecutor v. Nyiramasuhuko et al.*, Case N° ICTR-98-42-T, 24 June 2011, Paras 6182 *et seq*; *Prosecutor v. Bagosora et al.*, Case N° ICTR-98-41-T, 18 December 2008, Paras 254 *et seq*.

³⁵⁰ This policy of prosecuting high profile persons is expressed in the United Nations Security Council Resolution 1503 (2003); M. Chidi Njaju, 'The Role of Judicial Institutions in the Restoration of Post-Conflict Societies: The Cases of Rwanda and Sierra Leone,' 16 *Journal of Conflict and Security Law*, (2011), at 365 *et seq*; Y.Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, (2010), at 243; F.X. Nsanzuwerwa, 'The ICTR Contribution to National Reconciliation,' 3 *Journal of International Criminal Justice*, (2005), at 948.

³⁵¹ See ICTR, 'Status of Cases,' available at <<http://www.unict.org/Cases/tabid/204/Default.aspx>>; accessed October 2012.

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 minds 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.³⁵² 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.³⁵³ In this sense, the ICTR helps to promote accountability for human rights abuses and combating impunity at both national and international level.³⁵⁴

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.³⁵⁵ 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.'³⁵⁶ 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.

³⁵³ P. Clark 'Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda' in B. Bowden, H. Charlesworth and J. Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict*, (2009), at 246-249; K. Prost, 'The ICTY and its Relationship with National Jurisdictions: Powers, Limits, and Misconceptions,' in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (2011), at 434 *et seq.*

³⁵⁴ R. Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes,' 71 *British Yearbook of International Law*, (2000), at 259-315; K. Prost, 'The ICTY and its Relationship with National Jurisdictions: Powers, Limits, and Misconceptions' in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (2011), at 434.

³⁵⁵ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 449 *et seq.*; L. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, (2002), at 3; see also Art. 6(1), ICTR Statute.

³⁵⁶ G.A. Finch, 'The Nuremberg Trial and International Law,' 41 *American Journal of International Law*, (1947), at 20-37.

of genocide committed in Rwanda, and for prosecuting some of the ‘big fish’ who could not have been apprehended by Rwanda.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.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.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.³⁶⁰

Many judgments contain long discussions of the historical context in which the genocide was organised and executed.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.³⁶² Therefore, even when the

³⁵⁷ M.A Drumbl, ‘The Crime of Genocide,’ in B.S Brown (ed.), *Research Handbook on International Criminal Law*, (2011), at 37 *et seq*; T. Meron, ‘International Criminalisation of Atrocities,’ 89 *American Journal of International Law*, (1995), at 554- 555.

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.unicttr.org/Cases/tabid/204/Default.aspx>>, accessed in October 2012.

³⁵⁹ Address of ICTY President Antonio Cassese to the UN General Assembly, A/52/PV.44, 4 November 1997, at 2; F. Gaynor, ‘Uneasy Partners and Evidence, Truth and History in International Trials,’ 10 *Journal of International Criminal Justice*, (2012), at 5.

³⁶⁰ M.A. Drumbl, ‘Punishment, Postgenocide,’ 75 *New York University Law Review*, (2000), at 1290 *et seq.*; M.A. Drumbl, *Atrocity, Punishment, and International Law*, (2007), at 97 *et seq.*

³⁶¹ 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 *et seq.*

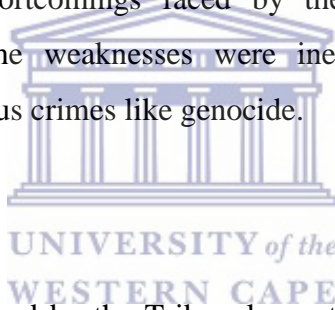
³⁶² W. A Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, (2012), at 200 *et seq*; R.A. Wilson, *Writing History in International Criminal Trials*, (2011), at 121 *et seq*; R.A.Wilson,

defendants are acquitted, the facts regarding the massacre itself remain intact, demonstrating that trials can help to create a significant historical record.³⁶³

Therefore, the jurisprudence of the ICTR has clarified the framework of genocide as a core crime.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.’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.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

‘Judging History: The Historical Record of the International Criminal Tribunal for the former Yugoslavia,’ 27 *Human Rights Quarterly*, (2005), at 909 *et seq.*

³⁶³ F. Gaynor, ‘Uneasy Partners and Evidence, Truth and History in International Trials,’ 10 *Journal of International Criminal Justice*, (2012), at 5-6; J. B. Quigley, *The Genocide Convention: An International Law Analysis*, (2006), at 50 *et seq.*; G. Mettraux, *International Crimes and the Ad hoc Tribunals*, (2005), at 193 *et seq.*

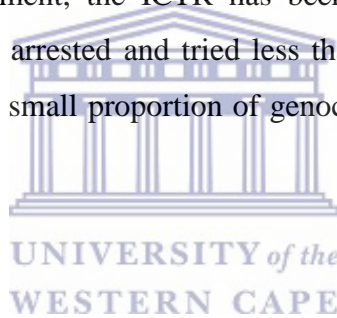
³⁶⁴ P.C. Bornkamm, *Rwanda’s Gacaca Courts: Between Retribution and Reparation*, (2012), at 28; W.A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 1st edn, (2006), at 44 *et seq.*; G. Mettraux, *International Crimes and the Ad hoc Tribunals*, (2005), at 21 *et seq.*

³⁶⁵ P.C. Bornkamm, *Rwanda’s Gacaca Courts: Between Retribution and Reparation*, (2012), at 28; see also G. Mettraux, *International Crimes and the Ad hoc Tribunals*, (2005), at 21 *et seq.*; W.A Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, (2006), 1st edn, at 44 *et seq.*

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.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.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.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.³⁷⁰

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



³⁶⁷ 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 80; E. Møse, 'Appraising the Role of the ICTR: Main Achievements of the ICTR,' 3 *Journal of International Criminal Justice*, (2005), at 920-943; E. Møse, 'The ICTR Completion Strategy-Challenges and Possible Solutions,' 6 *Journal of International Criminal Justice*, (2008), at 667-679; R. Zacklin, 'The Failings of the *Ad hoc* Tribunals,' 2 *Journal of International Criminal Justice*, (2004), at 541-543.

³⁶⁸ T. Anni, 'Rwandan Government Promises to Work with War Crimes Court,' *Agence France Presse* (AFP), 24 November 1994; J.A.F. Godinho, 'The Surrender Agreements between the US and the ICTY and ICTR: A Critical View,' 1 *Journal of International Criminal Justice*, (2003), at 505-516; V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 638-649.

³⁶⁹ Q.C Geoffrey Nice and P. Vallières-Roland, 'Procedural Innovations in War Crimes Trials,' 3 *Journal of International Criminal Justice* at 354-380; V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 707-708.

³⁷⁰ V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 708 *et seq.*

³⁷¹ A. Corey and S.F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda' 103 *African Affairs* (2004), at 81; 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; S. Rugege, 'Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development Judicial Independence in Rwanda,' *Pacific McGeorge Global Business and Development Law Journal*, (2007), at 411.

³⁷² See 'ICTR, Status of Cases' available at <<http://www.unict.org/Cases/tabid/204/Default.aspx>>, accessed in October 2012.

number of perpetrators is one of the major weaknesses of the Tribunal.³⁷³ 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).³⁷⁴

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.³⁷⁵ International trials have proved to be more protracted and lengthy than trials conducted at the national level.³⁷⁶ For instance, hearings in the Nyiramasuhuko case commonly known as the ‘Butare trial’,³⁷⁷ began on 12 June 2001 and ended on 24 June 2011.³⁷⁸ The trial was on-going for ten years with over 189 witnesses. The judgement, excluding the annexes, is approximately 1500 pages long.³⁷⁹ In the Bagosora case, much of the material was translated or interpreted into three languages.³⁸⁰ Investigations were conducted and many witnesses were brought from all over the world.³⁸¹ As noted by Schabas, the Tribunal’s proceedings are more



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³⁷³ 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.

³⁷⁴ See ‘ICTR Website,’ available at <<http://www.unicttr.org/Default.aspx>>, accessed in January 2013.

³⁷⁵ 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.*

³⁷⁶ 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.

³⁷⁷ 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.

³⁷⁸ *Prosecutor v. Nyiramasuhuko et al*, Case N° ICTR-98-42-T, 24 June 2011.

³⁷⁹ *Prosecutor v. Nyiramasuhuko et al*, Case N° ICTR-98-42-T, 24 June 2011; ICTR Annual Report 2001, Para 14 *et seq.*

³⁸⁰ *Prosecutor v. Théoneste Bagosora et al*, Case N° ICTR-98-41-T, 18 December 2008, Para 1 *et seq.*

³⁸¹ For instance, witnesses from the Prosecution and Defence side were 242 in total; see *Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-T, 18 December 2008, Paras 2015 *et seq.*

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.³⁸²

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.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.³⁸⁴ Media coverage of ICTR trials is very scarce.³⁸⁵ Even if the ICTR is internationally reputable, it remains unpopular among ordinary Rwandans and is considered ineffective.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



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³⁸² W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 1st edn, (2006), at 7; see also K. Margetts and K. I. Kappos, 'Current Developments at the *Ad hoc* International Criminal Tribunals,' 10 *Journal of International Criminal Justice*, (2012), at 460 *et seq* and the Universal Declaration of Human Rights, and International Covenant on Civil and Political Rights; Art.2 of the ICTR Statute; ICTR Annual Report, (2001), Para 14 *et seq*.

³⁸³ M. Chidi Nmaju, 'The Role of Judicial Institutions in the Restoration of Post-Conflict Societies: The Cases of Rwanda and Sierra Leone,' 16 *Journal of Conflict and Security Law*, (2011), at 382 *et seq*; Q.C Geoffrey Nice and P. Vallières-Roland, 'Procedural Innovations in War Crimes Trials,' 3 *Journal of International Criminal Justice*, (2005), at 354-380.

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,' *The New Times Rwanda*, September 2012, A commentator 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.'

³⁸⁵ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 30; J.M. Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation,' 16 *Leiden Journal of International Law*, (2003), at 115 *et seq*.

³⁸⁶ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 30; V. Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme,' 3 *Journal of International Criminal Justice*, (2005), at 950.

in Rwanda.³⁸⁷ Therefore there is a need to disseminate information about proceedings in Arusha to the Rwandan population.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.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.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.

³⁸⁷ M. Glasius, 'Do International Criminal Courts Require Democratic Legitimacy?' 23 *European Journal of International Law*, (2012), at 44.

³⁸⁸ V. Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme,' 3 *Journal of International Criminal Justice*, (2005), at 950-957; 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 80.

³⁸⁹ 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 80 *et seq.*; V. Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme,' 3 *Journal of International Criminal Justice*, (2005), at 955 *et seq.*; see details in P. Clark 'Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda,' in B. Bowden, H. Charlesworth and J. Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict*, (2009), at 254-269.

³⁹⁰ E. Møse, 'Main Achievements of the ICTR and the ICTR Completion Strategy-Challenges and Possible Solutions,' 3 *Journal of International Criminal Justice*, (2005), at 923 *et seq.*; Report of the Secretary-General on the Activities of the Office for Internal Oversight Services, at Para. 41 *et seq.*, UN Doc.A/51/789 (1997).

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.³⁹¹ However, different authors question the ICTR's genuineness in achieving this key objective of reconciliation.³⁹² The term national reconciliation appears just once in the ICTR Statute,³⁹³ 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.³⁹⁴

It is reported that there is an overall lack of knowledge regarding the Tribunal's work within the respective communities concerned.³⁹⁵ As mentioned earlier, the ICTR is detached from day-to-day realities in Rwanda and provides limited outreach in Rwanda.³⁹⁶ So, the ICTR does not have an impact on the life of most Rwandans and thus contributes little to the process of reconciliation.³⁹⁷ Instead, it is argued by different authors that the Arusha Tribunal focuses more

³⁹¹ See Preamble of the ICTR Statute

³⁹² M.R. Amstutz, 'Is Reconciliation Possible After Genocide?: The Case of Rwanda,' 48 *The Journal of Church and State*, (2006), at 541-565; P. Clark 'Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda,' in B. Bowden, H. Charlesworth and J. Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict*, (2009), at 254-269.

³⁹³ Preamble of the ICTR Statute; T. Gallimore, 'The Legacy of the International Criminal Tribunal for Rwanda and its Contributions to Reconciliation in Rwanda,' 14 *New England Journal of International and Comparative Law*, (2008), at 241; D. Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace,' 20 *Third World Quarterly*, (1999), at 239-256.

³⁹⁴ P. Clark, 'Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda' in B. Bowden, H. Charlesworth and J. Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict*, (2009), at 254 *et seq*; J.M. Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation,' 16 *Leiden Journal of International Law* (2003), at 115-133.

³⁹⁵ See Report of the Expert Group to conduct a Review of the Effective Operation and Functioning of the ICTY and ICTR, Para 97, 22 November 1999, (UN Doc. A/54/634); M. Glasius, 'Do International Criminal Courts Require Democratic Legitimacy?' 23 *European Journal of International Law*, (2012), at 44; V. Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme,' 3 *Journal of International Criminal Justice*, (2005), at 950-961.

³⁹⁶ See M.S. Ellis, 'The Contribution of Non-Governmental Organisations to the Creation of International Criminal Tribunals,' in B.S Brown (ed.), *Research Handbook on International Criminal Law*, (2011), at 164.

³⁹⁷ Preamble of the ICTR Statute (1994); M.S. Ellis, 'The Contribution of Non-Governmental Organisations to the Creation of International Criminal Tribunals,' in B.S Brown (ed.), *Research Handbook on International Criminal Law*, (2011), at 164; see H. C. Rhone, 'International Jurisdiction and Reconciliation-Experiences from the ICTR (2003),' 1 *Max-Planck Institute for Foreign and International Criminal Law*, available at

on legal processes and contributions to international law than on its potential impact within Rwanda.³⁹⁸ However, this research does not allow the conclusion that criminal trials can never facilitate reconciliation,³⁹⁹ 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,⁴⁰⁰ as seen in the following chapter which examines the role and status of domestic genocide prosecutions in Rwanda.



[http://www.iuscrim.mpg.de/shared/data/pdf/international_jurisdiction_and_reconciliation_experiences_from_the_ictr_\(rohne\).pdf](http://www.iuscrim.mpg.de/shared/data/pdf/international_jurisdiction_and_reconciliation_experiences_from_the_ictr_(rohne).pdf), accessed September 2012.

³⁹⁸ T. Gallimore, 'The Legacy of the International Criminal Tribunal for Rwanda and its Contributions to Reconciliation in Rwanda,' 14 *New England Journal of International and Comparative Law*, (2008), at 243 *et seq*; K. Nash, 'A comparative Analysis of Justice in Post-Genocidal Rwanda: Fostering a Sense of Peace and Reconciliation,' 1 *Africana*, (2007), at 62 *et seq*; UN Report, 'Rwanda Questions Usefulness of UN Genocide Court' (24 July 2002).

³⁹⁹ See A. Richters, C. Dekker, and K. de Jonge, 'Reconciliation in the Aftermath of Violent Conflict in Rwanda,' 3 *Intervention*, (2005), at 207 *et seq*; G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly*, (2011), at 331-348.

⁴⁰⁰ Art. 8 of the ICTR Statute; see S. Byamukama and J.A. Kapranos Huntley, 'Criminal Justice in the Aftermath of the 1994 Rwanda Genocide,' in R. Henham and P. Behrens, *The Criminal Law of Genocide, International, Comparative and Contextual Aspects*, (2007), at 233; L. S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, (1997), at 301 *et seq*; C. Wibabara, 'The Relationship between National and International Courts-A Critical Analysis,' *University of the Western Cape*, Thesis (2009), at 5 *et seq*.

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

⁴⁰¹ Art. VI of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; P.N. Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, Book II Genocide, Leyden, (1959), at 27-33; D. F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of A Prior Regime,' 100 *New York Law Journal*, (1991), at 2562-2568; P. Starkman, 'Genocide and International Law: Is There a Cause of Action,' 8 *ASIL International Law Journal*, (1984), at 7-14; J. Verhoeven, 'Le crime de Génocide, Originalité et Ambiguïté,' 24 *Revue Belge de Droit International*, (1991), at 19; W. Wald, 'Genocide and Crimes against Humanity,' 6 *Washington University Global Studies Law Review*, (2007), at 622.

⁴⁰² 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 159-165; D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' 100 *New York Law Journal*, (1991), at 2593; N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,' 78 *California Law Review*, (1990), at 466 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 69, MN 194 and 197 *et seq*; 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 2.

⁴⁰³ M. A. Drumbl, *Atrocity, Punishment, and International Law*, (2007), at 21 *et seq*; W.A. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,' 1 *Journal of International Criminal Justice*, (2003), at 44; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 111, MN 297 *et seq*.

⁴⁰⁴ See Art. 2, Organic Law N° 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'Ibyaha by'Itsembabwoko n'Itsembatsemba*:

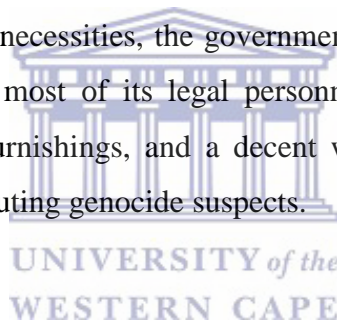
B. Generalities on Rwanda National Courts

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.⁴⁰⁶ 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.⁴⁰⁷ 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.⁴⁰⁸

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.⁴⁰⁹ Towards the end of 1996, national courts began prosecuting genocide suspects.



Amategeko Rishingiyeho, *Editions RCN* (1995), at 11-12; W.A. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,' 1 *Journal of International Criminal Justice*, (2003), at 45 *et seq.*

⁴⁰⁵ 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.

⁴⁰⁶ K. Nash, 'A Comparative Analysis of Justice in Post-Genocidal Rwanda: Fostering a Sense of Peace and Reconciliation,' 1 *Africana*, (2007), at 79 *et seq.*

⁴⁰⁷ J. Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' 1 *Hague Journal of Rule of Law*, (2009), at 87 *et seq.*

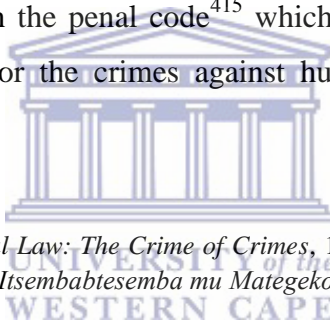
⁴⁰⁸ P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 24 *et seq.*; see Art. 19 of the 08/96 Organic Law.

⁴⁰⁹ A Lawyers' Committee Report on the ICTR and National Trials July 1997, 'Prosecuting Genocide in Rwanda,' at <<http://www.unwatch.com/rwanda.html>>, accessed December 2012.

II. Organisation of Ordinary Courts

To begin with, this study shows how Rwandan law was wholly unequipped for the situation after the genocide.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 1975.⁴¹¹ 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.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.⁴¹³ The chambers were competent to try genocide, crimes against humanity, and war crimes.⁴¹⁴ To avoid retroactivity, the organic law did not introduce new crimes but based its prosecutions on ordinary crimes in the penal code⁴¹⁵ which were carried out in relation to the events surrounding the genocide or the crimes against humanity committed.⁴¹⁶ Such crimes



⁴¹⁰ W.A Schabas, *Genocide in International Law: The Crime of Crimes*, 1st edn, (2000), at 389; Y. De Wolf, R. De Wolf, and C. Ntampaka, *Itsembabwoko n'Itsembabtesemba mu Mategeko y'Rwanda*, ASSEPAC Editions, (1997), at 26-29.

⁴¹¹ P. Quayle, 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention,' 5 *International Criminal Law Review*, (2005), at 371; W.A Schabas, *Genocide in International Law: The Crime of Crimes*, 1st edn (2000), at 175; Rwanda ratified the Convention by Décret-loi N° 08/75 du 12 Février 1975 Approuvant et Ratifiant Diverses Conventions Internationales Relatives aux Droits de l'Homme, au Désarmement, à la Prévention et à la Répression de Certains Actes Susceptibles de Mettre en Danger la Paix entre les Hommes et les Nations, *Journal officiel de la République Rwandaise*, (1975), at 230.

⁴¹² The Genocide Convention is presently ratified by 141 States; for discussion, see M. Milanovic, 'State Responsibility for Genocide,' 17 *European Journal of International Law*, (2006), at 553-604; J. Webb, 'Genocide Treaty-Ethnic Cleansing-Substantive and procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia,' 23 *Georgia Journal of International and Comparative Law*, (1993), at 337 *et seq.*

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.

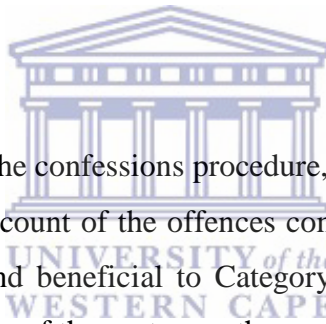
⁴¹⁴ Art. 1 of the Organic Law N° 08/1996 of 30 August 1996; K. McCourt, 'Judicial Defenders: Their Role in Postgenocide Justice and Sustained Legal Development,' 3 *International Journal of Transitional Justice*, (2009), at 272-283; L. Werchick, 'Prospects for Justice in Rwanda's Citizen Tribunals,' 8 *Human Rights Brief*, (2001), at 15 *et seq.*

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.

⁴¹⁶ Art. 1(b) of Organic Law N° 08/1996 of 30 August 1996. For a detailed discussion, see P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 54-55.

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

The organic law established four categories based on the accused's acts during the conflict, which formed a basis for determining the penalties.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.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.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

⁴¹⁷ The 1977 Rwandan Penal Code, Arts. 312 *et seq.*, Arts. 318 *et seq.*, Arts. 360 *et seq.*, Arts. 388 *et seq.*, Arts. 396 *et seq.*; 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.*; see also P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 52-56; For Non-retroactivity Principle, see Art.15 of the ICCPR.

⁴¹⁸ Art. 2, of the Organic Law N°08/1996 of 30 August 1996; see also P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 41.

⁴¹⁹ Art. 6, of the Organic Law N°08/1996 of 30 August 1996.

⁴²⁰ Art. 105 of Organic Law N° 16/2004.

Category One suspects after merging the categories and extending the competence of the Gacaca courts to deal with Category Two and Three suspects.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.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.⁴²³

III. Reparations

Specialised chambers were given competence to hold trials for victims' reparations in criminal trials.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.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

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.

⁴²² Arts. 2 and 4 *et seq.*, 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, P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 24.

⁴²³ The reform in genocide trials came with the introduction of Gacaca courts.

⁴²⁴ For a detailed discussion on reparations in Rwanda, see P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 132 *et seq.*

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.

reparations for violent crimes committed by perpetrators in other categories, particularly those tried by ordinary courts.⁴²⁶

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.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 2002.⁴²⁸ And by the end of 2004, a total of 10,026 individuals had been tried by the ordinary courts.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 2005,⁴³⁰ ordinary courts continued prosecuting only Category One genocide cases, but at a significantly lower rate⁴³¹ and no longer by the specialised chambers.⁴³² From January 2005 to March 2008, the courts merely tried 222 genocide suspects.⁴³³ Thus, the total number of

⁴²⁶ For a detailed discussion on reparations in Rwanda, see P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 131 and 133 *et seq.*

⁴²⁷ 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 committed since 1 October 1990; Urukiko rw'Ikirenga, Umutwe Ushinzwe Inkiko-Gacaca, *Imfashanyigisho Ku Nkiko-Gacaca*, (2001), at 2.

⁴²⁸ See Amnesty International, 17 December 2002, 'Gacaca: A Question of Justice,' at 17 available at <www.amnesty.org/en/library>, accessed July 2012. According to Amnesty International, 379 defendants were tried for genocide in 1997, and 895 defendants were tried in 1998; Similar statistics are provided in J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 899; In addition, for statistics relating to the total number of genocide trials until late 1999, see UN Human Rights Report on Rwanda, (2000), Para 136.

⁴²⁹ B. Ingelaere, 'The Gacaca Courts in Rwanda,' in L. Huyse and M. Salter (eds.), *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,' 3 *Journal of International Criminal Justice*, (2005), at 888.

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.

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.

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.

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.⁴³⁴ 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.⁴³⁵ 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.⁴³⁶

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 courts⁴³⁷ or military tribunals, based on the territoriality and nationality principles of jurisdiction.⁴³⁸ The Supreme Court is the highest court of jurisdiction that has competence to deal with appeal cases from both the high court of the republic⁴³⁹ and the military high court.⁴⁴⁰ The discussion below will thus assess a number of

statistics compiled by the 'Supreme Court of Rwanda, Urukiko rw'Ikirenga, 'Raporo y'Urwego rw'Ubucamanza 2006, 2007, and 2008.

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.

⁴³⁵ D. Magasm, in P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 45; see also B. Oomen, 'Rwanda's Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law,' in R. Haveman and O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, (2006), at 161 *et seq.*

⁴³⁶ Statement by Honourable Tharcisse Karugarama, Minister of Justice and Attorney-General of Rwanda, available at <http://www.minijust.gov.rw/MoJ/AX_Articles.aspx?id=1315&cid=14>, accessed April 2013.

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.

⁴³⁸ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 40.

⁴³⁹ Appeals before ordinary courts go to the High Court of the Republic, Arts. 87, 105(1) of Organic Law N° 51/2008. Since 2004, a second appeal to the Supreme Court against an appeal judgment by the High Court of the Republic is admissible in cases of blatant miscarriage of justice, or a sentence of at least 10 years of imprisonment, Art. 108 of Organic Law N° 51/2008 O.G.R.R. N° 5 of 1 March 2008; Art.43(2)(2) to (6) and (8) of Organic Law N° 01/2004 of 29 January 2004 establishing the Organisation, Functioning and Jurisdiction of the Supreme Court, O.G.R.R. N° 3 of 1 February 2004, as modified by Art. 3 of Organic Law N° 58/2007 of 16 December 2007 Modifying and Complementing Organic Law N° 01/2004 of 29 January 2004.

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

	ACCUSED	SUMMARY OF ACCUSATIONS	DATE AND JUDGMENT
1	Cpt Twagiramungu Theophile	Planned and incited interahamwe to kill Tutsis, non assistance of persons in danger, and criminal group formation.	24/02/2006: Overturned the previous death penalty and was acquitted on appeal.
2	Gataza Noel	Murder of many people, torture, dehumanizing acts, and violent crimes resulting in death of many Tutsis.	12/01/2007: Same imprisonment of 30 years as the previous court but was to pay higher reparations of 57.117.296 FRW.
3	Gatorano Didace	He was in position of authority, supervised and led criminal attacks, notorious murderer, and looting.	12/01/2007: The case was inadmissible on appeal in the Supreme Court but the prior court had sentenced him to death penalty.
4	Gd Anne Marie Nyirahazimana and Nginshuti Athanase	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.	27/06/2008: On appeal, the case was sent to Gacaca appeal court yet previously he had been sentenced to death penalty and reparations.
5	Harelimana Etienne, Rudodo Joseph, Mutabaruka Joseph, Harindwintwali Antoine and Bimenyimana Emmanuel	Genocide in Butare, systematic attacks and violent crimes resulting in death of Tutsis in the Southern Province.	20/06/2008: Inadmissible case on appeal but the prior court had sentenced Harelimana and 3 others to death while Bimenyimana to life imprisonment.
6	Nzirabatinyi Felecien	Torture, notorious murderer, looting, participated in attacks and committed violent crimes resulting in deaths.	18/04/2008: Same sentence of life imprisonment as the former appeal court.
7	Nzisabira Jean Baptiste	Murder of many Tutsis, dehumanising acts, and participated in criminal attacks.	04/05/2007: Overturned life sentence to 19 years sentence on appeal.

8	Pandasi, Bugeri J. Baptiste and Nzajyibwami Eugene Alias Gahini	Committed various genocide acts leading to deaths of several Tutsis and moderate Hutus in the Northern Province (Ruhengeri).	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.
9	Rurangirwa Hycinthe, Bimenyimana and Ntawangaheza	Criminal group formation, destruction of Tutsi houses, rape, sexual torture, unlawful gun possession, non assistance of persons in danger.	20/06/2008: The case was inadmissible on appeal but the prior court had sentenced them to death penalty and deprivation of civil liberties.
10	Sibomana J.M Vianney	Committed genocide and other crimes against humanity with a particular zeal.	13/06/2008: Inadmissible on appeal but before he had been sentenced to death and reparations of Frw 42.527.900.
RELEVANT CASES WITHIN THE SPECIALIZED CHAMBERS PRIOR TO ESTABLISHMENT OF GACACA			
1	Banzi Wellars <i>et al.</i> ,	Genocide within the Western Province (Gisenyi).	25/05/2001: Death sentence and reparations.
2	Hanyurwimfura Epaphrodite	Genocide within the Southern Province (Butare).	08/08/2001: Not guilty.
3	Kalisa Ignace <i>et al.</i> ,	Genocide within the Northern Province.	31/01/2002: Not guilty.
4	Karorero Charles <i>et al</i>	Genocide within the Western Province (Cyangugu).	31/03/2000: Death and loss of civic rights.
5	Muzatsinda Emmanuel	Genocide within Kigali (Kigali City).	17/03/1998: Not guilty.
6	Mvumbahe Denys	Genocide within the Western Province (Kibuye).	16/07/2000: Life sentence and loss of civic rights.
7	Nyilishema Andre	Genocide within Kigali Province (Nyabisundu).	14/11/1997: Life imprisonment but the case was inadmissible on appeal.
8	Sibomana J.B <i>et al.</i> ,	Genocide within the Southern Province (Gitarama).	08/04/2002: Not guilty.
9	Ukezimfura Jean	Genocide within the Eastern Province (Kibungo).	29/09/2000: 9 years imprisonment.

As is apparent from the above cases,⁴⁴¹ various defendants were sentenced to capital punishment but Rwanda carried out executions of only 22 convicts.⁴⁴² The abolition of the death penalty in 2007 meant that people sentenced to death were spared to serve life imprisonment.⁴⁴³ 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 courts⁴⁴⁴ which tried genocide cases prior to the establishment of Gacaca courts.

I. Prosecutor versus Cpt Twagiramungu

The case started from the military court in Kigali⁴⁴⁵ where the defendant was acquitted on all the prosecution's charges of planning genocide, non-assistance to persons in danger,⁴⁴⁶ formation of a criminal group and inciting Interahamwe to kill Tutsis and moderate Hutus.⁴⁴⁷ 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 deprivation of

⁴⁴¹ The above cases are all in Kinyarwanda, and translation was done by the author.

⁴⁴² A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 761; see Amnesty International, Rwanda: '22 People, executed on 24 April,' AI Index: AFR 47/15/98, 27 April 1998, available at <http://www.amnesty.org/es/library/asset/AFR47/015/1998/es/285a93fd-f880-11dd-b378-142bfbe1838/afr470151998en.pdf>, accessed January 2012; see also 'Rwanda executes genocide convicts, (24 April 1998)' available at <http://news.bbc.co.uk/2/hi/africa/82960.stm>, accessed in December 2011; see J. Busingye, *Reality and Challenges of Legal and Judicial Reconstruction in Rwanda*, (2006), available at www.cilc.nl/Post_Conflict_Situations.pdf, December 2006, at 21 *et seq.*

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.*

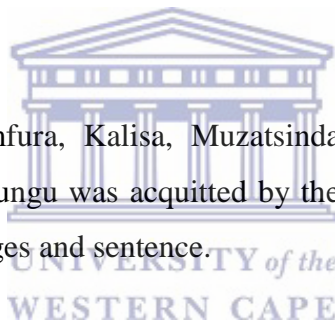
⁴⁴⁵ *The Prosecutor v. Cpt Twagiramungu Theophile* (RP 0045/CG-CS/2000), judgment of 20/06/2000

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

⁴⁴⁷ Art. 2 and 25, 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; Art.256, Arts.281, 282 and 283 of the 1977 Penal Code.

all civil liberties.⁴⁴⁸ 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.⁴⁴⁹ 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.⁴⁵⁰ 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.⁴⁵¹



Like in the cases of Hanyurwimfura, Kalisa, Muzatsinda, and Sibomana trials before the specialized chamber,⁴⁵² Twagiramungu was acquitted by the Supreme Court which ordered the immediate removal of former charges and sentence.

⁴⁴⁸ *Prosecutor v. Cpt Twagiramungu Theophile* (RPA 0189/CM/2001), judgment of 10/01/2003. See also Art. 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.

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.

⁴⁵⁰ Art. 25 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.

⁴⁵¹ Urukiko rw'Ikirenga, icyegeranyo cy'Ibyemezo by'Urukiko rw'Ikirenga, Imanza za Jenocide iz'Ibyaha byakozwe n'Abana n'iz'Inshinjabyaha, (2006).

⁴⁵² *Prosecutor v. Hanyurwimfura Epaphrodite*, (R.M.P 42.088/S8, R.P 52/2/200), judgment of 08/08/2001, Urukiko rwa mbere rw'Iremezo rwa Butare. *Prosecutor v. Kalisa Ignace et al.*, (R.P 065/S1/CH.SP/RSHI), judgment of 14/11/1997, (Urugereko rwihariye rwa Rushashi). *Prosecutor v. Muzatsinda Emmanuel*, (R.M.P 900/S11/NG/KE/R.P.041/CS/KIG), judgment of 17/03/1998, (Urugereko rwihariye rwa Kigali). *Prosecutor v. Jean Baptiste Sibomana et al.*, (R.M.P 27811/S4/M.P R.P. 89/GIT/CH.S/3/99), judgment of 08/04/2002, (Urugereko rwihariye rwa Gitarama). All these defendants were found not guilty of the genocide charges.

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.⁴⁵³ 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.⁴⁵⁴

II. Prosecution versus Pte Gataza

Gataza was accused of various genocide crimes between April and July 1994,⁴⁵⁵ and the first court sentenced him to death and to pay reparations of 57,117,296 RWF (86,541 USD) to victims.⁴⁵⁶ 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.⁴⁵⁷ 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

⁴⁵³ Urukiko rw'Ikirenga, icyegeranyo cy'Ibyemezo by'Urukiko rw'Ikirenga, Imanza za Jenocide Iz'Ibyaha Byakozwe n'Abana n'iz'Inshinyabaha, (2006).

⁴⁵⁴ W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 889.

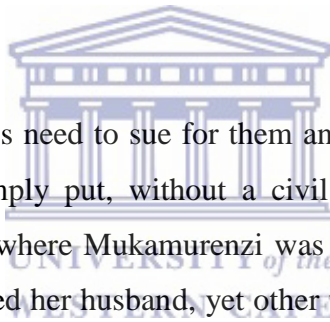
⁴⁵⁵ Biteganywa n'Amasezerano Mpuzamahanga y'Umuryango w'Abibumbye yo kuwa 9/12/1948. Arts. 312, 281, 282, 283, 22, 24, 89, 90, 91, the 1977 Rwanda Penal Code and Organic Law N° 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity.

⁴⁵⁶ *Prosecution v. Gataza Noel* (RP 5053/CG-CS/00), judgment of 24/5/ 2002.

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.⁴⁵⁸ 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.⁴⁵⁹

However due to extreme poverty in Rwanda, reparations are often not paid in practice.⁴⁶⁰ 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.⁴⁶¹ 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.⁴⁶²

⁴⁵⁸ *Prosecution v. Gataza Noel* (RPAA0010/GEN/06/CS), judgment of 12/11/2007. See Art. 312, Rwandan Penal Code, 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.

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.

⁴⁶⁰ A. Storey, Economics and Ethnic Conflict: Structural Adjustment in Rwanda, 17 *Development Policy Review*, (1999), at 43-63; K. Nash, 'A Comparative Analysis of Justice in Post-Genocidal Rwanda: Fostering a sense of Peace and Reconciliation,' 1 *Africana*, (2007), at 79 *et seq*; S. Stewart, *Conflict Resolution: A Foundation Guide*, (1998), at 7 *et seq*.

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

⁴⁶² See also C. Tomuschat, 'Reparation for Victims of Grave Human Rights Violations,' 10 *Tulane Journal of International and Comparative Law*, (2002), at 168.

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 citizens⁴⁶³ 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.⁴⁶⁴ 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.⁴⁶⁵ It is noted that the crime of genocide against a protected group can be the responsibility of a state or state-like organization.⁴⁶⁶

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 subordinate 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 subordinate.

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.⁴⁶⁷ And on the 17 November 2001, the first instance hearing found the defendant guilty and sentenced him to death.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.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.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.⁴⁷¹

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.

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.

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

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.

⁴⁷¹ Amnesty International, *Unfair Trials: Justice Denied*, (8 April 1997), at 14, AI Index AFR 47/008/1997, available at <[http://www.amnesty.org/library/pdf/AFR470081997ENGLISH/\\$File/AFR4700897.pdf](http://www.amnesty.org/library/pdf/AFR470081997ENGLISH/$File/AFR4700897.pdf)>, accessed December 2012; M. Cousineau, 'L'établissement de l'État de Droit au Rwanda: Un but Irréalizable,' 28 *Ottawa Law Review*, (1997), at 185 *et seq.*

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 Nginshuti

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 Nginshuti, 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.

⁴⁷³ Art.2 part IV of the 1948 Genocide Convention; Arts. 89, 90, 91, 312 and 317 of the 1977 Rwandan Penal Code; see also H.G. Van Der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction,' 4 *Journal of International Criminal Justice*, (2006), at 240.

⁴⁷⁴ *Prosecutor v. Banzi Wellars et al.*, (R.M.P 61099/S5/ML/KRE/KD, R.P. 221/R2/2000), the defendants were sentenced to death and reparations to victims; Art.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.

⁴⁷⁵ 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.

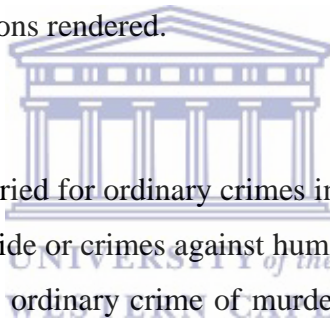
⁴⁷⁶ For details, see Urukiko rw'Ikirenga, Icyegeranyo cy'Ibyemezo by'Urukiko rw'Ikirenga, Imanza za Jenocide (2008), Ubushinjacyaha na Major GD Anne Marie Nyirahakizimana na Nginshuti Athanase, Urupapuro rwa 20.

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.

⁴⁷⁸ *Prosecutor v. Gd Anne Marie Nyirahazimana and Nginshuti Athanase* (RP.0001/CM-CS/KGL/99), judgment of 3/06/1999.

verdict.⁴⁷⁹ 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.⁴⁸⁰ 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.⁴⁸¹

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.⁴⁸² The 08/96 organic law organised prosecution and punishment of genocide suspects based on existing crimes under domestic criminal law.⁴⁸³ 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.⁴⁸⁴ The special intent degree is what distinguishes for instance the ordinary crime of murder from the crime of genocide.⁴⁸⁵ In

⁴⁷⁹ *Prosecutor v. Gd Anne Marie Nyirahazimana and Nginshuti Athanase* (RPA.003/GEN/06/CS) 27/06/2008), judgment of 27/06/2008.

⁴⁸⁰ This was in reference to Organic Law N° 13/2008 of 19/05/2008 modifying Organic Law N° 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 N° 16/2008.

⁴⁸² See D. De Beer, *Ikurikiranwa mu Nkiko Ry'ibyaha by'itsembabwoko n'itsembatsemba: Amategeko rishingiyeho*, Editions RCN, (1995), at 1-2; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 66.

⁴⁸³ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 54-55; J.B. Quigley, *The Genocide Convention: An International Law Analysis*, (2006), at 65-66.

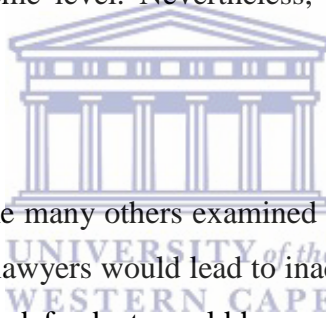
⁴⁸⁴ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (2012), at 55; F. Kabatsi, 'Defining or Diverting Genocide: Changing the Comportment of Genocide,' *5 International Criminal Law Review*, (2005), at 394.

⁴⁸⁵ H. Kreicker, 'National Prosecution of Genocide from a Comparative Perspective,' *5 International Criminal Law Review*, (2005), at 323-324; L.J. LeBlanc, 'The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding,' *78 American Journal of International Law*, (1984), at 370; D.L. Nersessian, 'The Razor's

fact it is considered that the perpetrators' intent is a central requirement to commit genocide.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.

V. Prosecutor versus Harelimana et al.

All the defendants⁴⁸⁷ 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.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.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.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

Edge: Defining and Protecting Human Groups under the Genocide Convention,' 36 *Cornell International Law Journal*, (2003), at 311-312.

⁴⁸⁶ Art. II *et seq* of the 1948 Genocide Convention; see J.R.W.D. Jones, 'Whose Intent is it Anyway? Genocide and the Intent to Destroy a Group,' in L. Chand Vohrah *et al.* (eds.), *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio Cassese*, (2003), at 478; L. Van Den Herik, 'The Schism between the Legal and the Social Concept of Genocide,' in R. Henman and P. Behrens (eds.), *The Criminal Law of Genocide, International, Comparative and Contextual Aspects*, (2007), at 159-161; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 271, MN 743 *et seq*.

⁴⁸⁷ Harelimana Etienne, Rudodo Joseph, Mutabaruka Joseph, Harindwintwali Antoine and Bimenyimana Emmanuel

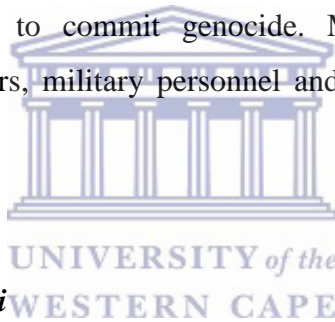
⁴⁸⁸ See *Prosecutor v. Harelimana Etienne et al.*, (RP 10/1/97), judgment of 22/10/1997(Specialised chamber), 15/05/2003 (1st appeal), 20/06/2008 (2nd appeal in Supreme Court). See, related case in the specialised chambers, *Prosecutor v. Nyilishema Andre*, (R.M.P 98228/S2/HJD/ R.P. 0010/1/GIRO RMPA 2/4170/PROGERAL, RPA 16/I/97/NZA), judgment of 14/11/1997.

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 *Journal of International Criminal Justice*, (2005), at 886.

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 superiours 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).

⁴⁹² Amnesty International, (2007), *Rwanda Abolishes Death Penalty*, available at, <<http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-2007080>>, accessed January 2013.

⁴⁹³ See *Prosecutor v. Nzirabatinyi Felecien* (RPA/GEN/0235/05/HC/KIG), judgment of 17/07/2003. Icyegeranyo cy'Ibyemezo by'Urukiko rw'Ikirenga, Imanza za Jenocide (2008), Urupapuro rwa 2.

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.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.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.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.⁴⁹⁸ In several cases there was much reference to Gacaca witnesses and alleged accomplices, as manifested in Pandasi's trial.

⁴⁹⁵ S. Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide,' 48 *Virginia Journal of International Law*, (2008), at 498-499; G. Dawson and R. Boynton, 'Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations *Ad hoc* Tribunals,' 21 *Harvard Human Rights Journal*, (2008), at 263.

⁴⁹⁶ See, case in the Specialized Chamber, *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 rwihariye 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.

⁴⁹⁷ A. Karekezi *et al.*, 'Localizing Justice: Gacaca Courts in Post-Genocide Rwanda,' in E. Stover and M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (2005), at 74 *et seq.*

⁴⁹⁸ Penal Reform International, *Monitoring and Research Report on the Gacaca: Information-Gathering during the National Phase*, (2006); Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda* (July 2008).

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.⁴⁹⁹ He participated in criminal groups and committed genocide against a great number of people because they belonged to the Tutsi ethnic group.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 deprivation 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.⁵⁰¹

⁴⁹⁹ *Prosecutor v. Nzisabira Jean Baptiste* (RP.0027/CG-CS/99), judgment of (30/12/2002), (RPA 0311/CM/2003), judgment of 12/04/2004, (RPAA 0001/ GEN/05/CS), judgment of 04/05/2007.

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.

⁵⁰¹ *Prosecutor v. Nzisabira Jean Baptiste* (RPAA 0001/ GEN/05/CS), judgment of 4/05/2007. See related case in the specialized chambers, *Prosecutor v. Ukezimfura Jean* (RMP 82693/S4/ND), judgment of 29/09/2000 (Urugereko rwihariye rwa Kibungo).

Quite clearly, this case shows that there is a significant level of independence of the judges from the prosecution and *vice versa*.⁵⁰² The prosecution does not influence the judges, as seen in several denials of their requests towards the accused like in the Pandasi case.⁵⁰³ Likewise, the prosecution can appeal against any decision of the judges as seen in Nyirahazimana case.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.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.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

⁵⁰² S. Rugege, 'Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development- Judicial Independence in Rwanda,' *Pacific McGeorge Global Business and Development Law Journal*, (2007). The 2003 constitution of Rwanda also recognises judicial independence.

⁵⁰³ *Prosecutor v. Pandasi et al.* (RS/Rev 0007/06/CS), judgment of 17/04/2006. See also judges' denial of the prosecution's requests in the specialised chambers; see, *Prosecutor v. Kalisa Ignace et al.*, (R.P 65/S1/CH.SP/RSHI), judgment of 14/11/1997, *Prosecutor v. Muzatsinda Emmanuel*, (R.M.P 900/S11/NG/KE/ R.P. 041/CS/KIG), judgment of 17/03/1998. All these defendants were found not guilty of genocide contrary to the prosecution's requests.

⁵⁰⁴ *Prosecutor v. Gd Anne Marie Nyirahazimana and Nginshuti Athanase* (RPA.003/GEN/06/CS) 27/06/2008), judgment of 27/06/2008.

⁵⁰⁵ For characteristics of impartiality see, P.C. Bornkamm, *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.

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.⁵⁰⁷ 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.⁵⁰⁸ 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.⁵⁰⁹ The defendants claimed to be declared innocent because their alleged accomplices in Gacaca had not mentioned them in their confessions.⁵¹⁰

However, on the 17/04/2006, the Supreme Court ruled that the motivation of the request for review was baseless,⁵¹¹ 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

⁵⁰⁷ Urukiko rw'Ikirenga, icyegeranyo cy'Ibyemezo by'Urukiko rw'ikirenga, Imanza za Jenocide iz'Ibyaha byakozwe n'Abana n'iz'Inshinjabyaha (2006).

⁵⁰⁸ *Prosecutor v. Pandasi Bugeri J. Baptiste and Nzajyibwami Eugene Alias Gahini* (RP 016/R98), judgment of 28/10/1998. See also the Specialized Chamber cases, *Prosecutor v. Nyilishema Andre*, (R.M.P 98228/S2/HJD/ R.P. 0010/1/GIRO RMPA 2/4170/PROGERAL, RPA 16/I/97/NZA), judgment of 14/1/1997.

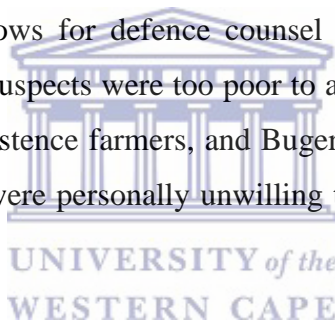
⁵⁰⁹ *Prosecutor v. Pandasi et al.*, (RP 016/R98), judgment of 28/10/1998 (Lower court), (RPA 45/R1/GC/RUH) judgment of 18/08/1999 (Higher court), (RS/Rev 0007/06/CS), judgment of 17/04/2006 (Supreme Court).

⁵¹⁰ For details on complicity, see H.G. Van Der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction,' 4 *Journal of International Criminal Justice*, (2006), at 240.

⁵¹¹ Art. 180 Organic Law N° 13/2004 of 17/5/2004.

hardly contribute to reconciliation because of the adversarial way in which they are conducted.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.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 Bugeru 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,⁵¹⁴ destruction of Tutsi houses, rape, torture, unlawful gun possession, and non-assistance of persons in danger among other crimes.⁵¹⁵ On the 23/03/1998, the above defendants were sentenced to death and deprivation of civil liberties as was done by the specialized chamber in Karorero Charles

⁵¹² D. Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace,' 20 *Third World Quarterly*, (1999), at 239-256; G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly* (2011), at 331-348.

⁵¹³ K. Nash, 'A Comparative Analysis of Justice in Post-Genocidal Rwanda: Fostering a Sense of Peace and Reconciliation,' 1 *Africana*, (2007), at 59-100.

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 *bis* of 1 July 1978.

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 *bis* of 1 July 1978. The Penal Code imposes an obligation on every Rwandan citizen to provide assistance to persons in danger.

*et al.*⁵¹⁶ 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.⁵¹⁷ Subsequent to the modification of laws and competence of the Supreme Court, the defendants' second appeal was inadmissible.⁵¹⁸

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 amendment⁵¹⁹ 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.

⁵¹⁶ *Prosecutor v. Charles Karorero et al.* (R.M.P 78.752/S2/KRL., R.P 26/96), judgment of 31/03/2000, Urukiko rwa mbere rw'Iremezo rwa Cyangugu.

⁵¹⁷ Urukiko rw'Ikirenga, icyegeranyo cy'Ibyemezo by'Urukiko rw'Ikirenga, Imanza za Jenocide (2008), Ubushinjacyaha na Rurangirwa, Urupapuro rwa 28.

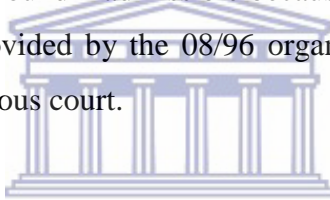
⁵¹⁸ See *Prosecutor v. Rurangirwa Hyacinthe, Bimenyimana, and Ntwangaheza* (RPAA 003/GEN/06/CS), judgment of 23/03/1998, (First trial), judgment of 25/07/2001 (First appeal), judgment of 20/6/2008 (Second Appeal). The appeal violated Art. 25 of the 08/96 Organic Law which required the defendants to have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

⁵¹⁹ Organic Law N° 13/2008 of 19/05/2008, published in the official Gazette of the Republic of Rwanda, edition N° 11 of 01/06/2008.

X. Prosecutor versus Sibomana

The prosecution accused the defendant of genocide and other crimes against humanity as indicated in the table above.⁵²⁰ 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 deprivation 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.⁵²¹

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.⁵²² 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.⁵²³ However, a brief look at the ICTR jurisprudence shows that it does not impose

⁵²⁰ *Prosecutor v. Sibomana J.M Vianney* (RP 065/CS/KIG), judgment of 30/04/1999, (RPA89/99/R1/KIG), judgment of 8/02/2003, (RPA0017/GEN/07/CS/), judgment of 13/06/2008.

⁵²¹ *Icyegeranyo cy'Ibyemezo by'Urukiko rw'Ikirenga, Imanza za Jenocide (2008)*, Ubushinjacyaha na Sibomana J.M Vianney, Urupapuro rwa 24.

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.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.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.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 (*nullum crimen nulla poena 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.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

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

⁵²⁵ Another inequality is that life imprisonment with special provisions does not apply to defendants whose cases are transferred or extradited to Rwanda, Art. 1 of Organic Law N° 66/2008 of 21 November 2008 modifying and completing Organic Law N° 31/2007 of 25 July 2007, O.G.R.R. N° 23 of 1 December 2008; see also Art. 3 of Organic Law N° 03/2009 of 26 May 2009 modifying and completing the Organic Law N° 11/2007 of 16 March 2007, O.G.R.R. N° Special of 26 May 2009.

⁵²⁶ Therefore in observance of the principle of legality, several laws had to support the judgments as seen in all the cases, such as the 1948 Genocide Convention; Organic Law N° 08/96 of 30 August 1996 Organising the Prosecution of Genocide Crimes and other Crimes against Humanity committed from the 1st of October 1990 to 31 December 1994; 2003 Constitution of the Republic of Rwanda; Organic Law of 07/2004 of 24/04/2004 on Organization, Functioning and Competence of the Supreme Court; Organic Law N° 10/2007 of 01/03/2007 on Organization, Functioning and Competence of Gacaca Courts; Law N° 13/2004 of 17 May 2004 relating to the Code of Criminal Procedure; O.G.R.R. N° Special of 30 July 2004 as modified by Law N° 20/2006 of 22 April 2006 modifying and completing the Law N° 13/2004 of 17 May 2004; O.G.R.R. N° Special of 27 May 2006; Decree-Law N° 21/77 of 18 August 1977 instituting the Penal Code of 1978.

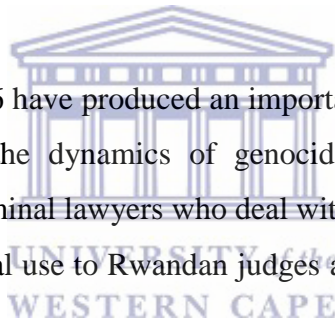
⁵²⁷ W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 889. He views the Tribunal's jurisprudence to have had such a limited impact on the national court trials which could be explained by the fact that most genocide-related judgments in Rwanda 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.⁵²⁸ In the aftermath of the genocide, the Rwandan government has developed the courts' human and material resources, as well as court structures.⁵²⁹ 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.⁵³⁰ 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.⁵³¹ These judgments will be of significance to researchers and criminal lawyers who deal with an assessment of factual issues.⁵³² They are therefore of great practical use to Rwandan judges and lawyers engaged in the ongoing



⁵²⁸ A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 748.

⁵²⁹ S. Vandeginste, 'Poursuite des Présumés Responsables du Génocide et des Massacres Politiques devant les Juridictions Rwandaises,' in S. Marysse and F. Reyntjens (eds.), *L'Afrique des Grands Lacs*, (1996-1997), at 107 *et seq.*

⁵³⁰ M.A. Drumbl, 'Prosecution of Genocide versus the Fair Trial Principle,' 8 *Journal of International Criminal Justice*, (2010), at 305; W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 879-895; 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, *Ligue des droits de la personne dans la région des Grands Lacs*, (2005), available at <http://www.christinacacioppo.com/content/publications/EducationAndReintegrationOfFormerPrisoners.pdf>, accessed February 2013.

⁵³¹ Jurisprudence from the ordinary courts indicates that they managed to try 10,248 persons for genocide related crimes from December 1996 to March 2008. See statistics compiled by the Supreme Court of Rwanda, 'Rapport y'Urwego rw'Ubucamanza 2006, 2007 and 2008,' and other statistics provided by the Inspectorate of Courts in the Supreme Court of Rwanda.

⁵³² K. McCourt, 'Judicial Defenders: Their Role in Postgenocide Justice and Sustained Legal Development,' 3 *International Journal of Transitional Justice*, (2009), at 272-283; W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 879-895.

prosecutions, and the cases establish principles for interpretation of the national legislation dealing with genocide prosecutions.⁵³³

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 1994.⁵³⁴ 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.⁵³⁵ 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.⁵³⁶ On a broader note, national legislation and genocide case law may give effect to the obligations enclosed in the 1948 Genocide Convention.⁵³⁷ 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.⁵³⁸ Based on the experience of Rwanda, it can be asserted that by incorporating the crime of genocide into the domestic legal system and applying

⁵³³ W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 880 *et seq.*

⁵³⁴ The Kigali Military Court, *Prosecutor v. Cpt Twagiramungu Theophile* (RP 0045/CG-CS/2000), judgment of 20/06/2000. *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.

⁵³⁵ *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'itsembatsemba, Umutungu wa Gatandatu, Urupapuro 67-136.

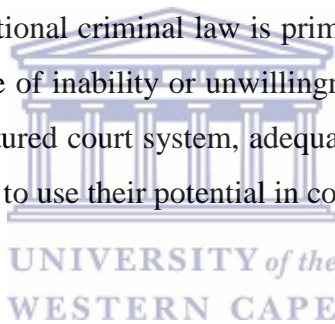
⁵³⁶ J. Wouters and S. Verhoeven, 'The Domestic Prosecution of Genocide,' *Leuven Centre for Global Governance Studies and Institute for International Law*, (2010), N° 55, at 1 *et seq.*

⁵³⁷ Art. IV of the Genocide Convention provides an express obligation to prosecute with regard to genocide.

⁵³⁸ M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, (2005), at 22 *et seq.*

it, the scope of the crime will be fixed.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.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.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.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.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.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

⁵³⁹ 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 1-3.

⁵⁴⁰ A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 736; M.A. Drumbl, *Atrocity, Punishment, and International Law*, (2007), at 21 *et seq*; K. McCourt, 'Judicial Defenders: Their Role in Postgenocide Justice and Sustained Legal Development,' 3 *International Journal of Transitional Justice*, (2009), at 272-283.

⁵⁴¹ G. Gahima, Accountability for Atrocity, Lessons from Rwanda, 8 *Georgetown. Journal of International Affairs*, (2007), at 110; M. A. Drumbl, *Atrocity, Punishment, and International Law*, (2007), at 21 *et seq*; W. A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 895.

⁵⁴² A. Cassese, *International Criminal Law*, 2nd edn, (2008), at 346; R. Wedgwood, 'National Courts and the Prosecution of War Crimes,' in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. 1, (2000), at 409 *et seq*.

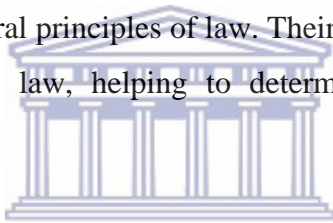
⁵⁴³ M. Milanovic, 'State Responsibility for Genocide,' 17 *European Journal of International Law*, (2006), at 553-604; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 82, MN 229.

⁵⁴⁴ A. Cassese, *International Criminal Law*, 2nd edn, (2008), at 346.

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.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.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.⁵⁴⁷



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

⁵⁴⁵ R. Wedgwood, 'National Courts and the Prosecution of War Crimes,' in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. 1, (2000), at 409.

⁵⁴⁶ S.R. Ramer and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd edn, (2001), at 182.

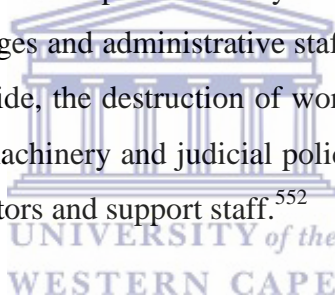
⁵⁴⁷ G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 58, MN 169 and 171; see *Prosecutor v. Rurangirwa Hyacinthe, Bimenyimana, and Ntawangaheza* (RPAA 003/GEN/06/CS), judgment of 23/03/1998, (First trial), judgment of 25/07/2001 (First appeal), judgment of 20/6/2008 (Second Appeal); The Kigali Military Court, *Prosecutor v. Cpt Twagiramungu Theophile* (RP 0045/CG-CS/2000), judgment of 20/06/2000. *Prosecutor v. Gd Anne Marie Nyirahazimana and Ngirinshuti Athanase*, (RPA.003/GEN/06/CS) 27/06/2008, judgment of 27/06/2008.

unprecedented experience in the region.⁵⁴⁸ 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.⁵⁴⁹ 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.⁵⁵⁰

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.⁵⁵¹ The urgent task in the area of justice was to train judges, prosecutors and support staff.⁵⁵²



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

⁵⁴⁸ A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 748; Y. De Wolf, R. De Wolf, and C. Ntampaka, *Itsembabwoko n'Itsembabtesemba mu mategeko y'Rwanda*, ASSEPAC Editions, (1997), at 28-29.

⁵⁴⁹ G. Prunier, 'Rwanda: The Social, Political and Economic Situation in June 1997,' (Report, Writenet (UK), July 1997); Amnesty International, 'The Troubled Course of Justice,' (London, 26 April 2000).

⁵⁵⁰ J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice* (2005), at 898.

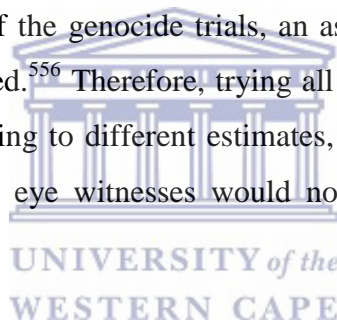
⁵⁵¹ For details see, M. Cousineau, L'établissement de l'État de Droit au Rwanda: Un But Irréalizable, 28 *Ottawa Law Review*, (1997), at 176; A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 748; C.J. Ferstman, 'Rwanda's Domestic Trials for Genocide and Crimes against Humanity,' 1 *Washington College of Law* (1997), at 1-15; K. McCourt, 'Judicial Defenders: Their Role in Postgenocide Justice and Sustained Legal Development,' 3 *International Journal of Transitional Justice*, (2009), 272-283.

⁵⁵² National Service of Gacaca Courts, Summary of the Report presented at the Closing of Gacaca Court Activities, Kigali, June 2012, at 5.

train judicial staff. After the training, judges increased to 841, whereas the prosecutors numbered 210 and the support staff numbered 910.⁵⁵³

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.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.⁵⁵⁵

Five years after commencement of the genocide trials, an assessment of their progress showed that only 6,000 cases had been tried.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.⁵⁵⁷ At this pace,



⁵⁵³ National Service of Gacaca Courts, Summary of the Report presented at the Closing of Gacaca Court Activities, Kigali, June 2012, at 6.

⁵⁵⁴ L. Van den Herik, *The Schism between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect*, (2012), at 75-95; L. Van den Herik, 'The Schism between the Legal and the Social Concept of Genocide,' in R. Henman and P. Behrens (eds.), *The Criminal Law of Genocide, International, Comparative and Contextual Aspects*, (2007), at 84 et seq; L. Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, (2005), at 263 et seq.

⁵⁵⁵ See the recommendations by ASF, April 2008, available at www.asf.be/index.php?module=publicaties&lang=fr&id=53, visited August 2011. Also, International standards relating to prison conditions are laid down in Art.10 of the, International Covenant on Civil and Political Rights (ICCPR). More detailed provisions are included in Art.28 of Law N° 38/2006 of 25 September 2006 Establishing and Determining the Organisation of the National Prison Service, O.G.R.R. N° Special of 23 October 2006.

⁵⁵⁶ Urwego rw'Igihugu rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), *Isomo ku Itegeko Ngenga N° 16/2004 ryo kuwa 19/06/2004 rigena imiterere, ububasha n'imikorere by'inkiko Gacaca*, (2004), at 2.

⁵⁵⁷ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 22-23 et seq; J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 899. The number of genocide suspects to be tried did not include only those in prison, many genocide suspects were still at large; 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 5; Recommendations of the Conference Held in Kigali from 1st November to 5th November 1995, at 23; Gacaca, Incamake Ya Raporo Yatanzwe Ku Isozwa ry'imirimu y'Inkiko Gacaca, Kigali, June 2012 at 5.

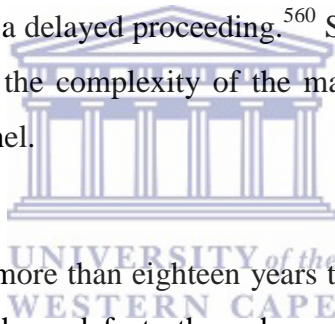
national courts would not be able to deal with all the genocide suspects in the overcrowded prisons hence the need for an alternative mechanism such as Gacaca.⁵⁵⁸

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 inefficiency⁵⁵⁹ that characterizes developing countries. The courts have sometimes failed to meet not only international standards but also national law on fair trial guarantees.

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.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.⁵⁶¹ In fact, before the

⁵⁵⁸ See Avocats Sans Frontieres (ASF), *Ingendanyi, Imiburanishirize y'Icyaha cya Jenocide n'Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z'u Rwanda 2004*, (2005), at 7 *et seq.* Similarly see, W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 895; Avocats Sans Frontieres (ASF), *Ingendanyi, Imiburanishirize y'Icyaha cya Jenocide n'Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z'u Rwanda 2004*, (2005), at 7 *et seq.*; Human Rights Watch, 'Rwanda: the Search for Security and Human Rights Abuses,' New York, (April 2000).

⁵⁵⁹ A. Storey, *Economics and Ethnic Conflict: Structural Adjustment in Rwanda*, 17 *Development Policy Review*, (1999), at 43-63; K. Nash, 'A Comparative Analysis of Justice in Post-Genocidal Rwanda: Fostering a Sense of Peace and Reconciliation,' 1 *Africana*, (2007), at 79 *et seq.*; S. Stewart, *Conflict Resolution: A Foundation Guide*, (1998), at 7 *et seq.*

⁵⁶⁰ See Avocats Sans Frontieres (ASF), *Ingendanyi, Imiburanishirize y'Icyaha cya Jenocide n'Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z'u Rwanda 2004*, (2005), at 48.

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, Ubuhotozi, Gusahura no Kurema Umutwe w’Abagizi banabi byose bijyana n’igitero yagiyemo kwa Dansira Kamberuka ntabimenyetso ubushinjacyaha bwagaragarije Urukiko.’⁵⁶²

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

2004, 2005 and 2007 new masses of releases followed, see Hirondele News Agency, Rwanda Liberates over 9,192 Prisoners, 19 February 2007, at <<http://www.hirondellenews.org>>, visited June 2012; see also Integrated Regional Information Network (IRIN), 4,500 Prisoners Released, 23 March 2004.

⁵⁶²An exemplary case includes: *Public prosecutor v. Kabirigi Anastase et al.* (RMP 51.498/S4/CM/KBY/97). For details of the case see (Urugereko rwihariye rw’Urukiko rwa Mbere Rw’Iremezo Rwa Kibuye, 10/12/1998, Urubanza rwa Kabirigi Anastase na Bagenzi Be, Igitabo Cy’Imanza Zaciwe n’Inkiko z’Urwanda Zerekeranye n’Icyaha Cy’itsembabwoko N’itsembatsemba Cyatangajwe na *Avocats Sans Frontieres* (ASF) n’Urukiko Rw’ikirenga Rw’u Rwanda, Umutumba Wa II, Urubanza N° 9, Urupaparo Rwa 26, Rusanze ya 4.

establish a fair verdict have sometimes led to protracted hearings in violation of the right to speedy justice.⁵⁶³

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.⁵⁶⁴ 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.⁵⁶⁵ 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.⁵⁶⁶

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.⁵⁶⁷ 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.⁵⁶⁸

⁵⁶³ See International Crisis Group, 'Rwanda at the end of the Transition' (ICG, Africa Report N° 53, 13 November 2002), at 2; Avocats Sans Frontieres (ASF), *Ingendanyi, Imiburanishirize y'Icyaha cya Jenocide n'Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z'u Rwanda 2004*, (2005), at 27-32. It is important to note that presumption of innocence applies irrespective of a confession, guilty plea and expression of remorse.

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.

⁵⁶⁵ L. Werchick, 'Prospects for Justice in Rwanda's Citizen Tribunals,' 8 *Human Rights Brief*, (2001), at 15 *et seq.*

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

⁵⁶⁷ Art. 36 of the 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.

⁵⁶⁸ M.H Morris, 'The Trials of Concurrent Jurisdictions: The Case of Rwanda,' 7 *Duke Journal of Comparative and International Law*, (1997), at 31.

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.⁵⁶⁹ 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.⁵⁷⁰ 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,⁵⁷¹ and Article 36 of the 1996 organic law. Later the appeals court found the defendant not guilty and he was acquitted.⁵⁷² Literally translated from the court ruling in Kinyarwanda, the court put as follows the acquittal:

'Rusanze urubanza rwahanishijwe uregwa igihano cyo kwicwa atarigeze yemererwa kunganirwa na Avoka we runyuranyije n'Itegeko Nshinga ryo ku wa 10 kamena 1991 n'ingingo ya 36 y'Itegeko Ngenga ryo ku wa 30 kanama 1996.'⁵⁷³

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

⁵⁶⁹ C. J. Ferstman, 'Rwanda's Domestic Trials for Genocide and Crimes against Humanity,' 1 *Washington College of Law*, (1997), at 1-15; PRI Research on Gacaca, Report III: April–June 2002, at 4 *et seq* available at <<http://www.penalreform.org/reports-4.html>>, accessed July 2012; PRI, Integrated Report on Gacaca Research and Monitoring, Report VII: Pilot Phase, January 2002–December 2004, (2005) available at <<http://www.penalreform.org/reports-4.html>>, accessed July 2012, at 18 *et seq*.

⁵⁷⁰ See *Avocats Sans Frontieres (ASF), Ingendanyi, Imiburanishirize y'Icyaha cya Jenocide n'Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanze z'u Rwanda 2004*, (2005), at 39-41.

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 *Ururukiko 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'Ururukiko, Umutungurira, 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;

‘Urukiko rw’Uburujire rwa Cyangugu mu rubanza rwa Munyangabe Theodore, rusanze yaravukijwe uburenganzira bwo kunganirwa na Avoka yihitiyemo nkuko biteganywa n’ingingo ya 36 y’itegeko Ngengaryya 1996, kuko yasabye urukiko kwimurira iburanisha ku wundi muni kugira ngo ashobore gushaka Avoka umwunganira ariko rukabimwangira nkuko biboneka mu nyandiko mvugo rwemeje ko Munyangabe Theodore ari umwere.’⁵⁷⁴

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 1999.⁵⁷⁵ And in 2000, he found that the trials conformed to international standards.⁵⁷⁶ 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.⁵⁷⁷

Although certain fair trial standards have been recognized as forming part of international customary law,⁵⁷⁸ 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.⁵⁷⁹ 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.⁵⁸⁰

⁵⁷⁴ *Munyangabe Theodore v. the prosecutor*, Urukiko rw’Uburujire rwa Cyangugu mu rubanza rwa Munyangabe Theodore, (RPA 003/R1/97 06/07/1999).

⁵⁷⁵ UN Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, (1999), Para.35; W. A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 *Journal of International Criminal Justice*, (2005), at 887.

⁵⁷⁶ UN Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, (1999), Para 137.

⁵⁷⁷ C. Ntampaka, ‘Le Gacaca Rwandais, une Justice Répressive Participative,’ 6 *Actualité du Droit International Humanitaire*, (2001), at 213; P. Scherrer, *Justice in Transition and Conflict Prevention in Rwanda after the Genocide*, (1997), at 4 *et seq.*

⁵⁷⁸ Art. 2(2) of the the International Covenant on Civil and Political Rights (ICCPR), provides for the obligation of fair trial implementation.

⁵⁷⁹ H. Kreicker, ‘National Prosecution of Genocide from a Comparative Perspective,’ 5 *International Criminal Law Review*, (2005), at 319.

⁵⁸⁰ M. A. Drumbl, ‘Prosecution of Genocide versus the Fair Trial Principle,’ 8 *Journal of International Criminal Justice*, (2010), at 290; A. Karekezi, ‘Juridictions Gacaca: Lutte contre l’Impunité et Promotion de la Réconciliation Nationale,’ in E. Ntaganda (ed.), *Les Juridictions Gacaca et les Processus de Réconciliation Nationale*, *Cahiers du*

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 Bivugarabago, 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.

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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

Centre de Gestion des Conflits N° 3, *Éditions de l'Université Nationale du Rwanda*, (2001), at 30; see again A. Karekezi *et al.*, 'Localizing Justice: Gacaca Courts in Post-Genocide Rwanda,' in E. Stover and M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (2005), at 71; M.H Morris, 'The Trials of Concurrent Jurisdictions: The Case of Rwanda,' 7 *Duke Journal of Comparative and International Law*, (1997), at 29-32.

⁵⁸¹ *Brown, Munyaneza, Nteziryayo, and Ugirashebuja v. the Government of Rwanda and the Secretary of State for the Home Department*, Case N° CO/8862/2008, (2009), EWHC 770 (Admin) (8 April 2009), at § 1-47.

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.

⁵⁸³ See, Ahorugeze case at

<<http://intlcrimlawdigest.files.wordpress.com/2009/07/20090527-supreme-court sweden-ahorugeze.pdf>>, accessed in July 2011.

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.⁵⁸⁴ 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.⁵⁸⁵

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.⁵⁸⁶ 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.⁵⁸⁷ 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.⁵⁸⁸ 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

⁵⁸⁴ Article by J. Karuhanga in *The New Times-Rwanda's First Daily* (29 July 2011), 'Martin-Ngoga: Release of Genocide Suspect Controversial,' see also E. Kayiranga, Kurekura Ahorugeze akidegembya ni ugupfobya Jenoside-IBUKA, available at

<http://www.izuba.org.rw/i-i-583-a-24381.izuba>, accessed in June 2012.

⁵⁸⁵ The local Sweden news in English 'Genocide suspect's appeal denied in Europe,' available at <http://www.thelocal.se/41430/20120614/>, published on 14/06/2012 and accessed in July 2012.

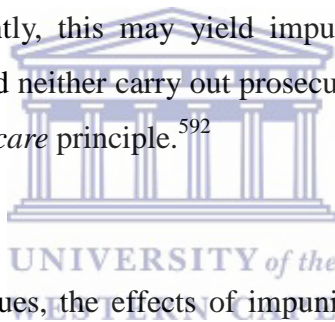
⁵⁸⁶ With exception of Dr Vincent Bajinya (Brown), the other suspects, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Ugirashebuja were all Bourgmasters (Mayors).

⁵⁸⁷ *Brown, Munyaneza, Nteziryayo, and Ugirashebuja v. The Government of Rwanda*, at § 1-33.

⁵⁸⁸ 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 *versus* the Fair Trial Principle,' 8 *Journal of International Criminal Justice*, Vol. 8, (2010), at 290.

fair trial.⁵⁸⁹ 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.⁵⁹⁰

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 1994.⁵⁹¹ 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.⁵⁹²



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

⁵⁸⁹ J. Karuhanga, 'Release of Genocide Suspect Controversial,' *The New Times*, 29 July 2011, see also E. Kayiranga, 'Kurekura Ahorugeze akidegembya ni ugupfobya Jenoside-IBUKA,' available at <<http://www.izuba.org/rw/i-i-583-a-24381.izuba>>, accessed in October 2012.

⁵⁹⁰ W. A Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn, (2009), at 481; see also C. Enache Brown and A. Fried, 'Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut judicare* in International Law,' 43 *McGill Law Journal*, (1998), at 613 *et seq*; M.C Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,' 42 *Virginia Journal of International Law*, (2001), at 81 *et seq*; R. Cryer, *Prosecuting International Crimes*, (2005), at 73 *et seq*; P. Weis, 'The Future of Universal Jurisdiction,' in W. Kaleck *et al.* (eds.), *International Prosecution of Human Rights Crimes*, (2007), at 29 *et seq*; L. Reydams, *Universal Jurisdiction*, (2003); L. Nadya Sadat, 'International Criminal Law and Alternative Modes of Redress,' in A. Zimmermann (ed.), *International Criminal Law and the Current Development of Public International Law*, (2003), at 161 *et seq*; K. Randall, 'Universal Jurisdiction Under International Law,' 66 *Texas Law Review*, (1998), at 785 *et seq*.

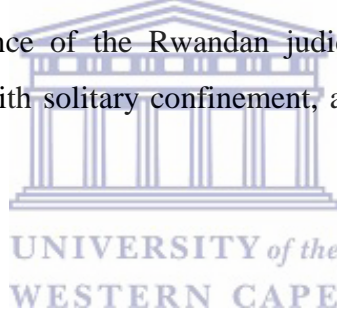
⁵⁹¹ The United Kingdom International Criminal Court Act, (2001).

⁵⁹² R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 58; H. Kreicker, 'National Prosecution of Genocide from a Comparative Perspective,' 5 *International Criminal Law Review*, (2005), at 319; 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 32.

prosecution.⁵⁹³ Then, the pursuit of international human rights regarding fair trials would not mean impunity for genocide suspects.⁵⁹⁴ 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.⁵⁹⁵

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.⁵⁹⁶ 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,⁵⁹⁷ 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.



⁵⁹³ See the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*), (2002); C. Enache Brown and A. Fried, 'Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law,' 43 *McGill Law Journal*, (1998), at 613 *et seq*; A. Eser, U. Sieber and H. Kreicker (eds.), *National Prosecution of International Crimes* (2005), Vol. 5, at 6; A. Eser, 'National Jurisdiction over Extraterritorial Crimes Within the Framework of International Complementarity,' in L. Chand Vohrah *et al.* (eds.), *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio Cassese*, (2003), at 279 *et seq*.

⁵⁹⁴ See M.A. Drumbl, 'Prosecution of Genocide *versus* the Fair Trial Principle,' 8 *Journal of International Criminal Justice*, Vol. 8, (2010), at 302 *et seq*; A. Orakhelashvili, 'Between Impunity and Accountability for Serious International Crimes: Legal and Policy Approaches,' 55 *Netherlands International Law Review*, (2008), at 207 *et seq*; A. Eser, 'National Jurisdiction Over Extraterritorial Crimes Within the Framework of International Complementarity,' in L. Chand Vohrah *et al.* (eds.), *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio Cassese*, (2003), at 279 *et seq*; see also J.B Siboyintore, National Prosecutor in Charge of the Genocide Fugitives Unit, Rwanda Television News, 7:30 PM, on 13 June 2012.

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 abolition 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,⁵⁹⁸ murder⁵⁹⁹ and abetting murder⁶⁰⁰ 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.⁶⁰¹ 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 discomfort 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.

⁵⁹⁸ See § 220a of the German Criminal Code (Strafgesetzbuch, StGB).

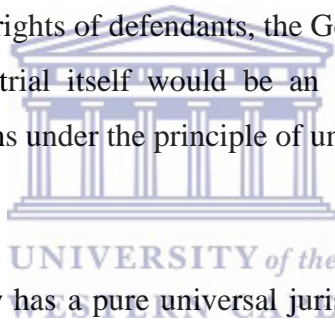
⁵⁹⁹ See §211 of the German Criminal Code (Strafgesetzbuch, StGB).

⁶⁰⁰ See § 27 of the German Criminal Code (Strafgesetzbuch, StGB). See also J. Kayonga, UBudage: Urubanza rwa Rwabukombe Onesphore ushinjwa ibyaha bya Jenocide rwaratangiye, January, 19 2011, available at <<http://news.igihe.org/news-7-11-9982.html>>, accessed in February 2012.

⁶⁰¹ Fred Muvunyi, 'Abatangabuhamyanya basaga 30 ni bo bamaze kumvwa mu rubanza rwa Rwabukombe, 1-11-2011, available at <<http://www.igihe.com/amakuru/abatangabuhamyanya-basaga-30-ni-bo-bamaze-kumvwa-mu-rubanza-rwa-rwabukombe.html>>, accessed July 2012.

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

⁶⁰² Like the ICTR suspects, perpetrators frequently used euphemistic, metaphorical or otherwise coded language that is understandable to the addressees but cannot be easily translated in other languages, see G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 283, MN 771 *et seq*; similar challenges of use of metaphorical or coded language were faced in the ICTR Trials, see *The Prosecutor v. Jean Kambanda*, Case N° ICTR-97-23-S, (TC), 4 September 1998; *Kambanda v. The Prosecutor*, Case N° ICTR 97-23-A, 19 October 2000.

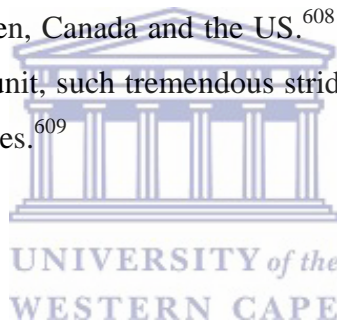
⁶⁰³ See M. T Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses,' 23 *Human Rights Quarterly*, (2001), at 940 *et seq*; C. Keith Hall, *Universal Jurisdiction: Developing and Implementing an effective Global Strategy*, in W. Kaleck *et al.* (eds.), *International Prosecution of Human Rights Crimes*, (2007), at 85 *et seq*; C. Edelenbos, 'Human Rights Violations; A Duty to Prosecute?' 7 *Leiden Journal of International Law*, (1994), at 5 *et seq*; D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of A Prior Regime,' 100 *New York Law Journal*, (1991), at 2537 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 70, MN 198 *et seq*.

⁶⁰⁴ See the Amnesty International Survey, *Germany: End Impunity Through Universal Jurisdiction*, (2008); G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 135, MN 361 *et seq*

⁶⁰⁵ See § 1 *Völkerstrafgesetzbuch*, (2002), and before its entry into force § 6 No. 1 *StGB* was in use; for a comment on the *Völkerstrafgesetzbuch* and its Consequences, see G. Werle and F. Jessberger, 'Das *Völkerstrafgesetzbuch*,' *Juristenzeitung*, (2002), at 725-734; see also M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, (2005), at 22.

prosecuted suspects of international crimes based on this code which covers crimes committed after its entry into force on 30 June 2002.⁶⁰⁶ For crimes committed before the entry into force of the *Völkerstrafgesetzbuch*, Section 220a of the *Strafgesetzbuch*, (StGB) was used in the case of genocide. According to the more recent *Völkerstrafgesetzbuch*, 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 *aut dedere aut judicare* principle.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.⁶⁰⁸ According to information provided by the genocide fugitive tracking unit, such tremendous strides against impunity would not give breathing space to genocide fugitives.⁶⁰⁹



⁶⁰⁶ C. Ryngaert, *Jurisdiction in International Law, United States and European Perspectives*, (2007), at 564-566; 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 32.

⁶⁰⁷ See Amnesty International, *International Law Commission: The obligations to Extradite or Prosecute*, (2009); M.C Bassiouni and E.M Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, (1995); G. Gilbert, *Transnational Fugitive Offenders* (1998), at 322 *et seq*; H. Kreicker, 'National Prosecution of Genocide from a Comparative Perspective,' *5 International Criminal Law Review*, (2005), at 319; Geneva Convention IV, Art. 146.

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, *Principles of International Criminal Law*, 2nd edn, (2009), at 113, MN 302; see also L. Reydam, *Universal Jurisdiction*, (2003), at 196 *et seq*; Amnesty International, *Universal Jurisdiction*, (2001), at 86 *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,' *93 American Journal of International Law*, (1999), at 529 *et seq*.

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,' *The New Times Kigali*, 08 April 2013.

Importantly, by virtue of third state prosecutions, the international community shows that there is no safe haven for those who commit international crimes.⁶¹⁰ 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.⁶¹¹ 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.⁶¹² 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.'⁶¹³

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.⁶¹⁴ 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.⁶¹⁵

⁶¹⁰ P. Weis, 'The future of Universal Jurisdiction,' in W. Kaleck *et al.* (eds.), *International Prosecution of Human Rights Crimes*, (2007), at 29 *et seq*; L. Reydams, *Universal Jurisdiction*, (2003), at 196 *et seq*; L. Nadya Sadat, 'International Criminal Law and Alternative Modes of Redress' in A. Zimmermann (ed.), *International Criminal Law and the Current Development of Public International Law*, (2003), at 161 *et seq*; K. Randall, *Universal Jurisdiction Under International Law*, 66 *Texas Law Review*, (1998), at 785 *et seq*.

⁶¹¹ M.C Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,' 42 *Virginia Journal of International Law*, (2001), at 81 *et seq*; R. Cryer, *Prosecuting International Crimes*, (2005), at 73 *et seq*; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 37 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 70, MN 198 *et seq*.

⁶¹² A. Cassese *et al.*, *International Criminal Law: Cases and Commentary*, (2011), at 557.

⁶¹³ I. R. Mugisha, 'Obama Ki-moon Pay Tribute to Rwandans,' *The New Times Kigali*, 08 April 2013.

⁶¹⁴ C. Edelenbos, 'Human Rights Violations; A duty to Prosecute?' 7 *Leiden Journal of International Law*, (1994), at 5 *et seq*; D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of A Prior Regime,' 100 *New York Law Journal*, (1991), at 2537 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 70, MN 198 *et seq*.

⁶¹⁵ M. T Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses,' 23 *Human Rights Quarterly*, (2001), at 940 *et seq*; W. A. Schabbas, C. Stahn and M. M. El Zeidy, 'The International Criminal Court and Complementarity: Five Years On,' 19 *Criminal Law Forum*, (2008), at 3. For

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.⁶¹⁶ It is this old Gacaca culture that was transformed to deal with the crime of genocide in the aftermath of war.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 2012.⁶¹⁸ 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.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

a detailed discussion, see C. Ryngaert ‘Applying the ICC Statute’s Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States acting under the Universality Principle,’ 19 *Criminal Law Forum*, (2008), at 158; see also Decision of 4 November 1998 of the Criminal Division of the National Court, Plenary Session, Appeal Record 84/98. For a detailed discussion, see H. Fischer, C. Kreß, and S. R Lüder, (eds.), *International and National Prosecution of Crimes under International Law, Current Developments*, (2004), at 846-857; see also the Decision by the German Federal Prosecutor on the Complaint against Rumsfeld *et al.*, of 10 February 2005, *Juristenzeitung*, (2005), at 311 *et seq.* See details in G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 135, MN 361 *et seq.*

⁶¹⁶ The Pre-1994 Gacaca principally dealt with simple civil cases referring to land use, property damage, live stock, and marriage or inheritance issues. F. Reyntjens, ‘Le Gacaca ou la Justice du Gazon au Rwanda,’ 40 *Politique Africaine*, (1990), at 37-40; W.A. Schabas, ‘Genocide Trials and Gacaca Courts,’ 3 *Journal of International Criminal Justice*, (2005), at 891; E.H Thelle, ‘The Gacaca Jurisdictions: A Solution to the Challenge of the Rwandan Judicial Settlement?’ 13 *Human Rights in Development*, (2001), at 83 *et seq.*

⁶¹⁷ A.S. Mboniyitege, *Gacaca Ishobora ite Kongera Kuba Inzira y’Ubwiyunge bw’Abanyarwanda, Urumuri rwa Kristu*, (1995), at 15; A. Karekezi, ‘Juridictions Gacaca: Lutte contre l’Impunité et Promotion de la Réconciliation Nationale,’ in E. Ntaganda (ed.), *Les Juridictions Gacaca et les Processus de Réconciliation Nationale, Cahiers du Centre de Gestion des Conflits N° 3, Éditions de l’Université Nationale du Rwanda*, (2001), at 30-31; Amnesty International, 17 December 2002, ‘Gacaca: A Question of Justice,’ at 20 available at www.amnesty.org/en/library, accessed in August 2012.

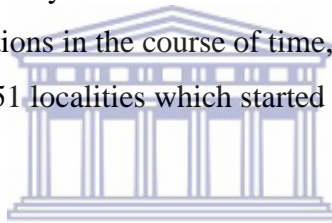
⁶¹⁸ Organic Law N° 04/2012/0L of 15/06/2012 terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction; The activities of the courts were officially launched and closed by President Paul Kagame on 18 June (2002 and 2012).

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 *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 meetings⁶²⁰ 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 2002.⁶²¹



I. The Evolution of Gacaca Courts

Gacaca jurisdictions were established in addition to the standard tribunals to try cases arising from the genocide.⁶²² 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

⁶²⁰ E.H. Thelle, 'The Gacaca Jurisdictions: A Solution to the Challenge of the Rwandan Judicial Settlement?' 13 *Human Rights in Development*, (2001), at 83 *et seq*; J. Sarkin, 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda,' 21 *Human Rights Quarterly*, (1999), at 767 *et seq*; J. Sarkin, 'Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in the New Millennium of using community-based Gacaca tribunals to deal with the past,' 2 *International Law Forum*, (2000), at 112 *et seq*.

⁶²¹ L.Waldorf, 'Mass Justice for Mass Atrocities: Rethinking Local Justice as Transitional Justice,' 79 *Temple Law Review*, (2006), at 45 *et seq*; L.Waldorf, 'Rwanda's Failing Experiment in Restorative Justice,' in D. Sullivan and L. Tiftt (eds.), *Handbook of Restorative Justice: A Global Perspective*, (2006), at 429 *et seq*.

⁶²² 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; 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.

violations of international law in Rwanda.⁶²³ 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.⁶²⁴ As years elapsed, the ICTR⁶²⁵ and specialized chambers were unable to address the overwhelming number of genocide cases.⁶²⁶

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.⁶²⁷ 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.⁶²⁸

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

⁶²³ UN Security Council Resolution 955, (1994) of 8 November 1994; for a detailed account of the Genocide, see A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 737; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 17, MN 54 *et seq.*

⁶²⁴ Organic Law N° 08/96 of 30 August 1996 organising the prosecution of genocide crimes and other crimes against humanity committed from the 1st of October 1990. The law also created special benches in ordinary and military courts for prosecuting genocide suspects which were classified in various categories; S. Straus, ‘The order of Genocide: The Dynamics of Genocide in Rwanda,’ 2 *Genocide studies and prevention an International Journal*, (2007), at 258 *et seq.*; Urukiko rw’Ikirenga, Umutwe ushinzwe Inkiko-Gacaca, *Imfashanyigisho ku Nkiko-Gacaca*, (2001), at 3-10.

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 detainees 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); Urwego rw’Igihugu rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), *Isomo ku Itegeko Ngenga N° 16/2004 ryo Kuwa 19/06/2004 rigena Imiterere, Ububasha n’Imikorere by’Inkiko Gacaca*, (2004), at 2; Urukiko rw’Ikirenga, Umutwe Ushinzwe Inkiko-Gacaca, *Imfashanyigisho Ku Nkiko-Gacaca*, (2001), at 1-2.

⁶²⁷ J. Stromseth, ‘Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?’ 1 *Hague Journal of Rule of Law*, (2009), at 87 *et seq.*

⁶²⁸ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2011), at 25 *et seq.*; A. Karekezi *et al.*, ‘Localizing Justice: Gacaca Courts in Post-Genocide Rwanda,’ in E. Stover and M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (2005), at 71; African Rights, *Gacaca Justice: A Shared Responsibility*, Kigali, (2003), at 65 *et seq.*

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.⁶²⁹

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.⁶³⁰

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.⁶³¹ 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.⁶³²

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

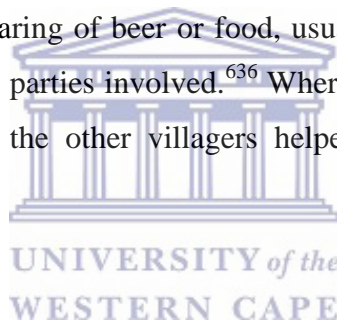
⁶³⁰ G. Werle, 'Justice in Transition-Prosecution and Amnesty in Germany and South Africa,' *Criminal Law Forum*, (2009), at 519-524; C. Tomuschat, *The Duty to Prosecute International Crimes Committed by Individuals*, (2002), at 337; A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 769; A. Tiemessen, 'After Arusha: Gacaca Justice in Post-Genocide Rwanda,' 8 *African Studies Quarterly*, (2004), at 57; On the transition from ordinary prosecutions to the Gacaca system, see Arts. 47–49 of Organic Law N° 40/2000 as amended to date; In November 2002, 672 Cell Gacaca jurisdictions in 106 Sectors began their prosecution of cases in the pilot phase and on 10 March 2005, the trial process began, and was extended to the whole country on 15 July 2006; 'PRI: Integrated Report on Gacaca Research and Monitoring, Report VII, Pilot Phase, January 2002–December 2004 (2005), available at <www.penalreform.org/reports-4.html>, accessed May 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 Isrealites came to her to have their disputes decided.

⁶³² P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, (2011), at 52-53.

The matters handled by the elders included family disputes, fighting, theft, land use, live stock, property damage, inheritance, marriage or adultery.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.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.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.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

⁶³³ P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, (2011), at 52 *et seq*; C. Ntampaka, 'Le Retour à la Tradition dans Le Jugement du Génocide Rwandais: Le Gacaca, Justice Participative,' 48 *Bulletin des Séances Académie Royale Des Sciences d'Outre-Mer*, (2002), at 434 *et seq*.

⁶³⁴ A.S. Mboniyintege, *Gacaca Ishobora ite kongera kuba Inzira y'Ubwiyunge bw'Abanyarwanda*, Urumuri rwa Kristu, (15 August 1995), at 15.

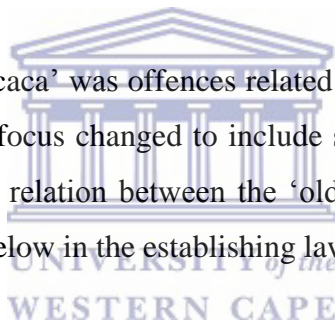
⁶³⁵ A. Karekezi, 'Jurisdictions Gacaca: Lutte Contre l'Impunité et Promotion de la Réconciliation Nationale,' in E. Ntaganda (ed.), *Les Jurisdictions Gacaca et les Processus de Réconciliation Nationale*, Cahiers du Centre Digestion des Conflicts (N° 3), Butare, Université Nationale du Rwanda, (May 2001), at 32.

⁶³⁶ F. Reyntjens and S. Vandeginste, 'Rwanda: An Atypical Transition' in E. Skaar *et al*, *Roads to Reconciliation*, (2005), at 15 *et seq*; C. Ntampaka, 'Le Retour à la Tradition dans Le Jugement du Génocide Rwandais: Le Gacaca, Justice Participative,' 48 *Bulletin des Séances Académie Royale Des Sciences d'Outre-Mer*, (2002), at 434 *et seq*.

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.⁶³⁷

History records that at the end of the twentieth century, Gacaca did not exist as a permanent judicial institution but was based instead on unwritten law and assembled only when conflicts arose within or between families, particularly in rural Rwanda.⁶³⁸ After independence, Gacaca survived informally and Rwandans continued to use it to settle conflicts among neighbours. Rather than going to the formal courts, they would sort out the problem among themselves. Even with the introduction of formal courts, Gacaca conciliatory and informal character remained as the cornerstone of the institution.⁶³⁹

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

Legally, Gacaca courts were created by the 2001 organic law,⁶⁴⁰ which was replaced by the 2004 organic law⁶⁴¹ with the latter modified periodically in June 2006,⁶⁴² March 2007,⁶⁴³ and in June 2008.⁶⁴⁴

⁶³⁷ F. Reyntjens, ‘Le Gacaca ou la Justice du Gazon au Rwanda,’ 40 *Politique Africaine*, (1990), at 37-40.

⁶³⁸ C. Ntampaka, *Le Gacaca: une Jurisdiction Pénale Populaire*, Agence Intergouvernementale de la Francophonie, <www.Droit.francophonie.org/acct/rjf/actu/13Ntampa.htm>, accessed December 2012; F. Reyntjens (December 1990), ‘Le Gacaca ou la Justice du gazon au Rwanda,’ *Politique Africaine*, at 32.

⁶³⁹ African Rights, *Gacaca Justice: A Shared Responsibility*, Kigali, (2003), at 65 *et seq*; F. Reyntjens, ‘Le Gacaca ou la Justice du Gazon au Rwanda,’ 40 *Politique Africaine* (1990), at 36 *et seq* ; A. Meyerstein, ‘Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality,’ 32 *Law and Social Inquiry*, (2007), at 467 *et seq* ; B. Oomen, ‘Rwanda’s Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law,’ in R. Haveman and O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, (2006), at 169 *et seq*.

⁶⁴⁰ 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 between 1st October 1990 and 31st December 1994.

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.⁶⁴⁵ 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.⁶⁴⁶

⁶⁴¹ The 2001 Organic Law was repealed 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 (hereinafter the Gacaca Law of 19/6/2004).

⁶⁴² Organic Law N° 28/2006 of 27/06/2006.

⁶⁴³ Organic Law N° 10/2007 of 01/03/2007.

⁶⁴⁴ Organic Law N° 13/2008 of 19/05/2008, published in the official Gazette of the Republic of Rwanda, edition N° 11 of 01/06/2008.

⁶⁴⁵ International Crisis Group Report, *Consensual Democracy in Post-Genocide Rwanda: Evaluating the March 2001 District Elections*, (9 October 2001), at 20.

⁶⁴⁶ Amnesty International (2004), *Rwanda, 'Marked for Death', Rape survivors living with HIV/AIDS in Rwanda*, available at <<http://www.amnesty.org/en/library/info/AFR47/007/2004>>, accessed January 2013.

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.⁶⁴⁷

First category

- a) 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;
- b) 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;
- c) 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;
- d) 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;
- e) Any person who committed the offence of rape or sexual torture together with his or her accomplices.

Second category

- a) 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;
- b) Any person who tortured another even though such torture did not result into death, together with his or her accomplice;
- c) Any person who committed a dehumanizing act on a dead body, together with his or her accomplice;
- d) 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;
- e) Any person who injured or attacked another with the intention to kill but such intention was not fulfilled, together with his or her accomplice;

⁶⁴⁷ Art. 51 the Gacaca Law of 19/6/2004 as modified by Art. 9 Organic Law N° 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.⁶⁴⁸

The different categories of suspects were heard nationwide at two administrative levels, the cell and sector level.⁶⁴⁹ 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.⁶⁵⁰ The sector also had an independent jurisdiction for appeal cases from Category Two.⁶⁵¹ 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.⁶⁵² 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.⁶⁵³ The consequences of assignment to a category were serious,

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.

⁶⁴⁹ Art. 3 of the Gacaca law of 19/6/2004; Organic Law N° 29/2005 of 31 December 2005 determining the administrative entities of the Republic of Rwanda, O.G.R.R. N° special of 31 December 2005, reorganized the administrative entities. At the highest level are the four provinces and the City of Kigali, followed by 30 districts in the country, then sectors and cells at grass root level. C. Kirkby, 'Rwanda's Gacaca Courts: A Preliminary Critique,' 50 *Journal of African Law*, (2006), at 104 *et seq.*

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.

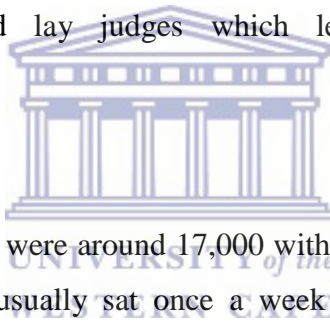
⁶⁵¹ Art. 85 of the Gacaca Law of 19/6/2004. The means of appeal recognized by this organic law are: Opposition, Appeal and Review of judgement. Gacaca courts of appeal were 1,545 in total, however because some of them had heavy case loads, 412 additional benches were created to complement these courts.

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.

⁶⁵³ Arts. 33, 34, 41(2) of the Gacaca Law of 19/6/2004; P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 46 *et seq.*; see, B. Oomen, 'Rwanda's Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law,' in R. Haveman and O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, (2006), at 169 *et seq.*

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.⁶⁵⁴ 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.⁶⁵⁵ 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.⁶⁵⁶



The numbers of judges nationwide were around 17,000 with women constituting around 34.3%, and men 65.7%.⁶⁵⁷ The judges usually sat once a week before a required quorum of 100 members of the general assembly.⁶⁵⁸ Sessions often had to be postponed when the quorum was

⁶⁵⁴ See Art. 6 of the Gacaca law of 19/6/2004; Urwego rw'Igihugu rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), *Isomo ku Itegeko Ngenga N° 16/2004 ryo kuwa 19/06/2004 rigena imiterere, ububasha n'imikorere by'inkiko Gacaca* (2004), at 4; Human Rights Watch, 'Elections May Speed Genocide Trials,' Press release, 4 October 2001; International Crisis Group, "'Consensual democracy" in post-genocide Rwanda: evaluating the March 2001 district elections,' Report, Nairobi and Brussels, (9 October 2001), at 20.

⁶⁵⁵ Arts. 14 and 15 of the Gacaca Law of 19/6/2004; see G. Gahima, 'Alternatives to Prosecution: The Case of Rwanda,' in E. Hughes, (eds.), *Atrocities and International Accountability: Beyond Transitional Justice*, (2007), at 175 *et seq*; S. Gasibirege, 'L'élection des Juges Inyangamugayo: Rupture ou Continuité,' in E. Ntaganda (ed.), *De la paix à la Justice: Les Enjeux de la Réconciliation Nationale*, in Cahiers du Centre de Gestion des Conflits N° 6, (2002), at 93 *et seq*; P. Ironside, 'Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation,' 15 *New York International Law Review*, (2002), at 50 *et seq*.

⁶⁵⁶ B. Ingelaere, 'The Gacaca courts in Rwanda,' in L. Huyse and M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, (2008), at 48 *et seq*; National Service of Gacaca Courts, Summary Report on Gacaca Courts Activities, June 2012.

⁶⁵⁷ National Service of Gacaca Courts, Summary Report on Gacaca Courts Activities, June 2012 at 34.

⁶⁵⁸ Art. 18 of the Gacaca Law of 19/6/2004 required a quorum of 100 persons in the General Assembly for the cell court session; see also Art. 20 of the Gacaca Law of 19/6/2004.

not reached. The modus operandi of Gacaca courts was popular participation, involving the community in all activities of the institution.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.⁶⁶⁰ Victims were equally encouraged to forgive perpetrators.⁶⁶¹

Gacaca judges could sentence those found guilty to imprisonment, community service,⁶⁶² or order them to make reparations to victims.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.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

⁶⁵⁹ L.Waldorf, 'Mass Justice for Mass Atrocities: Rethinking Local Justice as Transitional Justice,' 79 *Temple Law Review*, (2006), at 45 *et seq*; L.Waldorf, 'Rwanda's Failing Experiment in Restorative Justice,' in D. Sullivan and L. Tiftt (eds.), *Handbook of Restorative Justice: A Global Perspective*, (2006), at 429 *et seq*.

⁶⁶⁰ Art. 54 of the Gacaca law of 19/6/2004.

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.

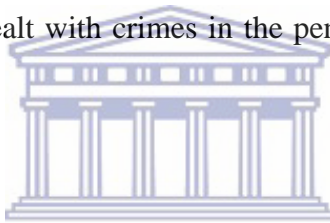
⁶⁶² Presidential Order N° 50/01 of 16 October 2005, O.G.R.R. N° 24 of 15 December 2005 amending Presidential Order N° 10/01 of 7 March 2005 determining the modalities of implementation of community service as alternative penalty to imprisonment. Community service work usually involves construction and repair of roads, schools, and housing settlements for genocide survivors.

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.

⁶⁶⁴ Art. 20, Organic Law N° 40/2000 as modified by organic law N° 16/2004 of 19/06/2004.

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.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.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.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.’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,

⁶⁶⁵ On the situation of minors, see C.F. Morrill, ‘Reconciliation and the Gacaca: The Perceptions and Peace-Building Potential of Rwandan Youth Detainees,’ 6 *Online Journal of Peace and Conflict Resolution*, (2004), at 5 *et seq.*

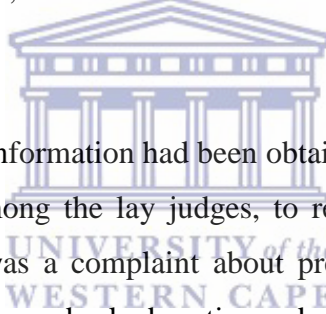
⁶⁶⁶ Art. 1 of the Gacaca Law; see also P. C. Bornkamm, *Rwanda’s Gacaca Courts: Between Retribution and Reparation*, (2012), at 24 *et seq.*

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.

⁶⁶⁸ Art. 62 of the Gacaca Law of 19/6/2004.

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.’⁶⁶⁹

If the accused did not plead guilty, the Gacaca court judges mentioned the accusations and then welcomed witnesses supporting the charges.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.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.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.⁶⁷³

⁶⁶⁹ Art. 54 of the Gacaca Law of 19/6/2004; Penal Reform International, *Eight Years On . . . A Record of Gacaca Monitoring in Rwanda*, (2010); see, Avocats Sans Frontières (ASF), *Monitoring des Juridictions Gacaca: Phase de Jugement*, (January 2008–March 2010).

⁶⁷⁰ Human Rights Watch, ‘Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts,’ (2011), at 69; S. Brown, ‘The Rule of Law and the Hidden Politics of Transitional Justice in Rwanda,’ in C. Lekha Sriram, O. Martin-Ortega and J. Herman (eds), *Peacebuilding and Rule of Law in Africa: Just Peace?*, (2011).

⁶⁷¹ See Art. 64 of the Gacaca Law of 19/6/2004.

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

⁶⁷³ Art. 32 of the Gacaca Law of 19/6/2004; A. Nkusi, ‘A Description of Gacaca Courts: Do they constitute a Category of Retributive or Restorative Justice?’ *University of Cape Town*, Thesis, (2011), at 40-41; Human Rights Watch, *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts*, (May 2011).

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.⁶⁷⁴ 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.⁶⁷⁵ 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.⁶⁷⁶ In a period of ten years, Gacaca courts tried 1,958,634 cases,⁶⁷⁷ 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.⁶⁷⁸ 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

⁶⁷⁴ Discussion on the operation of Gacaca can be seen in P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 159; P. Uvin, 'The Development/Peacebuilding Nexus: A Typology and History of Changing Paradigms,' 1 *Journal of Peacebuilding and Development*, (2002), at 11 *et seq.*

⁶⁷⁵ Arts. 11(3), 17(2), 19(2), 82(1) of the Gacaca Law of 19/6/2004; J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 904 *et seq.*

⁶⁷⁶ Penal Reform International, 'Monitoring and Research Report on the Gacaca: Information-Gathering during the National Phase,' London: PRI, (2006).

⁶⁷⁷ National Service of Gacaca Courts, Summary Report on Gacaca Courts Activities, June 2012.

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.⁶⁷⁹ 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 Ntawuruhunga*
- XIV. Gacaca court of Rusayo cell versus Sinaruhamagaye*
- XV. Gacaca court of Rusayo cell versus Simpunga*
- XVI. Gacaca court of Gitega sector versus Kaneza*

⁶⁷⁹ For statistical data, see National Service of Gacaca Courts, Summary Report on Gacaca Courts Activities, (June 2012), at 34.

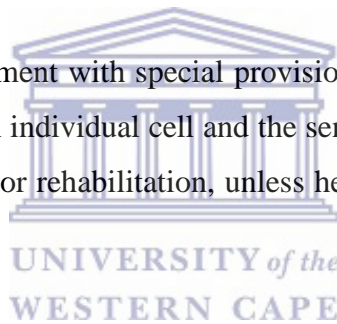
Table Showing Summary of the Facts in Gacaca Trials

Accused	Summary of accusation and Category(Cat)	Date of Judgment/Sentence
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)	5/06/2007: 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 Kirehe (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.
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

	children (Cat 2). Category: 2 (No confession by defendant)	children.
Munyagishari Bernari (Western Province)	Supervised and led genocide acts in 1994 (Cat 1). Category: 1 and later 2 (Confessed)	20/09/2007: Though he confessed, he was found innocent on all the charges.
Musangwa Hamissi (Kigali City)	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, 2 and 3 (No confession)	17/10/2009: Guilty of rape and sexual violence (Cat 1) hence subjected to life imprisonment under solitary confinement as well as loss of civic rights. He was further guilty of committing acts of murder falling under (Cat 2) together with his accomplices where they killed children. And he was to repay the destroyed property (Cat 3).
Mwamini Nyirandegeya Esperance (Kigali City)	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)	02/09/2009: Life sentence under solitary confinement. On appeal on the 17/10/2009 , the court sentenced her to life imprisonment only.
Ntawuruhunga Celestin (Western Province)	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)	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.
Nyirabarinda Evelyne (Western Province)	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)	09/10/2007: Not guilty of the accusations and was declared innocent.
Simpunga Theoneste (Western Province)	Looting, and committed property crimes with other suspects (accomplice), Category: 3	11/04/2007: Restitution to the various civil claimants.

Sinaruhamagaye Lambert (Western Province)	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. Category: 3	25/01/2007: Guilty of looting and therefore had to pay back the civil parties.
Turikumana Emmanuel (Southern Province)	Committed crimes in many cells, and participated in attacks and gangs of killers which resulted in death of many Tutsis. Category: 2 (Confessed)	07/08/2007: Guilty, and was then sentenced to 8 years imprisonment. It was a reduced sentence because of confession but no community service.
Twagirumukiza Alfred (Northern Province)	Rape accusation Category:1 (No confession)	18/12/2008: Guilty of rape hence life imprisonment under solitary confinement and deprivation of civic rights.

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.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.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 exemplary.⁶⁸²

⁶⁸⁰Art. 3, Law N° 32/2010 of 22/09/2010 relating to serving Life Imprisonment with Special Provisions. 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.

⁶⁸¹ Art. 54 of the Gacaca Law of 19/6/2004.

⁶⁸² *Gacaca court of Gahunga Sector versus Turikumana Emmanuel*, judgment of 07/08/2007, case file, N° 001; on restorative aims See F. Reyntjens and S. Vandeginste, 'Rwanda: An Atypical Transition,' in E. Skaar *et al*, *Roads to Reconciliation*, (2005), at 15 *et seq.*

The establishing law gave Gacaca courts competence to try the offences of genocide and crimes against humanity committed since October 1990 to December 1994.⁶⁸³ The temporal jurisdiction of Gacaca was clearly different from that of the ICTR, whose jurisdiction is limited to try similar crimes committed in 1994.⁶⁸⁴ 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.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.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 empaneled, and in the presence of the general assembly which constituted the community members.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.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.⁶⁸⁹

⁶⁸³ Art. 1 of the Organic Law N° 40/2000 of 26 January 2001 defines the jurisdiction *ratione temporis* of Gacaca, which does not apply to crimes committed after 1994. See P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 49.

⁶⁸⁴ Art. 1 of the ICTR Statute.

⁶⁸⁵ A. Mugesera, *Imibereho Y'Abatutsi Kuri Repubulika Ya Mbere N'iya Kabiri 1959-1990*, (2004), at 50 *et seq*; See also G. Prunier, *The Rwanda Crisis: History of a Genocide*, (1995), at 33 *et seq*.

⁶⁸⁶ Art. 25, the Gacaca Law of 19/6/2004.

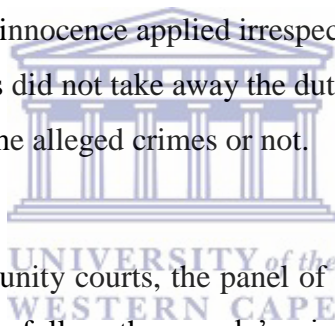
⁶⁸⁷ Art. 18 and 20 of the Gacaca Law of 19/6/2004; see also Arts. 19, 60(2) and 140(2), Constitution of the Republic of Rwanda of 4 June 2003, O.G.R.R. N° special of 4 June 2003 which guarantee Independence and impartiality; Urukiko rw'Ikirenga, Umutwe ushinze Inkiko-Gacaca, *Imfashanyigisho ku Nkiko-Gacaca* (2001), at 5; see also S. Brown, 'The Rule of Law and the Hidden Politics of Transitional Justice in Rwanda,' in C. Lekha Sriram, O. Martin-Ortega and J. Herman (eds), *Peacebuilding and Rule of Law in Africa: Just Peace?*, (2011).

⁶⁸⁸ U.S. Department of State, Country Reports on Human Rights Practices: Rwanda, (2006), at <<http://www.state.gov/g/drl/rls/hrrpt/2006/81364.htm>>, accessed January 2012; R.M. Borland, 'The Gacaca Tribunals and Rwanda after Genocide: Effective Restorative Community Justice or Further Abuse of Human Rights?' 13 *Swords and Ploughshares Journal of International Affairs*, (2003), at 12 *et seq*.

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, *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.⁶⁹⁰ For example, in the cases of Gakumburwa Martin,⁶⁹¹ Gatera Simon,⁶⁹² and Habimana Berenari,⁶⁹³ 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,⁶⁹⁴ Munyagishari Bernari,⁶⁹⁵ and Nyirabarinda Evelyne.⁶⁹⁶ These defendants were acquitted due to the fact that there was lack of credible witnesses and evidence from the general assembly.⁶⁹⁷

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 Berenari and Musangwa Hamissi. For instance

Droits de La Personne Dans La Region des Grands Lacs, (2005), available at <http://www.christinacacioppo.com/content/publications/EducationAndReintegrationOfFormerPrisoners.pdf>, accessed February 2013; P. Clark, and Z. Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, (2008), at 299 *et seq*; P. Clark, 'Establishing a Conceptual Framework: Six Key Transitional Justice Themes,' in P. Clark, and Z. Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, (2008), at 191-206.

⁶⁹⁰ S. Straus, 'How Many Perpetrators were there in the Rwandan Genocide? An estimate,' 6 *Journal of Genocide Research*, (2004), at 85-98; F. Reyntjens, 'Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda,' 110 *African Affairs*, (2011), at 1-34.

⁶⁹¹ *Gacaca Court of Rusebeya cell v. Gakumburwa Martin*, judgment of 10/5/ 2008, case file, N°048.

⁶⁹² *Gacaca Court of Rukoma sector v. Gatera Simon*, judgment of 5/06/2007, case file, N° 30.

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

⁶⁹⁴ *Gacaca Court of Rukoma sector v. Mbaraga Nahason*, judgment of 5/06/2007, case file, N° 35.

⁶⁹⁵ *Gacaca Court of Nyakiliba/Kayove sector v. Munyagishari Bernari*, judgment of 20/09/2007, case file, A 10.

⁶⁹⁶ *Gacaca Court of Cyanyanza sector v. Nyirabarinda Evelyne*, judgment of 9/10/2007.

⁶⁹⁷ T. Longman, 'Justice at the Grassroots? Gacaca Trials in Rwanda,' in N. Roht-Arriaza and J. Mariezcurrena (eds.), *Beyond Truth versus Justice: Transitional Justice in the New Millenium*, (2006), at 205 *et seq*.

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.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.⁶⁹⁹ This was to protect rape victims from trauma and public humiliation which was often caused by suspects intimidating them.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.⁷⁰¹

Offences relating to rape which Twagirumukiza Alfred,⁷⁰² Mbakenge Laurent⁷⁰³ 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.⁷⁰⁴ In addition, the defendants were deprived of certain civic rights.⁷⁰⁵

⁶⁹⁸ *Gacaca court of Nyakabanda sector v. Musangwa Hamissi*, judgment of 17/10/2009, case file, N° 302-00/2008.

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.

⁷⁰⁰ See D. Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice,' 31 *Human Rights Quarterly*, (2009), at 592; M. Sosnov, 'The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda,' 36 *Denver Journal of International Law and Policy*, (2008), at 135 *et seq.*

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.

⁷⁰² *Gacaca court of Kirwa sector v. Twagirumukiza Alfred*, judgment of 18/12/2008.

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

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

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.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.⁷⁰⁷ Life imprisonment with special provisions has been harshly criticized by human rights organizations for not meeting international standards.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).⁷⁰⁹ It appears that being guilty without confession would lead to strict application of the retributive sentencing regime.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.⁷¹¹

Besides, the cases of Kageruka Tesfori, Mbakenge Laurent, Mwamini Esperance,⁷¹² and Ntawuruhunga Celestin's⁷¹³ 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

Art. 76(5) stipulates a more extensive and detailed publication of the identity of those convicted and their crimes in the genocide memorials, sectors, 'criminal record' and Internet.

⁷⁰⁶ *Gacaca court of Nyarubuye sector v. Kageruka Tesfori*, judgment of 16/10/2008.

⁷⁰⁷ Art. 51 Organic Law N° 10/2007 of 1st March 2007; Art. 73 (1) of the Gacaca law of 19/6/2004.

⁷⁰⁸ See, e.g., Human Rights Watch, (HRW), 'There will be No Trial: Police Killings of Detainees and the Imposition of Collective Punishments,' (2007).

⁷⁰⁹ Art. 72 of the Gacaca law of 19/6/2004 as amended in Art. 17 Organic Law N° 13/2008.

⁷¹⁰ A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' 103 *African Affairs*, (2004), at 73-80.

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.

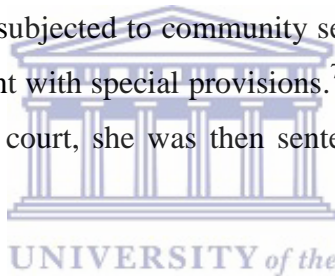
⁷¹² *Gacaca court of Nyakabanda sector v. Mwamini Nyirandegeya Esperance*, judgment of 02/09/2009, case file N° 302/0054.

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.⁷¹⁴

As for accomplices, they could sometimes fall under different categories and receive different verdicts regardless of their linked accusations.⁷¹⁵ 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.⁷¹⁶ 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.⁷¹⁷ 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.⁷¹⁸ Despite his prior sincere confession of killing Sebatiombo Feredariko and six other victims, he did

⁷¹⁴ 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.

⁷¹⁵ 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.

⁷¹⁶ 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.

⁷¹⁷ See discussion in P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 69.

⁷¹⁸ 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.

not reveal his exact role or individual criminal responsibility in killing some other three individuals which then aggravated his sentence.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.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.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.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.⁷²³

⁷¹⁹ S. Straus, *The Order of Genocide: Race, Power, and War in Rwanda*, (2007), at 97 *et seq.*

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 Gacaca Law of 19/6/2004 as amended in 2008. A person sentenced to both a custodial sentence and to serve 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.

⁷²¹ See, M. A. Drumbl, *Atrocity, Punishment, and International Law*, (2007), at 88 *et seq.*

⁷²² Art. 90, Gacaca Law of 19/6/2004 as modified by Art. 19 of Organic Law N° 10/2007.

⁷²³ Art. 89 the Gacaca Law of 19/6/2004; Art. 40, the Gacaca Law of 19/6/2004.

The Category Three cases of Sinaruhamagaye Lambert,⁷²⁴ Simpunga Theoneste⁷²⁵ 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.⁷²⁶

The negligible sum or little amount charged shows that most Rwandans are too indigent to pay full damages.⁷²⁷ 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.⁷²⁸ However, the most essential property was not subject to seizure.⁷²⁹

Moreover, those who merely committed offences against property were not subject to penal sanctions.⁷³⁰ They were only liable to pay damages as confirmed by the Gacaca law, which

⁷²⁴ *Gacaca court of Rusayo cell v. Sinaruhamagaye Lambert*, judgment of 25/1/2007, case file, N° 37.

⁷²⁵ *Gacaca court of Rusayo cell v. Simpunga Theoneste*, judgment of 11/4/2007, case file, N° 41.

⁷²⁶ 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 229 *et seq*; P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 87; Art. 8(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.

⁷²⁷ L. Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?' 8 *Journal of International Criminal Justice*, (2010), at 79 *et seq*.

⁷²⁸ Art. 94 of the Gacaca Law of 19/6/2004; Urwego rw'Igihugu rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), *Isomo ku Itegeko Ngenga N° 16/2004 ryo kuwa 19/06/2004 rigena imiterere, ububasha n'imikorere by'Inkiko Gacaca*, (2004), at 11.

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.

⁷³⁰ Penal Reform International (PRI), 'Monitoring and Research Report on the Gacaca: Information-Gathering during the National Phase, (2006); C. Kirkby, 'Rwanda's Gacaca Courts: A Preliminary Critique,' 50 *Journal of African Law*, (2006), at 104 *et seq*.

states that defendants, who committed offences related to property, are only sentenced to civil reparation for what they have damaged.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.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.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

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.

⁷³² Art. 75, the Gacaca Law of 19/6/2004; M. B. Braley, 'Rooting, Reforming, Restoring: A Framework for Justice in Rwanda,' 4 *Journal of Lutheran Ethics*, (2004) N° 3, MN. 39 *et seq*; D. Shelton, *Remedies in International Human Rights Law*, 2nd edn, (2005), at 160 *et seq*.

⁷³³ Avocats Sans Frontières, (ASF) Monitoring des Jurisdictions Gacaca, Phase de Jugement, *Rapport Analytique*, (Octobre 2005-Septembre 2006), at 19 *et seq*; A. Kubai, 'Between Justice and Reconciliation: The Survivors of Rwanda,' 16 *African Security Review*, (2007), at 53-66.

judges to define the individual criminal responsibility of the defendant in such accusations,⁷³⁴ 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.⁷³⁵ 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.⁷³⁶

As noted in the above Gitega sector court, case files were made according to the place where the crimes were committed.⁷³⁷ 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.⁷³⁸ 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

⁷³⁴ For details on such accusations see, P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 39 and 115.

⁷³⁵ See K. Brounéus, 'Truth-Telling as a Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts,' 38 *Security Dialogue*, (2008), at 55-76.

⁷³⁶ *Gacaca court of Gitega sector v. Kaneza Hamudari*, judgment of 20/03/2010, case file, N° 31.

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.

⁷³⁸ F. Reyntjens and S. Vandeginste, 'Rwanda: An Atypical Transition' in E. Skaar *et al*, *Roads to Reconciliation*, (2005), at 15; Urwego rw'Igihugu rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), *Isomo ku Itegeko Ngenya N° 16/2004 ryo kuwa 19/06/2004 rigena Imiterere, Ububasha n'Imikorere by'Inkiko Gacaca*, (2004), at 6.

archives department has huge records, approximately 60,000,000 case files stored in 17,000 boxes.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.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.⁷⁴¹

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.⁷⁴² On the other hand, restorative justice shifts the focus from

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.

⁷⁴⁰ T. Longman, ‘Justice at the Grassroots? Gacaca Trials in Rwanda,’ in N. Roht-Arriaza and J. Mariezcurrena (eds.), *Beyond Truth v. Justice: Transitional Justice in the New Millennium*, (2006), at 206; L.Waldorf, ‘Rwanda’s Failing Experiment in Restorative Justice,’ in D. Sullivan and L. Tiftt (eds.), *Handbook of Restorative Justice: A Global Perspective*, (2006), at 422-423.

⁷⁴¹ UN Secretary-General, 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.

⁷⁴² For an elaborate meaning of Reconciliation, see Chapter Six of this Study.

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 *vis-a-vis* Gacaca

N°	TYPE OF JUSTICE ITEM	RETRIBUTIVE	RESTORATIVE	GACACA JUSTICE	GACACA NATURE EVALUATION
1	Aims	Retribution Incapacitation Deterrence	Truth Healing Reconciliation Restoration	Truth Speed trials Eradicate Impunity Unity and reconciliation	Semi-restorative
2	Sentences	Death penalty Life sentence and Imprisonment terms	Reparations Reintegration Shaming	Life imprisonment and Imprisonment terms Community service	Semi-restorative

⁷⁴³ B. Oomen, 'Rwanda's Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law,' in R. Haveman and O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, (2006), at 169 *et seq*; A. Kubai, 'Between Justice and Reconciliation: The Survivors of Rwanda,' 16 *African Security Review*, (2007), at 53-66.

⁷⁴⁴ M.R. Amstutz, 'Is Reconciliation Possible After Genocide?: The Case of Rwanda,' 48 *The Journal of Church and State*, (2006), at 559; Reports during the International Conference on Gacaca Courts, 'Foundation for Sustainable Justice and Reconciliation-Achievements and Challenges of Gacaca Courts,' Parliamentary Building, Kigali, 17 June 2012.

		No amnesty	Amnesty/Forgiveness	No amnesty	
	Incarceration	Prisons Pre-trial detention	No prisons and detention Rehabilitation places	Prisons are the detention places There is pre-trial detention	Retributive
3	Main Stakeholders	Judge, prosecutor, lawyer and defendant Permanence of the court	Community, arbitrator offender and victim Temporary meetings	Community Inyangamugayo judges, victims and defendant Temporary in nature	Restorative
	Role of Parties	Active participation of legally trained judges, prosecution, lawyers and minimal role of defendant. Victim may act as witness.	Active role of non-trained arbitrators, community, victim and offenders. No lawyer and prosecutor	Active role of community, suspects, victims, and non trained Inyangamugayo. No lawyers and prosecution	Restorative
	Sub-poena power	Judges have sub-poena powers	No sub-poena powers	Inyangamugayo had sub-poena powers	Retributive

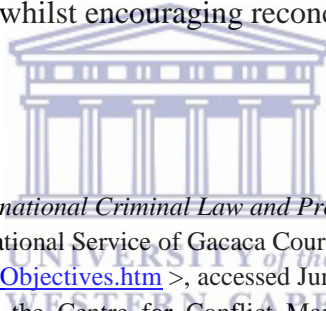
The characteristics of Gacaca courts as described above mainly emanate from the 2001 and 2004 organic laws.⁷⁴⁵ Having highlighted roughly the common features of restorative and retributive justice in the above table, the discussion below attempts to analyse the character or real nature of the courts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

⁷⁴⁵ The Organic Law N° 40/2000 of 26/01/2001 which was repealed 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; Urwego rw'Igihugu Rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), *Isomo ku Itegeko Ngenga N° 16/2004 ryo kuwa 19/06/2004 rigena Imiterere, Ububasha n'Imikorere by'Inkiko Gacaca*, (2004), at 3-10.

I. Aims of Gacaca Courts

Unlike retributive justice which focuses mainly on deterrence and retribution of perpetrators,⁷⁴⁶ Gacaca justice combined both retributive and restorative aims.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.⁷⁴⁸

Some of these aims depart from the common trend in ordinary courts to a semi-restorative nature of justice.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.⁷⁵⁰ By implementing the Gacaca jurisdictions under Rwandan law, the legislator intended to punish those responsible for the genocide, whilst encouraging reconciliation among Rwandans.⁷⁵¹



⁷⁴⁶ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 18-20.

⁷⁴⁷ See Objectives on the website of the National Service of Gacaca Courts, available at <http://www.inkiko-Gacaca.gov.rw/En/EnObjectives.htm>, accessed June 2012.

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 *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.

⁷⁴⁹ P. Clark, 'Hybridity, Holism, and Traditional Justice,' 39 *The George Washington International Law Review*, (2007), at 765-838; see also P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, (2011), at 48; A. Karekezi *et al.*, 'Localizing Justice: Gacaca Courts in Post-Genocide Rwanda,' in E. Stover and M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (2005), at 81.

⁷⁵⁰ G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly*, (2011), at 331-348.

⁷⁵¹ See B. A. Leebaw, 'The Irreconcilable Goals of Transitional Justice,' 30 *Human Rights Quarterly*, (2008), at 95; E. Zorbas, 'Reconciliation in Post-Genocide Rwanda,' 1 *African Journal of Legal Studies*, (2004), at 38 *et seq*; Penal Reform International, (2009-2010), The Contribution of the Gacaca Jurisdictions to Resolving Cases arising from the Genocide, Contributions, Limitations and Expectations of the Post-Gacaca Phase, at 13 (Hereinafter PRI: Final Monitoring and Research Report on the Gacaca Process, (2009-2010) available at www.penalreform.org), accessed in May 2011; Urwego rw'Igihugu Rushinzwe Inkiko Gacaca, Imbonerahamwe igaragaza imanza zaciwe, Ugushyingo 2011.

II. Sentences

Although capital punishment by ordinary courts was abolished in July 2007,⁷⁵² even before this date, it could not be imposed by Gacaca courts.⁷⁵³ 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.⁷⁵⁴ 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.⁷⁵⁵

However, the Gacaca judicial structure of sentences incorporated a system of confession and community service that is unfamiliar to retributive justice.⁷⁵⁶ Accordingly, suspects would receive reduced sentences if they confessed their crimes and prison terms would be combined with community service.⁷⁵⁷ 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.⁷⁵⁸ Against this backdrop, it can be argued

⁷⁵² 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.

⁷⁵³ J. Busingye, Presentation on the ‘Reality and Challenges of Legal and Judicial Reconstruction in Rwanda, Center for International Legal Cooperation, The Hague, 7 December 2006, available at www.cilc.nl/Post_Conflict_Situations.pdf, accessed November 2010, at 21 *et seq.*

⁷⁵⁴ Art. 72 of the Gacaca Law of 19/6/2004 modified by Art. 17 Organic Law N° 13/2008; Art. 73 the Gacaca Law of 19/6/2004 as amended by Art. 14 Organic Law N° 10/2007; see also table above on Gacaca trials and sentences.

⁷⁵⁵ See P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 47-48.

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.

⁷⁵⁷ The community service program includes public works like building and maintaining roads, schools, hospitals, and infrastructure; Art. 73 of the Gacaca Law of 19/6/2004 as modified by Art. 14 of Organic Law N° 10/2007; see also Art. 51 of the Gacaca Law of 19/6/2004 as modified by Art. 11 of Organic Law N° 10/2007.

⁷⁵⁸ For details of South African Truth Commission, see A. Boraine, Truth and Reconciliation: The Third Way, in R. Rotberg and A. Thompson (eds.), *Truth v. Justice: The Morality of Truth Commissions*, (2000), at 141-157; see also L. Fernandez, ‘Reparation for Human Rights Violations Committed by the Apartheid Regime in South Africa,’ in A. Randelzhofer and C. Tomuschat, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, (1999), at 185 *et seq.*; For more details on Gacaca, see L. Mallinder, ‘Can Amnesties and International Justice be Reconciled?’ 2 *International Journal of Transitional Justice*, (2007), at 208.

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.⁷⁵⁹ 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.⁷⁶⁰ 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.⁷⁶¹ 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.⁷⁶² Even witnesses who did not live in the cell or sector would be summoned to appear before the court if needed to provide information.⁷⁶³

⁷⁵⁹ See T. Longman, 'Trying Times for Rwanda,' 32 *Harvard International Review*, (2010), at 48; M. Rettig, 'Gacaca: Truth, Justice and Reconciliation in Post Conflict Rwanda?' 51 *African Studies Review*, (2008), at 25 *et seq.*

⁷⁶⁰ PRI: Final Monitoring and Research Report on the Gacaca Process, (2009-2010), at 81.

⁷⁶¹ See J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 908 *et seq.*

⁷⁶² See Art. 39 of the Gacaca Law of 19/6/2004; Urwego rw'Igihugu rushinzwe Inkiko-Gacaca (RCN-Justice and Démocratie), *Isomo ku Itegeko Ngenga N° 16/2004 ryo kuwa 19/06/2004 rigena Imiterere, Ububasha n'Imikorere by'Inkiko Gacaca* (2004), at 5.

⁷⁶³ Art. 29(4)(2) of the Gacaca Law of 19/6/2004 imposed penalties for non-appearance without good reason.

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.⁷⁶⁴ 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.⁷⁶⁵ In contrast with the sole conciliatory nature of indigenous Gacaca,⁷⁶⁶ the new mechanism appears different in structure save for its local and participatory character,⁷⁶⁷ 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.⁷⁶⁸ Gacaca dealt with the suspects in prison, and also handled the thousands

⁷⁶⁴ P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, (2011), at 48.

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.

⁷⁶⁶ C. Ntampaka, 'Le Retour à la Tradition dans Le Jugement du Génocide Rwandais: Le Gacaca, Justice Participative,' 48 *Bulletin des Séances Académie Royale Des Sciences d'Outre-Mer*, (2002), at 434 *et seq*.

⁷⁶⁷ PRI: Final Monitoring and Research Report on the Gacaca Process, (2009-2010), at 17 *et seq*; P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 32 *et seq*.

⁷⁶⁸ A. Kubai, 'Between justice and reconciliation: The Survivors of Rwanda,' 16 *African Security Review*, (2007), at 53-66; P. Harrell, *Rwanda's Gamble: Gacaca and a New Model of Transitional Justice*, (2003), at 36-37; Avocats Sans Frontières, (ASF) Monitoring des Jurisdictions Gacaca, Phase de Jugement, Rapport Analytique, Octobre 2005–Septembre 2006, at 26, available at <<http://www.asf.be/index.php?module=publicaties&lang=fr&id=53>>, accessed November 2011; Hirondelle News Agency, General Opening of the Semi-Traditional Tribunals, 3 January 2007, <<http://www.hirondelle.org>> accessed September 2012; Amnesty International, 17 December 2002, 'Gacaca: A Question of Justice,' at 14, available at <www.amnesty.org/en/library>, accessed July 2012.

more who were accused when the Gacaca courts started operating.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.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.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.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.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

⁷⁶⁹ B. Ingelaere, 'The Gacaca courts in Rwanda,' in L. Huyse and M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, (2008), at 52 *et seq.*

⁷⁷⁰ National Service of Gacaca Courts, Summary Report on Gacaca Courts Activities, June 2012.

⁷⁷¹ Organic Law N° 04/2012 of 15/06/2012 terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction.

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.

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.⁷⁷⁴ 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.⁷⁷⁵

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.⁷⁷⁶ 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.⁷⁷⁷ 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.⁷⁷⁸ Any adult could participate, intervene and testify on either side, since everyone was there; survivors, perpetrators, judges and the general population over 18 years.

⁷⁷⁴ PRI, Final Monitoring and Research Report on the Gacaca Process, (2009-2010), at 17; For discussions on general individual criminal responsibility see G. Werle, 'Individual Criminal Responsibility in Art. 25 ICC Statute,' 5 *Journal of International Criminal Justice*, (2007), at 953 *et seq*; see also F. Reyntjens, 'Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda,' 110 *African Affairs*, (2011), at 1–34.

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.

⁷⁷⁶ See P. de Grieff, 'A Normative Conception of Transitional Justice,' 50 *Politorbis*, (2010), at 20 *et seq*; N. Petrovic, 'Human Potential for Restorative Justice in the Balkans,' 3 *Family Travel Journal*, (2009), at 95-98; M. Volf, 'Forgiveness, Reconciliation, and Justice: A Theological Contribution to a more Peaceful Social Environment,' 29 *Millennium: Journal of International Justice*, (2000), at 861 *et seq.*

⁷⁷⁷ F. Kanyesigye, 'Gacaca has greatly contributed to peaceful co-existence–IRDP,' *The New Times*, Rwanda, 30 August 2011; E. Staub, 'Justice, Healing, and Reconciliation: How the Peoples' Courts in Rwanda Can Promote Them,' 10 *Peace and Conflict: Journal of Peace Psychology*, (2004), at 26 *et seq*; P. Uvin, 'The Gacaca Tribunals in Rwanda,' in D. Bloomfield *et al.* (eds.), *Reconciliation after Violent Conflict: A Handbook*, (2003), at 119. Presently references to ethnicity have been erased by the Government to avoid any prejudices.

⁷⁷⁸ E. Daly and J. Sarkin, *Reconciliation in Divided Societies: Finding Common Ground*, (2007), at 19 *et seq*; A. Richters, C. Dekker, and K. de Jonge, 'Reconciliation in the Aftermath of Violent Conflict in Rwanda,' 3 *Intervention*, (2005), at 211-215.

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.⁷⁷⁹

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,⁷⁸⁰ 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 *génocidaires*.⁷⁸¹

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.⁷⁸² 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.

⁷⁷⁹ E. Daly and J. Sarkin, *Reconciliation in Divided Societies: Finding Common Ground*, (2007), at 19 *et seq*; D. Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice,' 31 *Human Rights Quarterly*, (2009), at 592 *et seq*.

⁷⁸⁰ A total of 221,012 pleaded guilty and confessed to their crimes in the three categories.

⁷⁸¹ For details on collective guilty, see H. Cobban, 'The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law,' 27 *Boston Review*, (2002), at 4-15; M.A. Drumbl, 'Law and Atrocity: Settling Accounts in Rwanda,' 31 *Ohio Northern University Law Review*, (2005), at 65 *et seq*.

⁷⁸² K. Brounéus, 'Truth-Telling as a Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts,' 38 *Security Dialogue*, (2008), at 55-76; J. Burnet, 'The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda,' 3 *Genocide Studies and Prevention*, (2008), at 173-193; A. Kubai, 'Between Justice and Reconciliation: The Survivors of Rwanda,' 16 *African Security Review*, (2007), at 53-66.

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.⁷⁸³ 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.⁷⁸⁴ 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.⁷⁸⁵

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.⁷⁸⁶ The emotional experience survivors had to go through, narrating what happened or recalling events, could have contributed to inner healing.⁷⁸⁷ 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.⁷⁸⁸

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.

⁷⁸⁴ See P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 69.

⁷⁸⁵ E. Staub *et al.*, 'Healing, Reconciliation, Forgiving and the Prevention of Violence after Genocide or Mass Killings: An Intervention and its Experimental Evaluation in Rwanda,' 24 *Journal of Social and Clinical Psychology*, (2005), at 297-334; B. Ingelaere, 'The Gacaca Courts in Rwanda,' in L. Huyse and M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, (2008), at 39 *et seq.*

⁷⁸⁶ B. Ingelaere, 'The Gacaca courts in Rwanda,' in L. Huyse and M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, (2008), at 54; Human Rights Watch, 'Law and Reality: Progress in Judicial Reform in Rwanda,' (24 July 2008), at 40.

⁷⁸⁷ E. Staub *et al.*, 'Healing, Reconciliation, Forgiving and the Prevention of Violence after Genocide or Mass Killings: An Intervention and its Experimental Evaluation in Rwanda,' 24 *Journal of Social and Clinical Psychology*, (2005), at 297-334.

⁷⁸⁸ A. Kubai, 'Between Justice and Reconciliation: The Survivors of Rwanda,' 16 *African Security Review*, (2007), at 53-66; P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (2012), at 159; African Rights, *Gacaca Justice: A Shared Responsibility*, Kigali, (2008), at 63 -67.

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 logistics 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

⁷⁸⁹ T. W Bennett, 'Customary Criminal Law in the South African Legal System' in J. Fenrich, P. Galizzi and T. Higgins, *The Future of African Customary Law*, (2011), at 363-386.

⁷⁹⁰ 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 164; A. Megwalu, 'Dilemmas of Justice and Reconciliation: Rwandans and the Gacaca Courts,' 18 *African Journal of International and Comparative Law*, (2010), at 7 *et seq.*

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.*

⁷⁹² D. Mukantaganzwa, Presentation at the International Conference on Gacaca Courts, 'Foundation for Sustainable Justice and Reconciliation-Achievements and Challenges of Gacaca Courts,' Parliamentary Building, Kigali, 17 June 2012; F. Ndagiza, Transitional Justice and Reconciliation, Paper delivered at the Conference on Policy Research, Ottawa, (21 November 2002), at 7 *et seq.*

⁷⁹³ African Rights, 'Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes London/Kigali,' November 2008, available at <www.redress.org/reports.html>, at 101, accessed November 2012; PRI: Final Monitoring and Research Report on the Gacaca Process, (2009-2010), at 52.

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.⁷⁹⁴ For example, Gacaca has attracted discussions of localized transitional justice in Kenya, South Sudan, Burundi⁷⁹⁵ and Uganda,⁷⁹⁶ 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.⁷⁹⁷ 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.⁷⁹⁸ Due to its unprecedented nature in pursuit of justice for genocide crimes, the system was unavoidably imperfect to dispense justice in a satisfactory manner.

⁷⁹⁴ P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, (2011), at 352; Recommendations of the International Conference on Gacaca Courts, 'Foundation for Sustainable Justice and Reconciliation-Achievements and Challenges of Gacaca Courts,' Parliamentary Building, Kigali, 17 June 2012.

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.*

⁷⁹⁶ On the Ugandan Institution of Matoput, see, T. Murithi, African Approaches to Building Peace and Social Solidarity, 6 *African Journal on Conflict Resolution*, (2006), at 24 *et seq.*

⁷⁹⁷ P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, (2011), at 353; see L. Huyse and M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, (2008), at 3 *et seq.*; L. Waldorf, 'Mass Justice for Mass Atrocities: Rethinking Local Justice as Transitional Justice,' 79 *Temple Law Review*, (2006), at 16 *et seq.*

⁷⁹⁸ B. Oomen, 'Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda's Multi-Layered Justice Mechanisms,' in K. Ambos *et al.*, *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*, (2009), at 191 *et seq.*

I. Lack of Legal Representation

Gacaca's major criticism has been the violation of fair trial rights under international law.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.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.⁸⁰¹ Such issues reflect tensions among the goals of international criminal law and transitional justice.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.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.⁸⁰⁴ This element deviates from the practice in formal retributive courts which involve prosecutors and legal counsel.⁸⁰⁵



⁷⁹⁹ See details in P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 103-118.

⁸⁰⁰ S. Vandeginste, 'Victims of Genocide, Crimes against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of their Right to Reparation,' in J. Torpey, *Politics and the Past: On Repairing Historical Injustices*, (2003), at 261-265. See legal provisions in Art.14 and 15 of the ICCPR, Art. 26 of the African Charter on Human and Peoples' Rights of 27 June 1981 (Banjul Charter), and Art 141(2) of the 2003 Rwandan Constitution as amended by Art. 27, Amendment of 13 August 2008.

⁸⁰¹ D.L. Tully, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda,' 26 *Boston College International and Comparative Law Review*, (2002), at 385 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 111, MN 298.

⁸⁰² M.R. Amstutz, 'Is Reconciliation Possible After Genocide?: The Case of Rwanda,' 48 *The Journal of Church and State*, (2006), at 555; L.E Fletcher and H.M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,' 24 *Human Rights Quarterly*, (2002), at 573; D.L. Tully, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda,' 26 *Boston College International and Comparative Law Review*, (2002), at 410.

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.

⁸⁰⁴ P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 109-110.

⁸⁰⁵ Arts. 16–20, 60(2), 140, 141, 142 of the 2003 Rwandan Constitution, (Art. 141, 142 as amended by Arts. 27, 28 of the Amendment of 13 August 2008); see Art. 1(2), Law N° 13/2004 relating to the Code of Criminal Procedure, Official Gazette of the Republic of Rwanda, Special N° of 30/07/2004 as modified by Art. 1 of Law N° 20/2006.

On the other hand, according to Human Rights Watch, the absence of a public prosecutor placed the burden of proof on the accused.⁸⁰⁶ While the law provides for presumption of innocence, in practice the burden the burden of proof sometimes fell on the accused to prove that he or she did not commit the alleged crime.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.’⁸⁰⁸

II. Absence of Reparations

Concerning the right to reparation, the Gacaca law did not prescribe reparation to be given by the offender.⁸⁰⁹ Yet reparations are crucial for amending the harm caused by perpetrators to victims.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.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,⁸¹² still, this assistance does not tantamount to reparations.

⁸⁰⁶ Human Rights Watch, *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts*, (2011), at 69 *et seq.*

⁸⁰⁷ Human Rights Watch, *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts*, (2011), at 4 *et seq.*

⁸⁰⁸ Human Rights Watch, *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts*, (2011), at 69 *et seq.*

⁸⁰⁹ Art. 96 of the Gacaca Law of 19/6/2004; Urukiko rw’Ikirenga, *Umutwe ushinzwe Inkiko-Gacaca, Imfashanyigisho Ku Nkiko-Gacaca*, (2001), at 10.

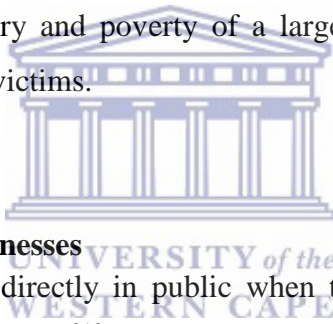
⁸¹⁰ L. Fernandez, ‘Reparation for Human Rights Violations Committed by the Apartheid Regime in South Africa,’ in A. Randelzhofer and C. Tomuschat, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, (1999), at 185; L. Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law,’ 85 *International Review of the Red Cross*, (2003), at 497.

⁸¹¹ J. Mucyo ‘Gacaca Courts and Genocide,’ in C. Villa-Vicencio and T. Savage (eds.), *Rwanda and South Africa in Dialogue: Addressing the Legacies of Genocide and a Crime against Humanity*, (2001), at 53; C. Ntampaka, *Le Gacaca Rwandais, Une Justice Répressive Participative*, 6 *Actualité du Droit International Humanitaire*, (2001), at 210 *et seq.*; C. Tomuschat (ed.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, (1999), at 7.

⁸¹² Improving the welfare of the needy genocide victims is done through le Fonds d’Assistance aux Rescapés du Génocide (FARG); see D. Shelton, *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,⁸¹³ but when it came to determining damages for death or injury, this was overlooked.⁸¹⁴ 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.⁸¹⁵

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.⁸¹⁶ 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.⁸¹⁷ 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.⁸¹⁸ It was evident that the weak protection measures led

⁸¹³ N. Roht-Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence,' in E. Stover and M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (2005), at 126 *et seq.*; see also Art. 75 of the Gacaca Law of 19/6/2004.

⁸¹⁴ Art. 96 of the Gacaca Law of 19/6/2004; see also P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 131-132.

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.

⁸¹⁶ See PRI August 2009 Report: The settlement of property offence cases committed during the genocide, available at <www.penalreform.org/reports>, accessed September 2012; Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, (2011), at 69 *et seq.*

⁸¹⁷ H. Rombouts and S. Vandeginste, 'Reparation for Victims in Rwanda: Caught between Theory and Practice,' in K. De Feyter *et al.*(eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, (2005), at 310 *et seq.*; PRI August 2009 Report: The settlement of property offence cases committed during the genocide, available at <www.penalreform.org/reports>, accessed September 2012.

⁸¹⁸ P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 159; African Rights, *Gacaca Justice: A Shared Responsibility*, Kigali, (2003), at 63.

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,

⁸¹⁹ PRI: Final Monitoring and Research Report on the Gacaca Process, (2009-2010), at 14; F. Reyntjens, ‘Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda,’ 110 *African Affairs*, (2011), at 1–34.

⁸²⁰ P. C. Bornkamm, *Rwanda’s Gacaca Courts: Between Retribution and Reparation*, (2012), at 159; African Rights, *Gacaca Justice: A Shared Responsibility*, Kigali, (2003), at 63 *et seq.*

⁸²¹ See T. Longman, ‘Trying Times for Rwanda,’ 32 *Harvard International Review*, (2010), at 48; M. Rettig, ‘Gacaca: Truth, Justice and Reconciliation in Post conflict Rwanda?’ 51 *African Studies Review*, (2008), at 25-27.

⁸²² National Ombudsman office, Report on Corruption of Gacaca Judges, (Kigali, 2008).

⁸²³ Penal Reform International, Rapport de Monitoring et de Recherches Sur La Gacaca: Les Témoignages et la Preuve devant Les Juridictions Gacaca, August 2008, at 50-51 *et seq.*; see also LIPRODHOR Report, Problématique des Informations et Témoignages devant Les Juridictions Gacaca, (2006), at 71-72 *et seq.*

⁸²⁴ PRI: Final Monitoring and Research Report on the Gacaca Process, (2009-2010), at 18; see PRI reports available at <www.penalreform.org/reports-4.html>, accessed February 2012.

made them highly susceptible to corruption, thereby jeopardizing the independence of the courts.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.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.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,⁸²⁸ there were numerous amendments of Gacaca law based on deficiencies identified by the public.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 2008.⁸³⁰ While some changes helped to improve the process and responded to particular problems that would

⁸²⁵ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 159; African Rights, *Gacaca Justice: A Shared Responsibility*, Kigali, (2003), at 16 *et seq.*

⁸²⁶ Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, 'Rwanda Should Celebrate Gacaca Legacy-Karugarama,' *The New times*, on the 18, June 2012.

⁸²⁷ Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, 'Rwanda Should Celebrate Gacaca Legacy-Karugarama,' *The New times*, on the 18, June 2012.

⁸²⁸ P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, (2011), at 251; J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 919 *et seq.*

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.*

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.*

⁸³² 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; L. Reydam, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' 3 *Journal of International Criminal Justice*, (2005), at 977-988. This Article critically examines the ICTR Prosecutor's policy towards the RPA, Rwandese Patriotic Army.

⁸³³ Amnesty International, Reports of Killings and Abductions by the Rwandese Patriotic Army, April–August 1994, AI Index AFR 47/016/1994, 14 October 1994, at 10 *et seq* available at

<[http://www.amnesty.org/library/pdf/AFR470161994ENGLISH/\\$File/AFR4701694.pdf](http://www.amnesty.org/library/pdf/AFR470161994ENGLISH/$File/AFR4701694.pdf)>, accessed July 2012; A.

Megwalu, Dilemmas of Justice and Reconciliation: Rwandans and the Gacaca courts, 18 *African Journal of International and Comparative Law*, (2010), at 1-23; B.L. Ottley, and T. Kleinhaus, 'Confronting the Past: The Elusive Search For Post-Conflict Justice,' 46 *Irish Jurist*, (2010), at 107 *et seq.*

⁸³⁴ A. J. Kuperman, 'Revoking Genocide: a Revised History of the Rwandan Patriotic Front,' 6 *Journal of Genocide Research*, (2004), at 61 *et seq.*

⁸³⁵ M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, (1998), at 8 *et seq*; J. Burnet, 'The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda,' 3 *Genocide Studies and Prevention*, (2008), at 173-193.

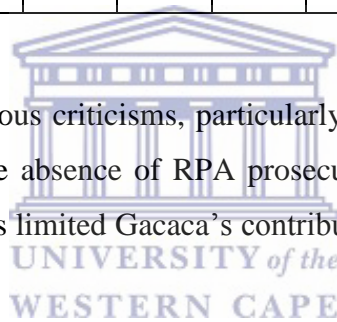
⁸³⁶ G. Prunier, 'The Rwandan Patriotic Front,' in C. Clapham (ed.), *African Guerillas*, (1998), at 130–133.

Also, the said killings were not sufficiently systematic and widespread to be qualified as crimes against humanity.⁸³⁷ Apparently, these crimes were qualified as war crimes,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.⁸³⁹ Below are figures of RPA trials before the military courts in the context of the civil war.

Table showing prosecutions of RPA soldiers

Year	1994	1996	1997	1998	2000	2001	2003	2004	2005	2006	2008
Accused	2	3	15	11	5	2	2	4	2	3	5

Despite these prosecutions,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,⁸⁴¹ which to some extent has limited Gacaca's contribution to reconciliation.⁸⁴² According



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.

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.

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*.

⁸⁴⁰ The numbers of RPA prosecutions are likely to increase because investigations are still ongoing.

⁸⁴¹ A. Molenaar, *Gacaca: Grassroots Justice after Genocide, the Key to Reconciliation in Rwanda?* (2005), at 111 *et seq*; B.L. Ottley, and T. Kleinhaus, 'Confronting the Past: The Elusive Search For Post-Conflict Justice,' 46 *Irish Jurist*, (2010), at 107 *et seq*; M. Sosnov, 'The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda,' 36 *Denver Journal of International Law and Policy*, (2008), at 139.

⁸⁴² A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' 103 *African Affairs*, (2004), at 86; For a critical analysis of prosecutions by the military courts, see, L. Haskell and L. Waldorf, 'The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences,' 34 *Hastings International and Comparative Law Review*, (2011), at 49–86.

to various authors, this might diminish the credibility of the justice process among Rwandans who lost their families or friends during those events.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.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.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.⁸⁴⁶

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.⁸⁴⁷ This justifies why it was better to do justice, albeit unsatisfactorily, than not to do justice at all.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

⁸⁴³ A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' 103 *African Affairs*, (2004), at 86; 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 159 *et seq*; B.L. Ottley, and T. Kleinhaus, 'Confronting the Past: The Elusive Search For Post-Conflict Justice,' 46 *Irish Jurist*, (2010), at 107.

⁸⁴⁴ D. Mason, 'Structures of Ethnic Conflict: Revolution versus Secession in Rwanda and Sri Lanka,' 15 *Terrorism and Political Violence*, (2003), at 83-113.

⁸⁴⁵ 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*.

⁸⁴⁶ M.C Bassiouni, 'Assessing Conflict Outcomes: Accountability and Impunity,' in M.C Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study of Conflicts, Victimization, and Post-Conflict Justice*, Vol.1, (2010), at 6.

⁸⁴⁷ B. Asiimwe, 'Rwandans Reflect on Gacaca as Trials Come to an End' *The New Times* Kigali, 19 June 2012.

⁸⁴⁸ J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 919 *et seq*; see D.L. Tully, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda,' 26 *Boston College International and Comparative Law Review*, (2002), at 410.

institutions.⁸⁴⁹ Therefore, the three processes of the UN Tribunal in Arusha, the national courts and Gacaca, were established with the hope that the strengths of these approaches might complement one another.

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.



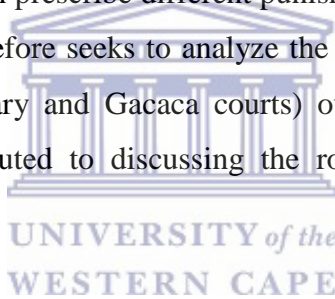
⁸⁴⁹ This is also acknowledged by P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 5; A. Megwalu, Dilemmas of Justice and Reconciliation: Rwandans and the Gacaca courts, 18 *African Journal of International and Comparative Law*, (2010), at 31.

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.⁸⁵⁰ Concurrent jurisdiction occurs when a particular set of facts gives rise to the jurisdiction of two or more courts.⁸⁵¹

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.⁸⁵² 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)

⁸⁵⁰ Avocats Sans Frontieres (ASF), *Ingendanyi, Imiburanishirize y'Icyaha cya Jenocide n'Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z'u Rwanda 2004*, (2005), at 7-10; E. Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda,' 34 *New York University Journal of International Law and Politics*, (2002), at 355; M.H Morris, 'The Trials of Concurrent Jurisdictions: The Case of Rwanda,' 7 *Duke Journal of Comparative and International Law*, (1997), at 349; I. Simonovic, 'Dealing with the Legacy of Past War Crimes and Human Rights Abuses, Experiences and Trends,' 2 *Journal of International Criminal Justice*, (2004), at 701.

⁸⁵¹ R.D. Atkins, *The Alleged Transnational Criminal* (1995), at 20; F. Lattanzi, 'Concurrent Jurisdictions between Primacy and Complementarity,' in R. Belleli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review*, (2010), at 186.

⁸⁵² See B. Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot,' 106 *Yale Law Journal*, (1997); J. D van den Vyver, 'Prosecution and Punishment of the Crime of Genocide,' 23 *Fordham Journal of International Law*, (1999), at 286 *et seq.* 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.*

emphasizes that the ICTR shall have the primacy over the national courts of all states.⁸⁵³ 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.⁸⁵⁴

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.⁸⁵⁵ Moreover 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.⁸⁵⁶

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.⁸⁵⁷ Indeed, other



⁸⁵³ A. Cassese *et al.*, *International Criminal Law: Cases and Commentary*, (2011), at 526 *et seq*; F. Lattanzi, 'Concurrent Jurisdictions between Primacy and Complementarity,' in R. Belleli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review*, (2010), at 186 *et seq*; The primacy of the *ad hoc* Tribunal also prohibits double jeopardy, (*ne bis in idem* principle).

⁸⁵⁴ P. Clark 'Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda,' in B. Bowden, H. Charlesworth and J. Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict*, (2009), at 246-249; M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, (2008), at 137 *et seq*; D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, (2004), at 348 *et seq*; S. O' Shea, 'Interaction Between International Criminal Tribunals and National Legal systems,' in T.M. Franck and G.H. Fox (eds.), *International Law Decisions in National Courts*, (1996), at 310.

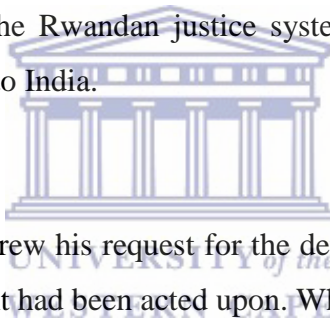
⁸⁵⁵ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 412 *et seq*; C. Lekha Sriram, 'Revolutions in Accountability: New Approaches to Past Abuses,' 19 *American University International Law Review*, (2003), at 357 and 398 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 82, MN 227.

⁸⁵⁶ P. Clark 'Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda,' in B. Bowden, H. Charlesworth and J. Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict*, (2009), at 248; W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 879-895.

⁸⁵⁷ D. Atkins, *The Alleged Transnational Criminal*, (1995), at 20 *et seq*; A. Cassese *et al.*, *International Criminal Law: Cases and Commentary*, (2011), at 523 *et seq*; S.R. Ramer and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd edn, (2001), at 187 *et seq*; Similarly, see P.

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.⁸⁵⁸ This is because both jurisdictions have the potential to address in parallel, the same disputes involving the same parties and issues.⁸⁵⁹

For example, Froduard Karamira became the object of a brief ‘tug of war’ between the ICTR and the government of Rwanda.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.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.⁸⁶² The trial ended with his being sentenced to death and the sentence was executed in

Uvin and C. Mironko, ‘Western and Local Approaches to Justice in Rwanda,’ 9 *Global Governance*, (2003), at 221 *et seq.*

⁸⁵⁸ B.S. Brown, ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals,’ 23 *Yale Journal of International Law*, (1998), at 394 *et seq.*; W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, (2006), at 1 and 270 *et seq.*; V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 313 *et seq.*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 81, MN 223.

⁸⁵⁹ See C. Mibenge, ‘Enforcing International Humanitarian Law at the National Level: The Gacaca Jurisdictions of Rwanda,’ 7 *Yearbook of International Humanitarian Law*, (2004), at 424; M.H Morris, ‘The Trials of Concurrent Jurisdictions: The Case of Rwanda,’ 7 *Duke Journal of Comparative and International Law*, (1997), at 349 *et seq.*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 82, MN 226.

⁸⁶⁰ See C. Tomlinson, ‘Tug of War Over Rwanda Suspect,’ *The Independent*, 13 March 1996, at 10.

⁸⁶¹ V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (2008), at 172 *et seq.*

⁸⁶² M.H Morris, ‘The Trials of Concurrent Jurisdictions: The Case of Rwanda,’ 7 *Duke Journal of Comparative and International Law*, (1997), at 365; V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (2008), at 172 *et seq.*

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.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.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

⁸⁶³ M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, (2008), at 137 *et seq*; V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (2008), at 172 *et seq*; C. Tomlinson, 'Tug of War Over Rwanda Suspect,' *The Independent*, 13 March 1996, at 10; see also J. Karuhanga, 'Genocide Trials should be heard in Rwanda-Martin Ngoga,' *The New Times Kigali*, 30 January 2012, The Prosecutor General Martin Ngoga emphasized that 'no more genocide trials should take place abroad' because Rwanda's justice system has acquired the required level of credibility and maturity to handle the cases.

⁸⁶⁴ A. Cassese *et al.*, *International Criminal Law: Cases and Commentary*, (2011), at 523 *et seq*; E. Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda,' 34 *New York University Journal of International Law and Politics*, (2002), at 355 *et seq*; M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, (2008), at 137 *et seq*.

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.⁸⁶⁵

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.⁸⁶⁶ 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.

standards at the international Tribunal in comparison to the national approaches dealing with perpetrators of the same situation,⁸⁶⁷ as shown below.

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.⁸⁶⁸ Similarly, the Rwanda legislation recognizes the right to counsel for defendants tried by national courts, but does not provide defense counsel for indigent defendants.⁸⁶⁹ On the contrary, the Gacaca law does not acknowledge the right to counsel,⁸⁷⁰ which has been criticized as a violation of fair trial rights.⁸⁷¹ There is a defendant, sometimes a victim, but no defence lawyer and no prosecution.⁸⁷² 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

⁸⁶⁷ See A. D'Amato, 'Peace vs. Accountability in Bosnia,' 88 *American Journal of International Law*, (1994), at 500-506; L.E Fletcher and H.M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,' 24 *Human Rights Quarterly*, (2002), at 573; C. Mibenge, 'Concurrent Application of International, National and African Laws in Rwanda,' in R.Yepes-Enriquez and L. Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters*, (2002), at 99 *et seq.*; W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 879-895.

⁸⁶⁸ 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, *International Criminal Justice: A critical Analysis of Institutions and Procedures*, (2007), at 20.

⁸⁶⁹ 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,' 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 for example *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.

⁸⁷⁰ 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.

⁸⁷¹ For various views on due process in Gacaca courts, see E. Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda,' 34 *New York University Journal of International Law and Politics*, (2002), at 35; J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 895 *et seq.*; S. Sandesh, 'Courts of Armed Opposition Groups,' 7 *Journal of International Criminal Justice*, (2009), at 489-514; W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 879 *et seq.*

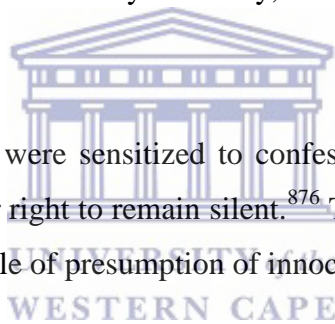
⁸⁷² P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 110 *et seq.*

the massacres gives both incriminating and exonerating evidence.⁸⁷³ 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.’⁸⁷⁴ 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.⁸⁷⁵

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.⁸⁷⁶ The emphasis placed on confessions may have compromised the principle of presumption of innocence.⁸⁷⁷



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.

⁸⁷⁴ Art.29, Organic Law N° 16/2004 of 19/06/2004 governing the Structure, Powers and Functions of Gacaca Courts.

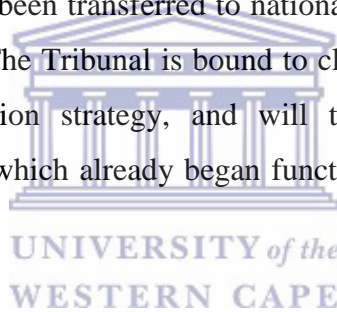
⁸⁷⁵ Art. 29 *et seq*, Organic Law N° 16/2004 of 19/06/2004 governing the Structure, Powers and Functions of Gacaca Courts.

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/S8, R.P 52/2/200), Urukiko rwa mbere rw’iremezo rwa Butare, (Southern Province).

⁸⁷⁷ A. Ashworth, *Principles of Criminal Law*, 5th edn, (2006), at 83; J. E. Burnet, ‘Justice, Truth, Reconciliation, and Revenge in Rwanda’s Gacaca,’ in A. L. Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, (2010), at 55 *et seq*.

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.⁸⁷⁸ 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).⁸⁷⁹ 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.⁸⁸⁰ 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*.⁸⁸¹ 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 2012.⁸⁸²



⁸⁷⁸ See S. Straus, 'How Many Perpetrators were there in the Rwandan Genocide? An estimate,' 6 *Journal of Genocide Research*, (2004), at 85–98.

⁸⁷⁹ See details in M.R. Amstutz, 'Is Reconciliation Possible after Genocide? The Case of Rwanda,' 48 *The Journal of Church and State*, (2006), at 541-565; A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' 103 *African Affairs*, (2004), at 81; R. Zacklin, 'The Failings of the *Ad hoc* Tribunals,' 2 *Journal of International Criminal Justice*, (2004), at 541-543; see the ICTR, available at <<http://www.unictt.org/>>; accessed October 2012.

⁸⁸⁰ See T. Gallimore, 'The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda,' 14 *New England Journal of International and Comparative Law*, (2008), at 242-243; E. Karake, 'Right to Host ICTR Archives,' *The New Times Rwanda*, 18 September 2012; ICTR, 'Status of Cases,' available at <<http://www.unictt.org/Cases/tabid/204/Default.aspx>>, accessed October 2012.

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.

⁸⁸² Statute of the International Residual Mechanism for Criminal Tribunals, Art. 27(3); G. Acquaviva, 'Was a Residual Mechanism for International Criminal Tribunals Really Necessary?' 9 *Journal of International Criminal Justice*, (2011), at 789 *et seq*; T. Pittman, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals: From Completion to Continuation,' 9 *Journal of International Criminal Justice*, (2011), at 797-817.

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 cases⁸⁸⁷ 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

⁸⁸³ See Amnesty International, 17 December 2002, 'Gacaca: A Question of Justice,' at 17 available at <www.amnesty.org/en/library>, accessed July 2012; Similar statistics are provided in J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 899. For statistics relating to the total number of genocide trials until late 1999, see UN Human Rights Report on Rwanda, (2000), Para 136.

⁸⁸⁴ See statistics compiled by the Supreme Court of Rwanda, 'Raporo y'Urwego rw'Ubucamanza 2006, 2007, and 2008'; see Supreme Court, 'Genocide trials,' available at <<http://www.supremecourt.gov.rw>> accessed May 2012.

⁸⁸⁵ See Arts.2 and 51 of the 2004 Gacaca Law as modified by Arts. 1 and 9 of Organic Law N° 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.

⁸⁸⁶ See Avocats Sans Frontieres (ASF), *Ingendanyi, Imiburandishirize y'Icyaha cya Jenocide n'Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z'u Rwanda 2004*, (2005), at 7; W. A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 895.

⁸⁸⁷ National Service of Gacaca Courts, Summary Report on Gacaca Courts' Activities, June 2012.

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,⁸⁸⁹ 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.⁸⁹⁰ 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 1994.⁸⁹¹ On the other hand, similar to Gacaca courts,⁸⁹² the organic law confers jurisdiction to national courts over offences committed from 1 October 1990 to 31 December 1994.⁸⁹³

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

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.

⁸⁹⁰ See P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 29; 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 25 *et seq.*

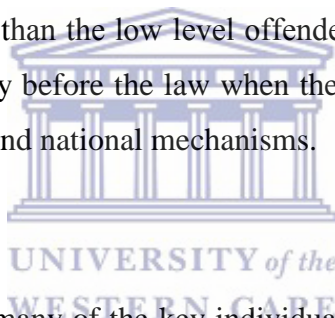
⁸⁹¹ V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 297 *et seq.*; P. Uvin, 'The Gacaca Tribunals in Rwanda,' in D. Bloomfield *et al.* (eds.), *Reconciliation after Violent Conflict: A Handbook* (2003), at 116-121; see also *The Prosecutor v. Akayesu*, Case N° ICTR-96-4-T, Judgement (TC), 2 September 1998.

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/HC/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 1994.⁸⁹⁴ 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 1990.⁸⁹⁵ 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.⁸⁹⁶ 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,⁸⁹⁷

⁸⁹⁴ K. Ambos, ‘International Criminal Law at the Crossroads: From *Ad hoc* Imposition to a Treaty-Based Universal System,’ in C. Stahn and L. Van den Herik (eds.), *Future Perspectives on International Criminal Justice*, (2010), at 161 *et seq.*; V. Morris and M. P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 302.

⁸⁹⁵ Apart from the 1994 genocide, the periods of 1990, 1991, 1992 and 1993 were marked by Tutsi massacres in Rwanda. See United Nations Department of Public Information, *The United Nations and Rwanda 1993-1996*, Vol. X, (1996), at 61 *et seq.*; G. Umugwaneza, ‘A Comparison of the Prosecution of Crimes under the Statute of the ICTR and Rwandan Organic Law N°08/96 of 30 August 1996,’ *National University of Rwanda*, Dissertation, (1999), at 11-15.

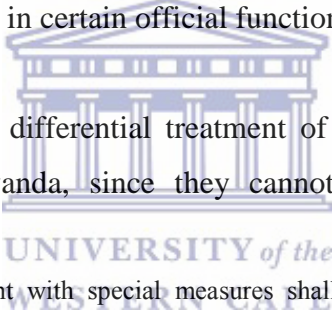
⁸⁹⁶ Avocats Sans Frontieres (ASF), *Ingendanyi, Imiburanishirize y’Icyaha cya Jenocide n’Ibyaha byibasiye Inyokumuntu Mu Inkiko zisanzwe z’u Rwanda 2004*, (2005), at 51 *et seq.*; A. Corey and S. F. Joireman, ‘Retributive Justice: The Gacaca Courts in Rwanda,’ 103 *African Affairs*, (2004), at 73-89.

⁸⁹⁷ Art. 3, Organic Law N° 31/2007 of 25 July 2007 relating to the Abolition of the Death Penalty; Amnesty International, (2007), *Rwanda Abolishes Death penalty*, available at, <http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-2007080>, accessed January 2013.

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

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.

⁸⁹⁹ 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.

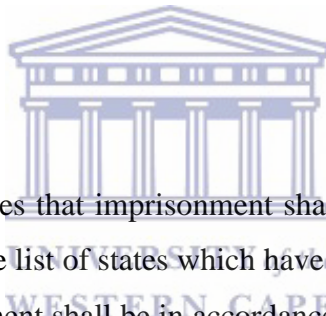
⁹⁰¹ Art.76, Gacaca Law N° 16/2004 governing the Structure, Powers and Functions of Gacaca Courts.

⁹⁰² For a detailed discussion, see P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 77 *et seq*; Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, (2011), at 2 *et seq*.

⁹⁰³ Organic Law N° 66/2008 of 2008 Modifying and Completing Organic Law N° 31/2007 of 2007 relating to the Abolition of the Death Penalty.

bear the least responsibility.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.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.⁹⁰⁶ The disparity in the sentencing practices under the different approaches can be socially divisive and negative to the national reconciliation process.



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.⁹⁰⁷

⁹⁰⁴ For sentences of life imprisonment with special measures, see National court, *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, *Gacaca court of Nyarubuye sector versus Kageruka Tesfori*, judgment of 16/10/2008.

⁹⁰⁵ V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (2008), at 163 *et seq.*

⁹⁰⁶ M.C Bassiouni, *Introduction to International Criminal Law*, (2003), at 324; D. Hailegebriel, 'A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda,' *Makerere University*, Thesis, (2003), at 2 *et seq.*; 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 *et seq.*; see also J. Philipp Book, *Appeal and Sentence in International Criminal Law*, (2011), at 29 *et seq.*

⁹⁰⁷ Penal Reform International (PRI), 'Eight years on...A record of Gacaca Monitoring in Rwanda,' (2010); Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, (2011), at 69 *et seq.*

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,⁹⁰⁸ low level perpetrators tried by national and Gacaca courts, are incarcerated in congested prisons, sometimes under unhealthy conditions.⁹⁰⁹ 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.⁹¹⁰ 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.⁹¹¹

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.⁹¹² 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

⁹⁰⁸ 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 also Rwanda: Sweden, France, ready to receive ICTR-Convicted Genocide Persons, 8 March 2008, <<http://allafrica.com/stories/200803080020.html>>, accessed on 13 January 2012; *The Prosecutor v. Michel Bagaragaza*, Case N° ICTR-2005-86-S, 17 November 2009, available at <<http://www.hirondellenews.com/content/view/15151/1214/>>, accessed on 20 December 2011.

⁹⁰⁹ H. Carla and J. Feistman, ‘Domestic Trials for Genocide and Crimes against Humanity,’ 9 *African Journal of International and Comparative Law*, (1997), at 870-871; V. Peskin, ‘Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme,’ 3 *Journal of International Criminal Justice*, (2005), at 950-957.

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.

⁹¹¹ M. A. Drumbl, *Atrocity, Punishment, and International Law*, (2007), at 21 *et seq*; 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 *et seq*.

⁹¹² J. W. Ntwali, ‘Ubujurire bwa Uwinkindi bwatwe utwatsi, byemezwa ko azaburanira mu Rwanda,’ *Igihe News*, 20 December 2011, at <<http://www.igihe.com/spip.php?article19269>>, accessed December 2011.

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.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.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.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.

⁹¹³ C. Mibenge, 'Concurrent Application of International, National and African Laws in Rwanda,' in R.Yepes-Enríquez and L. Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters*, (2002), at 95 *et seq*; Y.Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, (2010), at 103-110.

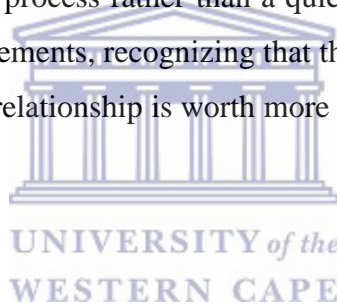
⁹¹⁴ C. Mibenge, 'Concurrent Application of International, National and African Laws in Rwanda,' in R.Yepes-Enríquez and L. Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters*, (2002), at 95 *et seq*; D. Zolo, 'Peace through Criminal Law?' 2 *Journal of International Criminal Justice*, (2004), 727-734.

⁹¹⁵ V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (2008), at 157 *et seq*; L. Barria, and S. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR' 9 *The International Journal of Human Rights*, (2006), at 349-368; see also E. Azar and C.I. Moon, *Managing Protracted Social Conflicts in the Third World: Facilitation and Development Diplomacy*, 15 *Millennium Journal of International Studies*, (1986), at 393-406.

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."⁹¹⁶ Reconciliation can also be defined as the repair and restoration of relationships and the rebuilding of trust.⁹¹⁷ According to Staub, reconciliation is more than co-existence, of formerly hostile groups living near each other, or simply interacting and working together.⁹¹⁸ Reconciliation requires that members of the two groups come to value the humanity of one another by breaking the cycle of violence.⁹¹⁹ It means coming to accept each other and to develop mutual trust.⁹²⁰

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.⁹²¹ 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



⁹¹⁶ See also M. Volf, 'Forgiveness, Reconciliation, and Justice: A Theological Contribution to a more Peaceful Social Environment,' 29 *Millennium: Journal of International Justice*, (2000), at 861 *et seq*; F. Reyntjens, 'Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda,' 110 *African Affairs*, (2011), at 1-34; Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, (2004).

⁹¹⁷ R.S Appleby, *The Ambivalence of the Sacred: Religion, Violence and Reconciliation*, (2000), at 22 *et seq.*; J. Natalya Clark, 'The ICTY and Reconciliation in Croatia: A Case Study of Vukovar,' 10 *Journal of International Criminal Justice*, (2012), at 397-422.

⁹¹⁸ E. Staub, 'Genocide and Mass Killing: Origins, Prevention, Healing and Reconciliation,' 21 *Political Psychology*, (2000), at 367-376.

⁹¹⁹ B. Ingelaere, 'The Gacaca Courts in Rwanda,' in L. Huyse and M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, (2008), at 147; 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.

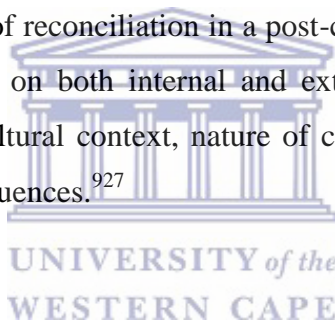
⁹²⁰ E. Staub, 'Justice, Healing, and Reconciliation: How the Peoples' Courts in Rwanda Can Promote Them,' 10 *Peace and Conflict: Journal of Peace Psychology*, (2004), at 26 *et seq*; E. Brahm, 'Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies,' 9 *International Journal of Not-for-Profit Law*, (2007), at 62-72.

⁹²¹ O. Ramsbotham, 'The Analysis of Protracted Social Conflict: Attribute To Edward Azar,' 31 *Review of International Studies*, (2005), at 109-126.

to forego the divisions in favour of unity.⁹²² It does not guarantee that things will be put back where they were, but it does mean that hostilities and violence have ceased.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.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.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,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.⁹²⁷



⁹²² D. Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace,' 20 *Third World Quarterly*, (1999), at 239-256.

⁹²³ T. Hauschildt, *Gacaca Courts and Restorative Justice in Rwanda*, University of Portsmouth, (2012), at 15 *et seq*; K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice*, (2005), at 17 *et seq*; D. Mason, 'Structures of Ethnic Conflict: Revolution Versus Secession in Rwanda And Sri Lanka,' 15 *Terrorism and Political Violence*, (2003), at 83-113.

⁹²⁴ N. Shnabel, *et al.*, 'The Role of Acceptance and Empowerment in Promoting Reconciliation from the Perspective of the Needs-Based Model,' 2 *Social Issues and Policy Reviews*, (2008), at 159-186; E. Staub *et al.*, 'Healing, Reconciliation, Forgiving and the Prevention of Violence after Genocide or Mass Killings: An Intervention and its Experimental Evaluation in Rwanda,' 24 *Journal of Social and Clinical Psychology*, (2005), at 297-334.

⁹²⁵ E. Zorbas, 'What Does Reconciliation After Genocide Mean? Public Transcripts and Hidden Transcripts in Post-Genocide Rwanda,' 11 *Journal of Genocide Research*, (2009), at 127-147; S. Stewart, *Conflict Resolution: A Foundation Guide*, (1998), at 7 *et seq*.

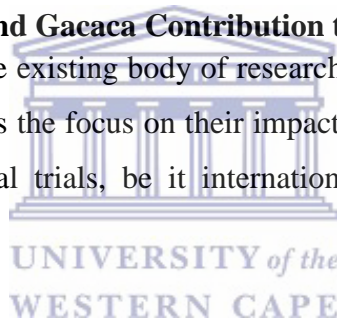
⁹²⁶ Truth and Reconciliation Commission of South Africa Report (TRC), Vol. 1, (29 October 1998), at 17, Paras 68-73, see also, Paras 46 and 113 of the TRC Report; C. Haws, 'Suffering, Hope and Forgiveness: The Ubuntu Theology of Desmond Tutu,' 62 *Scottish Journal of Theology*, (2009), at 477-489.

⁹²⁷ See E. Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence*, (2007), at 273 *et seq*; D. Backer, 'Civil Society and Transitional Justice: Possibilities, Patterns and Prospects,' 2 *Journal of Human Rights*, (2003), at 297-313; T. Paffenholz, 'Summary of Results for a Comparative Research Project: Civil Society and Peacebuilding, Geneva: Centre on Conflict, Development and Peacebuilding,' (2009); see also J. Galtung, 'Violence, Peace, and Peace Research,' 6 *Journal of Peace Research*, (1969), at 167-191.

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.⁹²⁸ 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.⁹²⁹ 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.⁹³⁰ Though there is no direct link between criminal trials, be it international, national and local courts with



⁹²⁸ See A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' 103 *African Affairs*, (2004), at 87-89; B. Ingelaere, 'Do we Understand Life after Genocide? Center and Periphery in the Construction of Knowledge In Postgenocide Rwanda,' 53 *African Studies Review*, (2010), at 49-50; K. Brounéus, 'Truth-Telling as a Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts,' 38 *Security Dialogue*, (2008), at 55-76.

⁹²⁹ A. Cassese, 'Reflections on International Criminal Justice,' 61 *The Modern Law Review*, (1998), at 1-10; J. Natalya Clark, 'The ICTY and Reconciliation in Croatia: A Case Study of Vukovar,' 10 *Journal of International Criminal Justice*, (2012), at 397-422; J. Natalya Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace,' in B. Swart, A. Zahar, and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (2011), at 55-80; M. P. Scharf and P.R Williams, 'The Functions of Justice and Anti-Justice in the Peace-Building Process,' 35 *Case Western Reserve Journal of International Law*, (2003); R.A Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia,' 27 *Human Rights Quarterly*, (2005), at 908-942.

⁹³⁰ 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 69-95; D. Webster, 'The Uneasy Relationship Between the ICTR and Gacaca,' in S. Straus and L. Waldorf (eds), *Remaking Rwanda: State Building and Human Rights after Violence*, (2011), at 184 *et seq*; L. Barria, and S. Roper, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and ICTR,' 9 *The International Journal of Human Rights*, (2006), at 349-368.

reconciliation;⁹³¹ the author examines the matter in the context of the established indicators of reconciliation in post-conflict societies.⁹³²

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.⁹³³ In so doing, they have restored the dignity of those who have been victims of the grave crimes.⁹³⁴ 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.⁹³⁵ 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.⁹³⁶ Acknowledgement of genocide acts in trials sets a moral standard, which provides a basis for restoration of relations between victims and perpetrators.⁹³⁷

⁹³¹ P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 33; E. Stover and H.M. Weinstein, 'Conclusion: A Common Objective, a Universe of Alternatives,' in E. Stover and H.M Weinstein (eds), *My Neighbor, My Enemy, Justice and Community in the Aftermath of Mass Atrocity*, (2004), at 323 *et seq.*

⁹³² P. de Grieff, 'A Normative Conception of Transitional Justice,' 50 *Politorbis*, (2010), at 20-25; O. Ramsbotham, 'The Analysis of Protracted Social Conflict: Attribute to Edward Azar,' 31 *Review of International Studies*, (2005), at 109-126; P. Wallensteen, *Understanding Conflict Resolution. War, Peace, and the Global System*, (2002), at 15.

⁹³³ L. Graybill, and K. Lanegran, 'Truth, Justice, and Reconciliation in Africa: Issues and Cases,' 8 *African Studies Quarterly*, (2004), at 1-18.

⁹³⁴ F.X. Nsanzuwera, 'The ICTR Contribution to National Reconciliation,' 3 *Journal of International Criminal Justice*, (2005), at 948 *et seq.*; M. Rettig, 'The Sovu Trials: The Impact of Genocide Justice on One Community,' in S. Straus and L. Waldorf, (eds.) *Remaking Rwanda: State Building and Human Rights After Violence*, (2011), at 194 *et seq.*; see, Development Assistance Committee, Organisation for Economic Co-ordination and Development, *Preventing Conflict and Building Peace: A Manual of Issues and Entry Points*, (2005).

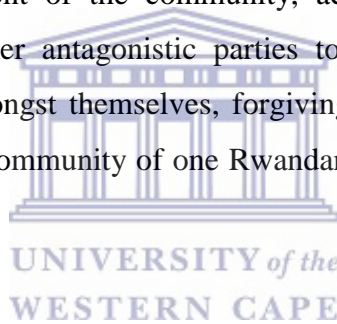
⁹³⁵ B. Ingelaere, 'Do We Understand Life After Genocide? Center and Periphery in The Construction of Knowledge in Postgenocide Rwanda,' 53 *African Studies Review*, (2010), at 49-50; H. Kelman, 'Conflict Resolution and Reconciliation: A Social Psychological Perspective on Ending Violent Conflict Between Identity Groups,' 1 *Landscapes of Violence*, (2010), at 1-9.

⁹³⁶ G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 36, MN 101; See similar experiences in South Africa, C. Haws, 'Suffering, Hope and Forgiveness: The Ubuntu Theology of Desmond Tutu,' 62 *Scottish Journal of Theology*, (2009), at 477-489; E. Zorbas, 'What Does Reconciliation after Genocide Mean? Public Transcripts and Hidden Transcripts in Post-Genocide Rwanda,' 11 *Journal of Genocide Research*, (2009), at 127.

⁹³⁷ N. Shnabel, *et al.*, 'The Role of Acceptance and Empowerment in Promoting Reconciliation from the Perspective of the Needs-Based Model,' 2 *Social Issues and Policy Reviews*, (2008), at 159-186; N. Shnabel, and A. Nadler, 'A Needs-Based Model of Reconciliation: Satisfying the Differential Emotional Needs of Victim and Perpetrator as a Key to Promoting Reconciliation,' 94 *Journal of Personality and Social Psychology*, (2008), at 116-132.

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.⁹³⁸ 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.⁹³⁹

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.⁹⁴⁰ 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.⁹⁴¹



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

⁹³⁸ Minister of Justice, Karugarama, Interview with Kimenyi, 'Rwanda Should Celebrate Gacaca legacy-Karugarama,' *The New times*, 18 June 2012.

⁹³⁹ 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.

⁹⁴⁰ Sometimes, confessions are a trade off and not genuine for reconciliation. See P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 69.

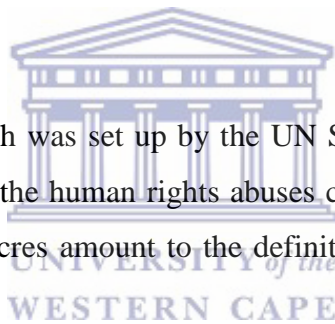
⁹⁴¹ A. De Waal, 'Group Identity, Rationality, and the State,' 11 *Critical Review*, (1997), at 279-289; K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice*, (2005), at 17 *et seq*; A. Purdeková, 'Building a Nation in Rwanda? De-Ethnicisation and its Discontents,' 8 *Studies in Ethnicity and Nationalism*, (2008), at 502-523; 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, *Ligue des Droits De La Personne Dans La Region Des Grands Lacs*, (2005), available at

<http://www.christinacacioppo.com/content/publications/EducationAndReintegrationOfFormerPrisoners.pdf> accessed February 2013.

of their community, as well as solving the problems of society together.⁹⁴² 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.⁹⁴³

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.⁹⁴⁴ 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.⁹⁴⁵

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.⁹⁴⁶ Not all ethnic massacres amount to the definition of genocide. The international



⁹⁴² 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; C. Kirkby, 'Rwanda's Gacaca Courts: A Preliminary Critique,' 50 *Journal of African Law*, (2006), at 95; Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, 'Rwanda Should Celebrate Gacaca Legacy-Karugarama,' *The New times*, on the 18, June 2012.

⁹⁴³ A. De Waal, 'Group Identity, Rationality, and the State,' 11 *Critical Review*, (1997), at 279-289; A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, (1999), at 568 *et seq.*

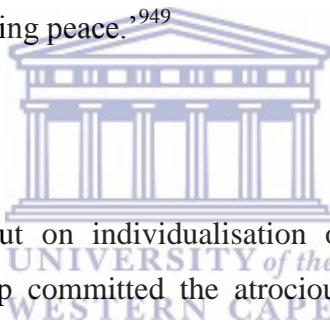
⁹⁴⁴ K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice*, (2005), at 17; O. Ramsbotham, 'The analysis of protracted social conflict: attribute to Edward Azar,' 31 *Review of International Studies*, (2005), at 109-126.

⁹⁴⁵ 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; L. Graybill, and K. Lanegran, 'Truth, Justice, and Reconciliation in Africa: Issues and Cases,' 8 *African Studies Quarterly*, (2004), at 1-18; UN Report, 'Rwanda Questions Usefulness of UN Genocide Court,' (24 July 2002); J. Pottier, *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century*, (2002), at 55.

⁹⁴⁶ L. Barria, and S. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR,' 9 *The International Journal of Human Rights*, (2006), at 349-368; M. Rettig, 'The Sovu Trials: The Impact of Genocide Justice on One Community' in S. Straus and L. Waldorf, (eds.) *Remaking Rwanda: State Building and Human Rights after Violence*, (2011), at 194 *et seq.*; B. Ingelaere, 'Do We Understand Life After Genocide? Center and Periphery in The Construction of Knowledge in Postgenocide Rwanda,' 53 *African Studies Review*, (2010), at 49-50; Robert E. Gribbin, *In the Aftermath of Genocide: The US role in Rwanda* (2005), at 280; P. Uvin, *Human Rights and Development* (2004), at 116-17.

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.⁹⁴⁷

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,⁹⁴⁸ 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.'⁹⁴⁹



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.⁹⁵⁰ 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

⁹⁴⁷ G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly*, (2011), at 331-348.

⁹⁴⁸ Cf. F.X. Nsanzuwera, 'The ICTR Contribution to National Reconciliation,' 3 *Journal of International Criminal Justice*, (2005), at 948-949.

⁹⁴⁹ A. Cassese, ICTY First Annual Report, UN Doc. IT/68, 17 August 1994, available online at <http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf> (last visited March 2013), at 16; see also L. Barria, and S. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR,' 9 *The International Journal of Human Rights*, (2006), at 349-368; J. Natalya Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace,' in B. Swart, A. Zahar, and G. Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (2011), at 55-80; J. Burnet, 'The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda,' 3 *Genocide Studies and Prevention*, (2008), at 173-193.

⁹⁵⁰ H. Cobban, 'The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law,' 27 *Boston Review*, (2002), at 4-15; M.A. Drumbl, 'Law and Atrocity: Settling Accounts in Rwanda,' 31 *Ohio Northern University Law Review*, (2005), at 65 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 36, MN 102.

perpetrator group is held collectively guilty for everything that occurred and there is a multi-layered sense of victimhood which could foster feelings of bitterness, anger or revenge.⁹⁵¹

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.⁹⁵²

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, Rwandans themselves were responsible for dealing with suspects of crimes committed in Rwanda by Rwandans against fellow Rwandans.⁹⁵³ Rather than simply punishing the perpetrator, justice was aimed more at reconciling the parties and reintegration of offenders.⁹⁵⁴ In case a suspect confessed his individual role in the crimes, he

⁹⁵¹ M. M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, (1998), at 143 *et seq*; S. Thomson, 'Re-Education for Reconciliation: Participant Observations on Ingando' in S. Straus and L. Waldorf (eds.), *Remaking Rwanda: State Building and Human Rights after Violence*, (2011), at 337 *et seq*; J. Burnet, 'The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda,' *3 Genocide Studies and Prevention*, (2008), at 173-193.

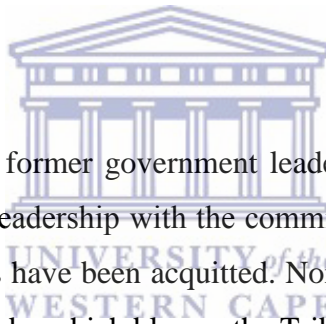
⁹⁵² See E. Daly, 'Between Punitive and Reconstructive Justice,' *34 New York University Journal of International Law and Politics*, (2002), at 388 *et seq*; M. Minow, *Between Vengeance and Forgiveness*, (1998), at 40; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 36 MN 102.

⁹⁵³ 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.

⁹⁵⁴ See P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 50, Bornkamm's Interview with *Domitilla Mukantaganzwa*, Executive Secretary of the *National Service of Gacaca Courts*, Kigali, 8 August 2007; G. Hankel, 'Justice in Transition: The Case of Rwanda,' in G. Werle (ed), *Justice in Transition-Prosecution and Amnesty in Germany and South Africa*, (2006), at 179-180; 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, *Ligue Des Droits De La Personne Dans La Region Des Grands Lacs*, (2005), available at <http://www.christinacacioppo.com/content/publications/EducationAndReintegrationOfFormerPrisoners.pdf>, accessed February 2012.

would receive a reduced sentence upon conviction.⁹⁵⁵

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.⁹⁵⁶ They had acted as commanders, architects and organizers, such that it was not certain to determine their share or individual responsibility in the crimes.⁹⁵⁷ The legally trained judges were able to establish the role of the leaders in the genocide, *inter alia* by applying the notion of superior responsibility for both military and civilian leaders.⁹⁵⁸ 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.⁹⁵⁹



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

⁹⁵⁵ Minister of Justice, Tharcisse Karugarama, interview with F. Kimenyi, 'Rwanda Should Celebrate Gacaca Legacy-Karugarama,' *The New times*, on the 18, June 2012.

⁹⁵⁶ Proving personal perpetration in crimes by high ranking officials is difficult, see L. Fernandez, 'Post-TRC Prosecutions in South Africa,' in G. Werle (ed), *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,' 8 *African Studies Quarterly*, (2004), at 1-18.

⁹⁵⁷ V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (2008), at 173 *et seq.*

⁹⁵⁸ 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.), *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,' 3 *Journal of International Criminal Justice*, (2005), at 944-949.

⁹⁵⁹ See G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 187, MN 499 *et seq.*; *Prosecutor v. Théoneste Bagosora et al.*, Case N° ICTR-98-41-T, 18 December 2008, Paras 49 *et seq.*

some instances. Victim associations have publicly denounced several acquittals of military officers and ministers as negation of the genocide and revisionism.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 realised 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.⁹⁶¹ To achieve reconciliation fully, transitional justice mechanisms need not to be separated from local realities and needs,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

⁹⁶⁰ E. Kwibuka, 'Rwandan Rally against ICTR Acquittals,' *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,' *The New Times*, 29 July 2011; see as well, E. Kayiranga, Kurekura Ahorugeze Akidegembya Ni Ugupfobya Jenoside – IBUKA, available at <<http://www.izuba.org.rw/i-i-583-a-24381.izuba>>, accessed September 2012.

⁹⁶¹ W. Mwangi, 'The International Criminal Tribunal for Rwanda: Reconciling the Acquitted,' in C.L. Sriram and S. Pillay (eds.), *Peace Versus Justice? The Dilemma of Transitional Justice in Africa*, (2009), at 262; A. De Waal, *Group Identity, Rationality, and the State*, 11 *Critical Review*, (1997), at 279-289.

⁹⁶² N. Shnabel, *et al.*, 'The Role of Acceptance and Empowerment in promoting Reconciliation from the Perspective of the Needs-Based Model,' 2 *Social Issues and Policy Reviews*, (2008), at 159-186; N. Shnabel, and A. Nadler, 'A Needs-Based Model of Reconciliation: Satisfying the Differential Emotional Needs of Victim and Perpetrator as a Key to Promoting Reconciliation,' 94 *Journal of Personality and Social Psychology*, (2008), at 116-132.

ICTR justice is flawed, which may be detrimental to reconciliation.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.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.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 dialogic truth as well as healing and restorative truth.⁹⁶⁶ For instance, formal courts are better geared to establish forensic truth than narrative or healing truth,

⁹⁶³ M. Rettig, 'The Sovu Trials: The Impact of Genocide Justice on One Community,' in S. Straus and L. Waldorf (eds.), *Remaking Rwanda: State Building and Human Rights after Violence*, (2011), at 206 *et seq*; N. Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda*, (2004), at 12 *et seq*; L. Graybill, and K. Lanegran, 'Truth, Justice, and Reconciliation in Africa: Issues and Cases,' 8 *African Studies Quarterly*, (2004), at 1-18.

⁹⁶⁴ See Chapter Three of this Thesis under Study.

⁹⁶⁵ F. Reyntjens, 'Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda,' 110 *African Affairs*, (2011), at 1-34; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 36, MN 101-102.

⁹⁶⁶ For a comprehensive discussion on the notions of truth see, Truth and Reconciliation Commission of South Africa Report, Vol. 1, (29 October 1998), at 110, Paras 29 *et seq*; C. Haws, 'Suffering, Hope and Forgiveness: The Ubuntu Theology of Desmond Tutu,' 62 *Scottish Journal of Theology*, (2009), at 477-489; P. Hazan, *Judging War, Judging History: Behind Truth and Reconciliation*, (2010), at 157 *et seq*; see also K. Brounéus, 'Truth-Telling as a Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts,' 38 *Security Dialogue*, (2008), at 55-76.

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

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.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.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.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.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

⁹⁶⁷ J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 918 *et seq*; J. Burnet, 'The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda,' 3 *Genocide Studies and Prevention*, (2008), at 173-193.

⁹⁶⁸ P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, (2010), at 22 *et seq*;

⁹⁶⁹ For a comprehensive discussion on the narrative truth, see Report of the Truth and Reconciliation Commission of South Africa, Vol. 1, (29 October 1998), at 112 *et seq*; N. Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda*, (2004), at 12 *et seq*.

⁹⁷⁰ See similar experiences in South Africa, C. Haws, 'Suffering, Hope and Forgiveness: The Ubuntu Theology of Desmond Tutu,' 62 *Scottish Journal of Theology*, (2009), at 477-489.

⁹⁷¹ A. Corey and S. F. Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda,' 103 *African Affairs*, (2004), at 87; P. Gready, 'You're Either with Us or against Us: Civil Society and Policy Making in Post-Genocide Rwanda,' 109 *African Affairs*, (2010), at 637-657.

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

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.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.⁹⁷⁵

⁹⁷² U. Behrendt, 'The prosecution of the Rwandan Genocide,' in G. Werle (ed), *Justice in Transition-Prosecution and Amnesty in Germany and South Africa*, (2006), at 230-231; G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly* (2011), at 331-348; M. Rettig, 'Gacaca: Truth, Justice and Reconciliation in Post Conflict Rwanda?' 51 *African Studies Review* (2008), at 25 *et seq.*

⁹⁷³ *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; see also National Unity and Reconciliation Commission, (2012). *Reconciliation tool*, available at <<http://www.nurc.gov.rw/reconciliation-tools/itorero.html>>, accessed February 2013; Penal Reform International (2010), *Eight years on...A Record of Gacaca Monitoring in Rwanda* at 30 *et seq.*

⁹⁷⁴ Report of the Truth and Reconciliation Commission of South Africa, Vol.1, (29 October 1998), at 111; P. Uvin, 'Difficult Choices in the New Post-Conflict Agenda: The International Community in Rwanda after the Genocide,' 22 *Third World Quarterly*, (2001), at 177 *et seq.*

⁹⁷⁵ See J. Natalya Clark, 'Limits of Retributive Justice,' 10 *Journal of international Criminal Justice*, (2009), at 483; V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State*

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.⁹⁷⁶ 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.⁹⁷⁷ 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.⁹⁷⁸ Ultimately, this provides a clear picture of facts which

Cooperation, (2008), at 167; E. Stover and H.M. Weinstein, 'Introduction: Conflict, Justice and Reclamation,' in E. Stover and H.M Weinstein (eds), *My Neighbor, My Enemy, Justice and Community in the Aftermath of Mass Atrocity*, (2004), 1-26, at 4.

⁹⁷⁶ P. Gready, 'You're Either with Us or against Us: Civil Society and Policy Making in Post-Genocide Rwanda,' 109 *African Affairs*, (2010), at 637-657; G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly*, (2011), at 331-348.

⁹⁷⁷ *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.

⁹⁷⁸ F. Gaynor, 'Uneasy Partners and Evidence, Truth and History in International Trials,' 10 *Journal of International Criminal Justice*, (2012), at 15 *et seq*; G. Werle, *Principles of International Criminal Law*, 2nd edn, (2009), at 36,

are widely not disputed as regards what happened, to whom, where, when and how, and who was involved in the conflict.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.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.⁹⁸¹ Trials conducted by international or national courts establish an indisputable, historical record of events, with legally binding consequences.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.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

MN 101; F. Reyntjens, 'Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda,' 110 *African Affairs*, (2011), at 1–34.

⁹⁷⁹ These aims can also be achieved by Truth and Reconciliation commissions, see the Truth and Reconciliation Commission of South Africa Report, Vol. 1, (29 October 1998), at 111; see also G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly*, (2011), at 331-348; M. Rettig, 'Gacaca: Truth, Justice and Reconciliation in Post Conflict Rwanda?' 51 *African Studies Review*, (2008), at 25 *et seq.*

⁹⁸⁰ P. Gready, 'You're Either with Us or against Us: Civil Society and Policy Making in Post-Genocide Rwanda,' 109 *African Affairs*, (2010), at 637–657.

⁹⁸¹ See P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 91 and 26-27; Truth and Reconciliation Commission of South Africa Report, Vol. 1, (29 October 1998), at 112, Para 37.

⁹⁸² 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 88 *et seq.*

⁹⁸³ 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; S. Warshauer Freedman *et al.*, 'Teaching History in Rwanda' in S. Straus and L. Waldorf, (eds.) *Remaking Rwanda: State Building and Human Rights after violence*, (2011), at 297 *et seq.*

process.⁹⁸⁴ 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.⁹⁸⁵ 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.⁹⁸⁶

Therefore, this research does not allow the conclusion that criminal trials can never facilitate reconciliation,⁹⁸⁷ 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.⁹⁸⁸ Ultimately, a coordinated relationship between the various established measures forms an important basis for reconciliation.



⁹⁸⁴ A. Cassese, 'Reflections on International Criminal Justice,' 61 *The Modern Law Review*, (1998), at 1-10; L.A. Barria and S.D. Roper, 'How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR,' 9 *The International Journal of Human Rights*, (2005), at 364; J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 915 *et seq.*; L.E. Fletcher and H.M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,' 24 *Human Rights Quarterly*, (2002), at 585 *et seq.*; B. Swart, 'Damaska and the Faces of International Criminal Justice,' 6 *Journal of International Criminal Justice*, (2008), at 100 *et seq.*

⁹⁸⁵ G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly*, (2011), at 331-348; A. Richters, C. Dekker, and K. de Jonge, 'Reconciliation in the Aftermath of Violent Conflict in Rwanda,' 3 *Intervention*, (2005), at 207.

⁹⁸⁶ See J. Natalya Clark, 'Limits of Retributive Justice,' 10 *Journal of international Criminal Justice*, (2009), at 463; C. Tomuschat, 'National Prosecutions, Truth Commissions and International Criminal Justice,' in G. Werle (ed), *Justice in Transition-Prosecution and Amnesty in Germany and South Africa*, (2006), at 160 *et seq.*

⁹⁸⁷ See A. Richters, C. Dekker, and K. de Jonge, 'Reconciliation in the Aftermath of Violent Conflict in Rwanda,' 3 *Intervention*, (2005), at 207 *et seq.*; G. Mukherjee, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda,' 28 *Conflict Resolution Quarterly*, (2011), at 331-348.

⁹⁸⁸ J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 918 *et seq.*; M. Rettig, 'The Sovu Trials: The Impact of Genocide Justice on One Community,' in S. Straus and L. Waldorf, (eds.) *Remaking Rwanda: State Building and Human Rights after Violence*, (2011), at 206; M. Arenhövel, 'Democratization and Transitional Justice,' 15 *Democratization* (2008), at 577-580.

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.⁹⁸⁹ 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

⁹⁸⁹ Gérard Prunier, 'Rwanda: The Social, Political And Economic Situation in June 1997' (Report, Writenet (UK), July 1997).

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.⁹⁹⁰ 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.

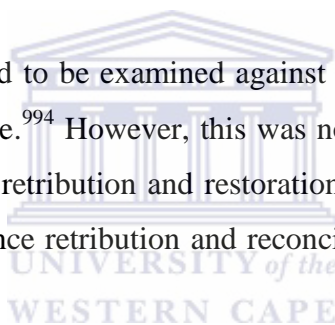
As a solution, the study suggests a comprehensive legal framework as the starting point towards a harmonised and coordinated relationship. Though the ICTR is closing down soon, its existence provides lessons that interactions between international and national courts in post-conflict societies should 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 foregoing 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.⁹⁹¹ 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.⁹⁹² 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.⁹⁹³

The ICTR and national courts need to be examined against the backdrop of criminal law since they are purely retributive in nature.⁹⁹⁴ However, this was not necessarily the case with Gacaca courts which had a dual nature of retribution and restoration.⁹⁹⁵ It was practically not easy for the semi-restorative courts to balance retribution and reconciliation goals while complying with



⁹⁹¹ Y.Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, (2010), at 103-110; C. Mibenge, 'Concurrent Application of International, National and African Laws in Rwanda,' in R.Yepes-Enríquez and L. Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters*, (2002), at 95 *et seq.*

⁹⁹² C. Mibenge, 'Concurrent Application of International, National and African Laws in Rwanda,' in R.Yepes-Enríquez and L. Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters*, (2002), at 95 *et seq.*; D. Zolo, 'Peace through Criminal Law?' 2 *Journal of International Criminal Justice*, (2004), at 727-734.

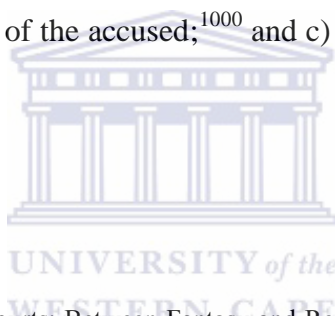
⁹⁹³ A. Ashworth, *Principles of Criminal Law*, 5th edn, (2006), at 68 *et seq.*; H. Carla and J. Feistman, 'Domestic Trials for Genocide and Crimes against Humanity,' 9 *African Journal of International and Comparative Law*, (1997), at 870-871.

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.

⁹⁹⁵ J. Raper, 'The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide,' 5 *Pepperdine Dispute Resolution Law Journal*, (2005), at 36; M.A. Drumbl, 'Law and Atrocity: Settling Accounts in Rwanda,' 31 *Ohio Northern University Law Review*, (2005), at 65 *et seq.*; J. Sarkin, 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda,' 21 *Human Rights Quarterly*, (1999), at 767.

the international fair trial standards.⁹⁹⁶ Nevertheless, as put by Bornkamm, the fact that customary traditional institutions mete out certain formalities does not necessarily render their decisions unfair.⁹⁹⁷ 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.⁹⁹⁸

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;⁹⁹⁹ 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;¹⁰⁰⁰ and c) Gacaca courts would have not been



⁹⁹⁶ For details, see, J. Fierens, 'Gacaca Courts: Between Fantasy and Reality,' 3 *Journal of International Criminal Justice*, (2005), at 896 *et seq*; see J. D. Mujuzi, 'The Prospect of Rehabilitation as a 'Substantial and Compelling' Circumstance to avoid imposing Life Imprisonment in South Africa: A Comment on S v Nkomo, 21 *South African Journal of Criminal Justice*, (2008), at 1-21; W.A. Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 879 *et seq*.

⁹⁹⁷ P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, (2012), at 104; see also B. Oomen, 'Rwanda's Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law,' in R. Haveman and O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, (2006), at 161 *et seq*; A. Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality,' 32 *Law and Social Inquiry*, (2007), at 467 *et seq*.

⁹⁹⁸ J.B. Fink, 'Deontological Retributivism and the Legal Practice of International Jurisprudence,' 49 *Journal of African Law*, (2005), at 129 *et seq*; P. Gready, *The Era of Transitional Justice, The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*, (2011), at 2; M.R. Amstutz, 'Is Reconciliation Possible After Genocide?: The Case of Rwanda,' 48 *The Journal of Church and State*, (2006), at 556; P. Harrell, *Rwanda's Gamble: Gacaca and a New Model of Transitional Justice*, (2003), at 85 *et seq*; O. Minogue, 'Peace vs. Justice: The Utility of Amnesties,' 29 *Criminal Justice Ethics*, (2010), at 306-314; A. Tiemessen, 'After Arusha: Gacaca Justice in Post-Genocide Rwanda,' 8 *African Studies Quarterly*, (2004), at 60 *et seq*.

⁹⁹⁹ M.A. Drumbl, 'Rule of Law and Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials,' 29 *Columbia Human Rights Law Review*, (1998); V. Morris and M. P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 311.

¹⁰⁰⁰ W.A Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice* (2005), at 879-895.

able to deal with the complex genocide matters of high level perpetrators single-handedly, mainly due to the lack of legal training.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.¹⁰⁰² However, their respective usefulness would have increased if they had a well-organised and coordinated relationship.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.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.

¹⁰⁰¹ A matter comprising of 54 defendants in one case would definitely be difficult for Gacaca lay judges. And notions like Joint criminal responsibility in the ICTR would be impossible for the lay judges to manage; For a critical assessment of Gacaca, see W.A Schabas, 'Genocide Trials and Gacaca Courts,' 3 *Journal of International Criminal Justice*, (2005), at 879-895; L.Waldorf, 'Rwanda's Failing Experiment in Restorative Justice,' in D. Sullivan and L. Tifft (eds.), *Handbook of Restorative Justice: A Global Perspective*, (2006), at 422 *et seq.*

¹⁰⁰² Y.Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, (2010), at 103 *et seq.*; D. Magasm in W. Kaleck *et al.* (eds), *International Prosecution of Human Rights*, (2006), at 159 *et seq.*; A. Smeulers and L. Hoex, 'Studying the Micro Dynamics of the Rwandan Genocide,' 50 *British Journal of Criminology*, (2010), at 435.

¹⁰⁰³ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 405 *et seq.*; H. Fischer, 'Concurrent Jurisdiction: Developments and Issues,' in Rodrigo Yepes-Enríquez and Lisa Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters*, (2002), at 56 *et seq.*; U. P. Behrendt, 'Dealing with the 1994 Genocide: A Comparative Analysis of Usefulness of the ICTR and Rwanda's National Prosecutions,' *University of Western Cape*, Thesis, (2001), at 1-3.

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.¹⁰⁰⁵ 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.¹⁰⁰⁶ 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.

¹⁰⁰⁵ F. Lattanzi, 'Concurrent Jurisdictions between Primacy and Complementarity,' in R. Belleli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review*, (2010), at 189; C. Mibenge, 'Concurrent Application of International, National and African Laws in Rwanda,' in R. Yepes-Enríquez and L. Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters*, (2002), at 95 *et seq*; V. Morris and M. P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998), at 312 *et seq*.

¹⁰⁰⁶ Art. 17 of the ICC Statute; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (2007), at 412 *et seq*; see also M.M. Elzeidy, 'From Primacy to Complementarity and Backwards: (Re-) Visiting Rule 11 *bis* of the *Ad hoc* Tribunals,' *57 International and Comparative Law Quarterly*, (2008), at 403-415; M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, (2008), at 140 *et seq*; V. Morris and M. P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, (1998) at 312 *et seq*.

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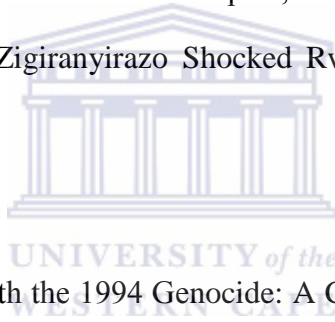
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