# Chapter 7
# Domestic Prosecution of International Crimes: The Case of Rwanda

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## Contents



The views expressed in this chapter are not necessarily those of the Supreme Court of Rwanda.

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## 7.1 General Introduction

The need to combat impunity for gross violations of human rights in breach of national and international laws has led to the pursuit of different approaches to the prosecution of crimes under international law involving international courts and tribunals, hybrid courts and national courts. At the same time, as such violations are committed during widespread conflict, there is often the need for national reconciliation, the pursuit of strategies for national unity and for reconstruction and development; hence the resort to truth commissions or certain neo-traditional justice initiatives.

There have been debates as to which approach is best suited to the African context; whether to go for international courts or domestic jurisdictions. In many situations, however, the two are not mutually exclusive alternatives. Domestic mechanisms of justice should be the default form of justice in any situation. Only where the concerned state is unable or unwilling to prosecute, should an international or regional court or tribunal be set up to supplement domestic justice systems. This is indeed the position taken in the Statute of the International Criminal Court on the basis of complementarity.[1] This may be because the country emerging from conflict does not have the capacity in terms of human and material resources to conduct credible prosecutions; it may be unwilling to prosecute because those who perpetrated the atrocities are too powerful to handle or the perpetrators may have fled the country and are out of reach of the national authorities. Moreover, for practical reasons, domestic jurisdictions are better suited to prosecute where large numbers of perpetrators are involved. They are able to prosecute more easily, cheaply and quickly than international courts and tribunals could.[2] In some situations, post-conflict regimes have opted for amnesty for those who committed crimes in return for truth about how and why the crimes were committed and the fate of the victims. Truth in such cases is seen as necessary for healing and reconciliation. In some cases amnesty is a result of a compromise reached during negotiations for regime change whereby the outgoing leaders make their departure conditional on being granted immunity from prosecution.

In Rwanda, given the decades of impunity for gross violations of human rights, post-genocide Rwanda as well as the international community opted for prosecutions of those who had committed crimes during the genocide in order to bring justice to victims and to put an end to the culture of impunity. However, as will be shown below, the need for reconciliation and nation-building was not ignored.

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[1] The Preamble to the Rome Statute recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". Article 17 of the Statute further states that a case is inadmissible where "[t]he case is being investigated or prosecuted by a State, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution".

[2] Werle 2009, p. 82 (marg no 229).

The administration of justice in post-genocide Rwanda has been a combination of judicial systems with the dual purpose of rendering justice for victims and combating impunity by punishing perpetrators, while at the same time incorporating mechanisms for forging healing, reconciliation, national unity and reconstruction. Prosecutions were carried out at the international level by the International Tribunal for Rwanda (ICTR), by Rwandan conventional courts and by neo-traditional Gacaca courts.

The ICTR was created by the United Nations Security Council in November 1994, a few months after the Rwandan genocide. It was set up to prosecute persons responsible for genocide and other serious violations of human rights under international humanitarian law. It was a stated objective of the United Nations that the prosecutions would be part of the effort of ensuring that impunity for perpetrators of genocide and crimes against humanity would no longer be tolerated. Importantly, it was also stated that the Tribunal was to contribute to the process of national reconciliation and the restoration of peace in Rwanda and the Great Lakes Region.

How has the ICTR performed in these two aspects? There is no doubt that the ICTR has played an important role in the area of international justice and in demonstrating that impunity should not be tolerated. First, the ICTR has tried, convicted and punished a number of high profile leaders of the genocide, including a former prime minister, other high government officials, military leaders and even religious leaders, for their involvement in the genocide. The exposure of the evidence against these *génocidaires* has drawn the world's attention to the brutality of the crimes committed. The prosecutions have also demonstrated that, however powerful, the long arm of the law catches up with one wherever one hides, thus significantly contributing to the war against impunity and in favor of accountability for serious violations of human rights and humanitarian law.

Secondly, through its detailed and well-researched judgments and interlocutory decisions, the ICTR has built up a body of jurisprudence on international criminal law relating to the crimes of genocide and crimes against humanity, as well as defining the elements of the crimes hitherto not well understood. A notable case is that of *Jean Paul Akayesu* in which the ICTR decided that rape can constitute an act of genocide.[3] Another ground-breaking case was the so-called *Media case* in which both the Trial Chamber and the Appeals Chamber laid out principles relating to hate speech and direct and public incitement to commit genocide, and spelled out the differences between the two.[4] The jurisprudence will assist other

[3] Ibid., p. 75 (marg no 227–229 and sources quoted therein).

[4] *Prosecutor v Nahimana*, *Barayagwiza and Ngeze*, Judgment and Sentence of 3 December 2003, Trial Chamber I and *Prosecutor v Nahimana*, *Barayagwiza and Ngeze*, Judgment of 28 November 2007, Appeals Chamber. In this case the defendants were accused of genocide and incitement to commit genocide based on their role in the broadcast and publication of hate propaganda against the Tutsi before and during the genocide. *Ferdinand Nahimana* was the founder and ideologist of Radio Television Libre de Mille Collines, *Jean Bosco Barayagwiza* was its Board member and founder of the extremist Hutu political party, Coalition for the Defence of the Republic, and *Hassan Ngeze* was the Editor-in Chief of the extremist newspaper Kangura.

courts, as well as researchers and students who are concerned with genocide and crimes against humanity.

Thirdly, in accordance with its mandate of assisting the domestic justice system to improve its capacity to deliver justice fairly and efficiently, the ICTR has assisted in the capacity building of the Rwandan judiciary and the prosecution service through workshops in Rwanda and study visits to the Tribunal in Arusha. The ICTR also has important outreach programmes in Rwanda, such as the documentation centers established around the country.

These are all important achievements for which the ICTR must be applauded. However, as far as contributing to peace building and national reconciliation in Rwanda and the Great Lakes region, which was also part of its mandate, is concerned, the impact of the ICTR is not so clear. International courts and tribunals, including the ICTR, have the major limitation of prosecuting those in leadership positions. Only a tiny fraction of those who have committed crimes under international law are dealt with by these tribunals. In the case of the ICTR, it has tried only 75 defendants in nearly 19 years, at a huge financial cost. The vast majority of those cases have involved some of the top leadership. The vast majority of suspects, however, had to be tried in the domestic courts.

Another issue is that international courts are seen as too remote and foreign to the communities concerned. The process happens far away from the victims and survivors of the crimes committed. There is not sufficient publicity of the proceedings of these tribunals reaching those most closely concerned—namely the victims and relatives of victims. Because of the distance, expense, visa requirements and other logistics involved in travelling to another country for a trial, only a handful could travel to Tanzania to attend the ICTR trials. There is no opportunity for victims to come face to face with the perpetrators and there is no chance to ask for forgiveness and reconcile between perpetrators and victims/survivors. Of those who have been tried by the ICTR, only nine have pleaded guilty and even in those cases it is not clear that the perpetrators had acknowledged of wrongdoing. Many continue to deny that genocide ever took place in Rwanda even after the Tribunal took judicial notice of the fact that genocide of the Tutsi had taken place in Rwanda in 1994. There is no expression of remorse by those convicted of genocide or crimes against humanity. There is therefore little chance that these proceedings can, in a significant way, contribute to reconciliation and national unity in Rwanda, except perhaps in the sense that the process has made it difficult for such former leaders to engage in politics and destabilize the recovery of Rwanda and nation-building efforts.

Given the limited mandate of the ICTR, it was always clear that it would not handle the bulk of the genocide perpetrators. However, even within the limited mandate, the ICTR was not able to prosecute all the masterminds, planners and organizers of the genocide. Many genocide fugitives are still at large, walking the streets of world capitals and are in some African countries. The hope to see them face justice was diminished by the United Nations Security Council's decision to close the ICTR in addition to the lack of political will of some host states to exercise their international obligations to either exercise their universal jurisdiction over the genocide fugitives or extradite them to Rwanda for prosecution. In

Rwanda, in order to prosecute any remaining genocide suspects that may be arrested and those that are transferred from the ICTR or from other countries, provision has been made for the former to be tried by the Intermediate Courts, while the latter are tried by a Special Chamber of the High Court dealing with international crimes. The rest of this chapter analyses the merits, challenges and the way forward of the domestic prosecution of the crime of genocide and crimes against humanity before Rwandan courts.

## 7.2 Prosecutions in Rwandan Specialized Chambers

After the genocide, there was a determination that those who had committed the horrendous crimes should not again enjoy impunity but should be brought to account for their actions. Hundreds of thousands of suspects were detained and awaited trial. Yet since the ICTR was only mandated to try the lead-planners and organizers of the genocide, the bulk of suspects had to be dealt with domestically. An attempt was made by setting up specialized chambers to prosecute the suspects despite the meagre human and material resources available. The shortage was not mitigated by the fact that prior to the genocide the judiciary was neglected as a public institution and not properly staffed with qualified judicial officers. As *William Schabas* has said: "The Rwanda judicial system had never been more than a corrupt caricature of justice […]."[5]

When the genocide against the Tutsi occurred in 1994, Rwanda had not yet enacted legislation giving effect to the Genocide Convention[6] that it had ratified two decades before.[7] The Genocide Convention is one of the international treaties that cannot effectively be applied without additional legislation. It is not a pure self-executing treaty. Article VI provides that the crime of genocide shall be tried before an international criminal court or by domestic courts of the country where the crime was perpetrated, although the provision is now interpreted as giving a subsidiary jurisdiction to countries with no territorial or personal jurisdiction.[8] The Convention does not prescribe punishments for acts of genocide it describes in its Articles II and III either. It leaves the obligation to States to take measures that will ensure its effective enforcement within the internal legal order.

Article V of the Genocide Convention calls on States "to undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the […] convention and, in particular, to provide

[5] Schabas 2008, p. 212.

[6] The Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948 (entered into force 12 January 1951), 78 UNTS 277.

[7] Ratified by the Presidential Decree No 8/75 of 12 February 1975, Journal Officiel, 1975, at p. 230.

[8] Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide in Chile, *Augusto Pinochet* of 5 November 1998.

effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III". For diverse reasons that may be political, constitutional, legal or technical, countries, including Rwanda, evaded for a long time their obligations to domesticate the Genocide Convention. The then Government of Rwanda did not forget to pass legislation enforcing the Genocide Convention. It rather concluded that there was no need to legislate crimes under the Genocide Convention. *Nicodème Ruhashyankiko*, a Rwandan scholar who was in the 1970s the United Nations Special Rapporteur on the Prevention and Punishment of the Crime of Genocide, argued that there was no need for such legislation as the requirement of Article V of the Genocide Convention was implicit in the Convention "in accordance with a well-established practice in the field of conventions concerning international penal law"[9] and that "ordinary laws in force are sufficient to prevent and punish genocide".[10]

The determination not to pass a law on genocide became obvious with the enactment of the Penal Code in 1977. The Code that was passed only two years after the ratification of the Genocide Convention made no reference whatsoever to the word genocide. The Government was aware that the Convention was not a pure self-executing treaty. Contrary to *Ruhashyankiko*'s view, some of its provisions cannot be enforced without domestic legislation. By not enacting an enforcing legislation and avoiding reference to the word "genocide" in the Penal Code, *Habyarimana*'s regime maintained the politics of impunity that had characterized Rwanda since 1959, and this deliberately created a legal gap that left Rwandan courts with no appropriate piece of legislation to try and punish genocide perpetrators. This was in addition to the problem of staff shortage, institutional obstacles and logistical problems.

Experts advised the Rwandan government to rely on international law in considering that the 1946 Resolution of the United Nations' General Assembly[11] called for states to directly apply international norms that resulted from the Nuremberg principles. The formula would have resulted in what *Daniel de Beer* calls "dual indictment" where the criminal act would constitute a breach of international law and a violation of the 1977 Penal Code, which at the same time provided for punishments for some of the crimes.[12] Although the argument appeared seductive, the government cautiously chose to address the issue of the legal gap by enacting the Organic Law no 08/96 of 30 August 1996[13] which, in addition to the principle of dual indictment, introduced other innovations that

[9] UN Doc E/CN.4/Sub.2/L/597 (1974), para 11.

[10] UN Doc E/CN.4/Sub.2/L/623, (1975), para 39.

[11] UN Doc, Res/GA 95 (I), 11 December 1946.

[12] De Beer 1997, p. 19.

[13] Organic Law No 08/96 of 30 August 1996 on the organisation of prosecution for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, in Official Gazette No 17 of 1 September 1996.

would help Rwandan courts to bring to justice genocide suspects that numbered approximately 100,000 in December 1996. The number of suspects had increased to 125,000 in 2000.[14]

## 7.3 The Organic Law of 30 August 1996: Rationale, Merits and Difficulties

The Rwandan lawmaker enacted this law as the first step in domesticating the Genocide Convention. The purpose of the law was to incorporate international customary law into domestic law and enable domestic courts to apply international norms. It was a situation-inspired legislation, enacted to provide responses to a particular situation.

### *7.3.1 Background and Rationale of the Organic Law of 30 August 1996*

The genocide against the Tutsi had put the entire world before an atypical situation. Its complexity and immensity derive from the number of victims, the scale of mass participation, the choice of weapons and the process of executing the crime. In only three months more than one million people were cruelly killed by a population gone mad, including friends, relatives and neighbors.[15] The country had become a society of hunters and hunted. A correct and restrictive application of the Rwandan Penal Code would have found that there was no bystander. Those who did not kill could still be prosecuted for direct incitement, assault, rape, theft or destruction of property, or for refusing to assist victims or abstaining from assisting them.

Judges and prosecutors who had not been killed had fled the country. Only 37 % of the judges were available in November 1994. There were altogether 14 prosecutors for the entire country, compared to 158 before the genocide.[16] The newly established Bar of 1997[17] consisted of only 35 lawyers and 18 interns. All these made the prosecution of the crime of genocide against the Tutsi a defying process.

In 1995, Rwandan leaders invited international experts, researchers and activists to reflect on strategies that would enable Rwanda to try genocide suspects and simultaneously constitute mechanisms for unity and reconciliation. The

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[14] UN DOC A/55/269, p. 26, para 102.

[15] Ministère de l'Administration Locale, du Développement Communautaire et des Affaires Sociales, Dénombrement des Victimes du Génocide, Rapport final, Kigali, 2004, p. 21.

[16] Réseau des Citoyens, Extrait du Rapport, Aperçu du Système judiciaire au Rwanda, Décembre 1995.

[17] Law No 03/97 of 19 March 1997 establishing the Kigali Bar Association.

colloquium on *La Lutte Contre l'Impunité: Dialogue pour une Réconciliation Nationale* of 31 October–3 November 1995[18] recommended the establishment of special chambers in charge of genocide cases within ordinary courts and tribunals, the categorization of offenders based on the seriousness of their involvement in the crime of genocide, the introduction of a procedure of guilty plea and confession in the criminal procedure as a mitigating circumstance to speed up the trials and the exclusion of capital punishment for genocide convicts other than those from the first category of masterminds, planners and organizers.

These strategies were included in the Organic Law of 30 August 1996. Its Preamble stresses that the law is aimed at eradicating the culture of impunity forever as a prerequisite for unity and national reconciliation.

By providing for the prosecution and adjudication of the perpetrators and accomplices of the crimes of genocide and crimes against humanity, the Organic Law of 30 August 1996 was intended to halt cycles of violence and the impunity of perpetrators that accompanied them and to satisfy the need for justice. It needs to be stated here that after the 1994 genocide against the Tutsi, any legislative initiative leading to the creation of new crimes or the provision for new penalties for existing crimes could not avoid the challenge posed by the principle of non-retrospectivity of criminal law. This principle is provided for in the Constitution and in the International Covenant on Civil and Political Rights that Rwanda ratified in 1975.[19]

However, that was not the only concern presenting itself to the lawmaker for a solution. The new legislation was expected to domesticate the international law of genocide and crimes against humanity, to foster truth through confessions, to distinguish criminal responsibilities of offenders, to differentiate particular responsibilities of masterminds, to take into account the rights of victims and to lay the basis for the process of unity and national reconciliation. The legislator was faced with an arduous task. The result was a complex piece of legislation, but which had the chance of providing answers to all these concerns.

### *7.3.2 Dual Incrimination*

The law addresses first the issue of domestication of international norms criminalizing genocide and crimes against humanity. The Genocide Convention had been duly ratified and its ratifying instrument published in the Official Gazette.[20] Rwanda was then a monist state. Monism postulates that international law and

[18] République Rwandaise, Bureau du Président, Rapport du Colloque International sur La Lutte Contre l'Impunité: Dialogue pour une Réconciliation Nationale, Kigali, Décembre 1995.

[19] Article 12 of the Constitution of the Republic of Rwanda of 10 June 1991, Journal Officiel, 1991, p. 615 and Article 15.1 of the International Covenant on Civil and Political Rights Ratified by the Decree Law No 8/75 of 12 February 1975.

[20] Ratified by the Presidential Decree No 08/75 of 12 February 1975, Journal Officiel, 1975, p. 230.

national law constitute one single legal system.[21] For a monist state, the procedure was sufficient to empower Rwandan judges to rely on the Convention directly.

However, not all provisions of the Genocide Convention could be directly invoked before national courts without the support of domestic legislation. *William Schabas* reminds that "the Genocide Convention provisions cannot easily be applied within domestic law without some additional legislation and are therefore, in a general sense, not self-executing".[22] Indeed, as noted earlier, there is an obligation in Article V of the Genocide Convention to enact domestic legislation providing for effective penalties.

Before the enactment of the Organic Law of 30 August 1996, the existing legal gap had left Rwanda with the simple option of relying on the Penal Code. Yet the Code contained no reference to genocide. Prosecuting the crime of genocide on the basis of the Penal Code would mean that perpetrators of genocide could only be charged with murder, rape, assault, destruction of property etc. as domestic crimes. Most of these crimes were subjected to ten years' prescription. Article 111 of the Penal Code read as follow: "L'action publique résultat d'une infraction se prescrit: 1° par dix années révolues pour les crimes […]."[23] In other words, prosecutions would have become illegal by 2004 for the majority of offenders.

One of the important innovations of the Organic Law of 30 August 1996 was the introduction of the principle of dual incrimination. The first stage of this principle consisted in checking whether a specific offence in the Penal Code was perpetrated by the suspect. The second stage was for the judge to verify whether the offence constitutes simultaneously a crime of genocide or a crime against humanity. The approach allowed a court to rely at the same time on the domestic law and on the Genocide Convention, the four Geneva Conventions of 1949 and their Additional Protocols and on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968.[24]

In practice, applying the principle of dual incrimination proved not to be an easy task for Rwandan judges. In criminal matters, judges were used to finding offences and their punishments in a single book, namely the Penal Code. Moreover, the majority of the judicial personnel in charge of implementing the Organic Law of 30 August 1996 were not professional lawyers. They had undergone accelerated training sessions on substantive and procedural laws in order to deal with the unprecedented situation that the country faced.

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[21] Ferdinandusse 2005, p. 137.

[22] Schabas 2009, p. 405.

[23] "A criminal action shall lapse after: 1° a period of 10 years for felonies." Articles 111 of the Decree Law No 21/77 of 18 August 1977 instituting the Penal Code, Official Gazette, No 13*bis*, 1978, p. 1.

[24] See the Preamble of the Organic Law No 08/96 of 30 August 1996 on the organization of prosecution for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, in Official Gazette No 17 of 1 September 1996. De Beer 1997, pp. 31–32.

There are judges who reached sound findings by effectively referring to both international criminal law and domestic criminal law. For instance, in the case of *Prosecutor v. Banzi Wellars and Others*, the Court recalled that each of the 54 co-accused had breached international law. In the findings, the judges carefully based their ruling on international law and on the above-mentioned Organic Law.[25] There are judges who based their findings on both international law and the Penal Code. In the case of *Prosecutor v. Ukezimpfura Jean and Others*,[26] the court first listed international law, including the Statute of the ICTR, before listing domestic sources. In the case *Prosecutor v. Mvumbahe Denys and Others*,[27] the Court relied first on the Constitution and other relevant domestic provisions before referring to the Genocide Convention of 1948.

However, not all judges effectively relied on international norms. For example, in the case of *Prosecutor v. Hanyurwimfura Epaphrodite*,[28] the judge simply recalled the Preamble of the Organic Law of 30 August 1996 that mentions the international convention above, to constitute the basis of the charge. The development of the judgment that followed, including the decision, did not refer at all to international law. In the case of *Prosecutor v. Karorero Charles and Others*, the First Instance Tribunal of Cyangugu also stated that the accused were prosecuted for "acts of genocide provided for in the International Convention on the Prevention and Punishment of the Crime of Genocide of 09/12/1948, the International Convention on the Non-Applicability of Statutory Limitations on war crimes and crimes against humanity".[29] This, however, was the only reference to international law in this judgment. The judge's ruling was instead based on domestic law. Relying exclusively on domestic law indicates that judges had not understood the purpose of the principle of dual incrimination. Since a prescribed offence is considered as an offence which has no legal standing,[30] judges run the risk of delivering judgments that could be challenged for violation of the principle of legality.

[25] *Prosecutor v. Banzi Wellars*, Tribunal de Premiere Instance de Gisenyi, Judgement of 25 May 2001, p. 52.

[26] *Prosecutor v. Ukezimpfura Jean and Others*, Tribunal de Premiere Instance de Kibungo, Judgment of 29 September 2000.

[27] *Prosecutor v. Mvumbahe Denys and Others*, Tribunal de Premiere Instance de Kibuye, Judgment of 16 July 2000.

[28] *Prosecutor v. Hanyurwimfura Epaphrodite*, Tribunal de Premiere Instance de Butare, Judgment of 8 August 2001.

[29] *Prosecutor v. Karorero Charles and Others*, Tribunal de Premiere Instance de Cyangungu, Judgment of 31 March 2000.

[30] French Court of Cassation, Criminal Chamber, Judgment of 19 April 1995, Case No 94-83519.

### 7.3.3 Categorization of Offenders

During the drafting process of the Organic Law, there was a debate on whether the law should provide for collective criminal responsibility for political parties and militias that planned and executed the genocide. Another view was that if members of political parties or militias could not bear collective criminal responsibility they should at least be presumed guilty until they reverse the onus of proof.[31] The two proposals did not find favor with the legislature. It was decided neither to criminalize groups and associations nor to replace the presumption of innocence by a presumption of guilt. The law maintained the principle of individual criminal responsibility but introduced the categorization of offenders.

According to Article 2 of the Organic Law of 30 August 1996, categorization is done after examining each offender's criminal responsibility.

- In the first category belong masterminds of the genocide. They are people who planned, organized, and supervised the genocide. The category also includes notorious murderers and persons who committed acts of sexual torture.
- The second category consists of group perpetrators, conspirators and accomplices to murders other than those who were zealous in the perpetration of the crime. Offenders who seriously assaulted victims with intent to kill but did not accomplish their objective are placed in this category.
- The third category is meant for perpetrators who were involved in other serious attempts against bodily integrity without necessarily intending to kill the victim.
- The fourth category relates to people who committed offences in respect of property.

Judges retained the discretionary power to move an offender from one category to another. The effect of categorization was that offenders from the first and second categories were liable to be sentenced to death or to life imprisonment, respectively, while offenders from the third category received punishments that corresponded to their criminal responsibility under the Penal Code. Article 14(d) of the Organic Law specifically states that persons convicted of offences against property are liable to civil damages in compliance with the law of damages. The provision was intended simultaneously to decongest the prisons and to lay down the basis of unity and reconciliation. However, offenders from the second and third category who confessed were also eligible for lenient punishments. This mechanism was also new in the Rwandan legal system.

[31] De Beer 1997, p. 27.

### 7.3.4 Confession and Guilty Plea

A confession, as evidence, was not regulated in the Organic Law of 30 August 1996. The ordinary criminal procedure provided and still provides for a confession as an element of evidence whose weight is assessed according to the discretion of the judge. At present, it would be dangerous to rely on the offender's confession only as if it remains the queen of evidence (*regina probatia*) as it was before the Enlightenment. Confession must be corroborated by other evidence as there are laudable and not so laudable reasons that might lead any suspect to confess.

In genocide cases, a confession was intended to be a factor contributing to unity and reconciliation. Offenders were encouraged to confess and to enter a guilty plea in exchange for lenient punishments. A confession and expression of remorse served at the same time as an acknowledgement by the wrongdoer for having violated the victim's humanity and dignity. Genocide and crimes against humanity constitute the denial of human dignity, even before they take away the right to life. Both the right to dignity and the right to life are fundamental human rights.

Offenders from the Second Category would normally have been liable for capital punishment under the Penal Code. They were spared the death penalty and this led to offenders from other categories also being spared the death penalty. Sentencing robbers to death whereas Second Category *génocidaires* had escaped it would have defied the logic of justice. Second Category offenders who took advantage of the procedure of confession and guilty plea and were found to be sincere, received a maximum of 11 years in custody instead of life imprisonment if they took the initiative before prosecution. Offenders from the Third Category whose confessions and guilty plea were found to be sincere and complete received a third of the punishment that the judge would normally have imposed.[32]

The procedure of confession and guilty plea was a mitigating excuse. Only mitigating excuses are provided for by the law whereas mitigating circumstances are left to judicial discretion. Judges read provisions on confessions and guilty plea as non-exclusive of mitigating circumstances. The punishment was further reduced where, in addition to confession and guilty plea, there were mitigating circumstances. The silence of the law on mitigating circumstances meant that the lawmaker did not encroach upon judicial discretion to decide on mitigating circumstances. Although, it is submitted, the lawmaker had gone beyond the necessary in mitigating the punishment for genocide. Judges imposed 2 years,[33]

[32] Article 15, para 1(a) and (b) of the Organic Law No 08/96 of 30 August 1996 on the organization of prosecution for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, in Official Gazette No 17 of 1 September 1996.

[33] *Prosecutor v Kanyabugande and Others*, Tribunal de Première Instance de Byumba, Judgment of 2 May 1997 and *Prosecutor v. Mahirane alias Kagina*, Tribunal de Première Instance de Kibungo, Judgment of 21 October 1998.

4 years,[34] 5 years,[35] 7 years,[36] 8 years,[37] 10 years,[38] 12 years,[39] 13 years,[40] 14 years[41] and 15 years imprisonment.[42]

This practice, it is further submitted, is evidence that Rwandan judges were too lenient in handling cases of genocide. They considered mostly the good faith of the accused in helping the court to discover and understand the way crimes were perpetrated without giving sufficient weight to the gravity of the offence. There are convicts who received lenient sentences even though they had not strictly complied with the confession and guilty plea procedure. In the case of *Prosecutor v. Nzabonimpa Kajabo and Others*, the judge stated, for example, that although the accused had partially confessed his crimes, he assisted the court in discovering the truth.[43] Other judges would simply consider the remorse that the accused showed during the trial.[44]

Rwandan judges are said to have been too soft on criminals who committed heinous crimes. *Nzakunda* argues that judges should not have imposed sentences below the minimum of punishments provided for under the Organic Law of 30 August 1996. He argues that genocide is an abominable crime that destroyed the Rwandan society and for which only exemplary punishments should be imposed. Only juvenile offenders should escape these exemplary punishments, *Nzakunda* contends.[45] In 1995, it was suggested that in the case of Rwanda "justice means […] blood".[46] The demand for so-called exemplary punishments

[34] *Prosecutor v. Byiringiro J.P. and Others*, Tribunal de Premiere Instance de Kibungo, Judgment of 21 October 1998.

[35] *Prosecutor v. Nshogoza Anastase and Others*, Tribunal de Première Instance de Byumba, Judgment of 30 November 1999.

[36] *Prosecutor v. Hakizimana Appolinaire and Others*, Tribunal de Première Instance de Gitarama, Judgment of 24 August 1998.

[37] *Prosecutor v. Semukanya Vincent and Others*, Tribunal de Première Instance de Kibungo, Judgment of 17 July 1998.

[38] *Prosecutor v. Munyangabo and Others*, Tribunal de Premiere Instance de Gikongoro, Judgment of 10 June 1998.

[39] *Prosecutor v. Nsabimana and Others*, Tribunal de Première Instance de Cyangugu, Jugdment of 5 June 1997.

[40] *Prosecutor v Gatsimbanyi and Others*, Tribunal de Première Instance de Nyamata, Judgment of 13 November 1998.

[41] *Prosecutor v. Musangwa and Others*, Tribunal de Première Instance de Kibungo, Judgment of 18 June 1997.

[42] *Prosecutor v. Murangira Jean Baptiste*, Tribunal de Première Instance de Nyamata, Judgment of 30 March 1998.

[43] *Prosecutor v. Nzabonimpa Kajabo and Others*, Tribunal de Première Instance de Nyamata, Judgment of 8 September 1999.

[44] *Prosecutor v. Kabiligi Athanase and Others*, Tribunal de Première Instance de Kibuye, Judgment of 10 December 1998.

[45] Nzakunda 2005.

[46] Prunier 1995, p. 355.

for heinous and mass crimes such as terrorism, crimes against humanity and genocide is said to be justified by the need for proportionality.[47]

The Rwandan lawmaker did not fully embrace this principle of proportionality between the gravity of the crime and its punishment. The judges were expected to use their discretion to arrive at the appropriate sentence in line with the goal of justice as conceived through the Organic Law of 30 August 1996. Adjudicating the crime of genocide had to be done in the context of horrendous crimes committed but also the need to promote reconciliation in order to weld again the Rwandan social fabric that genocide had torn apart. The latter is not normally a concern of classical tribunals that are often indifferent to the effect of their rulings on the social cohesion of the parties before them. Nevertheless, it is apparent that in some cases the discretion was either misused or even abused in meting out overly lenient sentences for those convicted of genocide and crimes against humanity.

### *7.3.5 The Inadequacy of the Organic Law of 30 August 1996*

It was clear that, by 2000, the laudable objectives of this law had not been translated into tangible results. It had been expected that the law would speed up trials and reduce the prison congestion, that suspects would in large numbers and sincerely embrace the confession and guilty plea opportunity and that the accompanying lenient sentences would speed up the process of unity and reconciliation. An assessment of the implementation of the Organic Law in 2000 was not encouraging. The number of suspects rose to 125,000.[48] The figure included 4,454 juvenile offenders and 7,176 women, all of whom were dispersed in the 19 prisons and detention centers.[49]

Rwandan prisons and detention facilities, already inadequate before 1994, were occupied far beyond their capacities. The overpopulation of prisons made the hygiene conditions of detainees very difficult. In such a context the question of genocide detainees quickly monopolized the debate on justice in Rwanda. In 1998, the international community was already very critical of the situation. Not only were overcrowded prisons a concern for human rights organizations but also the turn that justice took when the government carried out executions of 22 persons convicted of the genocide. At the local level, judges and prosecutors were deemed to be very slow in handling genocide cases. Only 2,580 cases out of 124,800 detainees were completed by December 1999.[50] Genocide suspects were suspicious about the procedure of confession and guilty plea while the survivors were

[47] Ohlin 2005.

[48] UN DOC A/55/269, p. 26, para 102.

[49] Karekezi 2001, p. 22.

[50] Ibid., p. 22.

unhappy about sentences handed down. By August 2000, courts had registered 3,751 instances of recourse to the procedure of confession and guilty plea.[51]

The Organic Law of 30 August of 1996 did not properly address the issue of compensation for victims. Judges relied on the law of damages and especially on Article 258 of the Civil Code, Book III. However, it quickly became apparent that assessing damages for genocide victims was not an easy task for judges. Judgments were condemning peasant suspects to pay compensation of millions of Rwandan Francs (Rwf) with no reasonable expectation that payment would materialize. For example, in the case of *Prosecutor v. Karorero and Others*, the Court imposed compensation of 212,155,000 Rwf.[52] In the case of *Banzi Wellars and Others*, the Court imposed compensation of 219,500,000 Rwf.[53]

A study of the cases conducted between 1997 and 1999 also revealed that compensation was only awarded to one out of two victims. This resulted from the fact that most victims were not aware of their rights to compensation, or failed to prove their relationship with their deceased relatives.[54] To resolve the issue of unrecovered damages, the victims' advocates started suing the suspect and the State of Rwanda simultaneously. The records of proceedings show that the State never appeared before the courts in these cases. Judges were obliged to condemn the State to pay damages by default judgment. In the year 2000, the Government declared that it owed 37,000,000 Rwf in judicial damages to victims.[55]

On the whole, the Special Chambers did a commendable job of prosecuting genocide crimes with the minimum resources. As *William Schabas* observed:

> Considering the impoverishment of Rwanda's justice system prior to the genocide, and the resource problems that continue to confront development in that country, 10,000 trials is an impressive figure by any standards […]. Arguably, Rwanda has done more in this respect in ten years than did the national jurisdictions of Germany, Italy and Austria from 1945–1955.[56]

Despite the commendable work of the Special Chambers trying genocide cases, Rwanda realized that strategies it had formulated in the Organic Law of 30 August 1996 were not realizing the results hoped for. It became apparent that the Rwandan judicial system was overwhelmed. At the rate at which it was going, trying all the genocide suspects before regular courts would have taken about 200 years. The failure of the judicial system to reduce the volume of pending cases significantly and the pressure on the prisons and other resources, led to the need to find an alternative way of dealing with genocide cases. Various discussions led to the

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[51] Ibid.

[52] *Prosecutor v. Karorero Charles and Others*, Tribunal de Première Instance de Cyangungu, Judgment of 31 March 2000.

[53] *Prosecutor v. Banzi Wellars and Others*, Tribunal de Premiere Instance de Gisenyi, Judgment of 25 May 2001.

[54] Karekezi 2001, p. 24.

[55] Le Verdict, No 01, 15 April 1999, p. 15.

[56] Schabas 2008, p. 218; Bornkamm 2012, pp. 24–25 and sources cited there.

rejuvenation of the Gacaca courts, a traditional method of conflict resolution, as a forum for prosecuting and punishing crimes committed during the genocide.

## 7.4 The Legacy of Gacaca Courts

Gacaca courts are neo-traditional courts that involve local communities. In 2001, it became compelling to resort to this heritage of Rwandan culture as a response to the challenge of the large number of genocide suspects awaiting trial who could not be tried in the conventional courts within a reasonable period of time. They were specifically inducted and empowered to hear and decide genocide cases.

### *7.4.1 Traditional Gacaca Courts and Neo-traditional Gacaca Courts*

Traditionally, Gacaca, or lawn, is a metonym referring to a physical space where men of a certain age gathered to debate and resolve conflicts among members of the community. Members of the assembly that formed the Council of Elders were selected among men known for their integrity (*inyangamugayo*) in the village. The test of suitability for the position was the elder's reputation for wisdom, erudition, probity and impartiality in taking a decision. The chief of the family or clan led the gathering, with the assistance of the Council of Elders. The role of a judge was a sacred matter.

During the gathering, parties were invited to defend their cases before the assembly. Gacaca resolved all conflicts in the interest of the family and the community. The decision was taken immediately and publicly. Gacaca imposed fines, compensation, restitution and damages. The sanction was often immediately executed. When one of the parties was condemned to pay a fine of pitchers of beer, judges shared the contents with parties, witnesses and the assembly as a sign of reconciliation. Some offences were, however, so serious that they sullied the entire family. In such cases, the family resorted to collective purification, which then closed the matter.[57]

The concept of justice under traditional Gacaca courts was distinct. Judges did not focus on looking for truth as understood by modern courts. Elders were first and foremost concerned with social harmony in which the losing party participated. The goal of justice was to reconcile the parties and not to humiliate the offender. However, efforts at reconciliation were not synonymous with impunity for serious crimes for which a heavy punishment was justified. Incorrigible and dangerous criminals were punished by ostracism. The convicted person ceased to

[57] Ntampaka 2005, p. 53.

enjoy social status within the community, which withdrew its support. The individual became a pariah for all intents and purposes, and was forbidden from taking part in social activities. This was the most feared punishment, because in traditional societies reciprocity played a vital role in everyone's life.[58] Crimes against the State and crimes that threatened human lives were tried by the Mwami's (King's) Bench itself and the death penalty was among possible punishments that the court could impose.[59]

Gacaca justice was thus built on the premise that punishment and reconciliation were not contradictory or mutually exclusive objectives. Eventually colonization refashioned traditional Gacaca courts. They first lost jurisdiction over petty criminal offences and retained jurisdiction over civil disputes only. Later, colonial authorities replaced clan chiefs with people who owed allegiance to the colonial regime, without paying attention to whether or not they were persons of integrity, who were fit to be Gacaca judges. After independence, Rwandan authorities maintained the Gacaca courts, granting them authority again to hear cases involving petty offences in order to decongest prisons. The Government, however, selected members of Gacaca courts from among local administrative authorities.[60] Before 1994, Gacaca tribunals had become pre-trial instances where persons prosecuted for theft, assault and destruction of properties would be heard before being tried by the *Tribunal de Canton*. It was no longer a forum for debating social cohesion but rather a political institution parallel to courts.[61]

In the post-1994 period, Gacaca courts were created in order to establish the real truth of what happened, to punish perpetrators of the crimes committed during the genocide and thus to end impunity as well as to promote unity and reconciliation. The Organic Law No 40/2000 of 26 January 2001 that set up Gacaca courts recalled that since genocide crimes were perpetrated publicly, the population had a moral obligation to tell the truth about what happened as witnesses, victims or offenders.[62] Therefore the choice was not between truth and justice. In transitional justice, there are policy-makers who choose to create some types of truth commissions which often trade amnesty in exchange for the full disclosure of the truth. There are others who opt for judicial mechanisms without necessarily demanding that the offender gives a complete account of the past.[63]

The Rwandan model was truth and reconciliation through justice. The country did not favor purely retributive justice that would widen the rupture between Rwandan communities. It also rejected a truth commission solution that would

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[58] Ibid., p. 54.

[59] Bourgeois 1954, p. 397.

[60] Karekezi 2001, p. 32.

[61] Ntampaka 2005, p. 55.

[62] Preamble of the Organic Law No 40/2000 of 2 January 2001 setting up Gacaca jurisdictions and organizing prosecutions of offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994, Official Gazette No 6, of 15 March 2001.

[63] For details see Clark 2010, pp. 33–35.

lead to a blanket amnesty, synonymous with impunity.[64] The government intended to get rid of the policy and practice of amnesty that had become inseparable with crimes perpetrated against the Tutsi. As far back as 1961, by a Resolution on crimes perpetrated against the Tutsi minority, the United Nations recommended to Belgium to release Hutu extremists it had imprisoned and to grant "full and unconditional amnesty".[65] After independence, all those who committed crimes against the Tutsi and their sympathizing Hutu between 1959 and 1963, in 1974 and in 1991 were subsequently granted amnesty by the Government.[66] Thus, until the 1994 genocide against Tutsi, "there was total impunity for the perpetrator" as *Gérard Prunier* reminds us.[67]

By establishing Gacaca courts through a law, extending their jurisdiction over life-threatening crimes and constituting them with elected judges, including women, on their benches, the lawmaker gave a modern character to this traditional institution. This modernized Gacaca should not be confused with the conventional system of prosecuting offences. It was rather an institution aimed at re-establishing the social concord and to put genocide convicts on the right path as citizens. The population was therefore invited to participate actively in this new form of participatory justice.

### *7.4.2 Goals Assigned to Gacaca and the Assessment of Its Achievements*

Much has been written about Gacaca courts and it is not possible to do justice to the subject of assessing the achievements and challenges in this chapter. What is intended here is to give an overview of the role of Gacaca in prosecuting international crimes in order to present a comprehensive picture of domestic prosecutions of international crimes in post-genocide Rwanda.

The procedure followed by Gacaca Courts was simplified to ensure that cases were processed rapidly. The purpose was to have as many suspects as possible answer to the charges against them and for victims or survivors to see justice dispensed in their lifetime. The proceedings excluded lawyers and as a result there

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[64] Jones 2010, p. 51.

[65] UN Doc A/1605 (XV), 21 April 1961, para 9.

[66] Loi du 20 Mai 1963 portant amnistie générale des infractions politiques commises entre le 1er Octobre 1959 et le 1er Juillet 1962, Official Gazette, 1963, p. 299; Décret-Loi du 30 Novembre 1974 portant amnistie de certaines infractions politiques, Official Gazette, 1974, p. 626 ; Loi no 60/91 du 13 Décembre 1991 portant amnistie générale et voie de solution au problème des refugies, Official Gazette, 1991, p. 1930.

[67] Prunier 1995, p. 31.

were no objections on minor points of law or procedure. Judgments were delivered on the day that all arguments were concluded or on the next day. The judicial process, including the suspect's responses to the charges, the assembly's public discussion of the evidence, and the judges' decision on the guilt or innocence of the accused was expected not to take more than three weeks. Gacaca laws permitted the bench to hear different witnesses in the same hearing.[68]

To illustrate how rapidly cases were processed, some figures may be cited. The pilot phase in 2002 started with 751 Gacaca courts at the Cell level in 118 Sectors.[69] This phase was primarily for conducting investigations. Given the challenges that this pilot phase faced, the law governing Gacaca courts was modified in 2004.[70] The trial of the cases completed in the 118 sectors started in 2005. Then only 118 Gacaca courts at the Sector level out of 1,545 and 118 Gacaca courts of appeal out of 1,545 started hearing cases.[71] Already by July 2006, Gacaca courts at the Cell level had gathered information on 717,942 persons of whom 63,000 belonged to the Category One, 335,000 to the Category Two and the others to Categories Three and Four. By 2006, Gacaca courts at the Sector level had already delivered 20,957 judgments out of the 23,423 cases heard.[72] Although figures do not mean justice, the results speak for themselves, having regard to the modest resources invested in these courts.

Gacaca courts also had the merit of being less formal. There were no strict procedures, no robing, no Latin formula, no French or English principles cited and no exceptions, etc. The court was user-friendly and less intimidating to witnesses. The relaxed environment encouraged everyone to say what he or she knew or saw. People attending the courts were neighbors who shared the same culture, and who were used to the metaphors of their language. Most modern courts lack a relaxed ambience, so witnesses can feel intimidated. On 31 October 2001, ICTR judges *William Sekule* (Tanzania), *Winston Maqutu* (Lesotho) and *Arlette Ramaroson* (Madagascar) suddenly burst out laughing when a Rwandan woman victim of genocide and who had been raped nine times by different men was asked, during cross-examination, to describe the genital parts of her rapists and the feeling she had during rape.[73] According to the Prosecutor in the case, witness *T.A.* had

[68] Clark 2010, p. 172.

[69] Avocats Sans Frontières, Monitoring des Juridictions Gacaca, Octobre 2005–Septembre 2006, Kigali, Palloti Press 2006, p. 7.

[70] Organic Law No 16/2004 of 19 June 2004 establishing the Organization, Competence and Functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994, Official Gazette, No Special of 19 June 2004.

[71] Avocats Sans Frontières 2006, p. 7.

[72] Ibid., p. 8.

[73] *Prosecutor v. Pauline Nyiramasuhuko* et al. Transcripts of October 2001, pp. 67–100.

repeated 1,194 times that she had been raped.[74] Such an atmosphere can only discourage witnesses.

Testimonies submitted to Gacaca courts had practical effects for survivors. Genocide survivors were not interested in symbolic justice. They simply wanted to know when, where and how their loved ones died. Gacaca hearings permitted victims to learn how their loved ones were killed, locate their remains and have them reburied in dignity.[75] The offender was also given an opportunity to acknowledge what he did, show remorse and ask for forgiveness in exchange for a lenient sentence. To encourage reintegration, the convicts were given an opportunity to influence the determination of their sentence by confessing and showing remorse. This procedure gave them the choice between remaining behind bars in prison or having half of their prison sentence converted into community work, also known as TIG (*Travaux d'Interet Général*).[76] By 2010, at least 90,000 persons, mostly second category perpetrators, co-perpetrators and accomplices, had chosen to take advantage of the guilty plea and confession procedure, which resulted in community work instead of long-term imprisonment.[77] At the same time, the community work performed by genocide convicts contributed to the reconstruction of the country. The interaction between the offender and the victim created chances for healing, reconciliation and ultimately, recreation of social cohesion.

A further advantage of Gacaca courts was that they were cost-effective for the State, victims and witnesses. Court proceedings took place where the crime was perpetrated. Witnesses did not need to travel far to attend court sessions.

In sum, Gacaca courts were a unique Rwandan solution to a unique Rwandan problem. They closed on 18 June 2012 after clearing nearly all genocide cases and helping establish the truth about what happened during the genocide. Gacaca courts tried 1,958,634 cases.[78] The figure proves that this is an unprecedented judicial experiment. The institution of Gacaca provided justice and constituted a basis for unity and reconciliation. Reconciliation is, however, a slow and gradual process. It involves emotional and interpersonal dynamics. As Archbishop *Desmond Tutu* rightly puts it, reconciliation can only be promoted.[79] Engaging the entire population in the process of justice, as well as a continuing dialogue has provided an important step towards a more sustainable reconciliation and harmony in the Rwandese society.

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[74] Quoted in Nowrojee 2005, p. 23.

[75] See African Rights and Redress 2008, p. 31. Available at http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf (All internet resources were accessed on 28 March 2014).

[76] Presidential Decree No 26/01 of 10 December 2001 relating to the Substitution of the penalty of imprisonment for community service, Official Gazette, No. 3 of 1 February 2002.

[77] Penal Reform International 2010, p. 29.

[78] National Service of Gacaca Courts 2012, p. 34.

[79] Tutu 1999, p. 274.

## 7.5 Criticisms and Challenges of Gacaca

### *7.5.1 Some Criticisms of the Gacaca Process*

#### 7.5.1.1 Lack of Legal Representation

The Gacaca system has been criticized for not permitting the accused a right to legal representation. For instance, *Nicholas Jones* has argued that "the absence of legal representation in the process may undermine the guarantee for a fair trial in that the accused is not presented with legal advice in preparation for their defence and during the process".[80] However, there was no inequality of arms since there was no prosecutor either. The court took on the role of the prosecutor by reading out the charges and questioning the accused and the witnesses, assisted in this by members of the community present (the general assembly of the Gacaca court). Since the events in question took place in public view, it is argued that all that needs to be known is the truth about what happened and that, furthermore, determining the veracity of eye witnesses can be done by lay persons as well as lawyers. With reference to the Gacaca process, it has been said that

> fairness is ensured through the presence of a whole range of witnesses, which allows an instant oral reconstruction of all the facts relevant to the case. The general assembly acts as prosecution and defence at the same time and thus ensures equality between the two parties. The presence of a professional in a Gacaca court would jeopardise this balance, confuse the witnesses, and contravene the spirit of the Gacaca system.[81]

This view conforms with a position held that "the General Assembly should engage in a largely open discussion at Gacaca hearings, in which judges act as mediators to help the community achieve certain legal and social objectives".[82] Moreover, permitting legal representation would have changed the whole character of the court and would have turned it into a regular court. It would have involved elaborate, formal legal procedures and consequent delays. It would also have meant bringing in legally qualified judges who would understand the legal jargon and technicalities so well-loved by lawyers. It would have brought in the almost hostile atmosphere of cross-examination, all kinds of preliminary objections, adjournments, etc. Moreover, even if the system were designed to accommodate lawyers, there were not enough in the country to represent hundreds of thousands of suspects scattered in villages around the country. Before 1994, the law school produced not more than ten law graduates a year. This was part of the control system of the State that did not encourage a rights discourse.

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[80] Jones 2010, p. 95.

[81] This is a summary by Bornkamm of arguments that explain the absence of legal representation in the Gacaca process, see Bornkamm 2012, p. 110.

[82] Clark 2008, p. 312.

It is also noteworthy that traditional courts in other African countries do not permit legal representation, the idea being to keep proceedings simple, people-friendly and to ensure a speedy resolution of disputes. Once again, it was a matter of weighing the pros and cons and in the Rwandan case the country chose to capitalize on the many advantages of Gacaca and live with the possible disadvantage of not having professional legal representation. At the same time, the accused had enough time to challenge whatever was said by the complainant or witness, and to call witnesses willing to testify on his or her behalf. Moreover, the accused person could be assisted by another person to present the defence and there was nothing in the law prohibiting a lawyer not claiming the prerogatives of defence counsel to come to the assistance of the accused.

#### 7.5.1.2 No Appeals to Regular Courts

Appeals were only allowed from the village Gacaca court to the ward or sector Gacaca court. Cases heard by the sector Gacaca courts at first instance could be appealed to the Gacaca court of appeal. However, there were no appeals to the regular courts. In the regular courts, convictions and sentences of imprisonment are appealable at least up to the High Court and in some cases up to the Supreme Court. For the reasons given regarding delays in regular courts, it was considered prudent to limit appeals to the system of Gacaca in the interest of fast-tracking genocide cases, getting convicted persons back into normal society as soon as possible and hence promoting reconciliation. Permitting appeals to regular courts would have meant following the usual procedures in those courts with the inevitable delays. That would have defeated the whole idea of taking the cases to Gacaca in the first place.

### *7.5.2 Challenges*

#### 7.5.2.1 Intimidation and Killing of Witnesses in Genocide Cases

Despite the obvious successes of the Gacaca system, there were challenges. One of the most serious ones was the intimidation and in a number of cases the killing of witnesses to dissuade them from testifying against suspects. Acts of intimidation included setting houses of survivors ablaze, sending them anonymous letters, uprooting their crops and killing their animals. There are also other acts of intimidation such as throwing stones on roofs of houses.[83] Witnesses have been killed; some after testifying, others before they were due to testify. This became a source of bitterness for some survivors who thought that the State was not doing

[83] African Rights and Redress 2008, p. 6. See also Redress 2012, pp. 23–29.

enough to protect them and a number became discouraged from participating in the process. Some Gacaca judges have also been intimidated, assaulted or killed.[84]

#### 7.5.2.2 Incomplete or Fake Confessions

As indicated, the law allowed suspects who confessed, told the truth and asked for forgiveness to get lighter sentences and to serve half of their sentence in community service. It was also the practice to identify those who had confessed and asked for forgiveness to be released from prison and await their trial in Gacaca from their homes. However, it turned out that quite a number did not tell the whole truth and just said enough to get them out of prison or to get them a light sentence, or even lied.[85] Some even mocked the Gacaca process once they were out and threatened to finish the job they started when the time is right.[86] This did not advance the cause of reconciliation. The whole philosophy of reconciliation was that truth and justice must precede reconciliation and not the other way round. Otherwise the survivors had no incentive in participating in reconciliation processes. They could only forgive when forgiveness was genuinely sought.

#### 7.5.2.3 Cases of Judges and Witnesses Succumbing to Corruption

There have been a few cases of Gacaca judges who were discovered to have been involved in genocide and other crimes against humanity. They were removed and prosecuted. Some Gacaca judges have also been prosecuted for corruption.[87] The National Gacaca Service acknowledged corruption as having been a challenge but also pointed out that the vice had been fought.[88] Some witnesses also succumbed to accepting bribes not to testify or even to change their testimonies at the appeal level, partly because of their impoverished living conditions and seeing no likelihood of improvement after the conviction of the accused. In other cases they

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[84] African Rights and Redress 2008, pp. 7–8 for testimonies on killing of Gacaca judges and witnesses.

[85] Ibid., p. 119. See also De Brouwer and Ruvebana 2013, p. 947.

[86] African Rights and Redress 2008, pp. 123–124.

[87] Hirondelle News of 6 October 2008, where it is reported that a Gacaca court judge was prosecuted and sentenced to five years imprisonment for attempting to bribe fellow judges so they could free his brother-in-law. www.hirondellenews.com/ictr-rwanda/411-rwanda-gacaca/22354.

[88] See "Interview with the Executive Secretary of the National Gacaca Service, Domithile Mukantaganzwa, on the eve of Closing of Gacaca Courts" (no date indicated, but presumed to be in June 2012), available at http://www.gov.rw/Interview-with-the-Executive-Secretary-of-National-Gacaca-Service-Domithile-Mukantaganzwa-at-the-eve-of-closing-of-Gacaca-Courts. See also Republic of Rwanda National Service of Gacaca Courts, Summary of the Report Presented at the Closing of Gacaca Courts Activities, Kigali, June 2012.

succumbed to the threat that they either accept the money or be killed.[89] However, most of the Gacaca judges were honest and committed to the cause of justice and reconciliation.

#### 7.5.2.4 Escaping from Community Service

Not all persons sentenced to TIG showed up for the community service. Because they perform it in camps close to communities and because of a lack of supervision, a number manages to escape and disappear. They change their identities and resettle in places far from their former communities or leave the country. These are, of course, those who were not sincere in their pleas for forgiveness in the first place. This still poses a serious challenge to the search for maximum reconciliation, especially given the fact that there are known perpetrators who escaped unpunished.[90]

#### 7.5.2.5 Lack of Reparations and Insufficient Material Support for Survivors

Most survivors lost family members and all the property they had in the genocide. They did not obtain any compensation, even in cases where perpetrators were convicted. The Gacaca Law only provided for reparation in respect of cases relating to destruction or damage to property, that is Category Three crimes.[91] Initially, it was envisaged that a State fund would be established, largely funded by contributions from the international community, to take care of non-property reparations to victims and survivors of the genocide.[92] However, the fund has not materialized due to a lack of contributions to it. At the same time, even the limited scope of reparation for property looted or damaged has not been enforced, not only because the convicted persons lack the means to pay, but also because some who have the means are reluctant to pay and find ways of evading the obligation. This state of affairs hurts survivors especially as they see those who were not affected by the genocide living comfortably. Although the State has acknowledged responsibility for reparations to survivors under the state succession doctrine, it has

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[89] African Rights and Redress 2008, pp. 47–49.

[90] "Bacitse Imirimo Nsimburagifungo Bavuga ko Bashaj", Kigali Today, 2 January 2014, TIG: 151 "Batorotse Ingando", Imvaho Nshya, No 2007.

[91] Article 95 of Organic Law establishing the organization, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the Crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994, Law No. 16/2004 of 19 June 2004.

[92] Ibid., Article 96.

so far only been able to help those who are destitute or very poor through a special State fund.[93] It would be difficult for a country like Rwanda, at its level of development, to compensate victims of the Genocide for their losses and pain.

The Fund for the Support of Genocide Survivors popularly known as FARG or *Fonds d'Assistance aux Rescapés du Génocide* is a state fund established in 1998.[94] The 1998 law setting up the fund was replaced by a more comprehensive law of 2008.[95] The State contributes six percent of the national budget to this fund which provides assistance for housing, the medical treatment of needy survivors and school expenses for their children as well as to orphans.[96] The fund also assists needy survivors to engage in beneficial self-help, economic and social programs. The fund administrators also have the responsibility of supervising and coordinating activities relating to the collection of contributions intended for survivors. The fund may raise money from any source, including charities. It may also take action against or seek indemnity for those convicted of genocide. However, there has not been much in terms of contributions from international sources.

## 7.6 Post-Gacaca Justice for the Genocide Cases

The eradication of impunity requires maximum accountability. Many of the masterminds of the genocide are still at large. Victims are still waiting to see host countries activate their universal jurisdiction to try genocide fugitives. Although there are a number of national foreign courts that have tried suspects of genocide against the Tutsi, two decades have now elapsed without witnessing any investigation into genocide cases in some countries. The concern that genocide suspects are escaping justice became greater when the United Nations' Security Council decided to terminate the activities of the ICTR.[97] The Rwandan legislature reacted to these concerns by establishing a special chamber within the High Court and reintroducing the jurisdiction of the Intermediate Courts to try genocide cases. The

[93] For a general discussion see, Ibuka and others 2012.

[94] Law No 02/98 of 22 January 1998 creating the National Fund for Assistance to Victims of Genocide and Massacres perpetrated in Rwanda from 1 October 1991 to 31 December 1994.

[95] Law No 69/2008 of 30 December 2008 relating to the establishment of the Fund for the Support and Assistance to the Survivors of the Tutsi Genocide and Crimes Against Humanity committed between 1 October 1990 and 31 December 1994, and determining its organization, competence and functioning, Official Gazette, No Special of 14 April 2009.

[96] Article 22(1) of the Law No 69/2008 of 30 December 2008 relating to the establishment of the Fund for the Support and Assistance to the Survivors of the Tutsi Genocide and Crimes Against Humanity committed between 1 October 1990 and 31 December 1994, and determining its organization, competence and functioning, Official Gazette, No Special of 14 April 2009.

[97] UN Doc S/RES/1966 (2010).

High Court Chamber deals with cases of persons extradited from abroad or transferred from the ICTR, while the Intermediate Courts deal domestically with First Category offenders who were not tried before or who came to light only after the Gacaca hearings came to an end.

Post-Gacaca justice has involved trials of: cases which should have been tried by these courts but which for one or another reason were not; some Category One cases which are still pending; and cases transferred from the ICTR, or cases of suspects extradited from other countries. Genocide suspects within the country who, for one reason or another, were not tried by Gacaca courts fall under the jurisdiction of the Primary Court or the Intermediate Court.[98] Other genocide cases, including those transferred and extradited, are tried by a specialized Chamber of the High Court in charge of international crimes. At first instance the case is tried by a single judge. The law, however, provides for the possibility of having a bench of three judges, depending on the complexity of the case. So far all the cases in this Chamber are being handled by panels of three judges.

For several years, the ICTR and foreign courts turned down all requests to transfer cases for trial in Rwanda. The reluctance was based on complaints related to the legal framework for the prosecution of suspects, the nature of punishments provided for the crime of genocide and crimes against humanity in Rwanda, and the ability of the Rwandan judiciary to conduct a fair trial. Rwanda addressed these concerns progressively by amending its laws and effecting reforms in the judicial system, as discussed below.

### *7.6.1 Legal and Institutional Reforms Related to Rule 11*bis *of the ICTR Rules of Procedure and Evidence*

In light of the call by the Security Council on the Ad Hoc Tribunals, the ICTY and ICTR, for a completion strategy,[99] Rule 11*bis* was introduced into the Rules of Procedure and Evidence, thus making it possible for low-level and medium-level cases to be transferred to national jurisdictions. The ICTR made its first transfer order on 13 April 2007 when it ordered the case of *Michel Bagaragaza*,[100] former head of the tea authority in Rwanda, to be transferred to The Netherlands for trial. This was followed in November 2007 by the decisions to transfer the cases of the

[98] Organic Law No 04/2012/OL of 15 June 2012 abolishing Gacaca Courts. See especially Articles 8 and 10 of the Organic Law No 02/2013/OL of 16 June 2013 modifying and complementing Organic Law No 51/2008 of 9 September 2008 determining the organization, functioning and jurisdiction of courts as modified and complemented to date, Official Gazette, No Special *Bis*, 16 June 2013.

[99] UN Doc S/RES 1503 (2003).

[100] *Prosecutor v. Michel Bagaragaza*, ICTR Trial Chamber III, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of The Netherlands, Rule 11*bis* of the Rules of Procedure and Evidence of 13 April 2007.

former Kigali priest, *Wenceslas Munyeshyaka*,[101] and former prefect of *Gikongoro*, *Laurent Bucyibaruta*,[102] to France. Rwanda was naturally a candidate for such transfers as the crimes had been committed in Rwanda by its own citizens. It therefore prepared itself for transfers by enacting an appropriate legal framework, namely the Transfer Law.[103] The law designated the competent court as the High Court, the Supreme Court as the appellate court. It also provided for guarantees of the rights of accused persons, the production of evidence, and the security of witnesses and defence lawyers. The law further provided that the ICTR could revoke a referral if it was not satisfied with the way in which the case was conducted.

At the time, Rwanda had the death penalty on its statute books although there had been a moratorium since 1998 when the last executions were carried out. At the same time, Rule 11*bis* (C) stipulated that a transfer could not be made to a country with capital punishment in its law. For this reason, the Transfer Law provided that the heaviest penalty to be applied in cases transferred from the ICTR, or to cases of persons extradited from other states, was life imprisonment. However, the death penalty remained applicable to other cases such as ordinary cases of murder, armed robbery, rape of children, etc. It was subsequently considered to be unfair and probably contrary to the Constitution for those transferred from the ICTR or extradited from other countries to be treated differently from those arrested and prosecuted in Rwanda. Moreover, the issue of the abolition of the death penalty had been debated in Rwanda for a long time and it was therefore decided to abolish the death penalty altogether in 2007.[104] The death sentence was substituted with life imprisonment or life imprisonment with special provisions, including solitary confinement.

#### 7.6.1.1 Life Imprisonment with Special Provisions

Following the passing of the Transfer Law and the abolition of the death penalty, it seemed all clear for cases to be transferred to Rwanda. However, questions continued to be raised in all applications lodged by the ICTR Prosecutor for referrals on various grounds, including the argument that although the death penalty had

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[101] *Prosecutor v. Wenceslas Munyeshyaka*, ICTR Trial Chamber III, Decision on Prosecutor's Request for Referral of Wenceslas Munyeshyaka's Indictment to France, Rule 11*bis* of the Rules of Procedure and Evidence of 20 November 2007.

[102] *Prosecutor v. Laurent Bucyibaruta*, ICTR Trial Chamber III, Decision on Prosecutor's Request for Referral of Laurent Bucyibaruta's Indictement to France, Rule 11*bis* of the Rules of Procedure and Evidence of 20 November 2007.

[103] Organic Law No 11/2007 of 16 March 2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other states, Official Gazette, Special Issue, 19 March 2007.

[104] Organic Law No 31/2007 of 25 July 2007 relating to the Abolition of Death Penalty, Official Gazette, Special Issue, 25 July 2007.

been abolished, there was a risk of suspects convicted in Rwandan courts being sentenced to life imprisonment with special provisions and thus to life in solitary confinement. Defence lawyers argued that solitary confinement was contrary to Article 7 of the International Covenant on Civil and Political Rights to which Rwanda is a party and which prohibits the use of torture, and that there was no assurance that accused persons transferred to Rwanda would not be subject to the sentence of life imprisonment with special provisions. In the *Munyakazi* referral decision,[105] the Trial Chamber held that although the Transfer Law stated that the maximum sentence for persons transferred from the ICTR was life imprisonment, it was not clear that the Rwandan courts would not apply the later Abolition of the Death Penalty Law, which replaced the death penalty with life imprisonment or life imprisonment with special conditions, and which in its Article 9 declared all previous provisions on the matter inconsistent with it repealed. The Appeals Chamber upheld the decision of the Trial Chamber, dismissing the application for transfer. It argued that although the Transfer Law was the *lex specialis* and therefore to be construed to prevail over general laws, the Abolition of the Death Penalty Law was the *lex posterior* and therefore could be construed as prevailing over the Transfer Law, thus as allowing the possibility of imposing life imprisonment with isolation in transfer cases. It further argued that, although the Abolition of the Death Penalty Law did not explicitly mention the Transfer Law, it provided in Article 9 that "all legal provisions contrary to this Organic Law are hereby repealed", which could be interpreted as including those provisions in the Transfer Law that are inconsistent with it. Similar decisions were made in the Prosecutor's application for the transfer of *Ildephonse Hategekimana*.[106]

In 2008, the Supreme Court was called upon to rule on the constitutionality of the sentence of solitary confinement in the *Tubarimo Aloys* case.[107] In that case, the argument was that solitary confinement amounted to torture, which is prohibited by the Constitution and by international conventions. The Court dismissed this argument. The ruling of the Court, however, appeared not to have reassured the ICTR, and foreign states requested the extradition of genocide fugitives from Rwanda. The same year the Abolition of the Death Penalty Law was amended to provide that life imprisonment in solitary confinement was not applicable to transferred or extradited cases.[108] Furthermore, to put the matter beyond doubt, in

[105] *Prosecutor v. Yussuf Munyakazi*, ICTR Trial Chamber III, Decision on Prosecutor's Request for Referral of the Indictment to the Republic of Rwanda, Rule 11*bis* of the Rules of Procedure and Evidence of 28 May 2008, paras 22–32.

[106] *Prosecutor v. Ildephonse Hategekimana*, ICTR Trial Chamber, Decision on the Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, Rules 11*bis* of the Rules of Procedure and Evidence of 19 June 2008.

[107] Re Tubarimo Aloys, Supreme Court of Rwanda, 29 August 2008.

[108] Organic Law No 66/2008 of 21 November 2008 modifying and completing the Organic Law No 31/2007 of 25 July 2007 relating to the Abolition of the Death Penalty, Official Gazette, No. 23, 1 December 2008.

2010, Parliament passed an interpretive law that confirmed that life imprisonment per se did not amount to torture and spelt out conditions regulating its implementation.[109]

Another issue that delayed the transfer of cases from the ICTR and extraditions from other countries is that of 'fair trial'. Rule 11*bis* (D) requires that in deciding whether to order the transfer of a case to a national jurisdiction, the Trial Chamber seized of the matter shall satisfy itself that the accused will receive a fair trial in the courts of the state concerned. In every case in which the Prosecutor has sought transfer of the suspect to Rwanda the defence and some NGOs have argued that that the accused would not be guaranteed a fair trial. Fair trial, according to the ICTR, includes being tried before an independent and impartial tribunal. For instance, in the *Munyakazi* case,[110] it was alleged by the defence that the fact that at the first instance the transferred accused would be tried by a single judge would not guarantee a fair trial as such a judge would be liable to influence by the Executive. The Chamber found that, while Rwandan legislation enshrines the principle of judicial independence, which by definition includes guarantees against outside pressures, it was not satisfied that the practice accorded with the theory. It found that a judge sitting alone would be particularly susceptible to pressure. Furthermore, the Chamber was not convinced that the accused's fair trial right to obtain the attendance of, and to examine, defence witnesses under the same conditions as witnesses called by the prosecution, could be guaranteed at that time in Rwanda.

However, in the subsequent case of *Hategekimana*, the Trial Chamber dismissed the argument on single judge trials, saying none of the submissions had provided evidence that single judge trials in Rwanda, which commenced with the judicial reforms of 2004, have been more open to outside influence than previous trials involving panels of judges.[111] Nevertheless, the Chamber declined the application for transfer on the grounds that it was not satisfied that Rwanda could ensure *Hategekimana*'s right to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him; and that, pursuant to Rwandan law, *Hategekimana* might face life imprisonment in isolation without adequate safeguards in violation of his right not to be subjected to cruel, inhuman or degrading punishment.[112]

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[109] Organic Law No 32/2010 of 22 September 2010 relating to Serving Life Imprisonment with Special Provisions, Official Gazette, No Special, 14 October 2010.

[110] *Prosecutor v. Yussuf Munyakazi*, ICTR Trial Chamber III, Decision on Request for Referral of 28 May 2008, para 48 and paras 67–70.

[111] *Prosecutor v. Ildephonse Hategekimana*, ICTR Trial Chamber, Decision on Request for Referral of 19 June 2008, para 41.

[112] *Prosecutor v. Ildephonse Hategekimana*, ICTR Trial Chamber, Decision on Request for Referral of 19 June 2008, para 78.

#### 7.6.1.2 Witness Protection

Another issue raised by some *amicus curiae* in the various referral application cases was that witnesses could not be guaranteed safety and could be charged with the offence of genocide ideology for what they said in their testimonies. For this reason it was argued that defence witnesses, whether from inside or outside Rwanda, would be reluctant to come forward and testify. The Chamber in *Kanyarukiga* accepted that the "defence may face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify. This may affect the fairness of the trial."[113] The Chamber went on to say that despite the presence of video link facilities in Rwanda, it was not satisfied that *Kanyarukiga* would be able to call witnesses residing outside Rwanda to the extent and in the manner which will ensure a fair trial if the case is transferred.[114] To put it beyond doubt that witnesses would not be prosecuted for what they said in court, the Transfer Law was amended in 2009 to read as follows: "Without prejudice to the relevant laws on contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial."[115] Thus even if an accused or his/her counsel makes a statement during proceedings denying the genocide against Tutsi or trivializing it (which are offences under Rwandan law) he or she will not be prosecuted for that.

Much was said in the various cases of referral about the safety of defence witnesses. The Transfer Law provides for witness protection for both prosecution and defence witnesses. Article 15 of that law states that in cases transferred from the ICTR and other states, the High Court shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure and Evidence. Article 15 further protects witnesses who travel to Rwanda to testify in transfer cases against search, seizure, arrest or detention during their testimony and during their travel to and from trials. Moreover, the Chief Justice issued an order creating the Witness Protection Unit within the judiciary to meet the criticism that the Victim and Witness Services Unit based in the Prosecutor General's office was inadequate to protect witnesses for the defence and that such witnesses would be afraid to come forward and testify.

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[113] *Prosecutor v. Kanyarukiga*, ICTR Trial Chamber, Decision on Request for Referral of 6 June 2008, para 73.

[114] *Prosecutor v. Kanyarukiga*, ICTR trial Chamber, Decision on Request for Referral of 6 June 2008, paras 77–81.

[115] Article 2, para 2 of the Organic Law No 03/2009/OL of 26 May 2009 modifying and completing the Organic Law No 011/2007 of 16 March 2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other states, Official Gazette, Special Issue, 26 May 2009.

#### 7.6.1.3 Alternative Ways to Obtain Testimony

The Transfer Law sets out in detail guarantees of rights of the accused person and deals with alternative ways of obtaining testimonies from persons residing abroad, including video link and rogatory missions by judges to take *viva voce* evidence. Article 14*bis* of the Transfer Law, inserted in 2009, provides that upon request of a party the judge may, in a transferred case in which a witness is unable or for good reason unwilling to appear before the High Court, order that the testimony of such witness be taken in any of three ways:[116]

1. By deposition in Rwanda or in a foreign jurisdiction before a competent authority authorized by the judge for that purpose;
2. By video-link hearing taken by the judge at the trial;
3. By a judge sitting in a foreign jurisdiction for the purpose of recording such *viva voce* testimony.

Testimony given in any of these ways must be transcribed so it can be made part of the trial record. The law specifies that such evidence shall carry the same weight as testimony given in court. The order must designate the date, time and place where such testimony will be taken, requiring the parties to be present to examine and cross-examine the witness.

While in the previous cases of *Kanyarukiga*, *Munyakazi* and *Hategekimana* the Appeals Chamber had found the use of video-link testimony inadequate to ensure fairness in the trial in that there would be inequality of arms between the prosecution and the defence, the Trial Chamber in *Uwinkindi* found the addition of the option of taking of testimony by a judge sitting in a foreign jurisdiction with the possibility of the presence of the accused by video-link to examine or cross-examine witnesses, to be adequate guarantees of equality between the parties.[117]

#### 7.6.1.4 Independence of the Judiciary

During Rule 11*bis* hearings at the ICTR and during extradition hearings in foreign courts, such as those in the UK and Sweden, the issue of independence of the judiciary in Rwanda has been raised since it is one of the criteria for an accused to have a fair trial. It was argued by Human Rights Watch and the Association of Defence Lawyers that there can be no fair trial in a case transferred under Rule 11*bis* or in case of extradition because the judges in Rwanda are not independent of the Executive. However, this argument was rejected by the Chamber in the

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[116] Article 3 of the Organic Law No 03/2009/OL of 26 May 2009 modifying and completing the Organic Law No 011/2007 of 16 March 2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other states, Official Gazette, Special Issue, 26 May 2009.

[117] *Prosecutor v. Jean Uwinkindi*, ICTR Referral Chamber, Decision on Request for Referral of 28 June 2011, para 106.

*Uwinkindi* case. The Chamber was satisfied that there has been a rigorous reform process in the judiciary since 2003 to enshrine and protect the independence of the judiciary in Rwandan laws.[118] Article 140 of the Constitution provides that the judiciary shall be independent from other branches of the Government and shall have administrative and financial autonomy.[119] The Law on the Statutes of Judges,[120] as well as the Law on the Code of Ethics for the Judiciary,[121] require the independence and impartiality of judges.

The appointment and termination of judges is a transparent process which is done through the High Council of the Judiciary which consists of a majority of judges with only one representative from the executive. There is security of tenure for all judges. Except for the President and Vice President of the Supreme Court who have limited terms of 8 years each, all other judges have an unlimited tenure. This is in accordance with Article 23, Para 4 of the Law on the Statutes of Judges and Judicial Personnel which states that judges who have been confirmed in their posts are irremovable. The provision in the 2008 amendment of the Constitution[122] introducing limited tenure for judges was removed in the 2010 Amended Constitution[123] which, therefore, restores the *status quo ante* of unlimited tenure until retirement or removal for serious misconduct or serious incompetence or incapacity.

The Penal Code also provides an incentive for the impartiality of judges in that it provides for stiff sentences for judges found to engage in corruption either by soliciting or accepting bribes or by using other forms of corruption.[124]

#### 7.6.1.5 Participation of Foreign Judges

In the context of Rule 11*bis* on transfer and extradition cases, the possibility of participation of foreign judges in trials may be said to enhance the assurance of independence. Under Rwanda's law on the Organization, Functioning and Jurisdiction of Courts, foreign judges may be requested to sit with their Rwandan counterparts to hear a case involving international crimes or cross-border crimes.

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[118] *Prosecutor v. Jean Uwinkindi*, ICTR Referral Chamber Decision on Request for Referral of 28 June 2011, para 51.

[119] Constitution of the Republic of Rwanda of 4 June 2003 as amended to date, Official Gazette No Special, 4 June 2003.

[120] The latest legislation is the Law No 10/2013 of 8 March 2013 governing the statutes of judges and judicial personnel, Official Gazette No 15 of 15 April 2013.

[121] Law No 09/2004 of 29 April 2004 relating to the code of ethics of for the Judiciary, Official Gazette, No 11 of 1 June 2004.

[122] Revision No 03 of 13 August 2008.

[123] Revision No 04 of 17 June 2010.

[124] Article 639 of the Organic Law No 01/2012/OL of 2 May 2012 instituting the Penal Code, Official Gazette, No Special of 14 June 2012.

In addition, the law governing the Supreme Court[125] gives powers to the Chief Justice to request the United Nations, other international organizations or a foreign country, to provide foreign judges to sit with Rwandan judges in cases transferred to Rwanda involving international crimes or transnational crimes committed in Rwanda or in a foreign country. The power may be exercised at the request of the accused, his/her advocate or by the prosecutor or by an international prosecution authority. However, this has not been requested or considered necessary so far.

### 7.6.2 Current and Pending Prosecutions

So far Rwanda has received seven files from the ICTR. These are files of *Jean Uwinkindi*, *Bernard Munyagishali*, *Charles Sikubwabo*, *Ladislas Ntaganzwa*, *Aloys Ndimbati*, *Ryandikayo*, *Fulgence Kayishema* and *Pheneas Munyarugarama*. The two first accused persons were transferred from the ICTR's detention center to Rwanda. Others are still at large.[126] *Charles Bandora* is the only suspect extradited from Norway. *Leon Mugesera* was not extradited but deported from Canada for infringing Canadian domestic law. *Emmanuel Mbarushimana* is still fighting an extradition ruling by Norwegian courts before the European Court for Human Rights.

It is expected that this Court will follow its previous ruling in the *Ahorugeze* case where it stated that it was satisfied that suspects extradited to Rwanda received fair trials and had no ground to doubt about the independence of the Rwandan judicial system.[127] The court systematically rejected the defence counsel's allegations of persecution to which the suspect would be subjected once in Rwanda and concluded that on the basis of previous decisions by the ICTR and other domestic courts such as those of The Netherlands or the Court of Oslo, there was evidence that in Rwanda prisoners are detained in good conditions.[128]

Two other genocide fugitives in France, *Innocent Musabyimana* and *Claude Muhayimana*, have requested the French *Cour de Cassation* to overrule the decision of the Paris Court of Appeal on their extradition to Rwanda. The French highest court has so far rejected extradition requests on the grounds that laws regulating and punishing the crime of genocide in Rwanda were *ex post facto* laws. *Libération*, a French Newspaper, alleges that in Rwanda the crime of genocide is prosecuted on the basis of a law of 19 June 1994 whereas the acts it criminalizes

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[125] Organic Law No 03/2012/OL of 13 June 2012 determining the organization, functioning and jurisdiction of the Supreme Court, Official Gazette, No 28 of 9 July 2012.

[126] "Transfer of Bernard Munyagishari to Rwanda", available at http://www.nppa.gov.rw/component/content/article/54-top/708-transfer-of-bernard-munyagishari-to-rwanda.html.

[127] *Ahorugeze v. Sweden*, European Court of Human Rights, Final Judgment of 4 June 2012.

[128] Ibid.

started in April 1994.[129] It is not known, where *Libération* found reference for this statement.

Most international crimes, and particularly genocide, are already criminalized by customary international law. The *nullum crimen sine lege* rule can no longer be a barrier for the prosecution of international crimes of the magnitude of genocide. Article II(2) of the Universal Declaration of Human Rights declares that the principle of legality in criminal matters is interpreted as having codified that principle for all nations. The Declaration itself is widely viewed as a codification of customary international law.[130] Other genocide fugitives are still fighting their extradition before domestic courts of some European or North American countries.[131]

In Rwanda, the judicial process for the extradited or transferred persons has not been rapid. None was expecting, however, those trials to follow an easy process. Cases are very complex. Countries that extradited genocide fugitives to Rwanda as well as the ICTR's Mechanism continue to make a direct or remote follow up, including monitoring by the representatives of the ICTR Prosecutor and Registrar. Accused persons are aware of the guarantees that the Government has pledged before their extradition or their transfer and which are largely reflected in the Transfer Law. They do invoke these guarantees but also appear to abuse the procedure.

For instance, *Leon Mugesera* challenged first the legality of his detention from the lower courts to the High Court. The High Court found that *Mugesera*'s arguments that he could not be detained before Canada sent his file to Rwanda were baseless. *Mugesera* lodged an appeal before the Supreme Court. He was later informed that his appeal before the Supreme Court did not comply with Article 162 of the Civil Procedure Code on the admissibility of appeals against interlocutory judgments. Such appeals are only admissible after and jointly with the final judgment.[132] *Mugesera* immediately challenged the constitutionality of the legal provision prohibiting an appeal against interlocutory judgments. A few days before the delivery of the Supreme Court's judgment on the constitutionality or unconstitutionality of Article 162 of the Civil Procedure Code, *Mugesera* withdrew his request.[133] The process on preventive detention took up to 4 months. When the trial was about to start the accused alleged that he was unable to plead in

[129] Génocide: la Justice Francaise Favorable à l'Extradition des Rwandais, Libération, 13 November 2013.

[130] Schabas 2013, p. 681.

[131] See for example, *Vincent Brown and Others v. The Government of Rwanda and Another* [2009] EWHC 770 Admin, United Kingdom High Court (England and Wales), Judgment of 8 April 2009; "Rwanda: Genocide Suspects in UK set for Extradition Hearing" available at http://allafrica.com/stories/201309040096.html.

[132] Article 162, para 2 of the Law No 18/2004 of 20 June 2004 relating to the Civil, Commercial, Labour and Administrative Procedure, Official Gazette, No Special *Bis* of 30 July 2004.

[133] *Ex Parte Leon Mugesera*, Supreme Court of Rwanda, 28 September 2012.

his mother tongue. The objection followed again the same process until the highest court decides on that matter.

Accused persons have also resorted to all kinds of procedural and legal technicalities as a way of getting away with the charges they are prosecuted for or adjourning and prolonging the trial. The plea of unconstitutionality of procedural laws has been used in other cases.[134] The Rwandan judiciary remains firm and determined to see the cases proceed and conclude in accordance with international standards.

## 7.7 General Conclusion

Rwanda has come a long way. It has not been easy to try genocide cases. Committed to eradicating the culture of impunity in the country, hundreds of thousands of perpetrators of genocide and other crimes against humanity had to be prosecuted. The International Criminal Tribunal for Rwanda was neither mandated, nor could it possibly have had the capacity to prosecute all perpetrators. It fell on national courts to carry the major burden. Against all odds, Rwanda has succeeded in bringing to justice to the majority of perpetrators. More than that, she opted to handle the perpetrators in a multi-faceted approach, focusing on fighting impunity but also on national unity and reconciliation through the neo-traditional Gacaca courts and innovative forms of punishment. The Rwanda experiment is likely to be adopted by other post-conflict societies if one considers the number of country delegations coming to Rwanda to learn how Gacaca operated. At the same time, international tribunals are important in using the available human and material resources to produce reference judgments for generations of scholars, students and other jurisdictions. Post-conflict justice, it appears, is best served by a multi-dimensional approach.

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[134] See, for example, *Prosecutor v. Umuhoza Victoire and Others*, Judgment of 13 October 2011; *Prosecutor v. Nditurende Tharcisse and Another*, Judgment of 28 March 2013. *Ex Parte Uwinkindi Jean*, Supreme Court of Rwanda, *Ex Parte Ingabire Umuhoza Victoire*, Supreme Court of Rwanda, in Urukiko rw'Ikirenga, Icyegeranyo cy'Ibyemezo by'Inkiko, Igitabo cya 2, No 17, 2013, pp. 3–27.

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