



# RWANDA: INTERNATIONAL AND NATIONAL RESPONSES TO THE MASS ATROCITIES AND THEIR INTERACTION

BY SIGALL HOROVITZ

**DOMAC/6, SEPTEMBER 2010**

## ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

**THE DOMAC PROJECT** is a research program funded under the Seventh Framework Programme for EU Research (FP7) under grant agreement no. 217589. The DOMAC project is funded under the Socio-economic sciences and Humanities Programme for the duration of three years starting 1st February 2008.

**THE DOMAC PARTNERS** are Hebrew University, Reykjavik University, University College London, and University of Amsterdam.

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## ACKNOWLEDGEMENTS

The author would like to thank the interviewees for their time and attention, and especially thank Edem Comlan for his helpful comments.

This paper represents not the collective views of the DOMAC Project, but only the views of its author.

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Published by DOMAC

Reykjavik University

Menntavegi 1, 101 Reykjavik

Iceland

[www.domac.is](http://www.domac.is)

## EXECUTIVE SUMMARY

Genocide and other atrocities perpetrated in Rwanda in 1994 have been subject to judicial proceedings both at the international and national levels. While about 70 individuals are or have been prosecuted by the International Criminal Tribunal for Rwanda (hereinafter: ICTR), mass amounts of perpetrators have been tried in Rwandan courts. But national trials developed separately from the international proceedings, applying different norms and procedures from those followed at the ICTR. In 2008, the ICTR found that Rwanda does not offer fair trials to genocide suspects and refused on that basis to refer cases to Rwanda. If this finding is true, then the combined impact of the national and international atrocity-related proceedings is sub-optimal, particularly when the more “problematic” national process deals with most perpetrators.

This report posits that in order to effectively fight impunity for atrocities, given the limited number of perpetrators international courts can prosecute, the international community must adopt a comprehensive approach which promotes a parallel utilization of international and national courts. Calibrating international and national trials would also ensure that substantive and procedural norms developed in international courts will be applied in national trials. In the case of Rwanda, the international community was primarily focused on international trials, and did not design the ICTR to encourage national trials. Thus, in its first ten years of existence, the ICTR had almost no impact on national atrocity-related proceedings in Rwanda. This changed to a certain extent in 2004, when the ICTR, in order to meet its closure deadline, adopted a procedure allowing the transfer of cases to national courts. Hoping to receive cases from the ICTR, Rwanda amended its due process provisions, abolished the death penalty, improved its prison conditions, and significantly increased its cooperation with the ICTR. In parallel, the ICTR became actively involved in strengthening the judicial capacity of Rwanda.

These and additional domestic impacts of the ICTR are identified and assessed in this report, which also offers ways to maximize any positive impacts identified. In preparing the report, the author analyzed various documents and interviewed over 30 core professionals affiliated with the ICTR or the Rwandan justice system.

# TABLE OF CONTENTS

Executive Summary .....	5
Table of contents .....	6
List of abbreviations .....	7
1. Introduction .....	8
1.1 Object of Report .....	9
1.2 Structure and Methodology .....	11
2. Country Background .....	12
2.1 General .....	12
2.2 Political, Administrative and Legal Systems .....	12
3. Conflict Background .....	14
3.1 Pre-conflict Tensions .....	14
3.2 The Conflict .....	16
3.3 The Mass Atrocities .....	18
4. Post-War Conditions in Rwanda .....	19
4.1 Political Will to Prosecute the Mass Atrocities .....	19
4.2 Capacity of the Legal System to Prosecute Mass Atrocities .....	21
4.3 Capacity Building Efforts in Rwanda .....	28
5. The National Response to the Mass Atrocities .....	31
5.1 Ordinary trials .....	31
5.2 Gacaca trials .....	36
5.3 Military trials .....	42
5.4 Non-Judicial Measures .....	44
6. The International Response to the Mass Atrocities: the ICTR .....	46
6.1 Establishment and Jurisdiction .....	46
6.2 Organization and Outreach .....	48
6.3 Judicial Activity .....	50
6.4 Completion Strategy and Referral Procedure .....	51
6.5 Funding .....	53
6.6 Local Perceptions of the ICTR in Rwanda .....	55
7. ICTR - Rwanda Cooperation .....	57
7.1 Cooperation of Rwanda with the ICTR: 1994 - 2003 .....	58
7.2 Cooperation of Rwanda with the ICTR: 2004 - 2010 .....	60
7.3 Cooperation of the ICTR with Rwanda .....	62
8. Impact of the ICTR on Rwandan Judicial Response to the Atrocities .....	64
8.1 Normative Impacts .....	64
8.2 Prosecution Rates and Trends .....	69
8.3 Sentencing Practices .....	70
8.4 Capacity Building .....	74
9. Conclusion and Recommendations .....	80

# LIST OF ABBREVIATIONS

ASF	Advocates Sans Frontiers
CID	Criminal Investigations Department
DCDMS	Defence Counsel and Detention Management Section
EC	European Commission
FAR	Rwandan Armed Forces
FARG	Fund for the Support of Genocide Survivors
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILPD	Institute for Legal Practice and Development
MRND	National Revolutionary Movement for Development
NURC	National Unity and Reconciliation Commission
OTP	Office of the Prosecutor
PRI	Penal Reform International
RPA	Rwandan Patriotic Army
RPF	Rwandan Patriotic Front
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNHRFOR	United Nations Human Rights Field Operation in Rwanda
WVSS	Witness and Victims Support Section

# 1. INTRODUCTION

From 7 April to 18 July 1994, between 800,000 and one million people were killed in Rwanda in what has been described as the fastest genocide in history. Most of the victims were civilians belonging to the Tutsi ethnic group, which was persecuted in Rwanda since the country's independence. The victims were often tortured and raped before they were killed. The perpetrators included soldiers, militia members and civilians, mostly of Hutu ethnicity. Serious crimes were also committed by Tutsis against Hutu civilians, in particular “revenge killings”. The genocide followed a 4-year protracted armed conflict between the Tutsi-dominated Rwandan Patriotic Front (hereinafter: RPF) and government forces. On 18 July 1994, the victorious RPF established a new government of national unity. Security forces began arresting suspected “genocidaires” (a term used in Rwanda when referring to genocide perpetrators). However, most of the high-ranking genocidaires have by then fled Rwanda.

In November 1994, the United Nations (hereinafter: UN) Security Council established the International Criminal Tribunal for Rwanda (hereinafter: ICTR) to prosecute the major perpetrators of the atrocities committed in Rwanda (or by Rwandans in neighboring countries) in 1994. The ICTR indicted a total of 92 persons. It began its trials in 1996, and is expected to complete all first instance trials by the end of 2010. In Rwanda, in late 1996, “specialized chambers” within the domestic courts started prosecuting the suspected genocidaires who were apprehended in the country. By 1998, mass arrests in Rwanda led to the detention of over 120,000 suspected genocidaires. As trials and investigations progressed, the list of suspects compiled by the Rwandan authorities exceeded a million persons. In 2001, to better handle mass trials, the government created a system of “gacaca courts” which are based on a traditional community justice mechanism. In addition to establishing criminal accountability, the gacaca courts were also designed to contribute to national reconciliation by bringing together community members to discuss the atrocities. At the time of writing, gacaca courts prosecuted over a million persons, mainly low and mid level suspected



perpetrators of genocide-related crimes. Ordinary national courts in Rwanda are still prosecuting the higher-level suspected genocidaires.<sup>1</sup>

To help meet its closure deadline, the ICTR has considered referring some of its cases to Rwanda. However, the Tribunal's judges ultimately decided against such transfers, in light of their concerns that the accused persons may not receive fair trials in Rwanda, and that they may receive a sentence which violates international law.

## 1.1 OBJECT OF REPORT

International courts are created to establish accountability in the aftermath of mass atrocities, through fair trials.<sup>2</sup> But they can only prosecute a handful of perpetrators, which in cases of mass atrocities usually represent a small fraction of the criminals. Therefore, international courts, even if they try the highest level perpetrators, have a greater chance to establish accountability in the countries they address if their process is complemented by national atrocity-related prosecutions in those countries.<sup>3</sup> The national prosecutions, however, must meet certain fairness standards, as to not amount to “victor’s justice” or “sham” trials.

To better achieve accountability, the international and national judicial responses to the atrocities must complement each other. Otherwise, if the two parallel processes compete over recourses or apply different norms and standards, they may undermine each other, eventually undermining their (supposed) mutual goal of establishing accountability through fair trials.

In the case of Rwanda, in the aftermath of the 1994 genocide, the international and national judicial responses to the atrocities developed separately, to the point that 14 years after its establishment, the ICTR has considered that Rwanda does not offer fair trials to genocide suspects. If this is the case, then the combined impact of the two

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<sup>1</sup> Trials of Rwandan genocide suspects have also been held in third states under the principle of universal jurisdiction. It is noted that Rwanda has also tried several RPF combatants, in military courts, for atrocities committed against Hutu civilians.

<sup>2</sup> International courts have other goals as well, but this report focuses on their goal of establishing accountability through fair trials.

<sup>3</sup> In principle, national trials can also take place in third states, under the principle of universal jurisdiction. However, it is unlikely that many such prosecutions would take place in the absence of the suspects and evidence in such third states. Even when suspects are present in third states, these states may not be legally able or politically willing to prosecute them. Furthermore, fair prosecutions before the domestic courts of the state of the crimes could also enhance the legitimacy of the post-conflict government and judiciary, and be more sensitive to local nuances than prosecutions by third states.

systems – national and international – is sub-optimal, particularly when the more “problematic” national process deals with the vast majority of perpetrators.

But even if Rwanda offers fair trials, the mere perception by the ICTR (and therefore by the international community) that Rwanda’s domestic justice system is unfair, can undermine the struggle to achieve accountability for the atrocities in Rwanda. For example, it is unlikely in these circumstances that the many perpetrators who still live freely outside Rwanda will be extradited to Rwanda. Thus, as most of them will not be prosecuted in their states of residence, due to lack of political will or judicial jurisdiction, the attainment of accountability for Rwanda’s atrocities can be seriously undermined. In addition, the ICTR’s perception about the Rwandan justice system will affect its future decisions about referring cases or transferring prisoners to Rwanda, which in turn may reduce the Tribunal’s ability to promote a culture of accountability in Rwanda.

When it established the ICTR, the UN Security Council did not adopt a comprehensive approach promoting the parallel utilization of the ICTR and national courts. Thus, the ICTR was not mandated to encourage national atrocity-related prosecutions, or to contribute to their quality. However, its process may have had certain impacts on national proceedings in Rwanda, including on their fairness. The object of this report is to identify these impacts, particularly in the following four areas: (1) the application of international norms in domestic proceedings which address atrocity crimes; (2) rates and trends of domestic prosecutions for atrocity crimes; (3) domestic sentencing practices in relation to atrocity crimes; (4) capacity to handle domestic prosecutions of atrocity crimes.

Not all impacts are desirable. For example, the holding of trials by an international court may provide an excuse for national courts to remain inactive. That is a negative impact, if we accept the above theory that the parallel activation of international and national courts is desirable. A positive impact would be the encouragement by an international court of national trials which are fair, and address the perpetrators that are not handled by the international court. This report, after identifying the ICTR’s impacts on national proceedings, will try to offer ways to maximize any positive impacts identified.

## 1.2 STRUCTURE AND METHODOLOGY

Parts 2 and 3 of the report provide a general background on Rwanda and the genocide. In part 4, the report outlines the political and legal conditions which prevailed in Rwanda after the genocide, in an attempt to identify the willingness and ability of the local authorities to prosecute the atrocities. Parts 5 and 6 describe the international and national responses to the atrocities, namely, the establishment and process of the ICTR, and the holding of national trials in Rwanda (including in ordinary, gacaca and military courts). In part 7, the cooperation between the ICTR and Rwanda is discussed. Part 8 assesses the impacts that the ICTR had on Rwanda's justice system, in the four areas described in section 1.1 above. Part 9 concludes the report and provides recommendations on how to maximize any positive impacts identified.

The information in this report was obtained in interviews with over 30 core professionals affiliated with the ICTR or the Rwanda justice system. In addition, information was gathered from documents such as UN reports and resolutions, international and national case law, academic and news articles, NGO reports, etc.

The interviews were conducted by the author during her missions to Rwanda and Arusha in October and November 2008. The interviewees were selected based on their knowledge of and active role within the ICTR or the domestic justice system in Rwanda. ICTR personnel who were interviewed included members of the Tribunal's Chambers, Office of the Prosecutor, Registry, and Defence Counsel. Some were Rwandan nationals. Interviewees affiliated with the national justice system of Rwanda included senior government officials, prominent judges and lawyers, legal academics, and representatives of international NGOs based in Rwanda. The interviews not only provided much of the information presented throughout this report, but they also shed light on some of the reasons underlying certain developments. Since many of the interviewed individuals did not want the information they provided to be attributed directly to them, they are cited throughout this report with generic references, such as "a Rwanda official", or "an ICTR judge".

## 2. COUNTRY BACKGROUND

### 2.1 GENERAL

The Republic of Rwanda is a small and landlocked country in Central-East Africa, covering an area of 26,338 sq km. It borders Uganda, Burundi, Tanzania, and the Democratic Republic of the Congo. Rwanda's capital city is Kigali. The official languages are French, English, and Kinyarwanda. Before the 1994 genocide, Rwanda's population totalled 7.14 million, comprising three ethnic groups: Hutu (about 85%), Tutsi (about 14%), and Twa (about 1%). The conflict and genocide resulted in the death or exodus of 35% to 40% of the total population. However, many Rwandans who previously left Rwanda returned to their homeland in the years following the genocide. By mid-2008, the population was estimated at about 10 million people. Today, Rwanda is the most densely populated country in Africa. Most of its population is engaged in subsistence agriculture. Life expectancy at birth is 50.5.<sup>4</sup>

Pre-colonial Rwanda was a monarchy ruled by Tutsi kings. In the 1890s, Rwanda became part of German East Africa. After the First World War, Rwanda came under the administration of Belgium as a League of Nations Trust Territory and subsequently a UN Trust Territory. In the 1930s, the Belgian administration introduced a national identification card, to be carried by all Rwandans, identifying the holder as Hutu, Tutsi or Twa. These identification cards were later used to single out Tutsis for purposes of extermination during the 1994 genocide. Rwanda became independent in July 1962.<sup>5</sup>

### 2.2 POLITICAL, ADMINISTRATIVE AND LEGAL SYSTEMS

Rwanda is a republic with an executive president and a multi-party system of government. It adopted a new constitution on 26 May 2003, replacing the pre-genocide 1991 constitution.<sup>6</sup> Rwanda's parliament comprises a 26-member Senate and an 80-

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<sup>4</sup> P. Gourou, 'Rwanda: Physical and Social Geography', in *Africa South of the Sahara* (Ed. Iain Frame, Routledge, 2009, 38th edition), p. 924; CIA World Fact-book: Rwanda <<https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html>> accessed 16 December 2009 (hereinafter: CIA World Fact-book).

<sup>5</sup> T. Ofcansky, P. Clark, Z. Kaufman, 'Rwanda: Recent History', in *Africa South of the Sahara* (Ed. Iain Frame, Routledge, 2009, 38th edition), pp. 924-925; Alison Des Forges, *Leave None to Tell the Story* (HRW, 1999) <[http://www.hrw.org/legacy/reports/1999/rwanda/Geno1-3-09.htm#P196\\_82927](http://www.hrw.org/legacy/reports/1999/rwanda/Geno1-3-09.htm#P196_82927)> accessed 16 December 2009 (hereinafter: Des Forges, *Leave None*), pp. 31-37.

<sup>6</sup> The Constitution of the Republic of Rwanda, 26 May 2003 <<http://www.mod.gov.rw/?Constitution-of-the-Republic-of>> accessed 16 December 2009 (hereinafter: Rwandan Constitution of 2003). The Constitution was adopted by

member Chamber of Deputies. Senate members include provincial representatives and individuals appointed by the president. The Chamber of Deputies comprises representatives of all sectors of the population. Under Rwanda's post-genocide constitution, thirty percent of the parliamentary seats must be held by women.<sup>7</sup> Following the last elections, women won 44 out of 80 seats in the Chamber of Deputies. Eight women sit in the Senate. This is the highest level of female-representation in any national parliament.<sup>8</sup>

After the RPF gained control of Rwanda on 18 July 1994, it established a national unity government. To ensure substantial representation of the Hutu majority in the new government, Pasteur Bizimungu, a Hutu, was chosen as the President of Rwanda. Paul Kagame, the leader of the RPF, became the Vice-President and Defence Minister. Following a disagreement between the two, Bizimungu resigned from the presidency on 23 March 2000 and Kagame became president.<sup>9</sup> Rwanda's first post-genocide presidential elections were held in 2003. Kagame was elected as President with over 90% of the vote.<sup>10</sup> Rwanda's next presidential elections were held in August 2010, with Kagame winning again by a landslide. There were allegations of improprieties during and

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referendum with an 87% turnout and a 93% affirmative vote. Interestingly, the preamble of the new constitution condemns the Rwandan Genocide and expresses hope for reconciliation and prosperity.

<sup>7</sup> 'Rwanda: Directory', in *Africa South of the Sahara* (Ed. Iain Frame, Routledge, 2009, 38th edition) (hereinafter: Rwanda: Directory), p. 946.

<sup>8</sup> AllAfrica News, 'Rwanda: Female-Majority House Elects Speaker After Historic Poll', AllAfrica.com News (by K. M. David, 6 October 2008) <<http://allafrica.com/stories/200810070155.html>> accessed 16 December 2009; Panorama of Parliamentary Elections 2008 (Inter-Parliamentary Union) <<http://www.ipu.org/pdf/publications/elections08-e.pdf>> accessed 16 December 2009, p. 7.

<sup>9</sup> During Bizimungu's administration, many believed that Kagame had true control of the government. In May 2001, Bizimungu founded an opposition movement, the Party for Democratic Renewal (PDR). It was almost immediately banned by the government, which accused it of being a radical Hutu party. Critics claim that the government was crushing opposition figures under the pretext of inciting racial tensions. On 19 April 2002, Bizimungu was placed under house arrest for continuing the operations of the party and charged with endangering the state. On 7 June 2004, he was sentenced to 15 years imprisonment for attempting to form a militia, inciting violence and embezzlement. On 17 February 2006, Bizimungu's appeal was denied by the Supreme Court, but eventually he was pardoned by Kagame and released on 6 April 2007. See BBC News, 'From President to Prison' (7 June 2004) <<http://news.bbc.co.uk/2/hi/africa/3728807.stm>> accessed 18 December 2009; BBC News, 'Rwanda's Ex-Leader Loses Appeal' (17 February 2006) <<http://news.bbc.co.uk/2/hi/africa/4724338.stm>> accessed 18 December 2009; BBC News, 'Rwanda Ex-Leader Freed from Jail' (6 April 2007) <<http://news.bbc.co.uk/2/hi/africa/6533163.stm>> accessed 18 December 2009.

<sup>10</sup> M. A. Drumbl, 'Law and Atrocity: Settling Accounts in Rwanda', 31 Ohio N.U. L. Rev. 41 (2005) (hereinafter: Drumbl, Law and Atrocity), p. 44.

around both elections.<sup>11</sup> According to some report, ethnic tensions continue to compromise Rwanda's political stability.<sup>12</sup>

Administratively, as of 1 January 2006, Rwanda is divided into five provinces (North, East, South, West and Kigali) which are further divided into districts, sectors and cells. Provinces are also called prefectures or *Intara* and districts are also known as communes or *Akarere*. Districts are the country's basic political-administrative units.<sup>13</sup>

The legal system in Rwanda derived from the Belgian civil law system. However, since the legal reform of 2004, common-law elements have been introduced into the Rwandan legal system (see section 4.2 below). Rwanda's court system comprises ordinary courts (also called conventional or classical court) and specialized courts. The ordinary courts are the Supreme Court, the High Court of the Republic, and provincial, district and municipal courts. The specialized courts are the "gacaca" courts and military courts. Under the Constitution, additional specialized courts may be established by law.<sup>14</sup> The gacaca court system was established in 2001 to enable efficient prosecution of large amounts of genocide suspects, while simultaneously promoting reconciliation (see section 5.2 below). Rwanda's military courts include the Military Tribunal and High Military Court, which have jurisdiction over cases involving military personnel.<sup>15</sup>

## 3. CONFLICT BACKGROUND

### 3.1 PRE-CONFLICT TENSIONS

Tensions between the Tutsi and Hutu ethnic groups in Rwanda have always existed, but they intensified during the Belgian colonial domination. The Belgian administration

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<sup>11</sup> See, e.g., *Ibid*; Guardian.co.uk, 'Rwandan ballots point to easy victory for Paul Kagame', 10 August 2010 <<http://www.guardian.co.uk/world/2010/aug/10/rwanda-election-paul-kagame-victory>> accessed 20 September 2010; Reuters, 'U.S. expresses concern about Rwanda election', 13 August 2010 <<http://www.reuters.com/article/idUSTRE67D0DX20100814>> accessed 20 September 2010.

<sup>12</sup> See, e.g., CIA World Fact-book (n 4) ("Despite substantial international assistance and political reforms - including Rwanda's first local elections in March 1999 and its first post-genocide presidential and legislative elections in August and September 2003 - the country continues to struggle to boost investment and agricultural output, and ethnic reconciliation is complicated by the real and perceived Tutsi political dominance. Kigali's increasing centralization and intolerance of dissent, the nagging Hutu extremist insurgency across the border, and Rwandan involvement in two wars in recent years in the neighboring DRC continue to hinder Rwanda's efforts to escape its bloody legacy.")

<sup>13</sup> Official website of the Republic of Rwanda, Ministry of Local Government <<http://www.minaloc.gov.rw>> accessed 24 June 2009. Rwanda was previously divided into 12 provinces, but the administrative layout was reformed on 1 January 2006 as part of a decentralization process.

<sup>14</sup> Rwandan Constitution of 2003 (n 6), Article 143.

<sup>15</sup> Rwandan Constitution of 2003 (n 6), Article 153.



accorded preferential treatment to the Tutsi, including in areas such as access to education and participation in local administration. However, when the Tutsi began to demand independence, the Belgians started supporting the Hutu. In 1959, three years before Rwanda's independence from Belgium, the majority ethnic group, the Hutu, overthrew the ruling Tutsi king. Inter-ethnic violence erupted that year, resulting in the exodus of many Tutsis from Rwanda.<sup>16</sup>

By 1960, the Hutu-dominated Parmehutu party gained political control of Rwanda, which it retained after the country achieved independence in 1962. The party's leader, Gregoire Kayibanda, became Rwanda's first president. In 1963, the Rwandan government enacted the Law of General Amnesty, which granted a blanket amnesty to persons who committed "political" offences as part of the "fight for national liberation" between 1959 and 1962. The fight for national liberation was understood as the struggle of the "oppressed mass" (the Hutu) against the Belgian colonialists and their Tutsi allies, as well as against the historic Tutsi monarchy.<sup>17</sup>

Over the next several years, thousands of Tutsis were killed, and over a hundred thousand fled to neighboring countries, including Uganda. The refugees occasionally tried to invade Rwanda, in unsuccessful attempts which were followed by reprisals against Tutsi civilians in Rwanda. Tensions between Hutu and Tutsi again escalated in the early 1970s. In 1973, Kayibanda's Defence Minister, Juvenal Habyarimana, seized power in a military coup. He remained president for the next 21 years. In 1974, Rwanda adopted a second amnesty law, exempting from prosecution perpetrators of political offences.<sup>18</sup> By 1975, Habyarimana turned Rwanda into a single-party state, controlled by

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<sup>16</sup> Des Forges, *Leave None* (n 5), p. 36.

<sup>17</sup> But the law exempted from this amnesty "people opposing the liberation of the oppressed mass from feudal colonial domination". Thus, while the Hutu enjoyed impunity for crimes committed against the Tutsi, this was not the case with respect to crimes committed by Tutsi against Hutu in this period, included in self defence. For a similar analysis of Rwanda's Law of General Amnesty of 1963 see Nicholas A. Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge, 2010) (hereinafter: Jones, *The Courts of Genocide*), p. 31. On the same page, Jones also provides the following English version of the law's main provisions:

1. Unconditional general amnesty is given for all offences, committed during the Social Revolution between 1959 October 1 and 1962 July 1, that, due to their nature, their motives, their circumstances or to what inspired them, are part of the fight for national liberation, and take on a political character even though these offences are an infringement to the common law.

2. Offences committed during this period by people opposing the liberation of the oppressed mass from feudal colonial domination are not benefiting from the amnesty given in the first article of this present law.

<sup>18</sup> Jones, *The Courts of Genocide* (n 17), pp. 31-32.

the National Revolutionary Movement for Development (hereinafter: MRND).<sup>19</sup> It was only in June 1991 that Rwanda adopted a multi party political system.

### 3.2 THE CONFLICT

The RPF was established in Uganda by Rwandan Tutsi refugees. It had its own armed forces called the Rwandan Patriotic Army (hereinafter: RPA).<sup>20</sup> On 1 October 1990, the RPA invaded Rwanda and fought against the Hutu-dominated Rwandan Armed Forces (hereinafter: FAR). The government arrested and imprisoned 8,000-10,000 people around the country, primarily Tutsis or suspected opponents of President Habyarimana. Many of them were detained without charges for several months. The armed conflict between the RPA and the FAR continued through 1991 and 1992, resulting in the deaths of thousands and the displacement of around 100,000 persons. In early 1992, political elements affiliated with President Habyarimana transformed the MRND youth group into a Hutu militia called the *Interahamwe* (in Kinyarwanda: “those who attack together”). Around the same time, the youth group of another Hutu-dominated party, the Coalition for the Defence of the Republique, was also transformed into a Hutu militia.<sup>21</sup> This smaller militia was known as the *Impuzamugambi* (in Kinyarwanda: “those who have the same goal”). Both militias were trained and supplied by the Rwandan army since early 1992, and later played a central role in the 1994 genocide.<sup>22</sup>

During 1992 and 1993, peace negotiations between the Rwandan government and the RPF were held in Arusha, Tanzania. These resulted in the signing of five protocols, dating from 18 August 1992 to 3 August 1993, and a final peace agreement signed on 4 August 1993 (hereinafter collectively: Arusha Accords). The Arusha Accords provided for a demobilization program, the creation of an integrated army, a new transitional government headed by a prime minister acceptable to both sides, multiparty general elections with full RPF participation, and the right of return for Rwandan refugees abroad. It was agreed that a UN peace force would oversee the implementation of the

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<sup>19</sup> Des Forges, *Leave None* (n 5), pp. 31-43; Drumbl, *Law and Atrocity* (n 10), p. 43; Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (1995) (hereinafter: Prunier, *The Rwandan Crisis*), Chapters 1-2; US Institute of Peace, ‘Rwanda: Accountability for War Crimes and Genocide’, January 1995, Special Report No. 13 <<http://www.usip.org/resources/rwanda-accountability-war-crimes-and-genocide>> accessed 17 December 2009 (hereinafter: USIP 1995 Report), p. 2.

<sup>20</sup> In 2002, the RPA was renamed the Rwandan Defense Forces (RDF).

<sup>21</sup> It is recalled that by then Rwanda adopted a multi party political system.

<sup>22</sup> Prunier, *The Rwandan Crisis* (n 18), Ch. 2-3; Des Forges, *Leave None* (n 5), p. 46; USIP 1995 Report (n 18), p. 3.



Arusha Accords. Hutu extremists opposed the Arusha Accords and the consequent reduction of their own power.<sup>23</sup> On 19 August 1993, the UN sent a reconnaissance mission to Rwanda to oversee the implementation of the Arusha Accords. On 5 October 1993, the UN Security Council replaced this reconnaissance mission with the United Nations Assistance Mission in Rwanda (hereinafter: UNAMIR), staffed by 2,548 troops and led by General Roméo Dallaire.<sup>24</sup>

The Arusha Accords failed to deliver long-term peace. Massive ethnic massacres in Burundi in October 1993 fuelled tensions in Rwanda, and violence increased.<sup>25</sup> On 6 April 1994, a plane carrying Habyarimana and the Burundian President Cyprien Ntaryamira was shot down near the Kigali airport, killing both presidents as well as all other passengers, including the FAR Chief of Staff. Hutu extremists immediately accused the RPF of assassinating President Habyarimana, although it is unclear until today who shot down the plane.<sup>26</sup> Almost instantly, Hutu soldiers and members of the Hutu militias began to kill Tutsi civilians, as well as Hutu opposition leaders and moderate members of Habyarimana's government, including Rwanda's prime minister. It has since been established that the political killings and the mass murder of civilians which followed the President's assassination was not chaotic or uncontrolled violence, but rather a planned and organized campaign of genocide.<sup>27</sup>

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<sup>23</sup> Des Forges, *Leave None* (n 5), pp. 95-96; USIP 1995 Report (n 18), p. 3; Phillip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families* (1998) (hereinafter: Gourevitch, *We Wish to Inform You*), pp. 99-100.

<sup>24</sup> UNAMIR's mandate has been considered to fall "short of what would have been needed to guarantee implementation of the Accords". See Des Forges, *Leave None* (n 5), pp. 99-100.

<sup>25</sup> Des Forges, *Leave None* (n 5), pp. 100-104; Gourevitch, *We Wish to Inform You* (n 23), p. 101.

<sup>26</sup> According to some reports, evidence suggests that extreme Hutus who opposed to the Arusha Accords shot down the plane. See, e.g., Drumbl, *Law and Atrocity* (n 10) p. 43.

<sup>27</sup> The Appeals Chamber of the ICTR has characterized the events of 1994 as "a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population". See *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Appeals Chamber), 16 June 2006, para. 35. Relying in this ruling, the ICTR Trial Chamber held in the high-profile *Military 1* case: "Leaving aside the particular facts in this case, it is clear that a genocide occurred. The Tribunal has convicted a high number of individuals in completed cases for genocide committed in various parts of the country. The Appeals Chamber has even concluded that the genocide in Rwanda in 1994 is a fact of common knowledge which there is no reasonable basis to dispute." See *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, Judgement and Sentence (Trial Chamber), 18 December 2008, 1998, para 1998. Also see Report of the United Nations High Commissioner for Human Rights, Human Rights Field Operation in Rwanda (13 November 1995) UN Doc. A/50/743 <<http://www.un.org/documents/ga/docs/50/plenary/a50-743.htm>> accessed 23 December 2009 (hereinafter: UNHRFOR Report of November 1995), para. 2 ("The massive human rights violations were perpetrated in a pre-planned, organized and systematic manner by extremist Hutu militia throughout the country"); USIP 1995 Report (n 18), p. 3 ("Sufficient evidence exists to confirm that the slaughter that ensued was not chaotic, uncontrolled violence, but rather a planned and organized campaign of genocide").

On 7 April 1994, ten Belgian UN peacekeepers were killed by Rwandan soldiers.<sup>28</sup> Fighting immediately resumed between the FAR and the RPA. That day has been described by the UNAMIR force commander, General Roméo Dallaire, as “the first day of a hundred-day civil war and a genocide that would engulf all of us in unimaginable carnage”.<sup>29</sup> On 18 July, the RPA defeated the Hutu regime and ended the killings. With the Hutu-dominated Rwandan government in flight, the RPF declared victory and established a new government of national unity. Fearing Tutsi retribution, about 2 million Hutus fled to neighboring Burundi, Tanzania, Uganda, and Zaire (later renamed the Democratic Republic of Congo).<sup>30</sup>

### 3.3 THE MASS ATROCITIES

While tens of thousands of civilians were killed or arbitrarily arrested from 1990 to 1993, the worst atrocities took place between 7 April and 18 July 1994. In this period of just over three months, between 800,000 and one million Tutsis and moderate Hutus, mostly civilians, were killed.<sup>31</sup> Victims were brutally tortured, raped in the most gruesome fashion, and forced to watch as their loved ones were tortured and murdered.<sup>32</sup> On 26 July 1994, the UN appointed a Commission of Experts to investigate the events between 6 April and 15 July 1994.<sup>33</sup> The Commission found that “acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and

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<sup>28</sup> Consequently, UNAMIR was significantly downsized. See Des Forges, *Leave None* (n 5), pp. 474-476.

<sup>29</sup> Romeo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (2003), p. 262.

<sup>30</sup> CIA World Fact-book (n 4) (explaining that most of the refugees have since returned to Rwanda, but several thousands remained in the Democratic Republic of Congo, where they formed an extremist insurgency determined to retake Rwanda).

<sup>31</sup> The exact death toll is disputed. According to the Rwandan government, over one million people died during the genocide. See official website of the Republic of Rwanda <[http://www.gov.rw/page.php?id\\_article=19](http://www.gov.rw/page.php?id_article=19)> accessed 17 December 2009. According to a UN report from 1995, between 500,000 and one million persons died in the genocide. See UNHRFOR Report of November 1995 (n 27), para. 3. Another UN report, from 1999, set the death toll at around 800,000. See Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (15 December 1999), enclosed in Letter dated 15 December 1999 from the Secretary-General Addressed to the President of the Security Council (16 December 1999), UN Doc. S/1999/1257 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement>> accessed 17 December 2009, para. 1. Also the American CIA estimates that around 800,000 people died. See CIA World Fact-book (n 4).

<sup>32</sup> Drumbl, *Law and Atrocity* (n 10) p. 43.

<sup>33</sup> UN Security Council Resolution 935 called for the appointment of an impartial Commission of Experts to examine and analyze “the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide”. See UNSC Res 935 (1 July 1994), UN Doc. S/RES/935 <[www.undemocracy.com/S-RES-935\(1994\).pdf](http://www.undemocracy.com/S-RES-935(1994).pdf)> accessed 17 December 2009. On 26 July 1994, the UN Secretary General appointed a Commission of Experts composed of three members: Mr. Atsu-Koffi Amega (Togo), as Chairman; Ms. Habi Dieng (Guinea); and Mr. Salifou Fomba (Mali). See Preliminary Report of the Independent Commission of Experts (29 September 1994), annexed to Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council (4 October 1994) UN Doc. S/1994/1125 <[www.un.org/Docs/secu94.htm](http://www.un.org/Docs/secu94.htm)> accessed 17 December 2009 (hereinafter: Preliminary Report of the UN Commission of Experts dated 29 September 1994), para. 10.

methodical way”.<sup>34</sup> The Commission also found that war crimes and crimes against humanity were perpetrated by individuals from both sides to the armed conflict.<sup>35</sup>

Broad complicity characterized the perpetration of genocide in Rwanda. The general population was deliberately incited, and often forced, by the planners of the genocide to participate in the slaughter of Tutsis and moderate Hutus.<sup>36</sup> On 18 July 1994, Kigali was left in ruins. Of its 350,000 pre-war inhabitants, only around 45,000 remained. There was no running water, no electricity, no government infrastructure, and nearly every building was damaged.<sup>37</sup>

## 4. POST-WAR CONDITIONS IN RWANDA

### 4.1 POLITICAL WILL TO PROSECUTE THE MASS ATROCITIES

#### *The Aftermath of Genocide*

Immediately following the genocide, the new national unity government of Rwanda embarked on a campaign of mass arrests of suspected genocidaires. In September 1994, the government asked the international community to “[set] up as soon as possible an international tribunal to try the criminals”.<sup>38</sup> However, in light of the large amount of suspects, it was clear to the Rwandan government that international justice would not be enough and domestic trials will have to take place in parallel. In November 1995, President Bizimungu ruled out the granting of an amnesty for those who were arrested in Rwanda for participation in the genocide.<sup>39</sup> Domestic prosecutions for genocide started

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<sup>34</sup> Preliminary Report of the UN Commission of Experts dated 29 September 1994 (n 33), para. 148.

<sup>35</sup> *Ibid*, paras. 146-147. The report recommended that an international tribunal be created to prosecute the atrocities (paras. 133-142). Consequently, the UN Security Council established the ICTR on 8 November 1994. See UNSC Res 955 (8 November 1994) UN Doc. S/RES/955 <[http://www.undemocracy.com/S-RES-955\(1994\).pdf](http://www.undemocracy.com/S-RES-955(1994).pdf)> accessed 20 December 2009 (hereinafter: UNSC Res 955).

<sup>36</sup> Des Forges, *Leave None* (n 5), p. 7.

<sup>37</sup> USIP 1995 Report (n 18), pp. 3-4.

<sup>38</sup> Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council (29 September 1994) UN Doc S/1994/1115 <<http://www.undemocracy.com/S-1994-1115.pdf>> accessed 20 December 2009, p. 4. Around the same time, the UN-appointed Commission of Experts also recommended that an international tribunal be created to prosecute the atrocities. Consequently, on 8 November 1994, the UN Security Council established the ICTR (see note 35 above). For a detailed discussion regarding the ICTR's establishment and operation, see Part 6 below.

<sup>39</sup> W. A. Schabas, 'Genocide, Impunity and Accountability in Rwanda: is it Reasonable to Expect a Devastated Legal System to Deal Justly with Those who Destroyed it?', *Inroads: A Journal of Opinion* (1 January 1997) <<http://www.encyclopedia.com/doc/1G1-30340223.html>> accessed 21 June 2009 (hereinafter: Schabas, *Impunity and Accountability in Rwanda*). Also see P. Clark, 'Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda', 39 *Geo. Wash. Int'l L. Rev.* 765 (2007) (hereinafter: Clark, *Gacaca Courts*), pp. 780-781 ("At an international conference in Kigali in October 1995, the government considered both a general amnesty

taking place a year later, and continue until today in both ordinary and gacaca courts (see sections 5.1 and 5.2 below).

As of January 2010, over a million individuals have been tried for genocide-related crimes in Rwanda. It is recalled that following the ethnic-based violence in the 1960's and 1970's, blanket amnesties were granted to Hutus with respect to the crimes they committed against Tutsis (see section 3.1 above). Most likely, this culture of impunity encouraged the perpetration of the 1994 genocide. Against this backdrop, the political choice of the new post-genocide government not to exempt anyone from prosecution can be better understood.<sup>40</sup>

In contrast to Rwanda's ambitious attempt to prosecute all those involved in genocide-related crimes, there seems to have been little political will to prosecute members of the RPA for the crimes they committed in connection with the war. Nonetheless, a few dozen RPA soldiers were prosecuted in military courts for such crimes (see section 5.3 below).

### *Contemporary Will to Prosecute Atrocities*

In light of the recent decline in genocide prosecutions in Rwanda, some commentators suggest that the political will in Rwanda to prosecute genocide perpetrators has been decreasing.<sup>41</sup> This view seems hard to reconcile with Rwanda's ongoing attempts to secure the extradition to Rwanda of genocide suspects from third states (see section 4.2 below), and the transfer of cases from the ICTR to Rwandan courts (see section 6.4 below). Perhaps the recent decline in genocide prosecutions in Rwanda can be explained by the fact that most perpetrators have already been tried. But still, a Rwandan attorney confirmed that there is a strong will in Rwanda to expedite proceedings in

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and gacaca as possible methods for dealing with genocide suspects. Amnesty was rejected on the grounds that it would simply inflame many genocide survivors' perceived desire for vengeance. The government rejected gacaca on the grounds that it violated existing Rwandan law regarding the need to formally prosecute serious crimes, particularly murder.”)

<sup>40</sup> For a similar analysis see Jones, *The Courts of Genocide* (n 17), p. 32.

<sup>41</sup> See, e.g., Human Rights Watch, 'Law and Reality: Progress in Judicial Reform in Rwanda', 25 July 2008 <<http://www.hrw.org/en/reports/2008/07/24/law-and-reality-0>> accessed 20 December 2009 (hereinafter: HRW, *Law and Reality*), p. 29 (“According to statistics from the inspectorate of courts, the higher courts—the only ones mandated to hear genocide cases—judged a total of nearly 23,000 cases between January 2005 and March 2008, but only 222 were genocide cases”). The report suggests that this relatively small number of genocide related prosecutions in ordinary courts is explained by the decreasing political interest in Rwanda to prosecute genocide cases in ordinary courts.

genocide cases and start a new page.<sup>42</sup> Moreover, a Rwandan Supreme Court Judge noted that most of the genocide cases in Rwanda were transferred from ordinary courts to gacaca courts “so that the whole genocide chapter can be closed as quickly as possible”.<sup>43</sup> Finally, it should be noted that the trial of the most high-profile defendant currently being prosecuted by Rwanda’s ordinary courts – former Justice Minister Agnes Ntamabyariro – is progressing extremely slowly (see section 5.1 below). According to a representative of an international NGO in Rwanda, this slow progress is indicative of the present lack of political will in Rwanda to conduct genocide trials in ordinary courts.<sup>44</sup>

Thus, as counterintuitive as this may seem, given the monumental efforts it invested in genocide-related accountability mechanisms, the Rwandan government today seems to prioritize other objectives over genocide trials. In addition, public interest in genocide cases before ordinary courts is low: even with regards to the high profile trial of Ntamabyariro, who was the Justice Minister during the genocide, it was mentioned in an interview that “most of the time there is no one attending the trial, although it is public. People are not interested”.<sup>45</sup>

## 4.2 CAPACITY OF THE LEGAL SYSTEM TO PROSECUTE MASS ATROCITIES

### *The Aftermath of Genocide*

The war left Rwanda devastated. The country’s infrastructure was destroyed, and millions of internally displaced persons and refugees were scattered in camps in Rwanda and along its borders. There was no functioning justice system. Almost all members of the judiciary and most of the country’s legal professionals had either died or fled Rwanda during the genocide. Courthouses and prosecution offices were destroyed. Funds were needed to rehabilitate a system which could handle not only genocide cases, but also ordinary murders, petty crimes, property offences, etc. There was also a need to adopt necessary legal frameworks. Donor states and international organizations began

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<sup>42</sup> Interview notes with author.

<sup>43</sup> Interview notes with author.

<sup>44</sup> Interview notes with author. Agnes Ntamabyariro has been held in custody in Rwanda since 1997. On 20 January 2009, she was sentenced by the first instance court to life imprisonment, and her appeal is still pending (for further details about this trial see section 5.1 below). The interviewee stressed that Rwanda is currently prioritizing commercial cases over genocide trials.

<sup>45</sup> Interview notes with author. However, the interviewee, a representative of an international NGO in Rwanda, admitted that the lack of public interest in this trial could be explained by the public’s perception that this is a sham trial, and that Ntamabyariro will certainly be convicted and receive a life sentence.



allocating resources to re-building Rwanda's justice system almost immediately after the war (see section 4.3 below).<sup>46</sup>

In the months following the genocide, as a result of the arrests made by the new government, the prisons became over-populated. By the end of 1996, about 87,000 suspects were in custody.<sup>47</sup> According to a UN official who worked in Rwanda in July 1994, most detainees spent several years in prison without seeing a judge, mainly due to the lack of judges. He added that Rwanda did not even have the capacity to open case files, and its Criminal Investigations Department (hereinafter: CID) was composed of former fighters who were untrained in law enforcement, and whose conduct often violated due process norms.<sup>48</sup>

The Rwandan judiciary had to re-invent itself quickly after the war, especially considering the large numbers of detainees who needed to be prosecuted. Judges had to be found and trained, and courtrooms had to be built.<sup>49</sup> According to a Rwandan judge who helped rebuild the judiciary after the genocide, it was extremely difficult to find people who could serve as judges. Of the few legal professionals left in Rwanda, not many were interested to serve in the justice sector or even practice law, preferring instead to work in the financial and other sectors. Consequently, person with no legal qualification were appointed as judges. They assumed office following a short training. In July 1994, only 34 out of about 800 judges had law degrees.<sup>50</sup> According to interviews,

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<sup>46</sup> Prunier, *The Rwandan Crisis* (n 18), Ch. 9; Schabas, *Impunity and Accountability in Rwanda* (n 39). Interviewees also confirmed that the Rwandan justice system was devastated after the genocide, including a Rwandan judge who helped re-construct the justice system after the war and a UN official who worked in Rwanda in July 1994. Interview notes with author.

<sup>47</sup> W. A. Schabas, 'Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems', *Criminal Law Forum* Vol. 7 No. 3 (1996), p. 526.

<sup>48</sup> Interview notes with author.

<sup>49</sup> According to Prof. Schabas, who was in Rwanda in the years following the genocide: "... the Rwandese legal system had never been more than a corrupt caricature of justice... The events of April, May and June 1994 devastated what little existed of the infrastructure, and reliable estimates suggest that no more than 20 percent of personnel survived ... The survivors, recruited and trained during the Habyarimana period, show the unfortunate signs of their inadequate professional backgrounds and have difficulty responding to the special needs of the situation ...". See Schabas, *Impunity and Accountability in Rwanda* (n 39).

<sup>50</sup> Interview notes with author. The judge added that although Rwandan law permits the appointment of foreign judges, the parliament did not welcome such a course of action. This was also confirmed by a Rwandan lawyer, who worked after the genocide as a prosecutor in Kigali. He recalled that in 1995, the Rwandan Justice Minister proposed that foreigners be incorporated in the domestic jurisdictions that would try genocide perpetrators. The Parliament rejected the idea, on the basis that it would violate the sovereignty of Rwanda. Interview notes with author.

after the judges were appointed and the courts started functioning, a fragile security situation and political pressure interfered with their judicial work.<sup>51</sup>

From late 1995, consultations took place in Rwanda with international legal experts, including Professor William Schabas, in preparation for the anticipated national genocide trials.<sup>52</sup> Consequently, in August 1996, Rwanda adopted Organic Law No. 08/96 which criminalized genocide under domestic law (hereinafter: 1996 Genocide Law).<sup>53</sup> The first trial under the 1996 Genocide Law was heard by a national court in December 1996. Thousands of trials followed in subsequent years (more details about the 1996 Genocide Law and the trials that followed are available in section 5.1 below).

Thus, by late 1996, the Rwandan judiciary was coping with genocide-related prosecutions, and a new law on genocide, while still dealing with the rehabilitation of the normal activities of the courts. These challenges were compounded by the ongoing arrests which continued to seriously burden the justice system. In 1997-1998 Rwanda's prison population reached 124,000 detainees, while its prison facilities were designed to hold only 49,400 prisoners.<sup>54</sup> Many of the detainees were held without being charged.<sup>55</sup> In 2001, to increase the rates of genocide trials and to decrease the prison population, the Rwandan government adopted Organic Law N° 40/2000 which created a system of "gacaca courts" and introduced the penalty of community services as an alternative to

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<sup>51</sup> A Rwandan judge referred to the fragile security situation at the time, noting that some of the judges were assassinated shortly after they were appointed. A Rwandan lawyer, who worked as a prosecutor in Kigali in 1995, noted that incidents of political interference in the judicial process were common at the time. A representative of an international NGO in Kigali suggested that the Rwandan judiciary became independent only after the legal reform of 2004 (see below), once judges were required to hold law degrees and more resources were allocated to national courts. Interview notes with author.

<sup>52</sup> Schabas, *Impunity and Accountability in Rwanda* (n 39). Around that time, international donors and various NGOs started providing training sessions to strengthen Rwanda's capacity to handle genocide trials, as well as logistical, human and material support (see section 4.3 below). A senior government official recalled that the National University of Rwanda began prioritizing degrees in laws around that time. Interview notes with author.

<sup>53</sup> Organic Law N° 08/96 of 30/8/1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 [Rwanda] (hereinafter: 1996 Genocide Law). The term "organic law" in Rwanda refers to laws that are normatively superior to regular laws, secondary only to the Constitution. It is noted that Rwanda ratified the Genocide Convention in 1975.

<sup>54</sup> This was an improvement from the pre-genocide prison capacity of 18,000 prisoners. After the genocide, new prisons were built and existing ones were extended. See Amnesty International, 'Rwanda: Gacaca: A Question of Justice' (17 December 2002) <<http://www.amnesty.org/en/library/info/AFR47/007/2002>> accessed 20 December 2009 (hereinafter: AI, *Gacaca: A Question of Justice*), sec. III (2). In the following years their number slightly decreased, reaching 120,000 in 2000 and 112,000 by 2002. See Report on the Situation of Human Rights in Rwanda submitted by the Special Representative of the UN Commission on Human Rights (25 February 2000) UN Doc. E/CN.4/2000/41 <[http://www.unhcr.ch/Huridocda/Huridocda.nsf/\(Symbol\)/E.CN.4.2000.41.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridocda.nsf/(Symbol)/E.CN.4.2000.41.En?Opendocument)> accessed 20 December 2009 (hereinafter: UN 2000 Human Rights Report on Rwanda), paras. 92 *et seq.*

<sup>55</sup> UN 2000 Human Rights Report on Rwanda (n 54), paras. 92 *et seq.*

imprisonment (hereafter: 2001 Gacaca Law).<sup>56</sup> In 2003, to help lower the costs of prison maintenance, around 25 thousand prisoners were pre-maturely released from jail either because of their personal circumstances (elderly or sick persons) or following confessions.<sup>57</sup> Some of them were to face gacaca trials later. In 2005, an additional 36 thousand prisoners were released for similar reasons.<sup>58</sup>

### *Constitutional and Legal Reform, 2003-2004*

Another important measure taken by Rwanda to improve the quality and efficiency of the justice system was the adoption of a new constitution in 2003. It was adopted by referendum on 26 May 2003, after two years of public deliberations, and replaced the older constitution of 1991. According to the 2003 Constitution, no party can hold more than half of the government seats, and the president and prime minister must belong to different parties. The Constitution condemns the Rwandan Genocide in its preamble, and expresses hope for reconciliation and prosperity. It also requires, innovatively, that thirty percent of the parliamentary seats be held by women (see section 2.2 above).

In addition, the government undertook a comprehensive legal reform process in 2004. New laws introduced the requirement that judges and prosecutors be qualified in law. Consequently, 95% of Rwandan judges today are trained in law, compared to 5% before 2004.<sup>59</sup> Legal guarantees were provided to increase the independence of the

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<sup>56</sup> Organic Law N° 40/2000 of 26/01/2001 Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between October 1, 1990 and December 31, 1994 [Rwanda] (hereafter: 2001 Gacaca Law). The alternative punishment of community service was applicable to defendants who confessed, pleaded guilty, expressed repentance and apologized. Section 5.2 below provides more details on the 2001 Gacaca Law and gacaca courts in general.

<sup>57</sup> W. A. Schabas, 'Genocide Trials and Gacaca Courts', 3 J. Int'l Crim. Just. 879 (2005) (hereinafter: Schabas, Genocide Trials), p. 880.

<sup>58</sup> BBC News, 'Rwanda starts prisoner releases' <<http://news.bbc.co.uk/2/hi/africa/4726969.stm>> accessed 26 December 2009. It is noted that keeping the large amounts of detainees in prisons has drained government resources. A UN report from 2006 has estimated that the Rwandan government spends each year an amount of 4.6 billion Rwandan francs (around 8 million US dollars at the time of writing) to maintain its prisons. See UN IRIN News, 'Rwanda: Community service for tens of thousands of genocidaires' (21 September 2006) <<http://www.irinnews.org/Report.aspx?ReportId=61143>> accessed 8 August 2009.

<sup>59</sup> HRW, Law and Reality (n 41). In relation to Rwandan prosecutors, it was noted in an interview that they enjoyed a "transitional period" of four years, during which all prosecutors without legal training were allowed to obtain such training. The transitional period was supposed to end in 2008, but was extended until 2012. In addition, interviewees affiliated with the Rwandan justice system added that as part of the reform, judges and prosecutors receive advanced legal training from international bodies (see section 4.3 below) including the ICTR (see section 8.4 below). Interview notes with author.



judiciary. The number of courts and judges were reduced. Rwandan criminal procedures were revised to include international standards of human rights and due process.<sup>60</sup>

A judge who was involved in the legal reform process, explained that the process was inspired by international instruments such as the Universal Declaration on Human Rights (hereinafter: UDHR) and the International Covenant on Civil and Political Rights (hereinafter: ICCPR), as well as the domestic laws of the UK, neighboring African countries, and South Africa. Consequently, aspects of the common law system were introduced into the Rwandan legal system.

Also in 2004, Rwanda adopted Organic Law N° 16/2004 which sought to simplify the gacaca system and increase its efficiency (hereinafter: 2004 Gacaca Law).<sup>61</sup> This law replaced both the 1996 Genocide Law and the 2001 Gacaca Law and is still valid today (as amended in 2007 and 2008).<sup>62</sup>

### *Contemporary Capacity to Prosecute Atrocities*

The ICTR, in a series of decisions from 2008, refused to transfer cases to Rwanda.<sup>63</sup> It based these decisions on its finding that fair trials may not be available to the defendants (in question) in Rwanda, because witnesses may be reluctant to testify on their behalf out of fear of being harassed, prosecuted by gacaca courts, or charged with “genocide ideology”.<sup>64</sup> These decisions are discussed in further detail in section 6.4 below.

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<sup>60</sup> HRW, Law and Reality (n 41).

<sup>61</sup> Organic Law N° 16/2004 of 19/6/2004 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 October 1, 1990 and December 31, 1994 [Rwanda] (hereinafter: 2004 Gacaca Law).

<sup>62</sup> Section 5.2 below provides more details about the 2004 Gacaca Law (n 61) and gacaca courts in general.

<sup>63</sup> *Prosecutor v. Munyakazi*, Case No. ICTR-97-36, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11 bis (Appeals Chamber), 8 October 2008 (hereinafter: *Munyakazi* Appeals Decision of 8 October 2008); *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11 bis (Appeals Chamber), 30 October 2008 (hereinafter: *Kanyarukiga* Appeals Decision of 30 October 2008); *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11 bis (Appeals Chamber), 4 December 2008 (hereinafter: *Hategekimana* Appeals Decision of 4 December 2008); *Prosecutor v. Gatete*, Case No. ICTR-2000-61, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (Trial Chamber), 17 November 2008 (no appeal was filed); *Prosecutor v. Kayishema*, Case No. ICTR-01-67, Decision on Prosecutor’s Request for Referral of Case to the Republic of Rwanda (Trial Chamber), 16 December 2008 (no appeal was filed).

<sup>64</sup> Charges of “genocide ideology” could be made under a Rwandan law from 2007, which imposes a sentence of 10 to 25 years’ imprisonment for manifesting “genocidal ideology”. According to Amnesty International, the law’s terms are “vague and ambiguous”, and it “could potentially stifle freedom of expression, and restrict the ability of the accused to put forward a defence in criminal trials”. See Amnesty International, ‘Report 2009: The State of the World’s Human Rights’ (Annual Report covering the period January to December 2008) <<http://thereport.amnesty.org/en/regions/africa/rwanda>> accessed 20 December 2009 (hereinafter: AI 2009 World Report).

Also European courts, in denying Rwanda's requests for the extradition of suspected genocidaires, found that Rwanda does not offer fair trials, for similar reasons to those cited by the ICTR.<sup>65</sup> One UK court found that Rwanda lacks an independent judiciary, and considered this an additional reason to refuse to extradite suspects to Rwanda.<sup>66</sup> In interviews, two ICTR officials also expressed the view that Rwanda lacks an independent judiciary.<sup>67</sup> However, this proposition was rejected by the ICTR Appeals Chamber as a ground for refusing to transfer cases to Rwanda.<sup>68</sup>

Contrary to the position of the ICTR judges and European courts, senior ICTR prosecutors still consider that Rwanda offers fair trials for genocide suspects.<sup>69</sup> Also Rwandan officials, judges and lawyers believe that Rwanda offers fair trials for genocide suspects, and that its judges are independent and impartial, including in genocide

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<sup>65</sup> See, e.g., Decision by the High Court of England and Wales in *Brown (aka Vincent Bajinja) et al. v. Government of Rwanda et al.* [2009] EWHC 770 Admin, Judgment, 8 April 2009 (hereinafter: *Brown v. Rwanda* [2009] EWHC). This decision, in paragraph 47, refers to the following European cases in which extradition of genocide suspect to Rwanda was also denied, at least partly based on reasons cited by the ICTR: Decision by the Toulouse Court of Appeal dated 23 October 2008 (in *Bivugarabago*); Decision by the Appellate Court of Frankfurt am Main dated 3 November 2008 (in *Mbarushimana*); Decision by the Mamoudzou Court of Appeal dated 14 November 2008 (in *Senyamuhara*); Decision by the Court of Appeal of Paris dated 10 December 2008 (in *Kamali*); Decision by the Lyon Court of Appeal dated 9 January 2009 (in *Kamana*). News articles concerning the denial of extradition requests to Rwanda include: BBC News, 'France Blocks Rwanda Extradition' (11 December 2008) <<http://news.bbc.co.uk/2/hi/7777129.stm>> accessed 24 June 2009; The Guardian UK News, 'Rwanda Extradition Appeal Fails' (by S. Laville, 14 March 2007) <<http://www.guardian.co.uk/uk/2007/mar/14/world.rwanda>> accessed 24 June 2009; TopNews Law, 'Finland not to extradite genocide suspect to Rwanda' (by R. Iyer, 20 February 2009) <<http://www.topnews.in/law/finland-not-extradite-genocide-suspect-rwanda>> accessed 24 June 2009. However, on 9 July 2009, the Swedish authorities approved an extradition request from Rwanda, following the Swedish Supreme Court's decision to allow the extradition. This was the first time that the authorities of a European country approved an extradition request by Rwanda. But on 13 July 2009, the defendant appealed the Swedish decision before the European Court of Human Rights. On 16 July 2009, Sweden announced that it was suspending the extradition until further notice. See Hironnelle News, 'Rwanda: Swedish Decision Sets a Good Precedence' (10 July 2009) <<http://allafrica.com/stories/200907100095.html>> accessed 8 August 2009; Hironnelle News, 'Rwanda: Stockholm Now Suspends Extradition of Genocide-Accused Rwandan' (16 July 2009) <<http://allafrica.com/stories/200907200443.html>> accessed 8 August 2009.

<sup>66</sup> *Brown v. Rwanda* [2009] EWHC (n 65), paras. 67-121 (relying heavily on HRW, Law and Reality (n 41)).

<sup>67</sup> Interview notes with author.

<sup>68</sup> *Munyakazi Appeals Decision* of 8 October 2008 (n 63). In this decision, the ICTR Appeals Chamber reversed the Trial Chamber's finding that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying the prosecution's transfer request. The UK judges in *Brown* held that this conclusion of the ICTR Appeals Chamber "was based only on the record before it, and ... we have the evidence of a specific incident of judicial interference that the Appeals Chamber lacked". The UK court relied on HRW, Law and Reality (n 41), as well as on evidence provided by Professors F. Reyntjens, P. Sands and W. Schabas, and "in particular the acceptance by Professor Schabas in cross-examination on 21 April 2008 that there probably was executive interference in the Bizimungu case." See *Brown v. Rwanda* [2009] EWHC (n 65), paras. 119-121.

<sup>69</sup> Interview notes with author. However, one senior ICTR prosecutor admitted that the unavailability of defence witnesses weakens the capacity of the Rwandan justice system to investigate and prosecute trials in a fair manner. Another ICTR prosecutor argued that the Rwandan system is no more bias, politically influenced or lacking due process than France's justice system, for example. It should be noted that two senior officials of the ICTR Registry who were interviewed, did agree with the ICTR judges that fair trials are unavailable in Rwanda. One of them stressed that "victim's justice" is practiced in Rwanda. The other stressed that the Rwandan witness protection program is run from the Prosecutor General's office which is not entirely geared towards protecting defence witnesses, and that the ICTR had two cases in which defence witnesses have been threatened by members of the Rwandan witness protection program.

cases.<sup>70</sup> Some Rwandans stressed that even if some people refuse to testify on behalf of defendants in genocide cases in Rwanda, this did not render trials in Rwanda unfair.<sup>71</sup> Foreign legal experts who are based in Rwanda expressed mixed views on whether Rwanda offers fair and independent justice to genocide suspects. While two of them considered that Rwanda offers fair trials today, even in high profile genocide cases,<sup>72</sup> a third expert suggested that people in Rwanda “cannot raise all issues, and trials are therefore not fair”, and even added that there is significant political influence over Rwanda judges.<sup>73</sup> A fourth foreign legal expert said that there are “human rights issues” in Rwanda, and that high profile cases there can be “too political”.<sup>74</sup> In January 2009, Human Rights Watch (hereinafter: HRW) reported that “[c]onventional courts [in Rwanda] are operating more efficiently under reforms begun in 2004, but still lack independence and fair trial guarantees”.<sup>75</sup>

A major weakness in Rwanda’s justice system, about which most interviewees agreed, is the low level of legal knowledge of its legal practitioners. Even those who believe that Rwanda offers fair trials stressed the limited legal experience and education of Rwandan legal practitioners.<sup>76</sup> Two foreign legal experts based in Rwanda mentioned

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<sup>70</sup> Interview notes with author.

<sup>71</sup> Interview notes with author. One senior Rwandan official said that even if some people refuse to testify, this does not compromise trial fairness since no particular witness is “indispensable” to any case. He stressed that Rwandan courts obtain more witnesses and evidence than the ICTR is able to obtain. Another Rwandan official noted that not all defence witnesses were genocide perpetrators who are afraid to travel to Rwanda to testify. There are enough people who know the truth and did not perpetrate crimes. But he agreed that if a witness travels to Rwanda from abroad, and is wanted in Rwanda for genocide, he will be detained by the Rwandan authorities. He added that it was ironic that the ICTR transferred two cases to France, a country to which not all witnesses would agree to travel.

<sup>72</sup> Interview notes with author.

<sup>73</sup> Interview notes with author. The foreign expert explained that Hutus, who are the majority in Rwanda, are afraid to speak, even those who were only eye witnesses. They are afraid to speak even to their relatives and colleagues. See also Human Rights Watch ‘World Report 2009: Events of 2008’ <<http://www.hrw.org/en/node/79182>> accessed 18 December 2009 (hereinafter: HRW 2009 World Report) (“Rwandan authorities exercise tight control over political space, civil society, and the media, often accusing dissenters of ‘genocide ideology’” (see note 64 above explaining the prohibition against “genocide ideology”)).

<sup>74</sup> Interview notes with author. The expert referred to the trial against Agnes Ntamabyariro, as an example, stressing that there is nothing in her file but since she was a very high ranking government official, the system cannot accept that she is innocent. Agnes Ntamabyariro has been held in custody in Rwanda since 1997. On 20 January 2009, she was sentenced by the first instance court to life imprisonment, and her appeal is still pending (see section 5.1 below).

<sup>75</sup> HRW 2009 World Report (n 73). It should be noted that the ICTR decisions which denied the referral of cases to Rwanda, largely relied on Amicus Briefs submitted by HRW.

<sup>76</sup> Interview notes with author. The following observations were made by interviewees: only five people in the country hold a doctorate degree in law, and most of them are not involved in academia; most law graduates did not even see a judgement as judgements are not typically published in Rwanda; the number of experienced lawyers in Rwanda is low; most current judges were appointed in 2004, straight out of law school, and still lack the ability to write a proper judgement; due to insufficient funding, Rwanda cannot attract good lawyers, judges and law professors; in order to open a law firm in Rwanda, is sufficient to hold a first degree in law, without practical training or internships, leading to many mistakes by young inexperienced lawyers; some judges are not familiar with the current state of the law, and occasionally refer to laws which were in place in 1996 but have since been abolished.

that the legal institutions in Rwanda, such as the Kigali Bar Association, were still very weak.<sup>77</sup> One of them added that even when judges accept that Rwanda is party to a certain international treaty, they still only apply national norms.<sup>78</sup> But a third foreign legal expert based in Rwanda considered that legal professionals in Rwanda are well trained, and the main weaknesses of the Rwandan justice system are in the areas of court management, communications, and physical structures.<sup>79</sup>

### 4.3 CAPACITY BUILDING EFFORTS IN RWANDA

Many international actors became involved in developing Rwanda's justice sector in the aftermath of the genocide, including UNAMIR and several UN agencies. The UN High Commissioner for Human Rights established a Field Operation in Rwanda (hereinafter: UNHRFOR), mandated to investigate the genocide, as well as help re-build the national judiciary and promote respect for human rights.<sup>80</sup> According to a former UNHRFOR official, the field operation had a specific focus on building national capacity to handle genocide trials. It trained and supported the Rwandan judiciary, the CID, and the Prosecutor General's Office, and also advised the local authorities on improving prison conditions.<sup>81</sup>

NGOs also engaged in judicial capacity building in Rwanda. For example, in 1995, the NGOs Citizens Network, Juristes Sans Frontieres, and the International Center for

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<sup>77</sup> Interview notes with author. One of the foreign experts specified that although the Kigali Bar Association is growing very fast, with about 60-80 new members a year, its members are still very inexperienced. He added that the Kigali Bar Association started with 44 members, and today includes around 350 members. It is noted that the Kigali Bar Association was established in 1997, pursuant to Law No. 03/1997 of 19 March 1997 Establishing a Bar in Rwanda [Rwanda], 15 April 1997 <<http://www.unhcr.org/refworld/docid/3ae6b54f4.html>> accessed 3 January 2010 (hereinafter: Law Establishing a Bar in Rwanda).

<sup>78</sup> Interview notes with author. Rwanda adheres to the monist theory with respect to the domestic status of international legal instruments. Article 190 of its 2003 Constitution stipulates: "Upon publication in the *Official Gazette*, international treaties and conventions which have been duly ratified or approved take precedence over organic laws and ordinary laws, subject, for each agreement or treaty, to implementation by the other party." Thus, an international treaty or convention enters into force and becomes directly applicable in Rwanda, as soon as it has been ratified by Rwanda (as long as it is ratified and applied by the other party). See Human Rights Committee, Replies of the Government of Rwanda to the List of Issues to be taken up in Connection with the Consideration of the Third Periodic Report of Rwanda UN Doc. CCPR/C/RWA/Q/3/Rev.1/Add.1 (29 March 2009).

<sup>79</sup> Interview notes with author. However, the view that Rwandan legal professionals are well trained was not shared by other interviewees. Perhaps the interviewee meant that Rwandan legal professionals were better trained today than previously, rather than suggesting that they are sufficiently trained to handle complex genocide cases in a fair manner.

<sup>80</sup> Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda (11 September 1998) UN Doc. A/53/367 <[www.unhcr.ch/Huridocda/Huridoca.nsf/0/22737cda4bc5a95d802566b000421de7?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/22737cda4bc5a95d802566b000421de7?Opendocument)> accessed 22 February 2010. According to paragraph 14 of this report, the Rwandan government required UNHRFOR to close its operations on 28 July 1998.

<sup>81</sup> Interview notes with author. The official also explained that UNHRFOR and the UN Development Program assisted the local authorities in drafting the 1996 Genocide Law (n 53). He added that UNHRFOR participated in a research project with the National University of Rwanda and other national institutions, which eventually supported the efforts to establish the gacaca court system.

Human Rights and Democratic Development trained Rwandan judicial investigators, lawyers, and judges to handle genocide cases in Rwanda.<sup>82</sup> In 1996, the NGO Advocates Sans Frontiers (hereinafter: ASF) began holding six-month training sessions for Rwandan judges, and has been involved in judicial capacity building in Rwanda ever since.<sup>83</sup> In 1997, ASF also provided foreign defence counsel to represent genocide suspects in Rwandan courts.<sup>84</sup> In 1998, the Danish Center for Human Rights began training “judicial defenders”.<sup>85</sup> These judicial defenders, after six months of legal training, may represent defendants in first instance courts, where genocide cases are tried.<sup>86</sup> In addition, the NGO Penal Reform International (hereinafter: PRI) researches and reports on gacaca trials, and HRW makes presentations to the Rwandan National Human Rights Commission.<sup>87</sup>

Moreover, the governments of the UK, the US, Germany, Belgium, and the Netherlands also helped in rehabilitating Rwanda’s justice system after the genocide. For example, it was mentioned in interviews that the Netherlands and Belgium (through the Belgian Technical Cooperation) helped fund the gacaca courts. It was also noted that in 1998 the European Commission (hereinafter: EC) became involved in justice projects in

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<sup>82</sup> Schabas, *Impunity and Accountability in Rwanda* (n 39). This information was also provided in interviews with a senior UN official, a foreign legal expert based in Kigali, and a Rwandan lawyer. The senior UN official added that also the NGOs Africare and Care International participated in the early effort to rebuild the Rwandan justice system. A representative of an international NGO in Rwanda added that once genocide trials started in Rwanda, the NGO RCN Justice and Democracy provided logistical support to the judges. Interview notes with author.

<sup>83</sup> For a summary of the programs and activities of ASF in Rwanda, see *Avocats Sans Frontières in Rwanda* <<http://www.asf.be/index.php?module=programmas&lang=en&id=141>> accessed 23 December 2009. In addition, it was noted in interviews that ASF has been funding a legal aid scheme in Rwanda which supports local lawyers who defend genocide suspects. Recently, ASF initiated an “access to justice” program in Rwanda, which will support legal clinics throughout the country where Rwandan lawyers will offer legal services. In addition, ASF trains local judges on international law issues, and also monitors and reports on gacaca proceedings. Interview notes with author.

<sup>84</sup> Schabas, *Genocide Trials* (n 57), p. 886 (“*Avocats sans frontières*-Belgium took the lead in ensuring that defence lawyers would be supplied to persons accused before the Rwandan courts and, in practice, most defendants were well represented by competent counsel, generally foreigners, from Europe or elsewhere in Africa”). It was noted in an interview that after the establishment of the Kigali Bar in 1997 (see note 77 above), ASF in principle stopped providing defence counsel to genocide suspects in Rwanda, except for in particularly high profile cases, such as the case of Agnes Ntamabyariro (discussed in section 5.1 below). The interviewee added that ASF may provide defence counsel in the future, in cases transferred from the ICTR or third states. Interview notes with author.

<sup>85</sup> ‘Mid-Term Evaluation of the Danish Center for Human Rights Project “Judicial Defenders in Rwanda”’, Danish Center for Human Rights (2000) <<http://www.humanrights.dk/files/pdf/Publikationer/Mid-Term%20Evaluation%20of%20the%20Danish%20Center%20for%20Human%20Rights%20Project%20Judicial%20Defenders%20in%20Rwanda.pdf>> accessed 23 December 2009.

<sup>86</sup> Law Establishing a Bar in Rwanda (n 77), Title II.

<sup>87</sup> This information was provided in interviews with representatives international NGOs based in Rwanda. Interview notes with author. Also see Penal Reform International <<http://www.penalreform.org/great-lakes-2.html>> accessed 23 December 2009.



Rwanda.<sup>88</sup> In 2003, the ICTR began its capacity building activities in Rwanda (see section 8.4 below).

In 2006, the Institute for Legal Practice and Development (hereinafter: ILPD) was established under Rwandan law to provide training to legal practitioners in Rwanda.<sup>89</sup> It became operative in 2008.<sup>90</sup> According to an ILPD employee, the institute trains prosecutors and judges, in programs lasting about six to nine months (this is a national requirement). In addition, the ILPD trains defence attorneys and legal support staff. As of late 2008, there were 500-600 practicing lawyers undergoing training at the ILPD. The training sessions are often funded and conducted by international actors.<sup>91</sup>

In 2008, the Rwandan government adopted a “sector wide approach”, according to which donors contribute to the justice sector as a whole, rather to its specific components.<sup>92</sup> For example, in 2008, UNDP has allocated over 1 million US dollars to fund a justice sector support program, and announced that it will allocate a similar amount in each of the four following years.<sup>93</sup> In July 2009, the EU contributed 35 million Euros to the Rwandan justice sector.<sup>94</sup> A representative of an international NGO in Rwanda indicated that previously, donors used to allocate funds for specific projects, but they agreed to Rwanda’s request to shift to a sector wide approach because they considered that Rwanda has made progress.<sup>95</sup>

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<sup>88</sup> Interview notes with author.

<sup>89</sup> Rwandan Law N° 22/2006 of 28 April 2006. The ILPD is located in Nyanza, about an hour from Kigali.

<sup>90</sup> Official website of the Republic of Rwanda, Ministry of Justice <<http://www.minijust.gov.rw/spip.php?article31>> accessed 24 June 2009. Also see official website of ILPD <<http://www.ilpd.ac.rw>> accessed 24 June 2009.

<sup>91</sup> Interview notes with author. The interviewee explained that when the institute is asked to hold a certain training program, it actively seeks international funding and trainers. He added that the rector and vice-rector of the ILPD are foreigners who are paid by the World Bank.

<sup>92</sup> ‘Report by the Government of Rwanda on JRLO SWAP Roadmap’ (25 November 2008) <[http://www.minijust.gov.rw/IMG/pdf/Rwanda\\_JRLO\\_SWAP\\_Roadmap\\_FINAL\\_25\\_Nov\\_08.pdf](http://www.minijust.gov.rw/IMG/pdf/Rwanda_JRLO_SWAP_Roadmap_FINAL_25_Nov_08.pdf)> accessed 7 August 2009.

<sup>93</sup> United Nations Development Programme: Rwanda: ‘Justice Sector Support Program 2008-2012: Access to Justice for all, the foundation for good governance and poverty reduction’ <<http://www.undp.org.rw/Democratic-project60453.html>> accessed 23 December 2009.

<sup>94</sup> AllAfrica News, ‘Rwanda: Judiciary Gets Euro 35 Million Support Fund’ (9 July 2009) <<http://allafrica.com/stories/printable/200907090514.html>> accessed 7 August 2009. The funds are to be divided between the Justice Ministry, National Police, Public Prosecution Authority, Supreme Court, Human Rights Commission, National Unity and Reconciliation Commission, Office of the Ombudsman and Military Courts.

<sup>95</sup> Interview notes with author. The interviewee suggested that another reason for the donors to have agreed to this arrangement was their guilt over the fact that the international community did nothing to prevent the genocide.

## 5. THE NATIONAL RESPONSE TO THE MASS ATROCITIES

### 5.1 ORDINARY TRIALS

As noted above, mass arrests of suspected genocidaires started taking place in Rwanda immediately after the genocide. The RPF government rejected the idea of granting an amnesty, and insisted on prosecuting all suspects (see section 4.1 above). In August 1996, Rwanda adopted the above-mentioned 1996 Genocide Law, which criminalized genocide and crimes against humanity.<sup>96</sup> To solve the problem of retroactive punishment, the 1996 Genocide Law punished acts which were already criminalized under domestic criminal law, but which also constituted acts of genocide and crimes against humanity as defined in international instruments.<sup>97</sup> The law classified genocide-related crimes into four categories, depending on the level of the perpetrator and gravity of the crime, with Category I including the most serious crimes and offenders followed by Categories II, III and IV.<sup>98</sup>

The 1996 Genocide Law provided sentencing guidelines in relation to each category,<sup>99</sup> and offered reduced sentences to defendants who confessed.<sup>100</sup> According to the law, for a confession to entail a reduction in sentence, it had to include “(a) a detailed description of all the offences...; (b) information with respect to accomplices...;

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<sup>96</sup> The 1996 Genocide Law (n 53) was partially replaced by the 2001 Gacaca Law (n 56), and eventually entirely replaced by the 2004 Gacaca Law (n 61). Section 5.2 below provides more details about the 2001 and 2004 Gacaca Laws and gacaca courts in general.

<sup>97</sup> John B. Quigley, *The Genocide Convention – An International Law Analysis* (Ashgate, 2006), pp. 65-66.

<sup>98</sup> 1996 Genocide Law (n 53), Article 2. Category I included: (i) “the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity”, (ii) individuals “in positions of authority” who committed or encouraged these crimes, (iii) “notorious murderers” who committed the crimes with particular zeal or malice, and (iv) “persons who committed acts [of] sexual torture”. Category II covered persons who committed murder or violent crimes resulting in death and did not fall within Category I. Category III offenders included those who committed serious crimes against the person. Finally, Category IV covered property offenders. These categories were modified in later version of the law (see below).

<sup>99</sup> 1996 Genocide Law (n 53), Article 14. According to the provisions of this article, Category I convicts were “liable to the death penalty”. Category II convicts could receive a maximum penalty of life imprisonment. The penalty for Category III convicts was to be determined in accordance with the Penal Code. Category IV convicts were liable only to civil damages. These sentencing guidelines were modified in later version of the law (see below). For example, Category I convicts could receive a life sentence, according to the 2001 Gacaca Law (n 56) and the 2004 Gacaca Law (n 61).

<sup>100</sup> 1996 Genocide Law (n 53), Articles 15-16. Thus, Category II convicts who confessed before their trial started could receive sentences of between 7 and 11 years in prison, instead of the maximum life imprisonment. If they confessed during their trial, they could receive between 12 and 15 years imprisonment. As for Category III convicts, their sentence could be reduced by two thirds if they confessed before their trial started, or by half if they confessed during their trial. However, sentence reduction was not allowed in Category I cases, where the death penalty applied. These provisions were modified in later version of the law (see below). For example, Category I convicts were eligible for sentence reductions in return for confessions, to the 2001 Gacaca Law (n 56) and the 2004 Gacaca Law (n 61).

(c) an apology...; (d) an offer to plead guilty...".<sup>101</sup> The prosecutor had three months to confirm the validity of a confession, after which, if deemed valid, the confession became a guilty plea and the file proceeded to sentencing.<sup>102</sup>

In addition to classifying genocide-related crimes into four categories, and establishing a confession and guilty plea procedure, a third important aspect of the 1996 Genocide Law was that it created "specialized chambers" within Rwanda's ordinary courts for adjudicating genocide cases.<sup>103</sup> The very first genocide trial before a specialized chamber started on 27 December 1996. It involved two defendants, who were both convicted and sentenced to death on 3 January 1997.<sup>104</sup> Amnesty International criticized the fact that state-funded counsel were not made available to defendants, and that the accused were not given a chance to present witnesses on their behalf or to cross-examine prosecution witnesses.<sup>105</sup> UNHRFOR also considered the trial to be unfair.<sup>106</sup> In late 1997, a more favorable report was issued by UNHRFOR, although some concerns were still expressed.<sup>107</sup> According to Professor William Schabas, who attended trials in Rwanda in 1997 as an observer for Amnesty International, many of those who criticized the trials came from common law systems and did not properly understand the nature of civil law proceedings. Thus, they could not accept that the trials were relatively short, based on written evidence, and without cross-examinations.<sup>108</sup>

One of the most famous trials in 1997 in Rwanda was the one against Froduald Karamira, the former vice-president of the MDR political party in Rwanda.<sup>109</sup> His trial began on 13 January 1997 before a specialized chamber in the courts of Kigali. On 14 February 1997, he was found guilty of genocide and was sentenced to death.<sup>110</sup> On 12

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<sup>101</sup> 1996 Genocide Law (n 53), Article 6.

<sup>102</sup> 1996 Genocide Law (n 53), Articles 7-8.

<sup>103</sup> 1996 Genocide Law (n 53), Article 19. Specialized chambers were also created in the military courts.

<sup>104</sup> Amnesty International, 'Rwanda: Unfair Trials: Justice Denied' (8 April 1997) <<http://www.amnesty.org/en/library/info/AFR47/008/1997>> accessed 23 December 2009.

<sup>105</sup> *Ibid.* Also see Schabas, Genocide Trials (n 57), p. 886.

<sup>106</sup> Schabas, Genocide Trials (n 57), p. 886.

<sup>107</sup> *Ibid.* It is recalled that in 1997 ASF provided foreign defence attorneys to represent genocide suspects in court (see note 84 above and attached text).

<sup>108</sup> Schabas, Genocide Trials (n 57), pp. 886-887.

<sup>109</sup> Karamira was arrested in June 1996 in Bombay and extradited to Rwanda for trial. See *Ministère Public v. Karamira*, 1 Recueil de jurisprudence contentieux du génocide et des massacres au Rwanda (1st instance, Kigali, 14 February 1997), p. 75.

<sup>110</sup> Karamira was also found guilty of the crimes of murder, conspiracy, and non-assistance to people in danger.



September 1997, the Kigali Appeals Court rejected his appeal. On 24 April 1998, Karamira was executed in public by a firing squad in Kigali's Nyamirambo stadium.<sup>111</sup>

In 1997 and 1998, the specialized chambers completed genocide cases concerning 1,274 defendants.<sup>112</sup> But that number reflected only about one percent of the detainees awaiting trial.<sup>113</sup> The courts almost tripled their output over the next couple of years, with 1,306 persons tried in 1999 and 2,458 persons tried in 2000 for genocide related crimes.<sup>114</sup> However, even at this increased rate, it would have taken about a century to prosecute all the detainees (and that assumes that no additional arrests take place).

Seeking a creative solution, the government adopted the above-mentioned 2001 Gacaca Law, which created "gacaca courts" and authorized them to handle all cases not falling within Category I. Gacaca courts are discussed in section 5.2 below, but for the purposes of the present section it is noted that they started their "data-collection" activities in mid-2002, and their actual trials in March 2005. Category I cases continued to be tried in ordinary courts, under the 1996 Genocide Law, although no longer by specialised chambers.<sup>115</sup> By the time gacaca courts started their "data-collection" activities, in mid-2002, Rwandan ordinary courts completed genocide cases concerning 7,181 defendants. But over 100,000 detainees still awaited trial.<sup>116</sup> By the end of 2004, a

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<sup>111</sup> Trial Watch, 'Froduald Karamira' <[www.trial-ch.org/en/trial-watch/profil/db/legal-procedures/froduald\\_karamira\\_580.html](http://www.trial-ch.org/en/trial-watch/profil/db/legal-procedures/froduald_karamira_580.html)> accessed 29 July 2009. On the day of Karamira's execution, 21 other individuals were publicly executed, following a conviction for genocide related crimes. Three of them were executed with Karamira in Kigali, and the another 18 persons were executed in other Rwandan towns.

<sup>112</sup> According to Amnesty International, 379 defendants were tried for genocide in 1997, and 895 defendants were tried in 1998. See AI, *Gacaca: A Question of Justice* (n 54), p. 17 (referring to statistics compiled by a local NGO called League for the Promotion and Defence of Human Rights in Rwanda and known by the acronym Liprodhor). Similar statistics are provided in J. Fierens, 'Gacaca Courts: Between Fantasy and Reality', 3 *J. Int'l Crim. Just.* 896 (2005), p. 899. For statistic relating to the total number of genocide trials until late 1999, see UN 2000 Human Rights Report on Rwanda (n 54), para. 136.

<sup>113</sup> According to Amnesty International, during 1997 and 1998, Rwanda's prison population reached 124,000 detainees. See AI, *Gacaca: A Question of Justice* (n 54), p. 8. HRW reported that by 1998 there were 135,000 detainees in Rwanda's prisons. See HRW, *Law and Reality* (n 41), page 13. According to the UN, as of late 1999, there were 121,500 detainees in Rwandan prisons. See the UN 2000 Human Rights Report on Rwanda (n 54), para. 136.

<sup>114</sup> AI, *Gacaca: A Question of Justice* (n 54), p. 17 (referring to statistics compiled by Liprodhor). But in 2001 and 2002 there was a decline in genocide related prosecutions by ordinary courts, with 1,416 persons judged in 2001 and 727 persons judged in the first half in 2002. Amnesty International attributed this decline to reduced donor funding and government intervention in the operation of the courts. See AI, *Gacaca: A Question of Justice* (n 54), p. 16. In 2003 and 2004, there was even a steeper decline in genocide-related prosecutions by ordinary courts. HRW reported that "[a]fter 2002, the rate of prosecutions [in ordinary courts] slowed as prosecutors shifted their efforts to preparing cases for transfer to gacaca jurisdictions. Then the [ordinary] courts halted work for months as they took account of organizational changes and other aspects of the extensive judicial reforms of 2004." See HRW, *Law and Reality* (n 41), p. 17.

<sup>115</sup> 2001 Gacaca Law (n 56), Articles 2 and 96.

<sup>116</sup> AI, *Gacaca: A Question of Justice* (n 54).

total of about 10,026 individuals had been tried by ordinary courts in Rwanda for genocide related crimes.<sup>117</sup>

To render gacaca courts more efficient, Rwanda adopted the above-mentioned 2004 Gacaca Law, which replaced both the 2001 Gacaca Law and the 1996 Genocide Law.<sup>118</sup> This law facilitated the commencement of gacaca trials in March 2005.<sup>119</sup> Category I cases still remained under the exclusive jurisdiction of ordinary courts, which continued prosecuting genocide cases, but at a significantly lower rate: from January 2005 to March 2008, they tried only 222 genocide suspects.<sup>120</sup> Thus, the total number of persons tried for genocide related crimes in Rwanda's ordinary courts from 1997 to March 2008 was 10,248. After March 2008, very few genocide trials were heard in ordinary courts.<sup>121</sup>

In 2007, the 2004 Gacaca Law was amended to redefine some of the Category I defendants as Category II defendants, effectively transferring tens of thousands of cases to the jurisdiction of gacaca courts.<sup>122</sup> The 2004 Gacaca Law was further amended in 2008, to the effect that it explicitly granted gacaca courts jurisdiction over most of the offenders falling within Category I, leaving only the highest level planners and organizers

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<sup>117</sup> B. Ingelaere, 'The Gacaca courts in Rwanda', in L. Huyse and M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict* (Stockholm, International IDEA), p. 45 ("The classical justice system [in Rwanda] dealt with 10,026 [genocide related] cases between 1997 and 2004"). Prof. Schabas also estimated that around 10,000 cases were dealt with by the end of 2004. See Schabas, *Genocide Trials* (n 57), p. 888.

<sup>118</sup> 2004 Gacaca Law (n 61). Article 51 of this law kept the categorization of genocide suspects, but it merged Categories II and III into one category and thus reduced the number of categories of offenders from four to three. It also broadened the scope of Category I offenders by including within this category persons who committed acts of torture which did not lead to death, and dehumanizing acts on the dead body (but these offenders were later reclassified as Category II cases, as discussed in note 122 below and attached text).

<sup>119</sup> Gacaca trials were initially conducted in 752 "pilot" cells but from July 2006, trials were held in over 9,000 cells throughout the country (see section 5.2 below).

<sup>120</sup> According to HRW, 62 persons were tried by ordinary courts in Rwanda in 2005, 73 persons were tried in 2006, 83 persons were tried in 2007, and 4 persons were tried in the first quarter of 2008. See HRW, *Law and Reality* (n 41), Annex 1 at pp. 101-102 (referring to statistics compiled by the "Republic of Rwanda, Supreme Court, 'Raporo y'urwego rw'ubucamanza 2006' and other tables provided by the Inspectorate of Courts").

<sup>121</sup> It is anticipated that a later report by DOMAC (Work Package 3) will provide the figures regarding the number of trials since March 2008 until today.

<sup>122</sup> Organic Law N° 10/2007 of 01/03/2007 Modifying and Complementing Organic Law n°16/2004 of 19/6/2004 Establishing the Organisation, 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 October 1, 1990 and December 31, 1994 as modified and complemented to date [Rwanda] (hereinafter: 2007 Amendment). According to a report prepared by the International Legal Assistance Consortium, as of 7 September 2007, there were 17,000 persons awaiting trials by ordinary courts for genocide related crimes. But the report noted that the numbers kept changing due to the transfer of defendants from Category I to Category II. See International Legal Assistance Consortium, 'Justice in Rwanda: An Assessment' (November 2007), pp. 6 and 14 <[www.ilac.se/sites/default/files/Rwanda\\_Report\\_2007.pdf](http://www.ilac.se/sites/default/files/Rwanda_Report_2007.pdf)> accessed 26 December 2009. According to a news article, in January 2008 there were 7,500 Category I cases pending before ordinary courts. See Hirondele News, 'Rwandan Government Plans to Shift all Genocide cases to Gacaca Courts', 22 January 2008 <<http://www.hirondellenews.com/content/view/5556/26/>> accessed 26 December 2009. However, less than one hundred of these cases were completed in 2007 and 2008 (see note 120 above).

of the genocide under the jurisdiction of ordinary courts.<sup>123</sup> For example, currently on trial before an ordinary court is Agnes Ntamabyariro, who was the Minister of Justice in Habyarimana's government. On 20 January 2009, Ntamabyariro was convicted and sentenced to life imprisonment by a first instance ordinary court, for participating in the 1994 genocide. As of the time of writing this report, her appeal is still pending.<sup>124</sup> Today, according to foreign legal experts based in Rwanda, only about 1,000 suspects remain under the jurisdiction of ordinary courts.<sup>125</sup> While a few of them are currently on trial, many are still at large, possibly outside Rwanda.

As for the jurisprudence developed by Rwanda's ordinary courts in relation to genocide and crimes against humanity, it seems that most of the judgements in genocide cases concern factual rather than legal issues.<sup>126</sup> Thus, Professor William Schabas explained that:

The [Rwandan genocide-related] judgments will not be of great interest to international criminal lawyers, because there is little in the way of discussion of the legal issues relating to the prosecution of the international crimes within the jurisdiction of the Rwandan courts, genocide and crimes against humanity. Instead, they deal principally with the assessment of factual issues, and are of undoubted interest in this respect as an insight into the dynamics of genocide ... Perhaps most importantly, the judgements provide a reassuring portrait of a judicial system hard at work, contending with the rights of the accused, conflicting evidence and legal questions, and attempting to come to a fair result.<sup>127</sup>

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<sup>123</sup> Organic Law N° 13/2008 of 19/05/2008 Modifying and Complementing Organic Law N°16/2004 of 19/6/2004 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 October 1, 1990 and December 31, 1994 as modified and complemented to date [Rwanda] (hereinafter: 2008 Amendment). Articles 1 and 9 therein limit the jurisdiction of ordinary courts to the highest level planners and organizers of the genocide.

<sup>124</sup> Agnes Ntamabyariro was convicted by the Nyarugenge Court of First Instance. She was found guilty of various crimes, including incitement to commit genocide, criminal conspiracies and complicity in murders. The voluminous trial judgement is currently available only in Kinyarwanda. Ntamabyariro lodged an appeal, which is currently pending. Ntamabyariro is jointly defended by a Belgian lawyer from ASF and the local lawyer Gashabana Gatera, who is the president of the Kigali Bar Association. Ntamabyariro is the only member of the former interim government to be tried in Rwanda. She has been in custody since 1997. The slow pace of her trial has been attributed by a representative of an international NGO to the lack of current political will in Rwanda to prosecute genocide cases in ordinary courts. Interview notes with author.

<sup>125</sup> Interview notes with author. In addition, any genocide cases which will be transferred to Rwanda from the ICTR or a third state will be prosecuted in ordinary courts. Moreover, after the closure of gacaca courts, which is expected in 2010, new genocide cases will be prosecuted by ordinary or military courts. See 2008 Amendment (n 123), Article 25.

<sup>126</sup> A selection of the genocide-related judgements rendered by Rwanda's ordinary courts were published by ASF in several volumes of case-law reports, titled "Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda". Copy with author.

<sup>127</sup> William A. Schabas, "Genocide Trials and Gacaca Courts", 3 J. Int'l Crim. Just. 879 (2005), at 889.

## 5.2 GACACA TRIALS

The gacaca courts, created by the Rwandan government through the 2001 Gacaca Law, are a modified version of a traditional community-based dispute resolution mechanism called “gacaca” (which is the Kinyarwanda word for “grass”, as disputes were resolved outdoors on the grass). The traditional gacaca typically addressed property and family matters. Essentially, the Rwandan government transformed this practice into an institutionalized criminal justice system intended to process genocide-related prosecutions on a mass scale.<sup>128</sup> The new system had another important goal: to contribute to national reconciliation by bringing members of the community together to discuss the atrocities. Thus, gacaca courts have both retributive and restorative justice goals.<sup>129</sup>

The 2001 Gacaca Law kept the classification of offenders into four categories.<sup>130</sup> It authorized gacaca courts to try all defendants falling within Categories II, III and IV, while leaving Category I defendants to the exclusive jurisdiction of ordinary courts.<sup>131</sup> The law also kept the confession and guilty plea procedure.<sup>132</sup> A significant innovation of the 2001 Gacaca Law was that it allowed imprisonment terms to be converted in part into community services.<sup>133</sup> The law also authorized gacaca courts to grant civil damages.<sup>134</sup>

In June 2004, the 2001 Gacaca Law was replaced by the 2004 Gacaca Law, which reduced the number of categories of offenders from four to three (essentially combining Categories II and III into a single category), still leaving Category I crimes

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<sup>128</sup> For a discussion of the traditional gacaca practice and its commutation into a gacaca court system see Clark, *Gacaca Courts* (n 39).

<sup>129</sup> According to the official website of Rwanda’s National Service of Gacaca Jurisdictions, gacaca courts have the following five goals: (1) To reveal the truth about what has happened; (2) To speed up the genocide trials; (3) To eradicate the culture of impunity; (4) To reconcile the Rwandans and reinforce their unity; and (5) To prove that Rwandan society has the capacity to settle its own problems through a system of justice based on the Rwandan custom. See National Service of Gacaca Jurisdictions, ‘The Objectives of the Gacaca Courts’ <<http://www.inkiko-gacaca.gov.rw/En/EnObjectives.htm>> accessed 22 July 2009.

<sup>130</sup> It is recalled that this classification was originally established by the 1996 Genocide Law (n 53). The 2001 Gacaca Law (n 56) slightly redefined Categories II and III (see Article 51 therein).

<sup>131</sup> 2001 Gacaca Law (n 56), Article 2. This law did not authorize Gacaca courts to impose capital punishment, while ordinary courts could impose the death penalty in Category I cases.

<sup>132</sup> 2001 Gacaca Law (n 56), Articles 54-63. This law applied the confession procedure also to Category I crimes. Previously, according to Articles 5 and 14 (a) of the 1996 Genocide Law (n 53), Category I crimes could only be punished by death without the possibility of sentence-reductions in cases of confessions.

<sup>133</sup> Community service is often referred to in Rwanda in its French version “Travaux d’Interet General” (or “TIG”).

<sup>134</sup> 2001 Gacaca Law (n 56), Articles 71 and 90. In cases of Category IV offenders, the only sanction can be civil reparations for property damages, and if the parties agree on the damages to be paid by the perpetrator, their agreement is valid and there is no need for the court to determine the damages. See 2001 Gacaca Law (n 56), Article 71.

under the exclusive jurisdiction of ordinary courts.<sup>135</sup> The 2004 Gacaca Law established gacaca courts of first instance at the levels of the sector and the cell (the sub-unit of a sector), and gacaca courts of appeal.<sup>136</sup> It provided that cell-level courts would handle Category III cases, sector courts would handle Category II cases as well as appeals from cell-level courts, and the courts of appeal would handle appeals from sector courts or from persons sentenced in absentia.<sup>137</sup> Moreover, the 2004 Gacaca Law decreased the number of judges required at the cell courts from 19 to 14, reducing the overall number of judges required for gacaca courts from 250,000 to 170,000.<sup>138</sup> Finally, it should be noted that the 2004 Gacaca Law kept the penalty structure of the 2001 Gacaca Law.<sup>139</sup>

In March 2005, “pilot” gacaca trials started in 118 sectors across Rwanda.<sup>140</sup> In these sectors, which represent about a quarter of all sectors in Rwanda, a total of 752 gacaca courts were operating at the level of the cell. By 14 July 2006, trials concerning 7,721 persons were completed.<sup>141</sup> At this stage, gacaca courts were extended to the whole country, with 9,013 gacaca courts operating at the cell level, 1,545 gacaca courts at the sector level, and 1,545 gacaca courts of appeal. By the end of 2006, gacaca courts completed cases concerning approximately 40,000 accused.<sup>142</sup> At the time, there were 766,489 suspected genocidaires in Rwanda.<sup>143</sup>

In March 2007, the 2004 Gacaca Law was amended by Organic Law N<sup>o</sup> 10/2007.<sup>144</sup> The amendment re-defined the categories of offenders, effectively re-classifying tens of thousands of Category I defendants as Category II defendants,

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<sup>135</sup> The 2004 Gacaca Law (n 61) also broadened the definition of Category I offenders (see Article 51 therein).

<sup>136</sup> 2004 Gacaca Law (n 61), Articles 3-4. According to the previous law, gacaca courts were also supposed to operate at the level of the district and province. See 2001 Gacaca Law (n 56), Articles 3-4.

<sup>137</sup> 2004 Gacaca Law (n 61), Articles 41-43.

<sup>138</sup> 2004 Gacaca Law (n 61), Article 13.

<sup>139</sup> There were some modifications, for example, Category I offenders who confessed before they were placed on the list of Category I suspects, could now enjoy a more significant sentence reduction than previously (between 25 to 30 years imprisonment). See 2004 Gacaca Law (n 61), Articles 55 and 72.

<sup>140</sup> The gacaca pilot phase actually started earlier, with data-collection activities taking place from 2002 in 12 sectors on 19 June 2002 (but the trials started in 2005).

<sup>141</sup> Reports on the achievements of gacaca courts during the pilot phase are available on the official website of Rwanda’s National Service of Gacaca Jurisdictions. See, e.g., National Service of Gacaca Jurisdictions, ‘Report on Trials in Pilot Gacaca Courts’ <[http://www.inkiko-gacaca.gov.rw/pdf/introduction\\_%20english.pdf](http://www.inkiko-gacaca.gov.rw/pdf/introduction_%20english.pdf)> accessed 12 July 2009.

<sup>142</sup> The New Times (Kigali), ‘Gacaca Courts to Change Structure’ (G. Agaba, 7 January 2007) <[http://www.rwandagateway.org/article.php3?id\\_article=3978](http://www.rwandagateway.org/article.php3?id_article=3978)> accessed 22 July 2009.

<sup>143</sup> *Ibid.* Of these 766,489 suspects, 72,539 were in Category I, 397,103 in Category II and 296,847 in Category III. The list of suspects grew since then and eventually included over a million individuals.

<sup>144</sup> 2007 Amendment (n 122).



leading to the transfer of their cases from ordinary to gacaca courts.<sup>145</sup> The 2004 Gacaca Law was further amended in 2008, through Organic Law N° 13/2008.<sup>146</sup> This amendment reduced the number of gacaca courts, and decreased the number of gacaca judges at each cell level court from 14 to nine.<sup>147</sup> It also encouraged a more extended use of community services as an alternative punishment to imprisonment.<sup>148</sup> Importantly, the amendment expanded the jurisdiction of gacaca courts to cover certain groups of Category I offenders, leading to the transfer of thousands of cases from ordinary to gacaca courts.<sup>149</sup>

Gacaca trials are held locally, at the level of the cell or sector. All members of the community are obligated by law to actively participate in the proceedings, and refusal to testify at a gacaca hearing could entail prosecution and punishment of up to one year in jail.<sup>150</sup> The procedures applied by gacaca courts differ significantly from those applied by ordinary courts. For example, the parties in gacaca trials are not represented by lawyers. Moreover, gacaca trials are not presided over by professional judges, but rather by persons of integrity from the society. These lay judges are volunteers who do not receive any remuneration for their service as gacaca judges. At the time of writing, over a million people had already been prosecuted by gacaca courts, and gacaca trials are expected to

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<sup>145</sup> *Ibid.*, Article 11. A foreign legal expert based in Rwanda noted that, as a result of the amendment, around 70,000 out of 80,000 cases were transferred from Category I to Category II. Interview notes with author.

<sup>146</sup> 2008 Amendment (n 123).

<sup>147</sup> *Ibid.*, Articles 3 and 4.

<sup>148</sup> *Ibid.*, Article 21 (providing that when someone was sentenced to a combination of a prison term and community services, gacaca courts may commute the prison term to an additional term of community services). On the other hand, the amendment increased the maximum penalty gacaca courts can impose to life imprisonment in isolation (which is termed “life imprisonment with special provisions”), the maximum sentence in Rwanda since the abolition of the death penalty (see *ibid.*, Article 17 (1)).

<sup>149</sup> 2008 Amendment (n 123), para. 7. About 9,000 cases, amounting to over 90 percent of all remaining Category I cases were transferred to gacaca courts as a result of the amendment. See Rwandan Development Gateway, ‘Gacaca Courts to get more powers’ (7 March 2008) <[http://www.rwandagateway.org/article.php3?id\\_article=8283](http://www.rwandagateway.org/article.php3?id_article=8283)> accessed 15 July 2009 (the Rwandan Development Gateway is a center at the National University of Rwanda, established jointly by the Rwandan government and the Development Gateway Foundation). HRW reported that 9,300 category-one cases were transferred from ordinary courts to gacaca courts in June 2008, and that 90 percent of these cases involved sexual offences. See HRW 2009 World Report (n 73). Interviews with foreign legal experts based in Rwanda, confirmed that about 90 percent of Category I cases were moved to gacaca courts. Interview notes with author.

<sup>150</sup> 2004 Gacaca Law (n 61), Article 29 (“Every Rwandan citizen has the duty to participate in the Gacaca courts activities. Any person who omits or refuses to testify on what he or she has seen or on what he or knows, as well as the one who makes a slanderous denunciation, shall be prosecuted by the Gacaca Court which makes the statement of it. He or she incurs a prison sentence from three (3) months to six (6) months. In case of repeat offence, the defendant may incur a prison sentence from six months (6) to one (1) year.”) Also the preamble of the 2004 Gacaca Law (n 61) stressed the obligation to participate in gacaca proceedings (“Considering that such crimes were publicly committed in the eyes of the population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators; Considering that testifying on what happened is the obligation of every Rwandan patriotic citizen and that no body is allowed to refrain from such an obligation whatever reasons it may be”). It is noted that while traditional gacaca practices also involved communal participation, such participation was never required by law.

run until late 2010.<sup>151</sup> The gacaca system has been considered successful in keeping the prison population at a “manageable” size.<sup>152</sup>

However, certain aspects of the gacaca system have attracted considerable criticism by international NGOs. For example, HRW reported that “[i]nstances of faulty procedure, judicial corruption, and false accusations undermine trust in gacaca jurisdictions among victims as well as the accused.”<sup>153</sup> According to Amnesty International, “Gacaca trials were reportedly marred by false accusations and corruption. In addition, defence witnesses were reluctant to come forward because they feared that the authorities would level false accusations against them”.<sup>154</sup> In an interview, a representative of an international NGO based in Kigali explained, that Rwandans do not want to attend the gacaca trials and prefer not to waste a day’s work, but they attend because it is obligatory. He noted that the system is manipulated and that witnesses are intimidated and sometimes arrested during the trials, especially defence witnesses.<sup>155</sup> It is also noted that gacaca trials are sometimes held in the absence of the accused.<sup>156</sup>

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<sup>151</sup> The original plan was to conclude all gacaca trials in December 2007, but already at the close of the pilot phase, it was clear that gacaca courts would deal with over 700,000 cases. Eventually, the number of suspects exceeded a million, as many suspects were added to the list as a result of new information provided in testimonies and confessions before gacaca courts. Hence, the 2007 deadline has been extended several times. See AllAfrica News, ‘Rwanda: One Dollar Campaign Comes Up Short, Reburials Fail’ (by C. Riungu, 6 July 2009) <<http://allafrica.com/stories/200907061438.html>> accessed 7 July 2009. Also see HRW 2009 World Report (n 73) (“Originally scheduled to end in 2007, gacaca jurisdictions will continue hearing cases until 2010”). It is noted that according to the 2008 Amendment (n 123), any genocide-related offences which will be identified after the closure of gacaca courts, will be directed to ordinary or military courts. See 2008 Amendment (n 123), Article 25.

<sup>152</sup> According to the International Committee of the Red Cross, by the end of 2008, “[t]he majority of the more than 1 million cases brought before the 15,000 gacaca courts since July 2006 had been concluded, and a significant number of people who pleaded guilty were able to undertake community service as part of their sentences. As a result, the prison population in 2008 remained steady at around 60,000.” See International Committee of the Red Cross, Annual Report 2008 (Chapter on Rwanda) <[www.icrc.org/Web/eng/siteeng0.nsf/htmlall/annual-report-2008-rwanda/\\$File/icrc\\_ar\\_08\\_rwanda.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/annual-report-2008-rwanda/$File/icrc_ar_08_rwanda.pdf)> accessed 17 December 2009, p. 125.

<sup>153</sup> HRW 2009 World Report (n 73). The report provides the following examples: “In February a gacaca appeals court sentenced former presidential candidate Dr. Théoneste Niyitegeka to 15 years in prison for genocide. Dr. Niyitegeka, who had cared for Tutsis in 1994, had been acquitted by a lower court because of the scanty, vague, and contradictory testimony against him. The appeals court gave no explanation for overturning the previous acquittal. In another case marred by grave procedural errors, an appeals court overturned the acquittal by a lower court of Jean Népomuscène Munyangabe, a Rwandan working for the UN in Chad, who voluntarily returned to Rwanda to contest charges against him.” The report also notes that “The safety of witnesses in judicial proceedings continued to be a concern, with 17 genocide survivors killed in the first nine months of 2008, some in connection with testimony in gacaca proceedings.”

<sup>154</sup> AI 2009 World Report (n 63). A representative of another international NGO based in Kigali also suggested that corruption is a risk at gacaca courts because the gacaca judges are not paid. Another interviewee, a foreign legal expert based in Kigali, explained that corruption exists in the gacaca system, but is of relatively low levels. Interview notes with author.

<sup>155</sup> Interview notes with author. The interviewee stressed that international NGOs such as ASF, HRW and PRI, want gacaca courts to wind up.

<sup>156</sup> See, e.g., Hirondelle News, ‘Gacaca: Rwandan Senator Flees the Country to Escape Justice’ (4 June 2009) <<http://www.hirondellenews.com/content/view/12455/182/>> accessed 22 February 2010; Hirondelle News, ‘Ex-Burundian Refugee Gets Life Jail for His Role in 1994 Rwandan Genocide’ (11 May 2009) <<http://www.hirondellenews.com/content/view/12355/533/>> accessed 22 February 2010.

A Rwandan attorney suggested that the fairness of gacaca trials depended on the accused and the location of the court. In the countryside, where people are usually equal in terms of influence and wealth, gacaca works better as defence and prosecution witnesses testify freely. Problems arise in the cities, where inequalities are more common. For example, if a defendant is in a position of power within a big company, others may want his job and therefore would do anything to see him convicted, including intimidate defence witnesses. But generally speaking, explained the attorney, the gacaca court system is a good mechanism because it is transparent. He added that perhaps the sensitive cases, where intimidation may be anticipated, should be dealt with by ordinary courts.<sup>157</sup>

A prominent Rwandan judge stressed that the gacaca system combines justice and reconciliation, which cannot be achieved through the ordinary court system. It promotes reconciliation by allowing people to come together and work towards a common future.<sup>158</sup> Another prominent Rwandan judge referred to reduced sentences issued by gacaca courts. He explained that the sentence is not as important to Rwandans as the accountability and truth which is established by gacaca courts. Thus, even when they are authorized to give a life sentence, gacaca courts often reduce the sentence (following confessions). The judge added that promoting a reality where people can live together is considered more important in Rwanda than condemning genocide perpetrators.<sup>159</sup> When gacaca courts offer victims recognition that a crime was committed against them, they can live more easily in their communities where they must co-exist with the perpetrators.<sup>160</sup>

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<sup>157</sup> Interview notes with author.

<sup>158</sup> Interview notes with author. However, according to a representative of an international NGO, gacaca courts can undermine reconciliation because of their re-traumatizing effect. In addition, anyone can accuse anyone in gacaca proceedings, and thus new accusations are made 14 years after the genocide. As a result, people suddenly believe that their neighbor was involved in the genocide, after having lived next to him for 14 years without having considered this option. In addition, people are sometimes accused in surprise, or are arrested after having already been released. The NGO representative also noted that a major shortcoming of the gacaca system is that it is one sided, in the sense that it only addresses genocide crimes and not war crimes committed by the RPF. This can also undermine reconciliation. Another interviewee, a foreign legal expert based in Kigali, indicated that witnesses in gacaca trials do not feel free to discuss crimes committed by the RPF. While it is not legally prohibited, discussing such issues is generally not considered "politically correct" in Rwanda, also outside the context of gacaca trials. Interview notes with author.

<sup>159</sup> Interview notes with author.

<sup>160</sup> Interview notes with author. In addition, a Rwandan official stressed that some of the Category II and III perpetrators were released after they served a quarter of their sentence. However, a representative of an international NGO in Kigali noted that gacaca courts sometimes impose overly heavy sentences after very brief proceedings. He recalled occasions in 2007, where 14 people were convicted to life imprisonment in half a day of gacaca proceedings. Interview notes with author.



According to a senior ICTR official, despite all the remarks about their lack of fairness, gacaca trials promote the fight against impunity. In his view, the faults of gacaca proceedings are acceptable for three main reasons. First, gacaca courts promote reconciliation. Second, they help resolve the problems of congested prisons and overburdened courts. Finally, gacaca courts provide a good substitute for taking the law into private hands.<sup>161</sup> Another senior ICTR official theorized that bringing hundreds of thousands of people to some form of accountability also preserves the memory of the events. Moreover, the mass trials contribute to demobilizing fugitives by placing them on “wanted lists” and thus ensuring that they are constantly on the run.<sup>162</sup>

A foreign legal expert based in Kigali noted that international donors were initially reluctant to allocate funds to gacaca courts. They were unsure about the system’s credibility given the absence of defence counsel and professional judges, and the lack of international due process standards. At the same time, however, they also felt that the international community could not really propose a better alternative. Thus, the Dutch government and the Belgian government (mainly through the Belgian Technical Cooperation) agreed to fund gacaca courts. Furthermore, the EC recently allocated 3 million Euros for training gacaca judges, and it supports the National Human Rights Commission which monitors gacaca trials.<sup>163</sup> In 2007, the US also contributed funds to gacaca courts.<sup>164</sup> In addition, the national ILPD trains gacaca officials on how to handle sexual violence cases. It is also recalled that PRI conducts research and reports on gacaca courts (see section 4.3 above).<sup>165</sup>

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<sup>161</sup> Interview notes with author. The official explained that, in the first few years after the genocide, revenge killings were not uncommon in Rwanda’s rural areas. Thus, some kind of reckoning on the local community level, such as gacaca trials, was desirable, despite all the criticism against gacaca courts. He added that gacaca courts are actually trying to settle issues and allow victims and perpetrators to live in proximity, by trying the perpetrators and getting some of the property back. With regard to the problem of prison congestion, it is recalled that keeping the large amounts of detainees in prisons has drained government resources (see note 58 above).

<sup>162</sup> Interview notes with author.

<sup>163</sup> Interview notes with author. The interviewee added that support lessened when Category I cases were transferred to gacaca courts. However, as Rwanda abolished the death penalty before transferring any Category I cases to gacaca courts, most donors continued funding gacaca.

<sup>164</sup> The US donated 150,000 US dollars to gacaca courts in 2007. See <[http://www.undp.org/rw/hiv\\_aids\\_project23.html?id=112](http://www.undp.org/rw/hiv_aids_project23.html?id=112)> accessed 4 August 2009.

<sup>165</sup> In terms of cost, the budget initially approved by the government for gacaca trials was 5 billion Rwanda francs (about 8.8 million US dollars at the time of writing). In 2001, the government allocated 2 billion Rwanda francs (about 3.52 million US dollars at the time of writing) to gacaca courts. See Rwandan Development Gateway, ‘What happens in a Gacaca Session / Trial?’ (8 February 2005) <[http://www.rwanda.rw/article.php3?id\\_article=112](http://www.rwanda.rw/article.php3?id_article=112)> accessed 7 August 2009.

### 5.3 MILITARY TRIALS

In September 1994, the UN Commission of Experts reported that between April and July 1994 in Rwanda, in addition atrocities committed by Hutus against Tutsis, “mass assassinations, summary executions, breaches of international humanitarian law and crimes against humanity were also perpetrated by Tutsi elements against Hutu individuals”.<sup>166</sup> According to Tharcisse Karugarama, Rwanda’s Minister of Justice and Attorney General, 42 RPF soldiers were prosecuted by April 2007 for crimes perpetrated in connection with the war.<sup>167</sup> The Prosecutor of the ICTR, while acknowledging that 42 RPF soldiers were prosecuted in Rwanda for war-related crimes, added:

[O]f these 42 RPF soldiers on this list, 19 were actually prosecuted for offences committed in 1994 falling within the jurisdiction of the ICTR with the rest being prosecuted for offences committed post 1994 against civilians suspected of being genocidaires. Of the 19 soldiers, 12 were convicted and sentenced to various terms of imprisonment, 5 were acquitted and the remaining two cases did not proceed due to the absence of the accused persons”.<sup>168</sup>

In addition, in June 2008, a military court in Rwanda held the so called “Kabgayi Trial”. In this trial, four RPF military officers were charged with war related crimes for killing fifteen civilians (including thirteen catholic priests) at the Kabgayi Cathedral in Rwanda in 1994. The defendants included Brigadier General Gumisiriza and three more junior officers. The allegations were investigated both by the Rwandan military authorities and by the ICTR. Eventually, the four were not indicted by the ICTR, and in June 2008, the Tribunal’s Prosecutor permitted Rwanda to hold the trial nationally and transferred the case-file he had compiled against them to the Rwandan authorities (see sections 6.4 and 8.2 below). Brigadier General Gumisiriza and one of the other officers were acquitted, while the two remaining junior officers, who admitted to having shot the victims, were convicted and sentenced to five years of imprisonment. This was the first war-crimes

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<sup>166</sup> Preliminary Report of the UN Commission of Experts dated 29 September 1994 (n 33), para. 82 (the Commission also recommended that the “allegations concerning these acts should be investigated further”).

<sup>167</sup> Official website of the Republic of Rwanda, Ministry of Justice, ‘RPF Never Ignored to Punish Soldiers Guilty of War Crimes’ <<http://www.minijust.gov.rw/spip.php?article133>> accessed 26 July 2009 (referring to a press conference which the Minister of Justice and Attorney General of Rwanda held with Radio Rwanda on 1 June 2009).

<sup>168</sup> ICTR Prosecutor’s letter to HRW <[http://www.hrw.org/sites/default/files/related\\_material/2009\\_06\\_Rwanda\\_Jallow\\_Response.pdf](http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response.pdf)> accessed 21 August 2009, p. 2. It is noted that HRW provided statistics which were slightly different, and stressed the light sentences which were imposed: “[a]ccording to government statistics, only 32 soldiers have been brought to trial for crimes committed against civilians in 1994, with 14 found guilty and given light sentences”. See HRW, *Law and Reality* (n 41), p. 4. Details about each of the trials, including names of defendants and the sentences they received, are provided in HRW, *Law and Reality* (n 41), Annex 2, pp. 103-109.

prosecution in Rwanda against RPF members, as previous prosecution of RPF crimes in Rwanda were for ordinary crimes (even if related to the war).

HRW complained about the short proceedings and light sentences imposed in the Kabgayi Trial, and reported that this trial “proved to be a political whitewash”.<sup>169</sup> In response, the Rwandan Minister of Justice announced that “five years sentence is not a small punishment for a person who admitted to have committed the crime.”<sup>170</sup> The Prosecutor of the ICTR wrote a letter to HRW, stating that the Kabgayi Trial “was in my assessment properly conducted”.<sup>171</sup>

HRW also reported that “[n]either the Rwandan prosecutor’s office nor the ICTR anticipate further such prosecutions [of RPF members], despite United Nations estimates that between 25,000 and 45,000 persons were killed by RPF soldiers in 1994.”<sup>172</sup> Some commentators complain that the prosecution by Rwanda of only 23 RPF members, for war related crimes committed in 1994, amounts to an insufficient response to the UN commission’s finding that serious atrocities were committed by RPF soldiers.<sup>173</sup> But it seems that the Rwandan government, not unlike the ICTR (see section 6.3 below), has prioritized the prosecution of genocide-related crimes over “lesser” crimes (with fewer victims). A representative of an international NGO based in Kigali explained that donor

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<sup>169</sup> HRW, ‘Rwanda: Tribunal Risks Supporting Victor’s Justice’ (1 June 2009) <<http://www.hrw.org/en/news/2009/06/01/rwanda-tribunal-risks-supporting-victor-s-justice>> accessed 23 December 2009. HRW also criticized the Rwandan government for prosecuting the four officers only because the ICTR prepared a case against them. See HRW 2009 World Report (n 73) (“The RPF had acknowledged the crime committed by its soldiers 14 years ago, but brought the accused to trial only after the International Criminal Tribunal for Rwanda (ICTR) prepared a case against them”).

<sup>170</sup> Official website of the Republic of Rwanda, Ministry of Justice, ‘RPF Never Ignored to Punish Soldiers Guilty of War Crimes’ <<http://www.minijust.gov.rw/spip.php?article133>> accessed 26 July 2009.

<sup>171</sup> Letter from ICTR Prosecutor to HRW Executive Director (22 June 2009) <[www.hrw.org/sites/default/files/related\\_material/2009\\_06\\_Rwanda\\_Jallow\\_Response.pdf](http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response.pdf)> accessed 21 August 2009 (hereinafter: Letter from ICTR Prosecutor to HRW), p. 3. The ICTR Prosecutor added that monitors on his behalf “have provided me with their reports and attested to the proceedings, which were held in public, as having complied with the standards of fair trial ... Although you admit to HRW monitoring the trial, you have not, seven months since the verdict, brought to my attention any evidence to support your allegation that the trial ‘proved to be a political whitewash and a miscarriage of justice’.” See p. 2. his letter also indicated that “It is my strong belief that the prosecution of cases of crimes committed by the members of the RPF, where amply supported by concrete evidence, have a potentially greater impact on national reconciliation if conducted effectively and in accordance with fair trial procedures by the Rwandan authorities themselves.” See p. 3.

<sup>172</sup> HRW 2009 World Report (n 73). In addition to complaining that very few RPF crimes were prosecuted in Rwanda, HRW also expressed concern that “[i]n jurisdictions beyond its borders, Rwanda has vigorously pursued its goal of averting prosecution of its soldiers. When the ICTR prosecutor announced investigations of crimes by RPA soldiers, Rwandan officials in 2002 impeded the travel of witnesses for genocide trials at the ICTR, forcing the suspension of several trials for months. After a French judge issued warrants for nine RPA officers, Rwanda broke diplomatic relations with France; after a Spanish judge issued warrants for 40 RPA soldiers, President Kagame and government ministers denounced his action and called for other national jurisdictions to ignore the warrants.” HRW, Law and Reality (n 41).

<sup>173</sup> The 19 RPF soldiers who were prosecuted by 2007 and the four who were prosecuted in the Kabgayi Trial constitute a total of 23 persons.

countries do not press Rwanda on the issue of RPF accountability, perhaps because of their guilt over the genocide, or to avoid tarnishing the “success story” they consider Rwanda to be.<sup>174</sup>

## 5.4 NON-JUDICIAL MEASURES

In addition to trials in ordinary, gacaca and military courts, Rwanda adopted other measures to promote post-conflict justice and reconciliation, such as the constitutional reform mentioned in section 4.2 above. Institutional reforms also took place, such as the creation of the National Unity and Reconciliation Commission (hereinafter: NURC), the National Human Rights Commission, and the National Commission for the Fight Against Genocide. This report is concerned with judicial responses to the mass atrocities, but for the sake of completeness, the following paragraphs will briefly describe three of Rwanda’s non-judicial responses to the atrocities, including those involving monetary reparation for the victims and the creation and work of NURC.

### *National Unity and Reconciliation Commission (NURC)*

The NURC was established in March 1999.<sup>175</sup> It initially held consultations with the Rwandan population to identify the root-causes of the genocide.<sup>176</sup> One of the main functions of NURC is organizing three-months long “reconciliation retreats” (called *Ingando*) for different groups, including convicted genocidaires prior to their release from prison.<sup>177</sup> The retreats help them re-integrate more smoothly into their communities.<sup>178</sup> In parallel, NURC prepares the local community to receive the released prisoners.<sup>179</sup>

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<sup>174</sup> Interview notes with author. The interviewee explained that the donors are even more hesitant to criticize Rwanda following the Spanish and French indictments against RPF members, which, although partly based on well-documented facts, went too far in accusing RPF members of committing genocide.

<sup>175</sup> Official website of the Republic of Rwanda, National Unity and Reconciliation Commission <[http://www.nurc.gov.rw/index.php?option=com\\_content&view=article&id=73&Itemid=58](http://www.nurc.gov.rw/index.php?option=com_content&view=article&id=73&Itemid=58)> accessed 27 December 2009 (“In March 1999, by the law N°03/99 of 12/03/99, the Government of National Unity established the National Unity and Reconciliation Commission with the responsibility of using all available means to mobilize and sensitize Rwandans for this noble task”).

<sup>176</sup> According to a senior Rwandan official, the two main causes of the genocide which were identified by NURC were bad governance and ethnic based discrimination. Interview notes with author.

<sup>177</sup> Also demobilized combatants who return to Rwanda from the DRC go through *Ingando*.

<sup>178</sup> Such retreats have been conducted with groups numbering up to 30,000 participants. They are held in 20 centers throughout Rwanda called “re-education centers for peace and reconciliation”.

<sup>179</sup> A senior Rwandan official explained that some of the prisoners, after being released from the retreats, confess their crimes and ask for forgiveness from the relatives of their victims. The official stressed that such knowledge of how the victims were killed (and sometimes where they were buried) has provided justice, healing and closure to the victims’

### *Genocide Survivors Fund*

In January 1998, the Rwandan government established the Fund for the Support of Genocide Survivors (hereinafter: FARG) to help support genocide survivors who have suffered the worst hardships, such as orphans, widows, the crippled and the elderly. FARG offers support in the areas of education, health and housing. The Rwandan Government dedicates five percent of its annual budget to the FARG.<sup>180</sup>

From 2003 to 2007, over 60 percent of FARG's total budget was spent on assisting about 50,000 student survivors in the area of education. In 2007 alone, over 7.7 billion Rwandan francs (about 13.56 million US dollars at the time of writing) were spent to assist 52,148 students. In 2006 and 2007, about 3 billion Rwandan francs (about 5.4 million US dollars at the time of writing) were allocated for the construction of 3,788 houses.<sup>181</sup> By October 2008, the Rwandan government had started construction work in relation to 23,833 houses.<sup>182</sup>

### *Victims' Compensation Fund*

The 1996 Genocide Law called for the establishment of a Victim's Compensation Fund "whose creation and operation shall be determined by a separate law".<sup>183</sup> The fund is intended to cover judicial awards to genocide survivors in cases where convicted genocide perpetrators fail to pay the awards demanded of them.<sup>184</sup>

According to a Rwandan official, the main problem associated with setting up the Victims' Compensation Fund is that the government lacks the resources to support it.

relatives, allowing them to come to terms with the death of their loved ones. For example, the official recalled an incident where a released prisoner told an orphan where the bones of his mother were buried. The orphan later told the official that only after he was informed of the location of the bones, was he able to "regain humanity". The official also described an incident where a prisoner confessed his crimes before the mother of a victim he killed, and told her where he buried the body, and this helped her to come to terms with her daughter's death. Interview notes with author.

<sup>180</sup> AllAfrica News, 'Rwanda: Despite Poor Beginning, FARG Will Deliver' (8 April 2008) <<http://allafrica.com/stories/printable/200804090214.html>> accessed 8 August 2009. According to this article, in previous years, some of the Fund's officials misappropriated its resources and later fled Rwanda.

<sup>181</sup> *Ibid.*

<sup>182</sup> Rwandan Development Gateway, 'Genocide survivors to get over 3000 houses' (9 October 2008) <[http://www.rwanda.rw/article.php3?id\\_article=10038](http://www.rwanda.rw/article.php3?id_article=10038)> accessed 8 August 2009.

<sup>183</sup> 1996 Genocide Law (n 53), Article 32 ("Damages awarded to victims who have not yet been identified shall be deposited in a victims' Compensation Fund, whose creation and operation shall be determined by a separate law. Prior to the adoption of the law creating the fund, damages awarded shall be deposited in an account at the National Bank of Rwanda for this purpose by the Minister responsible for Social Affairs and the Fund shall be used only after the adoption of the law"). The subsequent 2001 Gacaca Law (n 56) and 2004 Gacaca Law (n 61) kept this provision. .

<sup>184</sup> International Center for Transitional Justice, 'Transitional Justice and DDR: The Case of Rwanda' (L. Waldorf, June 2009) <[http://www.ictj.org/static/Publications/DDR\\_Rwanda\\_Final.pdf](http://www.ictj.org/static/Publications/DDR_Rwanda_Final.pdf)> accessed 7 August 2009, p. 4.



The convicted perpetrators also lack the means to contribute to such a fund. The official noted that it is anticipated that the fund would compensate victims according to their injury. There is a current proposal that the fund will be financed from public taxes. Another idea which is being contemplated is the provision of services to victims instead of money.<sup>185</sup>

## 6. THE INTERNATIONAL RESPONSE TO THE MASS ATROCITIES: THE ICTR

### 6.1 ESTABLISHMENT AND JURISDICTION

In September 1994, the UN Commission of Experts reported that genocide and other international crimes have been committed in Rwanda between April and July 1994 (see section 3.3 above). The Commission recommended that an international court be established to prosecute the crimes.<sup>186</sup> Around the same time, Rwanda also requested the UN to establish an international tribunal to prosecute the genocide perpetrators (see section 4.1 above). On 8 November 1994, acting under Chapter VII of the UN Charter, the Security Council established the ICTR through Resolution 955.<sup>187</sup>

Security Council Resolution 955 mandated the ICTR to prosecute the international crimes committed between 1 January 1994 and 31 December 1994 in Rwanda, or by Rwandans in neighboring states. The Tribunal's jurisdiction covers the international crimes of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (commonly referred to as war crimes). The ICTR is governed by its Statute, which is annexed to Resolution 955.

On 22 February 1995, the Security Council adopted Resolution 977 which placed the seat of the ICTR in the town of Arusha, in the United Republic of Tanzania.<sup>188</sup> The Tribunal's judges were appointed in May 1995, and in June 1995 they adopted the ICTR Rules of Procedure and Evidence. The accused persons in the custody of the ICTR have been arrested and transferred to Arusha from more than 15 countries. The first accused

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<sup>185</sup> Interview notes with author.

<sup>186</sup> Preliminary Report of the UN Commission of Experts dated 29 September 1994 (n 33), para. 133.

<sup>187</sup> UNSC Res 955 (n 35).

<sup>188</sup> UN Security Council Resolution 995 left open where the seat of the Tribunal would be located. See UNSC Res 955 (n 35), para. 6. Based on this provision, among others, Rwanda voted against the establishment of the ICTR. Other reasons for Rwanda's objection to the ICTR are mentioned in section 6.7 below.



arrived in May 1996 and the first trial started in January 1997. Since then, as of the time of writing this report, the Tribunal has completed trials in the first instance involving 50 accused (this figure does not include two trials concerning contempt of court accusations). It is currently holding trial proceedings against 22 accused, and 2 additional accused are awaiting trial. The evidence phase of all ICTR first instance trials is scheduled to conclude by the end of 2010. These trials represent the first time that high-ranking individuals have been prosecuted by an international court for mass atrocities in Africa. The Tribunal's sentences, to the extent possible, are enforced in African countries.

According to Article 8 of the ICTR Statute, while the Tribunal and national courts have concurrent jurisdiction, the Tribunal enjoys "primacy over the national courts of all States". The article further stipulates that "[a]t any stage of the procedure the [ICTR] may formally request national courts to defer to its competence". In the Tribunal's first few years, it used its primacy powers to get cases from national jurisdictions.<sup>189</sup> But it never attempted to get cases from Rwanda.<sup>190</sup> One case which was tried in Rwanda and could have interested the ICTR was that of Froduald Karamira, the former vice-president of the MDR political party in Rwanda, who was arrested in June 1996 in Bombay and extradited to Rwanda for trial (see section 5.1 above). But the ICTR was not interested in trying him.<sup>191</sup> In a 1998 press release, the ICTR indicated as follows:

"The Tribunal recalls that it has concurrent jurisdiction with national Governments, including the Government of Rwanda, to prosecute individuals responsible for the Rwanda genocide. While the Tribunal has primacy of jurisdiction, it does not have exclusive jurisdiction. As a practical matter, given the Tribunal's limited life span, it will not be able to prosecute the thousands of individuals implicated in the genocide. This necessarily means that the bulk of these individuals will be prosecuted in Rwanda."<sup>192</sup>

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<sup>189</sup> See, e.g., *Prosecutor v. Alfred Musema*, Case No. ICTR-96-5-D, Decision on the formal request for deferral presented by the Prosecutor (Trial Chamber), 12 March 1996. In this decision, the ICTR Trial Chamber formally requested the Swiss federal Government to defer to the Tribunal all investigations and criminal proceedings currently being conducted in its national courts against Alfred Musema.

<sup>190</sup> A senior ICTR official explained that the Tribunal was not interested in trying any of the 120,000 individuals detained in Rwanda. He added that Rwanda had greater difficulties than the ICTR in apprehending the suspects wanted by the ICTR. Interview notes with author. Thus, for example, ICTR Accused Theoneste Bagosora was requested both by Rwanda and the ICTR. But Cameroon, where he was arrested, extradited him to the ICTR. See New York Times, 'Rwanda Atrocity Inquiries Focus on Former Officer' (B. Crossette, 28 March 1996) <<http://www.nytimes.com/1996/03/28/world/rwanda-atrocity-inquiries-focus-on-former-officer.html?pagewanted=1>> accessed 20 December 2009.

<sup>191</sup> Amnesty International criticized the ICTR for failing to "strenuously pursue" Karamira's transfer to the ICTR for trial, alleging that this was done as a "concession" to the Rwandan Government. The ICTR responded that it never sought to indict Karamira, and that Amnesty International's allegations "have no basis in fact". See ICTR Press Release of 29 April 1998 <[www.ictor.org/ENGLISH/PRESSREL/1998/117.htm](http://www.ictor.org/ENGLISH/PRESSREL/1998/117.htm)> accessed 29 July 2009.

<sup>192</sup> *Ibid.*

## 6.2 ORGANIZATION AND OUTREACH

The ICTR, modeled after the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY), has three organs: Chambers, Office of the Prosecutor (hereinafter: OTP), and Registry.<sup>193</sup> The Tribunal's Chambers comprise three Trial Chambers in Arusha and an Appeals Chamber in The Hague (common to the ICTY).<sup>194</sup> The OTP, headed by the Prosecutor, is in charge of investigations and prosecutions. It is based in Arusha and has a sub-office in Kigali.<sup>195</sup> The Registry is responsible for providing overall judicial and administrative support to the Chambers and the OTP. It is based in Arusha, with representatives in Kigali and The Hague, and is headed by the Registrar.<sup>196</sup>

Two important sections within the Registry are the Witness and Victims Support Section (hereinafter: WVSS) and the Defence Counsel and Detention Management Section (hereinafter: DCDMS). WVSS provides support and protection to all witnesses and victims called to testify before the ICTR.<sup>197</sup> DCDMS ensures that indigent accused or suspects detained by ICTR are provided with competent defence counsel, and that the UN Detention Facility in Arusha conforms to international standards.<sup>198</sup>

The Registry also serves as the Tribunal's channel of communication and is responsible for running the ICTR's Outreach Program, which informs Rwandans about the Tribunal's work. One of the ways in which the Tribunal disseminates information

<sup>193</sup> Official website of the ICTR <[www.ictt.org](http://www.ictt.org)> accessed 29 July 2009. This is the source of the information in the following paragraphs, including the footnotes.

<sup>194</sup> Each case before the Tribunal is heard at first instance by a Trial Chamber of three judges, and, if appealed, by five judges of the Appeals Chamber. The judges are elected by the General Assembly from a list submitted by the Security Council (containing nominees submitted by UN Member States). They are elected for a term of four years, and are eligible for re-election. No two of them may be nationals of the same State.

<sup>195</sup> The current Prosecutor is Mr. Hassan Bubacar Jallow of the Gambia, who was appointed by the Security Council on 15 September 2003. The OTP is divided into two divisions: the Prosecution Division which comprises an Investigation Section and Trial Teams, and the Appeals and Legal Advisory Division, which is responsible for handling appeals and providing legal advice to trial teams and senior management in the OTP.

<sup>196</sup> The current Registrar is Mr. Adama Dieng of Senegal. He was appointed on 1 March 2001 by the Secretary General after consultation with the President of the ICTR, and is the Representative of the UN Secretary General.

<sup>197</sup> The support afforded by WVSS to witnesses includes physical and psychological rehabilitation, especially counseling in cases of rape and sexual assaults, as well as any other specialized care such as gynecological, dental, ophthalmologic, laboratory, X-Ray, HIV medications in some cases. The section also assists them by providing childcare during the absence of the witness from the country of residence, and handling the acquisition of travel documents and visas required for the journey to Arusha and after testimony. To secure their person, WVSS provides twenty four hours protection to the witnesses, including during their travel to and from Arusha, and their stay in Arusha. It also assists in relocating vulnerable witnesses and their family (within or outside Rwanda). Additional measures employed by the ICTR to protect the security of witnesses include concealment of their identity by using pseudonyms, placing them in a witness box in the courtroom out of sight by the public, providing in certain circumstances for testimony in closed doors or via video link, and redacting the public transcripts.

<sup>198</sup> The work of DCDMS is divided between activities related to managing the UN Detention Facility, and activities associated with the assignment and provision of legal assistance. The latter include compiling and maintaining a list of Defence Counsel which is submitted to the indigent detainees to allow them to choose their Defence Counsel. This list is made up of more than two hundred lawyers from a wide variety of countries.

about its work in Rwanda is through “ICTR documentation centers” across Rwanda. The first such center was the “Umusanzu Center” which was established by the ICTR in Kigali in 2000.<sup>199</sup> With the cooperation of the Rwandan government and the financial support of the EC, the ICTR established nine additional documentation centers in 2008-2009, in different parts of Rwanda.<sup>200</sup> In addition, the Tribunal’s Outreach Program facilitates the work of Rwandan journalists who broadcast radio programs about ICTR proceedings on a daily basis from Arusha.<sup>201</sup> The Tribunal also produces documentaries in Kinyarwanda about its cases, which it shows throughout Rwanda, and disseminates CD ROMs in Rwanda containing its jurisprudence.<sup>202</sup> Moreover, the Tribunal occasionally invites Rwandans to attend events and judgement deliveries at its seat in Arusha.<sup>203</sup> The Outreach Program is funded by voluntary contributions, mainly from the EC, and not from the Tribunal’s regular budget.<sup>204</sup> It is noted that the ICTR’s capacity building activities in Rwanda (see section 8.4 below) also play an important role in informing Rwandans about the Tribunal’s work and mandate.<sup>205</sup>

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<sup>199</sup> The full name of the center is “Umusanzu mu Bwiyunge”, which in Kinyarwanda means “contribution to reconciliation”. See ICTR Press Briefing of 19 September 2000 <<http://www.ictor.org/ENGLISH/pressbrief/2000/brief190900.htm>> accessed 8 August 2009. Also see Afrol News, ‘Genocide Tribunal Intensifies its Work in Rwanda’ (26 September 2000) <[http://www.afrol.com/News/rwa007\\_tribunal\\_rwanda.htm](http://www.afrol.com/News/rwa007_tribunal_rwanda.htm)> accessed 8 August 2009.

<sup>200</sup> Report on the completion strategy of the International Criminal Tribunal for Rwanda’ (as at 4 May 2009), UN Doc. S/2009/247 (14 May 2009) <[www.ictor.org/ENGLISH/completionstrat/s-2009-247e.pdf](http://www.ictor.org/ENGLISH/completionstrat/s-2009-247e.pdf)> accessed 25 December 2009 (hereinafter: ICTR Completion Strategy Report of May 2009), para. 61; Report on the completion strategy of the International Criminal Tribunal for Rwanda’ (as at 9 November 2009), UN Doc. S/2009/587 (12 November 2009) <[www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Tribunals%20S%202009%20587.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Tribunals%20S%202009%20587.pdf)> accessed 23 February 2010 (hereinafter: ICTR Completion Strategy Report of November 2009), para. 64.

<sup>201</sup> Given that radio is the most widely-available medium in Rwanda, this is an important outreach activity. Interview notes with author.

<sup>202</sup> ICTR Completion Strategy Report of November 2009 (n 200), paras. 65 and 69.

<sup>203</sup> An ICTR judge recalled that Rwandan officials, including representatives of the gacaca authorities, have been on many visits to the ICTR. Also a prominent Rwandan judge confirmed that Rwandan judges have been invited to Arusha to attend ICTR proceedings. Interview notes with author.

<sup>204</sup> ICTR Completion Strategy Report of May 2009 (n 200), para. 65; ICTR Completion Strategy Report of November 2009 (n 200), para. 64.

<sup>205</sup> A senior ICTR official recalled that the ICTR has approached the Rwandan radio station “Radio Rwanda”, asking to air ICTR proceedings. However, the station requested an amount of money which the ICTR could not realistically afford. An ICTR judge stressed that the Tribunal always wanted to be much more active in Rwanda, but faced difficulties such as in the case of the radio station making it impossible for the ICTR to air its proceedings in Rwanda. He added that the Tribunal has tried for seven years to get a program on a Rwandan radio channel. In his view, the Rwandan government wanted the ICTR to lack public legitimacy in Rwanda, in case the Tribunal decided to prosecute members of the RPF leadership. A senior ICTR official added the Tribunal’s outreach was inefficient in its early days due partly to budget constraints and bad management, but also because of Rwanda’s lack of cooperation with the Tribunal (on Rwanda’s cooperation with the ICTR see sections 7.1 and 7.2 below). Another senior ICTR official described how the ICTR had to lobby journalists, and build a press center, to encourage them to come and report on its activities. Interview notes with author.

### 6.3 JUDICIAL ACTIVITY

The ICTR indicted 92 persons, of which 82 were arrested to date (10 indictees are still at large).<sup>206</sup> Those arrested include Rwanda's former prime minister, 14 ministers, 6 prefects (heads of districts), and other political and military leaders, as well as important religious and media persons.<sup>207</sup> As of the time of writing this report, the ICTR completed trials at the first instance with respect to 50 accused (not including two persons who were tried for contempt of court).<sup>208</sup> It is in the process of trying an additional 22 defendants, and intends to shortly begin trials against two more accused.<sup>209</sup> So far, nine accused pleaded guilty before the Tribunal, and eight were acquitted.

All of the ICTR's indictees to date, with the exception of one European, are Hutu. In an interview, a senior ICTR official explained that the Tribunal's Prosecutor preferred to pursue suspected genocidaires rather than focusing on persons who only committed war crimes. This prosecutorial strategy, he added, distinguishes the ICTR (which he called a "genocide tribunal") from the ICTY (which he called a "war crimes tribunal"). Thus, while RPF members may have committed war crimes, the Tribunal's primary focus is on prosecuting genocidaires.<sup>210</sup>

The jurisprudence of the ICTR contributed to the development of international criminal law. Its first judgement, issued in the *Akayesu* case, was the first ever genocide

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<sup>206</sup> In an interview, a senior ICTR official explained that the Tribunal's original list of suspects had over 300 names, but the ICTR eventually indicted only about 90 suspects because of resource and mandate limitations. Many were eliminated from the list for insufficient evidence or insufficient seniority. The focus was on the planners and not the foot soldiers. Some mid level commanders were indicted, based on the notoriety of their acts. Another senior Tribunal noted that the need to focus on high level perpetrators was further stressed by the requirements of the ICTR's completion strategy (discussed in section 6.4 below), which encouraged the ICTR to maintain jurisdiction over the senior perpetrators while transferring the lower ones to the national system. An ICTR judge expressed the view that there is a need to distinguish between crimes which should be internationally condemned and those that should not. In some cases, the violations of humanitarian law are so serious that they must be condemned by the international community through an international court. The ICTR therefore indicted only around 90 accused and not thousands. Interview notes with author.

<sup>207</sup> E. Møse, 'The ICTR's Completion Strategy - Challenges and Possible Solutions', *J Int Criminal Justice* 6 (2008) 667, p. 668. It was noted in an interview with a senior ICTR official that the OTP tried to indict suspects from all regions of Rwanda. Interview notes with author.

<sup>208</sup> Of these 62 accused, judgements with respect to 47 accused have already been rendered, and with respect to 15 accused are still being drafted. It is noted that the ICTR had a slow start - in its first mandate (May 1995 – May 1999), the Tribunal completed cases against a total of seven accused. In its second mandate (May 1999-May 2003), it completed cases against 14 accused.

<sup>209</sup> In addition, two defendants were transferred to France for trial under Rule 11 bis of the ICTR Rules, which permits the referral of cases from the ICTR to national jurisdictions (see section 6.4 below).

<sup>210</sup> Interview notes with author. The official also noted that the ICTR did not want to alienate the Rwandan government as it relies on its cooperation, but still, the Tribunal runs an active investigation on crimes allegedly committed by the RPF. Another senior ICTR official noted, with regret, that the Tribunal will go down in history as one-sided, as it indicted only Hutus (besides one non-Rwandan), despite having had information on international crimes committed by Tutsis. Interview notes with author. See also Letter from ICTR Prosecutor to HRW (n 171), p. 3 ("The ICTR [sic] has understandably focused for many years on [sic] the genocide as this is the main crime base of its mandate").

conviction by an international tribunal. In that case, the ICTR had to define for the first time some of the elements of the crime of genocide, such as the required intent. In particular, the Trial Chamber held that to establish the specific intent required for the crime of genocide, the Prosecutor must prove that the accused intended to produce the act with which he is charged.<sup>211</sup> It also established that rape and other forms of sexual violence can be tools of genocide.<sup>212</sup> Another important contribution to international criminal law was made in the *Musema* case, where the ICTR applied the principle of command responsibility in relation to a civilian corporate environment.<sup>213</sup> Furthermore, in its famous *Media* case, the first ever conviction for incitement to genocide by media leaders, the ICTR set a test for distinguishing statements protected by virtue of the freedom of expression, from incitement to genocide which is not protected by the freedom of expression.<sup>214</sup> The ICTR's case law also contributed to the definition of conspiracy in international criminal law.<sup>215</sup> Finally, the Tribunal's numerous decisions on fair trial rights have substantially developed this area of international law.

## 6.4 COMPLETION STRATEGY AND REFERRAL PROCEDURE

Although the ICTR was created in 1994 as an ad hoc tribunal, the Security Council established a deadline for its activities only nine years later, through its Resolutions 1503 (of 28 August 2003) and 1534 (of 26 March 2004).<sup>216</sup> These resolutions define what is

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<sup>211</sup> *Prosecutor v Jean Paul Akayesu*, Case No. ICTR-96-4, Judgement (Trial Chamber), 2 September 1998, para. 523.

<sup>212</sup> *Ibid*, para. 688. Prior to this case there was no internationally accepted definition of the crime of rape. Rape. In *Akayesu*, rape was defined as "a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive." The Chamber also considered the definition of sexual violence that is broader than that of rape. It defined sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive." Further, the Chamber held that the amount of coercion required does not need to amount to physical force as "...threats, intimidation, extortion and other forms of duress, which prey on fear or desperation, may constitute coercion." The *Akayesu* Trial Chamber also emphasised that coercion may be inherent in armed conflicts or when the military or militias are present. The *Akayesu* definition was adopted by the ICTY in the *Celebici* Trial Chamber Judgement. See *Prosecutor v. Delalic*, Judgement (Trial Chamber), Case No. IT-96-21-T, para. 394.

<sup>213</sup> *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement (Appeals Chamber), 16 November 2001.

<sup>214</sup> *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgement (Trial Chamber), 3 December 2003.

<sup>215</sup> *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-I, Judgement (Trial Chamber), 15 May 2003 (affirmed by the ICTR Appeals Chamber on 9 July 2004). Also see *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement and Sentence (Trial Chamber) 27 January 2000. In *Niyitegeka*, the ICTR for the first time found an accused guilty of conspiracy to commit genocide. The Trial Chamber defined conspiracy to commit genocide as "an agreement between two or more persons to commit the crime of genocide", explained that the required *mens rea* is "the specific intent to commit genocide", and clarified that "the act of conspiracy itself is punishable, even if the substantive offence has not actually been perpetrated" (para. 423). These elements were previously articulated by the ICTR in *Musema* (paras. 191-194), but in *Niyitegeka* they were for the first time applied to produce a conviction.

<sup>216</sup> UNSC Res 1503 (28 August 2003), UN Doc. S/RES/1503 <<http://www.ictor.org/ENGLISH/Resolutions/s-res-1503e.pdf>> accessed 25 December 2009 (hereinafter: UNSC Res 1503); UNSC Res 1534 (26 March 2004), UN Doc. S/RES/1534 <<http://www.ictor.org/ENGLISH/Resolutions/s-res-1534e.pdf>> accessed 25 December 2009 (hereinafter: UNSC Res 1534).



known as the ICTR's "completion strategy". In particular, they request the ICTR to complete its investigations by 2004, first-instance trials by 2008, and all work by 2010.<sup>217</sup> They were adopted in light of the increasing donor fatigue associated with the ad hoc tribunals. The resolutions also request the ICTR to submit to the Security Council every six months a report on its progress. Until then, explained a senior ICTR official, the Tribunal operated with no real strategy or time limit in mind.<sup>218</sup>

To enhance compliance with the newly imposed deadlines, Security Council Resolution 1503 urged the ICTR to transfer cases involving mid and low level accused to "competent national jurisdictions, as appropriate, including Rwanda".<sup>219</sup> Consequently, in 2004, Rule 11 *bis* of the ICTR Rules of Procedure and Evidence was amended to allow the referral of cases from the ICTR to national jurisdictions, including to states "in whose territory the crime was committed". Subsequently, on five occasions, the Prosecutor of the ICTR requested the Tribunal's judges to transfer ICTR cases to Rwanda.<sup>220</sup> But all five requests were denied by the judges, including at the level of the Appeals Chamber.<sup>221</sup>

The final decisions by the ICTR Appeal Chamber base the refusal to transfer cases on two grounds: the unavailability of fair trials in Rwanda, and a penalty structure which violates international law.<sup>222</sup> The first ground is based on the Appeals Chamber's finding that the defendants may be unable to obtain witnesses to testify on their behalf in Rwanda, due to fears that such witnesses may have of being harassed, subjected to gacaca trials, or charged with "genocide ideology".<sup>223</sup> The second ground is based on the

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<sup>217</sup> These resolutions also apply to the ICTY. The deadline for the completion of the ICTR's first instance trials was since extended twice by the Security Council (in 2008 and 2009), and is currently set at December 2010. See UNSC Res 1878 (7 July 2009), UN Doc. S/RES/1878 <[http://www.ictor.org/ENGLISH/Resolutions/s-res-1878\(2009\)e.pdf](http://www.ictor.org/ENGLISH/Resolutions/s-res-1878(2009)e.pdf)> accessed 25 December 2009.

<sup>218</sup> Interview notes with author.

<sup>219</sup> UNSC Res 1503 (n 216). The Resolution also noted "that the strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular".

<sup>220</sup> The Prosecutor's arguments in favor of such transfers were supported by Amicus Briefs submitted by the Rwandan Government and the Kigali Bar Association. The Defence arguments against the transfers were supported by Amicus Briefs submitted by Human Rights Watch and another NGO called the International Criminal Defence Attorneys' Association.

<sup>221</sup> For the list of ICTR decisions denying the transfer requests see note 63 above.

<sup>222</sup> *Munyakazi* Appeals Decision of 8 October 2008 (n 63); *Kanyarukiga* Appeals Decision of 30 October 2008 (n 63); *Hategekimana* Appeals Decision of 4 December 2008 (n 63).

<sup>223</sup> See e.g. *Munyakazi* Appeals Decision of 8 October 2008 (n 63), para. 37; *Kanyarukiga* Appeals Decision of 30 October 2008 (n 63), para. 26. The ICTR judges also added that many of the potential defence witnesses live abroad and will refuse altogether to enter Rwanda for these reasons. See *Munyakazi* Appeals Decision of 8 October 2008 (n 63), para. 40; *Kanyarukiga* Appeals Decision of 30 October 2008 (n 63), para. 31. Moreover, the ICTR judges



finding that the penalty of life imprisonment in isolation, which could be imposed in Rwanda in cases transferred from the ICTR, amounts to cruel and inhuman treatment and therefore breaches international norms.<sup>224</sup> But Rwanda intends to ask again the ICTR Prosecutor to apply for the transfer to cases to Rwanda.<sup>225</sup>

Before concluding this section, it is noted that Security Council Resolution 1534 requests the Prosecutor of the Tribunal to review his caseload “with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions”.<sup>226</sup> In 2005, the ICTR Prosecutor transferred to the Rwandan authorities about 35 case-files (“dossiers”) of suspected genocidaires whose conduct was investigated by the OTP but who have not been indicted by the ICTR.<sup>227</sup> Since these suspects have not been formally charged by the Tribunal, it was within the Prosecutor’s discretion to transfer their dossiers to Rwanda, without requiring the authorization of the ICTR judges. In 2008, the Prosecutor also transferred the dossiers of four RPF officers (see section 5.3 above).

## 6.5 FUNDING

By the end of 2009, the ICTR has cost over 1.3 billion US dollars.<sup>228</sup> Its biennial budget for 2008-2009 alone was around 300 million US dollars.<sup>229</sup> When the Tribunal was established, recalled a senior ICTR official, it had very little resources and relied largely on gratis personnel donated by states such as Finland, Holland, Norway, Canada and the US.<sup>230</sup> In 1996, the ICTR was still being funded on a monthly basis.<sup>231</sup> The budget of

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suggested that the witness protection scheme in Rwanda is underfunded and understaffed, and that “the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda”. See *Munyakazi* Appeals Decision of 8 October 2008 (n 63), para. 38; *Kanyarukiga* Appeals Decision of 30 October 2008 (n 63), para. 33. See note 64 above explaining the prohibition against “genocide ideology”.

<sup>224</sup> See e.g. *Kanyarukiga* Appeals Decision of 30 October 2008 (n 63), para. 15.

<sup>225</sup> Hirondele News, ‘Kigali Reiterates Its Requests to Try ICTR Cases’ (5 June 2009) <<http://allafrica.com/stories/200906230906.html>> accessed 24 June 2009 (“Kigali reiterated Thursday before the United Nations Security Council its request to try cases of the International Criminal Tribunal for Rwanda (ICTR)...”).

<sup>226</sup> UNSC Res 1534 (n 216).

<sup>227</sup> Letter from ICTR Prosecutor to HRW (n 171), p. 2.

<sup>228</sup> Hirondele News, ‘Basic Facts on the ICTR’ <[www.hirondellenews.com/content/view/19/101/](http://www.hirondellenews.com/content/view/19/101/)> accessed 5 August 2009. According to this article, the cost of the Tribunal as of the end of 2007 was US\$1,032,692,200. Adding to this amount the budget for 2008-2009 (US\$305,378,600; see below) brings the total cost of the ICTR to US\$1,338,070,800.

<sup>229</sup> The original budget for 2008-2009 was US\$267,356,200 gross (US\$247,466,600 net), but this was later revised to US\$305,378,600 gross (US\$282,597,100 net). See UNGA Res 63/643 (19 March 2009), UN Doc. A/RES/63/254 <<http://www.undemocracy.com/A-RES-63-254.pdf>> accessed 25 December 2009.

<sup>230</sup> Interview notes with author.

the ICTR grew each year, reaching about 52 million US dollars for the year 1998, and about 75 million US dollars for 1999.<sup>232</sup> Its biennial budget for 2000-2001 was 180 million US dollars; for 2002-2003 it was almost 178 million US dollars; for 2004-2005 it was around 235 millions US dollars, and for 2006-2007 it reached close to 270 million US dollars.<sup>233</sup>

While the ICTR has a much greater budget than the Rwandan judiciary,<sup>234</sup> it must be recalled that international trials involve expenses which are not incurred on the national level, such as trans-national transport of witnesses and staff, extensive translation and interpretation services, etc. Thus the Tribunal's Registry receives over half of the ICTR's budget. In addition, it should be stressed that the Tribunal consists of the OTP which conducts investigations and prosecutions. In fact, after the Registry, the OTP receives the largest part of the Tribunal's budget. Moreover, as was stressed by a senior ICTR official, the Tribunal had to set up a prison system and a criminal investigation department from scratch.<sup>235</sup> The official added that in comparison to complex domestic trials, such as the Lockerby or Oklahoma Bombing trials, the Tribunal's budget is not excessive. Another senior ICTR official even complained that the ICTR's current budget is insufficient to properly meet the challenges associated with the

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<sup>231</sup> Thus, for example, the UN General Assembly approved a budget of around 7.6 million US dollars for the first quarter of 1996. See UNGA Res 50/213 (22 February 1996), UN Doc. A/RES/50/213 <<http://www.un.org/Depts/dhl/res/resa50.htm>> accessed 25 December 2009, para. 1. For the first half of 1997, it approved a budget of about 20 million US dollars. See UNGA Res 51/744 (17 December 1996), UN Doc. A/51/744 <<http://www.undemocracy.com/A-51-744.pdf>> accessed 25 December 2009, para. 2.

<sup>232</sup> UNGA Res 53/213 (10 February 1999), UN Doc. A/RES/53/213 <<http://www.undemocracy.com/A-RES-53-213.pdf>> accessed 25 December 2009 (approving the ICTR a budget of US\$52,297,900 gross for 1998, for 583 posts, and of US\$75,260,600 gross for 1999, for 772 posts).

<sup>233</sup> For the Tribunal's biennial budget for 2002-2003 see P. Fullerton, 'Cost of Trials', Global Justice Program, Liu Institute for Global Issues (Vancouver, Canada, June 2003) <<http://www.gjp.ubc.ca/media/srch/030701costsoftrials.pdf>> accessed 5 August 2009. For the Tribunal's biennial budget for 2004-2005 see official website of the ICTR (January 2004) <<http://www.ictor.org/ENGLISH/newsletter/jan04/jan04.pdf>> accessed 5 August 2009. For the Tribunal's biennial budget for 2006-2007 see website of Univ. of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/ICTR.html>> accessed 5 August 2009.

<sup>234</sup> For example, the annual budget of the entire Ministry of Justice for the year 2003 was about 3.9 million US dollars. See Hirondele News Article titled "Confronting Genocide with Rwanda's Regular Courts", 17 September 2003, by Gabriel Gabiro, available at <http://www.hirondele.org/hirondele.nsf/0/e50bea4b77a0482bc1256763005ac92a?OpenDocument> (last visited on 7 August 2009).

<sup>235</sup> Interview notes with author. In this connection, see the following article comparing the costs of the ICTY to domestic trials in the US (concluding that the two are not that far apart): D. Wippman, 'The Costs of International Justice', 100 Am. J of International Law 861 (October 2006).

completion phase.<sup>236</sup> It is noted in this context that, as of December 2009, the ICTR employed over 1,000 staff members from over 80 nationalities.<sup>237</sup>

## 6.6 LOCAL PERCEPTIONS OF THE ICTR IN RWANDA

Although Rwanda initially requested an international tribunal, it eventually voted against Security Council Resolution 995 which created the ICTR in 1994.<sup>238</sup> Rwanda disapproved of the Tribunal's limited temporal jurisdiction, its location outside Rwanda, the possibility that its sentences would be enforced outside Rwanda, its inability to impose the death penalty, and its jurisdiction over war crimes (which may lead it to prosecute members of the ruling RPF party). Rwanda also complained that the composition and structure of the Tribunal are "inappropriate and ineffective" and that certain countries which "took a very active part in the civil war in Rwanda" can "propose candidates for judges and participate in their election".<sup>239</sup> The resistance of the Rwandan Government to the ICTR had influenced the public opinion in Rwanda about the ICTR. Moreover, repeated claims by Rwandan officials that the ICTR receives too much funding, and that had this money been allocated to Rwanda it would have been more helpful, also affect public opinion in Rwanda. After 2003, when the referral of cases from the ICTR to national jurisdictions became possible, the Rwandan authorities became more supportive of the ICTR (see section 7.2 below). But still, public opinion in Rwanda was already bias against the Tribunal. Moreover, Rwandan officials continue to complain that the ICTR is over-funded.

A survey conducted in early 2006 indicated that Rwandans generally believe in the importance of the ICTR, and consider that its creation demonstrates the international recognition of the Rwandan genocide.<sup>240</sup> Many of the surveyed individuals praised the Tribunal for prosecuting some of the "big fish" who could not have been apprehended by

<sup>236</sup> Interview notes with author. For example, the interviewee explained that funds are lacking for additional support staff at the Tribunal, such as court reporters and translators, which are needed in order to expedite the judicial process.

<sup>237</sup> Official website of the ICTR <<http://www.ictor.org/>> accessed 25 December 2009.

<sup>238</sup> Rwanda was then a member of the Security Council. It was the only state which voted against Resolution 995.

<sup>239</sup> UNSC, 'Report of the Security Council on the Situation Concerning Rwanda' (8 November 1994), UN Doc. S/PV.3453 <<http://www.undemocracy.com/S-PV-3453.pdf>> accessed 25 December 2009, pp. 13-16.

<sup>240</sup> 'Report of the Research Project on Assessing Rwandan Public Opinion About the ICTR and International Justice', Center for Conflict Management, National University of Rwanda (2006). Copy with author. The survey was conducted with the assistance of the ICTR. A total of 200 Rwandans were surveyed, from Kigali City and Butare Town. Of these individuals, 35 were local leaders (administrative, religious, civil society, academia), 40 were genocide survivors (or their representatives), 40 were suspected or convicted genocidaires, 35 were involved in the management of genocide trials (including by gacaca courts), and 50 were randomly selected.

Rwanda. However, they showed dissatisfaction with the way in which the ICTR operates, complaining in particular about the pace of the trials, use of funds, hiring of genocide suspects, protection of witnesses and the conduct of activities outside Rwanda. Most surveyed persons considered that the ICTR's role in stabilizing the Rwandan society and promoting national reconciliation is very limited. As a result, many Rwandans believe that the ICTR was not created for them and does not genuinely take into account their interests. A report summarizing the results of the survey, suggests that the ICTR has not effectively responded to local imperatives of justice and reconciliation.

Interviews with representatives of international NGOs in Rwanda confirmed that the general public opinion in Rwanda about the ICTR is negative. The representatives noted that Rwandans criticize the ICTR for its lenient sentences, excessive financial resources, luxurious detention conditions provided to defendants (in contrast to the poor living conditions of the genocide victims), and for not allowing victims to actively participate in its proceeding or to receive reparations. While Rwandans are generally aware of the ICTR's judgements, they do not consider the Tribunal relevant and do not follow its cases, which are excessively long and too geographically removed. Furthermore, the ICTR is portrayed negatively in the Rwandan press. Still, it was noted that the international recognition of the Rwandan genocide, promoted by the ICTR, is appreciated.<sup>241</sup> A foreign legal expert based in Kigali added that most Rwandans consider the Tribunal to be disconnected from the Rwandan reality.<sup>242</sup> A senior ICTR official indicated that in view of the high-level prison conditions enjoyed by the ICTR defendants, it is no wonder that Rwandans feel that they are getting "short changed".<sup>243</sup>

Rwandan officials and legal experts who were interviewed also noted that the ICTR is perceived as an overly expensive and slow justice system. They also mentioned that some Rwandans believe the Tribunal does not support the victims, or that it is politically manipulated by foreign actors. It was further suggested that the resources allocated to the ICTR should have been split between the Tribunal and Rwanda's justice

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<sup>241</sup> Interview notes with author.

<sup>242</sup> Interview notes with author. The expert complained that, despite the Tribunal's outreach activities, there is not enough radio or newspaper coverage in Rwanda of its ICTR trials, but this seems to be changing as the ICTR has recently been successful in informing prosecutors and judges in Rwanda about its process.

<sup>243</sup> Interview notes with author. The official added, however, that recently, with EU financial support, Rwanda built a new prison which meets international standards and has the same luxurious facilities as the ICTR's detention facilities.

sector.<sup>244</sup> According to a prominent Rwandan judge, the Rwanda population is generally discontent with the ICTR, and suspicious of its activities. These views have become stronger since the Tribunal's refusal to transfer cases to Rwanda.<sup>245</sup>

A Rwandan attorney indicated that the general public in Rwanda is aware of the ICTR, but only has a vague knowledge of its activities. The Tribunal makes the headlines in Rwanda only when a judgement is issued. Some Rwandans are frustrated because, for example, an important perpetrator in a certain province is tried far away, and people cannot see him facing judge.<sup>246</sup> Another Rwandan attorney explained that prosecutors in Rwanda are aware of the ICTR's process. They appreciate the adversary nature of the proceedings but criticize their length. Still, they agree with the manner in which the trial is conducted, and wish to imitate it.<sup>247</sup>

## 7. ICTR - RWANDA COOPERATION

The ICTR depends on the cooperation of States in order to accomplish its mandate, especially to arrest fugitives and enforce its sentences. The cooperation of Rwanda is particularly crucial for the Tribunal, which relies on Rwanda for its most basic daily functions, such as obtaining witnesses, documentary evidence, and entry visas for its staff members who travel to Rwanda to conduct investigations.

Although Rwanda voted against Security Council Resolution 955, it is still legally obligated to cooperate with the ICTR, as Resolution 955 was adopted under Chapter VII of the UN Charter.<sup>248</sup> Thus, in the event of serious non-compliance, Rwanda would risk being criticized by the Security Council. However, no additional incentives were provided to Rwanda to encourage good relations with the ICTR. Furthermore, no formal modalities for cooperation between the ICTR and Rwanda were put in place. The following sections address the history and current state of cooperation between Rwanda and the ICTR.

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<sup>244</sup> Interview notes with author.

<sup>245</sup> Interview notes with author.

<sup>246</sup> Interview notes with author. In his view, the Tribunal should have been located in Rwanda. The interviewee added that the Tribunal's positive impact in Rwanda would increase if its convicts would serve their sentence in Kigali, as the population would be able to see high-level perpetrators serve time in jail.

<sup>247</sup> Interview notes with author. The interviewee explained that this is why the Rwandan prosecuting authorities wanted to reform the format of their standard indictment and write it in a very detailed manner, with a lot of information for the accused, as it is done in the ICTR (see section 8.4 below).

<sup>248</sup> Under the UN Charter, all UN Member States, including Rwanda, must cooperate with Chapter VII enforcement measures.

## 7.1 COOPERATION OF RWANDA WITH THE ICTR: 1994 - 2003

Rwanda's interaction with the ICTR during the Tribunal's first years of existence was minimal. According to a prominent Rwandan judge, the Rwandan judiciary was too busy re-inventing itself after the genocide to be available or able to interact with the ICTR.<sup>249</sup> However, following the Tribunal's first arrests, an ICTR official recalled that Rwanda became more cooperative with the Tribunal.<sup>250</sup> Rwanda was probably relieved that the Tribunal was serious about prosecuting genocidaires, and that so far no indictments were issued against RPF members. In 1999, the Rwandan government installed a Special Representative to the ICTR, allowing more frequent formal and informal communications between Rwanda and the ICTR.<sup>251</sup> But still, Rwanda did not extend full or consistent cooperation to the Tribunal until much later.

One of the most famous examples of Rwanda's lack of cooperation followed the release by the ICTR of Accused Jean-Bosco Barayagwiza in November 1999. The former politician and media official was released by the Tribunal's Appeals Chamber because of violations of his due process rights in connection with his arrest and transfer to the ICTR.<sup>252</sup> The Rwandan authorities, clearly unsatisfied with the decision, threatened to sever their relations with the Tribunal.<sup>253</sup> Following a request for review filed by the ICTR Prosecutor, the Tribunal's Appeals Chamber reversed its previous decision, allowing the trial to proceed.<sup>254</sup> The Appeals Chamber noted that the due process violations will be remedied by reducing the sentence in the case of conviction, or providing compensation in the case of an acquittal. Subsequently, Rwanda began cooperating again with the Tribunal, but not for long.

In December 2000, the then ICTR Prosecutor Carla Del Ponte announced that she intends to investigate war-crimes allegations against RPF members.<sup>255</sup> Following

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<sup>249</sup> Interview notes with author.

<sup>250</sup> Interview notes with author.

<sup>251</sup> Diplomatic relations between the ICTR and Rwanda had existed even before Rwanda appointed a Special Representative to the ICTR, through the Rwandan ambassadors in Dar-a-Salaam and Nairobi, explained a senior ICTR official. He also added that the Tribunal's deputy prosecutor was based in Kigali and liaised with the Rwandan government. Interview notes with author.

<sup>252</sup> *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19, Decision (Appeals Chamber), 3 November 1999.

<sup>253</sup> W. A. Schabas, 'Barayagwiza v. Prosecutor (Decision, and Decision (Prosecutor's Request for Review or Reconsideration)) Case No. ICTR-97-19-AR72', 94 *American Journal of International Law* 563 (2000), pp. 565-566.

<sup>254</sup> *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19, Decision (Prosecutor's Request for Review or Reconsideration) (Appeals Chamber), 31 March 2000.

<sup>255</sup> ICTR Press Release of 13 December 2000 <<http://www.ictor.org/ENGLISH/PRESSREL/2000/254.htm>> accessed 8 July 2009.



this announcement, the Rwandan government again became suspicious of the ICTR and consequently reluctant to cooperate with it. For example, Rwanda impeded the travel of witnesses to Arusha and refused to provide ICTR officials with entry visas to Rwanda.<sup>256</sup> In addition, the government supported a 2002 boycott of ICTR proceedings advanced by two powerful Rwandan genocide survivors' associations (IBUKA and AVEGA), which accused the Tribunal of employing genocidaires and harassing witnesses.<sup>257</sup> In fact, Rwanda almost stopped cooperating with the Tribunal until Del Ponte was removed from her office as ICTR Prosecutor in August 2003.<sup>258</sup> Her removal from office (before any indictments were issued against RPF members) followed Rwanda's calls for her resignation.<sup>259</sup>

Among the official reasons given by Rwanda for its lack of cooperation with the ICTR were its concerns that the Tribunal employs genocidaires, harasses witnesses, fails to protect witnesses, and is mismanaged and corrupt.<sup>260</sup> But according to a judge at the ICTR, the main reason for Rwanda's limited cooperation with the Tribunal was its desire to prevent the Tribunal from gaining public legitimacy in Rwanda, in case it decided to prosecute members of the RPF leadership.<sup>261</sup>

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<sup>256</sup> This information was provided in an interview with a senior ICTR official. The official noted that Rwanda claimed that the witnesses could not travel to Arusha because of new requirements related to travel documents. Interview notes with author.

<sup>257</sup> The boycott was respected by many Rwandan genocide survivors. It followed, among other events, an incident where ICTR judges laughed while a witness testified about being raped by the accused. For a description of the 2002 breakdown in cooperation between the ICTR and Rwanda, see International Federation for Human Rights, 'Victims in the Balance- Challenges ahead for the International Criminal Tribunal for Rwanda' (November 2002); 'Rwanda: Tension with International Court', 39 Africa Research Bulletin: Political, Social and Cultural Series (August 2002), pp. 14975-14976; IRIN, 'In the Interest of Justice' (20 November 2008), p. 12.

<sup>258</sup> Del Ponte was also the ICTY Prosecutor. Her removal from office as the ICTR Prosecutor was done very elegantly: the Security Council decided that the ICTR and ICTY should each have its own prosecutor, and supported the nomination of Del Ponte to the position of ICTY Prosecutor. Interestingly, in an interview she gave, Del Ponte indicated that had she been asked, she would have preferred to remain in the position of ICTR Prosecutor. In the same interview she complained about Rwanda's non-cooperation with her investigations. See Hirondele, 'Interview with Carla Del Ponte: If I had the Choice, I Would Have Remained Prosecutor of the ICTR' (15 September 2003) <<http://www.hirondele.org/hirondele.nsf/caefd9edd48f5826c12564cf004f793d/58532063643cca47c1256721007ae0d0?OpenDocument>> accessed 8 July 2009.

<sup>259</sup> Del Ponte has attributed Rwanda's calls for her resignation to her investigations into RPF atrocities. See Global Policy Forum, 'Del Ponte Says UN Caved to Rwandan Pressure' (by S. Edwards, 17 September 2003) <<http://www.globalpolicy.org/component/content/article/163/29047.html>> accessed 8 July 2009 ("Ms. Del Ponte said she had no doubt Mr. Kagame's calls for her resignation were made as a result of her investigations into possible RPF atrocities"). Also see Carla Del Ponte, *Madam Prosecutor* (2009).

<sup>260</sup> Hirondele, 'Kigali Unhappy with Cross-Questioning of Prosecution Witnesses' (27 February 2001) <<http://www.hirondele.org/hirondele.nsf/caefd9edd48f5826c12564cf004f793d/997113e9da2d7002c12569d80079586d?OpenDocument>> accessed 8 July 2009 (referring to a statement made by Rwanda's Justice Minister that there had been "harassment of [ICTR] witnesses by defence lawyers" during cross-examination).

<sup>261</sup> Interview notes with author. According to the judge, Rwanda became confident that the ICTR no longer intends to prosecute RPF members only after the ICTR Prosecutor transferred to Rwanda his case-file ("dossier") against four RPF officers in 2008 (see section 6.4 above). Until then, he explained, the Rwandan government's entire activity and planning has been influenced by the risk of its leaders being indicted. He added that in addition to not cooperating,

Additional reasons for Rwanda's non-cooperation with the Tribunal have been mentioned in interviews. These include Rwanda's general distrust of UN institutions, following the failure of the international community to prevent the genocide, and Rwanda's desire to be self sufficient, including by having its own normative and institutional framework to prosecute genocidaires rather than depending on the ICTR to provide justice.<sup>262</sup>

## 7.2 COOPERATION OF RWANDA WITH THE ICTR: 2004 - 2010

The relations between Rwanda and the Tribunal normalized again with Del Ponte's removal from the position of ICTR Prosecutor in August 2003. Her successor, Hassan Jallow, continued the investigations into RPF crimes, but his manner of handling the issue did not provoke a strong reaction from Rwanda. In addition, the fact that Security Council Resolutions 1503 and 1534 requested the ICTR to complete its investigations by 2004, meant that it was unlikely that the ICTR would issue new indictments after 2004, including against RPF members. This may have appeased Rwanda's suspicion and reluctance to cooperate with the Tribunal from 2004. Notably, Rwanda became more cooperative with the Tribunal after the latter adopted, in 2004, a procedure for referring cases to national jurisdictions (see section 6.4 above).

Thus, Rwanda has generally been cooperative with the ICTR from 2004. Nonetheless, there were several exceptions to this atmosphere of cooperation. For example, tension between Rwanda and the ICTR sparked following the Tribunal's acquittal, in 2004, of former Rwandan Prefect Emmanuel Bagambiki. In particular, Rwanda criticized the ICTR for failing to include charges of rape and sexual violence in Bagambiki's indictment, and demanded that he be transferred to Rwanda to stand trial for these charges.<sup>263</sup> A senior ICTR employee explained that Rwandan officials regard all

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Rwanda has adopted an ambivalent attitude towards the ICTR: in meetings with the UN the Security Council and General Assembly Rwanda has usually spoken nicely about the ICTR, but on the ground it has been complaining that genocidaires work for the Tribunal, and that there is corruption and waste of money at the Tribunal.

<sup>262</sup> Interview notes with author.

<sup>263</sup> Hironelle, 'Rwanda Intends to Prosecute Ex-Governor Emmanuel Bagambiki for Rape' (8 March 2006) <<http://allafrica.com/stories/200603080032.html>> accessed 28 December 2009. Bagambiki was acquitted of genocide and crimes against humanity by the ICTR Trial Chamber on 25 February 2004. The acquittal was upheld by the ICTR Appeals Chamber on 8 February 2006. Following his acquittal, Rwanda demanded that the Tribunal re-arrest him on the basis of new charges brought against him in Rwanda, and transfer him for trial to Rwanda. The ICTR replied that it does not have the authority to carry out an unspecified arrest warrant, and Bagambiki eventually returned to his previous residence in Belgium. On 10 October 2007, Bagambiki was tried in absentia by the Court of First Instance of Rusizi, his native region in Rwanda, and sentenced to life imprisonment for rape and incitement to commit rape.

acquittals by the ICTR as failures of the Tribunal. Nonetheless, he believed that the Tribunal has succeeded in sending a message to Rwanda that a court must seek justice and not only convict defendants. In this context, he drew attention to the fact that Rwanda's rate of acquittals in genocide cases is almost 20 percent.<sup>264</sup> The opposition of Rwandan officials to acquittals by the ICTR may be linked to their conviction that the particular defendants before the Tribunal were all implicated in the atrocities. Another incident which created tension between Rwanda and the ICTR revolved around Rwanda's accusations in 2006 that the ICTR appointed a Rwandan genocide suspect as a defence counsel.<sup>265</sup>

According to ICTR officials, notwithstanding such small glitches, Rwanda has generally been cooperating with the Tribunal since 2004, regularly provide the ICTR with access to documents and witnesses, including to witnesses who are themselves on trial in Rwanda.<sup>266</sup> One of the officials added that, in obtaining evidence, ICTR investigators liaise on a daily basis with Rwandan investigators at the national and regional levels.<sup>267</sup> A senior Rwandan official confirmed that the Rwandan authorities always respond to operational requirements of the ICTR. He stressed that Rwanda has dispatched about 3,000 witnesses to the ICTR and each time a witness appears before the Tribunal, which occurs on a daily basis, it is a product of efforts of the Rwandan authorities. When the ICTR requests witnesses who are prisoners in Rwanda, the Rwandan authorities even examine gacaca court records to locate them. Finally, he added, the Rwandan authorities fund and provide protection services to ICTR witnesses in Rwanda.<sup>268</sup>

It is noted that Rwanda extends assistance to the ICTR usually through its prosecution authorities. A prominent Rwandan judge explained that even when the ICTR seeks information from a Rwandan court it usually requests the information from the

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<sup>264</sup> Interview notes with author.

<sup>265</sup> Hironelle, 'Case of Rwandan Lawyer Revives Tensions Between Kigali and the ICTR' (7 March 2006) <<http://allafrica.com/stories/200603080400.html>> accessed 28 December 2009.

<sup>266</sup> Interview notes with author. One of the Tribunal officials stressed that the cooperation extended by the Rwandan authorities to the ICTR has been crucial for the Tribunal's functioning.

<sup>267</sup> Interview notes with author. The senior Tribunal official added, however, that as a matter of procedure and largely due to security considerations, Tribunal investigators do not interview witnesses in the presence of national investigators.

<sup>268</sup> Interview notes with author. The official explained that any disagreements between Rwanda and the Tribunal are usually on policy rather than operational grounds. He admitted that there have been delays in exceptional cases in locating witnesses. As a result, defence lawyers have sometimes requested the ICTR judges to compel Rwanda to produce a witness. But in his view this merely indicates that ICTR members do not appreciate the high level of cooperation that Rwanda extends to the Tribunal.

Rwandan prosecution authorities, which, in turn, request it from the relevant domestic court.<sup>269</sup>

### 7.3 COOPERATION OF THE ICTR WITH RWANDA

The ICTR, seeking independence and international acceptance in its early years of existence, intentionally kept a distance from the Rwandan system. An ICTR official noted that the Tribunal had to focus all of its attention until about year 2000 on establishing itself, including in terms of infrastructure.<sup>270</sup> Moreover, explained another ICTR official, Tribunal officials were suspicious of Rwanda, and did not even trust the Rwandan interpreters employed by the ICTR.<sup>271</sup>

However, Tribunal officials became more cooperative with Rwanda after the ICTR adopted its completion strategy and a procedure for referring cases to national jurisdictions, in 2004 (see section 6.4 above). This cooperation is especially apparent at the level of the prosecution. For example, in 2005, the ICTR Prosecutor transferred to the Rwandan prosecution authorities about 35 case-files (“dossiers”) of genocide suspects who have not been indicted by the ICTR (see section 6.4 above). He also transferred case-files against four RPF officers to Rwanda in 2008 (see section 5.3 above).<sup>272</sup> It is recalled that the transfer of these case-files was undertaken at the Prosecutor’s discretion (since these suspects have not been indicted, the transfer of their case-files did not require a judicial decision by the Tribunal).

Other forms of prosecutorial cooperation have been mentioned in interviews with member of the Tribunal’s OTP. For example, it was noted that the OTP provided the Rwandan authorities with documents in connection with the national trial of Agnes Ntamabyariro (for details about this national trial see section 5.1 above).<sup>273</sup> One former

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<sup>269</sup> Interview notes with author.

<sup>270</sup> Interview notes with author. The official stressed that the ICTR judges did not even have computers or offices in the Tribunal’s early days. In addition, a prominent Rwandan judge recalled that the ICTR was hesitant to liaise with Rwanda in those years, aspiring to appear objective, neutral, and uninfluenced politically by Rwanda. Besides, he noted, it is doubtful whether the ICTR had the necessary capacity at the time to establish cooperation with Rwanda. The judge added that when the ICTR started its activities, its judges and staff knew nothing about Rwanda. Most of them did not even know where Rwanda was located and some of them refused to visit the genocide sites. A senior Rwandan official commented that the ICTR, in its early years, appeared to have no interest in Rwanda, and only recently began “advertising” itself in Rwanda. The official added that there could have been more of a dialogue between these systems, even though the ICTR and Rwandan courts must be independent of each other. Interview notes with author.

<sup>271</sup> Interview notes with author.

<sup>272</sup> *Ibid.*

<sup>273</sup> Interview notes with author.

OTP member recalled that a certain team of ICTR trial attorneys used to provide materials to Rwandan prosecutors on a regular basis.<sup>274</sup> An ICTR official based in Kigali noted that whenever the Rwandan authorities ask the ICTR office in Kigali for information relevant to their national cases, Tribunal officials try to provide the requested materials quickly and diligently.<sup>275</sup> A senior ICTR prosecutor recalled that the OTP provided Rwanda with public information which was at its disposal concerning the 1994 shooting down of the presidential aircraft in Kigali, and concerning France's involvement in the conflict in Rwanda. The OTP, he noted, assisted both Rwanda and France in this respect.<sup>276</sup>

Two senior ICTR prosecutors explained that when evidence is being collected by Tribunal investigators, it is not collected for purposes of domestic use. But once it is at the possession of the ICTR, the evidence is accessible and available to national authorities upon their request. If the evidence is confidential, national authorities may apply to the ICTR judges requesting access to the evidence. Many states have followed this procedure, and Rwanda is free to submit such applications.<sup>277</sup> However, a senior Rwandan prosecutor commented that evidence collected by the ICTR may not always be useful for Rwandan courts. For example, a Rwandan judge would not usually need photographs of mass graves, but such evidence is required by ICTR judges, who do not know Rwanda.<sup>278</sup>

In addition to the significant level of cooperation between the ICTR Prosecutor and the Rwandan prosecuting authorities, noted a senior official of the ICTR Registry, there is also cooperation between the Tribunal and Rwanda in relation to witness support services. The ICTR has a medical treatment program for its witnesses, which was

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<sup>274</sup> Interview notes with author. On the other hand, a senior Rwandan prosecutor, who confirmed this information, also noted that these collaborations were exceptional and did not reflect ICTR policies or practices. Interview notes with author.

<sup>275</sup> Interview notes with author.

<sup>276</sup> The prosecutor said: "I recall for instance the issue of the shooting down of the aircraft and the issue of France's involvement in the genocide ... both France and Rwanda asked us for information and we assisted both parties." Interview notes with author.

<sup>277</sup> Interview notes with author. One of these prosecutors explained that sharing of confidential information depends on witness protection concerns. The judges must first order the variation of the protection measures to enable the OTP to disclose information to national authorities. In addition, the Tribunal's OTP has some discretion in this matter, as it may have given assurances of confidentiality to a certain witness, and may therefore wish to seek that witness' consent to disclose information to a certain jurisdiction. The other prosecutor added that this system of requesting confidential ICTR evidence will continue to exist even after the closure of the ICTR. The nature, location and form of that system will be decided by the Security Council. He noted that, to his recollection, Rwanda does not generally request confidential information from the ICTR.

<sup>278</sup> Interview notes with author.

extended through NGOs to their families in Rwanda. In addition, the Tribunal's witness protection program has intimate connections with the parallel program in Rwanda.<sup>279</sup>

Finally, in recent years, ICTR prosecutors have been collaborating closely with the Rwandan authorities to promote the transfer of cases to Rwanda under Rule 11 *bis* of the ICTR Rules. Thus, they advise Rwanda on normative and institutional developments, and hold training sessions in Rwanda to enhance local capacity to handle transferred cases.<sup>280</sup> Senior members of the OTP explained that following the 2008 judicial decisions of the ICTR, denying the transfer of cases to Rwanda, the OTP has continued to collaborate with the Rwandan authorities in order to address the weaknesses in the Rwandan justice system, which were identified by the Tribunal's judges. The OTP is doing so with the intention of eventually submitting additional requests for the transfer of cases to Rwanda.<sup>281</sup> It should be noted that even after the adoption of the completion strategy, there is no formal structure which provides modalities for collaboration between the ICTR and Rwanda.

## 8. IMPACT OF THE ICTR ON RWANDAN JUDICIAL RESPONSE TO THE ATROCITIES

### 8.1 NORMATIVE IMPACTS

#### *Normative Impacts of the ICTR's Referral Procedure*

As noted above, Rule 11 *bis* of the ICTR Rules was amended in 2004 to allow the referral of cases to national jurisdictions of states "in whose territory the crime was committed" (see section 6.4 above).<sup>282</sup> The amended Rule 11 *bis* further provides that "[i]n determining whether to refer the case ... the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out".<sup>283</sup>

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<sup>279</sup> Interview notes with author.

<sup>280</sup> A senior ICTR prosecutor explained that the OTP regards such collaboration as its duty, stemming from Security Council Resolution 1503. Interview notes with author.

<sup>281</sup> Interview notes with author.

<sup>282</sup> Rule 11 *bis* (A) (i) of the ICTR Rules.

<sup>283</sup> Rule 11 *bis* (C) of the ICTR Rules.



Rwanda wanted to receive cases from the ICTR.<sup>284</sup> In 2007, to satisfy the ICTR that its accused would receive a fair trial in Rwandan national courts, Rwanda adopted Organic Law No. 11/2007 to regulate cases transferred to Rwanda from the ICTR or third states (hereinafter: Transfer Law).<sup>285</sup> The Transfer Law implemented domestically many of the ICTR's due process and fair trial standards, as well as evidence rules, applying these norms to defendants that were transferred to Rwanda from the ICTR or third states.<sup>286</sup> A foreign legal expert based in Rwanda explained that before the adoption of the Transfer Law, two normative frameworks existed for genocide trials in Rwanda: one applicable to defendants at ordinary courts, and the other applicable to defendants at gacaca courts. The Transfer Law created a third legal regime, applicable to defendants transferred from abroad.<sup>287</sup>

Rule 11 *bis* of the ICTR Rules did not require Rwanda to adopt such a law, but Rwanda wanted to remove any doubt that defendants transferred from the ICTR (or from a third state) would receive anything but a fair trial. The Transfer Law also went an extra length by providing that ICTR evidence and established facts would be admissible in Rwandan proceedings.<sup>288</sup> It also explicitly establishes channels of cooperation with the ICTR.<sup>289</sup> The law does not adopt all of the ICTR's fair trial and due process norms, but it covers the most important ones, in particular those concerning the rights of the

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<sup>284</sup> Rwanda wanted to bring more genocide suspects to justice at home. Thus, a referral by the ICTR of cases to Rwanda would have enabled more prosecutions in Rwanda, but also, the ICTR's recognition that Rwanda's justice system conforms to international standards would have encouraged third states to extradite genocide suspects to Rwanda.

<sup>285</sup> Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the ICTR and from Other States [Rwanda] (hereinafter: 2007 Transfer Law).

<sup>286</sup> Thus, Article 13 of the 2007 Transfer Law (n 285) guarantees the rights of defendants to a fair and public hearing; the presumption of innocence; to be informed promptly of the charge against him; to be given adequate time and facilities to prepare his defence; to a speedy trial without undue delay; to counsel of his choice; to be tried in his or her presence; to examine or have examined witnesses against him; to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him or her; to remain silent and not to be compelled to incriminate him or herself. Article 14 guarantees appropriate protection for witnesses and grants the Rwandan High Court "the power to order protective measures similar to those set forth in Articles 53, 69 and 75 of the ICTR Rules of Procedure and Evidence". Article 15 grants freedom of movement, immunity and protection to Defence Counsel and their support staff. Article 16 provides the right to appeal, both to the prosecution and the accused. Article 17 grants both parties the right to have a judgement reviewed.

<sup>287</sup> Interview notes with author.

<sup>288</sup> 2007 Transfer Law (n 285), Articles 7 to 12.

<sup>289</sup> 2007 Transfer Law (n 285), Articles 18 to 20 (allowing ICTR technical assistance, international monitors, and regulating the remand of cases if the ICTR revokes its referral order).

accused.<sup>290</sup> Thus, thanks its referral procedure, the ICTR has been able to encourage Rwanda to implement domestically international fair trial standards.<sup>291</sup>

The ICTR's referral procedure has also encouraged Rwanda to improve its sentencing standards: to satisfy the ICTR that transferred defendants would not receive capital punishment, Rwanda abolished the death penalty in July 2007.<sup>292</sup> Instead of the death penalty, Rwanda introduced the punishment of life imprisonment in isolation. However, in light of the ICTR's findings that this latter punishment violates international standards, discussions are currently taking place in Rwanda regarding its abolition or prohibition in cases transferred from abroad. While the abolition of the death penalty and the possible restriction of the punishment of life imprisonment in isolation reflect normative impacts of the ICTR in Rwanda, these matters are discussed in further detail in section 8.3 below, in connection with the ICTR's impacts on sentencing practices in Rwanda.

#### *Other Possible Normative Impacts*

There are many similarities between ICTR norms on the one hand, and legal provisions which were adopted by Rwanda after the genocide on the other hand. However, while some normative developments in Rwanda are undoubtedly attributable to the ICTR's influence, such as those discussed in the paragraphs above, other normative developments in Rwanda may be attributable generally to international criminal law, rather than specifically to the ICTR. For example, Rwanda's 1996 Genocide Law (as well as the 2001 and 2004 Gacaca Law) penalizes acts which constitute crimes under the 1948 Genocide Convention, essentially adopting the Convention's definition for genocide.<sup>293</sup> In addition, Rwanda's domestic law recognizes the principle of command

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<sup>290</sup> A senior Rwanda official explained that in order to avoid the slow pace in which the ICTR dispenses justice, the domestic law "simplified" some of the procedural provisions of the ICTR. Interview notes with author.

<sup>291</sup> It is recalled that ICTR prosecutors have been advising Rwandan officials on how to develop its norms to promote the transfer of ICTR cases to Rwanda (see section 7.3 above).

<sup>292</sup> It is noted that Rule 11 *bis* requires only that the receiving state refrains from applying the death penalty to transferred cases, and not that it abolishes altogether this punishment in its domestic law. According to most interviewees, the abolition of the death penalty in Rwanda was directly related to the possibility of receiving cases from ICTR. However, some commentators argue that this development should not be exclusively attributed to the ICTR's impact (see discussion in section 8.3 below).

<sup>293</sup> 1996 Genocide Law (n 53), Article 1. This definition remains valid in the 2001 Gacaca Law (n 56) and the 2004 Gacaca Law (n 61). In addition, the Rwandan Constitution reaffirms Rwanda's adherence to the 1948 Genocide Convention. See Rwandan Constitution of 2003 (n 6), preamble, para. 9.

responsibility in relation to international crimes.<sup>294</sup> This principle is also enshrined in the ICTR Statute, as is the definition of genocide provided in the 1948 Genocide Convention. But it was probably not the direct impact of the ICTR which caused Rwanda to adopt these norms.

Also international human rights law has had a significant impact on Rwandan domestic law in the years following the genocide. For example, the Rwandan Constitution of 2003 reaffirms Rwanda's adherence to international instruments such as the UDHR and ICCPR,<sup>295</sup> and explicitly safeguards certain internationally recognized fair trial and due process guarantees which are also provided in the ICTR Rules.<sup>296</sup> In addition, Rwanda's Code of Criminal Procedure, as amended in 2004, accords defendants the rights to legal counsel and to be brought before a judge following their arrest.<sup>297</sup> These human rights are also protected in the ICTR Rules.

Interestingly, two prominent Rwandan legal experts who were interviewed, noted that that during Rwanda's legal reform process of 2004 (see section 4.2 above), national officials consulted many international law experts, including staff members of the ICTR. Still, the interviewees stressed that the 2004 legal reforms were mainly inspired by international instruments such as the ICCPR and UDHR, and not by ICTR norms (which themselves are inspired by the same international instruments).<sup>298</sup> Nonetheless, the fact that Rwanda involved ICTR members in its national legal reform process shows that it considered the ICTR's normative framework to be a possible source of inspiration.

As far as the manner in which international norms (substantive or procedural) are applied and interpreted in Rwandan case-law, interviews suggested that the ICTR's jurisprudence had little (if any) impact on Rwandan courts.<sup>299</sup> A senior Rwandan

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<sup>294</sup> Interview notes with author. It should be noted that the Rwandan law incorporates the principle of command responsibility. See e.g. *Hategekimana* Appeals Decision of 4 December 2008 (n 63), para. 12 ("the Appeals Chamber is satisfied that command responsibility is recognized under Rwandan law, in particular the *Gacaca* Law and the Organic Law No. 33bis/2003, and that the Trial Chamber therefore erred in assuming that Rwandan law does not recognize command responsibility").

<sup>295</sup> Rwandan Constitution of 2003 (n 6), preamble, para. 9.

<sup>296</sup> Rwandan Constitution of 2003 (n 6), Articles 10 to 44.

<sup>297</sup> Law no. 13/2004 of 17/5/2004 concerning the Code of Criminal Procedure, Articles 64, 89, 96. This law was published in the Official Journal of 30 July 2004 [Rwanda]. It should be noted that the Rwandan Constitution of 2003 also guarantees the right to legal defence. See Articles 18 and 19 of the Rwandan Constitution of 2003 (n 6).

<sup>298</sup> Interview notes with author.

<sup>299</sup> Interview notes with author. The information in this section relies largely on interviews. It is anticipated that a later report by DOMAC (Work Package 2) will provide a more comprehensive analysis of Rwandan case law aimed at identifying normative impacts of the ICTR jurisprudence.

prosecutor explained that there are various reasons why ICTR jurisprudence has not inspired Rwandan courts. First, the contextual situations in Rwandan cases are different than those at the ICTR which deals with the highest level perpetrators. Second, the manner in which one is required to establish facts in Rwanda is different. Third, more information is available in Rwanda and it is easier to connect suspects to the crimes. The community freely interacts with the national prosecution, unlike the situation at the ICTR. Thus, because evidence implicating defendants directly in the crimes is more easily obtainable in Rwanda, certain principles applied by the ICTR, such as command responsibility or joint criminal enterprise, are less relevant in Rwandan courts.<sup>300</sup>

A Rwandan Supreme Court judge added that the ICTR jurisprudence is not used by Rwandan courts in genocide cases because Rwanda follows the civil law system, where little reference is made to case-law or precedents. However, he noted that judges in Rwanda are starting to understand the importance of comparative law, for example, in some constitutional cases they have been referring to South African jurisprudence.<sup>301</sup> This was also confirmed by a Rwandan attorney, who noted that in the next few years he anticipates a wider use in Rwanda of the ICTR's jurisprudence.<sup>302</sup> A senior ICTR prosecutor also confirmed that the practice of referring to case-law and precedents is not part of the civil law system which is followed in Rwanda. But still, he added, the ICTR is exposing Rwandans to its jurisprudence through training activities (see section 8.4 below), outreach programs (see section 6.2 above), and the distribution of CD-ROMs containing ICTR decisions and judgements.<sup>303</sup>

A foreign legal expert based in Rwanda rejected the arguments that because Rwanda follows the civil law system, there are no references to ICTR jurisprudence in domestic cases. He explained that in civil law systems in Europe references are often made to high court decisions. In his opinion, there are no references to ICTR jurisprudence because of the lack of experienced lawyers and the low level of legal education.<sup>304</sup> Another foreign legal expert in Rwanda theorized that Rwandans may not

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<sup>300</sup> Interview notes with author.

<sup>301</sup> Interview notes with author.

<sup>302</sup> Interview notes with author.

<sup>303</sup> Interview notes with author.

<sup>304</sup> Interview notes with author. The interviewee added that in the past, judgements were not usually published in Rwanda, so most law graduates never saw a judgement before they graduated.

be aware that they can make references, in domestic trials, to principles established by the ICTR.<sup>305</sup>

Finally, it is recalled that most genocide-related judgements in Rwanda do not generally deal with legal issues, but rather focus mostly on factual issues (see section 5.1 above).<sup>306</sup> This may provide another explanation as to why ICTR norms had such a limited impact on Rwandan case law.

## 8.2 PROSECUTION RATES AND TRENDS

As discussed in Part 5 above, atrocity related prosecutions in Rwanda take place on three levels: prosecution of high level genocide perpetrators in ordinary courts, prosecution of mid and low level genocide perpetrators in gacaca courts, and prosecution of RPF members suspected of war-related crimes in military courts. As for genocide trials in ordinary courts, it is estimated that about 10,248 persons had been tried by March 2005 (see section 5.1 above). Around that time, gacaca courts became operative. Gacaca courts have prosecuted over a million genocide suspects thus far (see section 5.2 above).

Has the ICTR encouraged national prosecutions in Rwanda (of either genocide or war crimes)? As explained above, Rwanda's ambitious attempt to prosecute all genocide perpetrators was a result of the strong political will of its first post-genocide government (see section 4.1 above). In interviews, Rwandan officials and lawyers indicated that the ICTR did not play a role in encouraging national prosecutions of genocide perpetrators.<sup>307</sup> A senior Rwandan prosecutor noted that had the Security Council wanted the ICTR to encourage national trials in Rwanda, it should have opted for a model that was more complementary to national proceedings.<sup>308</sup>

However, with respect to prosecuting RPF members for war crimes, there may have been a more discernible impact of the ICTR on national proceedings in Rwanda. It

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<sup>305</sup> Interview notes with author.

<sup>306</sup> In terms of using facts established by the ICTR (as opposed to norms and legal principles), there was some indication that references were made by a Rwandan court to facts established by the ICTR: A senior Rwandan prosecutor indicated that in the domestic case against former Justice Minister Agnes Ntamabyariro, references were made to the ICTR's factual findings in relation to meetings where Ntamabyariro was present with Justin Mugenzi (who is accused before the ICTR). Interview notes with author. For details regarding Ntamabyariro's trial see section 5.1 above.

<sup>307</sup> Interview notes with author.

<sup>308</sup> Interview notes with author.

is recalled that in 2008 the ICTR Prosecutor transferred to Rwanda a case-file concerning four RPF officers suspected of committing war-crimes in Rwanda in 1994 (see sections 5.3 and 6.4 above). The four officers were suspected of being involved in the execution of thirteen catholic priests in the Kabgayi Cathedral in Rwanda, in 1994. The allegations against them were investigated by ICTR investigators but the four were eventually not indicted by the Tribunal. By transferring evidence compiled against the four RPF officers, the ICTR Prosecutor encouraged Rwanda to prosecute them. The four were eventually tried by a military court in Kigali, in a trial commonly referred to as the “Kabgayi Trial” (see section 5.3 above). This was the first war-crimes prosecution in Rwanda against RPF members, as previous prosecutions of RPF crimes in Rwanda were for ordinary crimes (even if related to the war). Several interviewees noted that the Kabgayi Trial would not have been held in Rwanda without the ICTR’s involvement.<sup>309</sup> It is also important that representatives of the ICTR OTP monitored the proceedings of this trial to ensure their conformity to international standards.<sup>310</sup>

### 8.3 SENTENCING PRACTICES

#### *Abolition of the Death Penalty*

One of the ICTR’s conditions for referring cases to national jurisdictions is that the accused will not receive capital punishments in those jurisdictions. It is recalled that in 2007, the Tribunal’s Prosecutor made five requests to the ICTR judges to refer cases to Rwanda. Just before these requests were made, Rwanda abolished the death penalty.<sup>311</sup>

Several interviewees confirmed that the ICTR, by prohibiting the application of the death penalty in transferred cases, encouraged Rwanda to abolish this penalty altogether.<sup>312</sup> However, a Rwandan lawyer noted that Rwandans have been ready for

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<sup>309</sup> Interview notes with author. One interviewee suggested that the referral of this case by the ICTR Prosecutor to Rwanda was motivated by political considerations. In particular, according to the interviewee, the ICTR sought to mitigate the international criticism that it has been pursuing “selective” or “victor’s” justice.

<sup>310</sup> See section 5.3 above for HRW’s criticism of these proceedings. It is recalled that the ICTR Prosecutor has also transferred dossiers of 35 genocide suspects to Rwanda (see sections 6.4 and 7.3 above). However, as explained by a senior ICTR official, none of these suspects are physically present in Rwanda. To his knowledge, extradition requests were made by Rwanda with respect to some of them, but none have been extradited to Rwanda thus far. Interview notes with author.

<sup>311</sup> Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty [Rwanda]. It is noted that Rwanda not only abolished the death penalty, but also ratified the Second Optional Protocol to the ICCPR, regarding the abolition of the death penalty.

<sup>312</sup> This was confirmed by senior ICTR officials, as well as representatives of international NGOs in Rwanda. Interview notes with author.



years to abolish the death penalty, and that its abolition was therefore only partly attributable to the impact of the ICTR. He explained that public pressure to abolish the death penalty in Rwanda started after 22 individuals (convicted of genocide) were publicly executed in Rwanda in 1998. The lawyer explained that the execution was perceived negatively by the local population, and consequently domestic pressure to abolish the death penalty started to build up.<sup>313</sup> Indeed, this was the last time the death penalty was executed in Rwanda, even though this punishment was to be abolished only nine years later.<sup>314</sup>

A foreign legal expert based in Rwanda agreed that the ICTR's referral procedure encouraged Rwanda to abolish the death penalty. He added that one of the arguments used by the Rwandan government to convince the local population that it was necessary to abolish this punishment, was that there were as many as 500 or 600 people on death row in Rwanda. The population agreed that it was too inhumane for the president to sign the deaths of that many people. Still, noted the expert, victims' groups in Rwanda criticize the abolition of the death penalty.<sup>315</sup>

Interestingly, a senior ICTR official recalled a conversation he had several years ago with Rwanda's President Kagame, where the latter indicated that he was not opposed to abolishing the death penalty, but needed time to consult with the people of Rwanda about taking such a step. At the time, there was still a lot of emotion in the

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<sup>313</sup> Interview notes with author. The lawyer placed this event in 1997, but he seems to have been referring to the public execution which took place on 24 April 1998. See BBC News, 'Rwanda executes genocide convicts' (24 April 1998) <<http://news.bbc.co.uk/2/hi/africa/82960.stm>> accessed 12 December 2009 ("Thousands of Rwandans, many of them survivors of the massacres, gathered in the capital, Kigali, to watch four prisoners, three men and one woman, being shot by firing squad. Another 18 convicts were executed in four other towns associated with the genocide"). Also see Amnesty International, Rwanda: 22 People, executed on 24 April", AI Index: AFR 47/15/98, 27 April 1998 <<http://www.amnesty.org/es/library/asset/AFR47/015/1998/es/285a93fd-f880-11dd-b378-7142bfbe1838/afr470151998en.pdf>> accessed 12 December 2009. It is recalled that Froduald Karamira, the former vice-president of Rwanda's MDR political party, was one of the four persons executed in Kigali that day (see footnote 111 above).

<sup>314</sup> It is also noted that although Rwandan law provided that certain ordinary crimes, such as murder, could be punished by death, the national 1996 Genocide Law (n 53) restricted the application of this punishment to Category I offenders (although some Category II offenders also committed murder). Furthermore, the 2001 Gacaca Law (n 56), provided that under certain circumstances Category I crimes could be punished by imprisonment terms (Article 68), relaxing the strict approach of the 1996 Genocide Law (n 53), under which the death penalty was mandatory in case of Category I convictions (Article 14 (a)). For a further discussion of Rwanda's inclination towards abolishing the death penalty irrespective of the ICTR's impact see A. Boctor, 'The Abolition of the Death Penalty in Rwanda', 10 Hum Rights Rev 99 (2009) <[www.springerlink.com/content/n5p02554u66542v3/fulltext.pdf](http://www.springerlink.com/content/n5p02554u66542v3/fulltext.pdf)> accessed 22 February 2010, p. 105.

<sup>315</sup> Interview notes with author. According to Amnesty International, 682 genocide perpetrators were on death row by mid-2002. See AI, Gacaca: A Question of Justice (n 54), p. 17 (referring to statistics compiled by Liprodhor which show that by mid-2002, Rwandan ordinary courts completed genocide cases against 7,181 individuals, and sentenced 9.5 percent of them to death).

country, and a decision by the President to abolish the death penalty may not have been supported by the local population.<sup>316</sup>

### *Life Sentence in Isolation*

When the death penalty was abolished in Rwanda, the punishment of life sentence in isolation became Rwanda's maximum legal punishment. However, as noted above, the ICTR judges considered this penalty to amount to cruel and inhuman treatment, which is contrary to international standards. Partly on this basis, they refused to transfer cases to Rwanda (see section 6.4 above).

A senior ICTR official indicated that Rwanda is currently considering abolishing this punishment, at least in relation to cases transferred from abroad. He added that this was a direct result of the ICTR's refusal to refer cases to Rwanda, which was partly based on the existence in Rwanda of this punishment.<sup>317</sup> A Rwandan lawyer, as well as several representatives of international NGOs in Rwanda, also confirmed that Rwanda is likely to abolish the punishment of life sentence in isolation, in order to promote the referral of cases from ICTR to Rwanda.<sup>318</sup> In April 2010, the National Assembly even passed a resolution to abolish this penalty.<sup>319</sup> When this resolution becomes a legislative act, it will constitute an important impact of the ICTR on sentencing practices in Rwanda.

### *Other Possible Impacts on Sentencing Practices*

Both gacaca and ordinary courts in Rwanda follow the sentencing guidelines provided in Rwanda's 2004 Gacaca Law, including in relation to defendants who confess and plead guilty (see section 5.1 above). The ordinary courts try the more senior perpetrators, and it is therefore more logical to expect that these courts (if any) will be more influenced by

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<sup>316</sup> Interview notes with author.

<sup>317</sup> Interview notes with author.

<sup>318</sup> Interview notes with author.

<sup>319</sup> AllAfrica News, 'Parliament Expunges Solitary Confinement' (by Edwin Musoni, 3 April 2010) <<http://allafrica.com/stories/201004050423.html>> accessed 2 May 2010. It is interesting to note in this context that a recent agreement between Rwanda and the UN-backed Special Court for Sierra Leone (hereinafter: SCSL), regarding the transfer of prisoners from the SCSL to Rwanda, includes a provision prohibiting Rwanda from holding in isolation any of the prisoners transferred from the SCSL to Rwanda. See 'Amended Agreement Between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone' (16 September 2009) <<http://www.scsl.org/LinkClick.aspx?fileticket=WNTKRblUNNc%3D&tabid=53>> accessed 9 December 2009.

the ICTR's sentencing practices than gacaca courts.<sup>320</sup> According to Amnesty International, Rwandan ordinary courts completed genocide trials concerning 7,181 defendants between early 1997 and mid-2002.<sup>321</sup> Amnesty International reported that the death penalty was imposed on 9.5 percent of these defendants, while 27.1 percent of them were sentenced to life imprisonment, 40.5 percent received fixed prison terms, and 19.1 percent were acquitted.<sup>322</sup> The ICTR judged only nine accused by mid 2002. Given this limited judicial activity, as well as the low levels of cooperation the Tribunal received from Rwanda at the time (see section 7.1 above), it is hard to conclude that the Tribunal's sentencing practices had any meaningful impact on Rwandan ordinary courts in this period. It was difficult to find sentencing statistics relating to genocide cases in Rwandan ordinary courts from mid 2002 until today, but it is recalled that these courts became less active in prosecuting genocide cases after mid 2002, in light of the newly created gacaca courts.<sup>323</sup>

While it is possible that the ICTR's process contributed to the decline in death penalties in Rwanda, it is more likely that internal developments in Rwanda and the general impact of international law had more of an impact in this respect. It also seems unlikely that the ICTR's process contributed to the increase in use of guilty pleas in Rwanda, which was essentially motivated by the need to promote national reconciliation and to reduce the burden on Rwanda's prisons (see section 5.1 above).<sup>324</sup> It is recalled

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<sup>320</sup> Since the ICTR has never sentenced RPF crimes, this section focuses on sentences imposed in genocide-related trials.

<sup>321</sup> AI, *Gacaca: A Question of Justice* (n 54), p. 17 (referencing statistics compiled by Liprodhor).

<sup>322</sup> *Ibid.* The report provides an annual breakdown of the sentences imposed in genocide cases and identifies the following trends: (i) a gradual decline in the percentage of death penalties (from 30.8 percent in 1997 to only 3.4 percent in 2002); (ii) a gradual decline in the percentage of life imprisonments (from 32.4 to 20.5 percent); (iii) an increase in fixed prison terms (from 27.7 to 47.2 percent); (iv) the acquittal rate almost tripled itself (from 8.9 to 24.8 percent). Prominent scholar Mark Drumbl attributes these trends, at least in part, to the facts that (a) the perpetrators prosecuted in the earlier trials were more notorious than those prosecuted later, and (b) recourse to guilty pleas became more popular with time. Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, 2007), p. 76. Drumbl also notes that the "Amnesty International statistics, however comprehensive, do not illustrate the factors the domestic courts consider in sentencing that transcend the guidelines provided by the Organic Law. The statistics are silent as to how the Rwanda genocide courts exercise their limited discretion with regard to punishing Category 2 and 3 offenders. Nor do they reveal the ways in which the Rwandan courts at times mold the statutory framework to suit unusual circumstances; or how, through the language, tone, and texture of their judgments, they give voice to certain penological goals ...".

<sup>323</sup> While it was difficult to find sentencing statistics relating to genocide cases in Rwandan ordinary courts from mid 2002 until today, it is anticipated that a later report by DOMAC (Work Package 3) will compile such statistics.

<sup>324</sup> It is recalled that the Rwandan 1996 Genocide Law (n 53) (as well as the 2001 Gacaca Law (n 56) and the 2004 Gacaca Law (n 61)) offers reduced sentences to defendants who confess to and apologize for having perpetrated genocide-related crimes. The confession procedure was introduced in Rwanda mainly to reduce the burden on the national justice system and prisons which had to deal with mass litigations and imprisonments related to genocide cases. This practice applies in both ordinary and gacaca courts in Rwanda, and has been extensively applied.

that practice of plea bargaining, which is characteristic to common law systems, was new to the Rwandan legal system which is based on civil law.

Indeed, at first glance the confession and guilty plea procedure in Rwandan genocide cases may seem very similar to the plea bargaining practices of the ICTR, in the sense that the convict's sentence is reduced in return for a confession. However, in Rwanda the sentence reductions are proscribed by law and automatically follow valid confessions, while the ICTR employs a conventional plea practice, characteristic to common law systems, where the sentence reduction is negotiated.<sup>325</sup>

Thus it seems that the main impacts of the ICTR on sentencing practices in Rwanda are that it encouraged the abolition of the death penalty and promoted discussions about abolishing or restricting the punishment of life imprisonment in isolation.

## 8.4 CAPACITY BUILDING

### *Training and Consultations*

It is recalled that Security Council Resolution 1503 of August 2003 urged the ICTR to transfer cases to “national jurisdictions ... including Rwanda” (see section 6.4 above). To this end, the resolution called on the international community “to assist national jurisdictions ... in improving their capacity”.<sup>326</sup> According to senior ICTR officials, Resolution 1503 was understood by Tribunal officials as mandating the ICTR for the first time to engage in capacity building in Rwanda.<sup>327</sup>

Since then, explained ICTR officials, various sections of the Tribunal have been engaged in capacity building activities in Rwanda, including by holding seminars and training sessions for Rwandan judges and lawyers.<sup>328</sup> A prominent Rwandan judge

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<sup>325</sup> Still, prior to the establishment of the ICTR, the practice of guilty pleas did not exist in Rwanda. But according to a prominent Rwandan lawyer, the introduction of this practice was not an impact of the ICTR but rather a more general influence of international law. Interview notes with author.

<sup>326</sup> UNSC Res 1503 (n 216). It is recalled that the resolution also noted “that the strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular” (see note 219 above).

<sup>327</sup> Interview notes with author. Before 2003, the ICTR did not engage in capacity development in Rwanda. However, it is recalled that the Tribunal engaged in outreach activities in Rwanda earlier, mainly through its documentation centers, the first of which was established in Kigali in 2000 (see section 6.2 above). Outreach activities can contribute to national capacity: for example, if lawyers or even law students learn about the ICTR's work and norms through ICTR outreach activities, this in turn will enhance their capacity as legal professionals.

<sup>328</sup> Interview notes with author. The interviewee stressed that the main sponsor for these activities is the EC.

recalled that he attended one such seminar conducted in 2007 by the ICTR, concerning criminal procedure.<sup>329</sup> It was also noted that ICTR staff periodically lecture to Rwandan law students, as well as provide them with books and assistance in setting up libraries.<sup>330</sup>

According to a senior ICTR official, the ICTR and Rwanda eventually managed to build a relationship which allows capacity building projects to take place even when they are not related to the referral of cases to Rwanda. The official explained that from about mid 2006, ICTR representatives have been meeting their Rwandan counterparts (including defence lawyers, prison administrators, judges and academics) to discuss possible capacity building programs.<sup>331</sup> Another senior ICTR official noted that the Tribunal has been holding consultations with Rwandan officials on how to improve the country's witness protection scheme. One issue under discussion was whether to allow the ICTR to provide guarantees to defence witnesses in Rwandan national trials, who are reluctant to come to Rwanda to testify.<sup>332</sup> As part of this capacity building program, a three-day training workshop on witness protection issues was given by ICTR officials to Rwandans, in November 2009, in Arusha.<sup>333</sup> A senior Rwandan official confirmed that Rwandan judges, prosecutors, and defence attorneys plan activities together with their ICTR counterparts.<sup>334</sup>

Since 2006, according to both ICTR and Rwandan officials, the Tribunal's OTP has been training Rwandan prosecutors and investigators.<sup>335</sup> It was noted that these capacity building activities are mainly funded by the EC.<sup>336</sup> A senior ICTR official

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<sup>329</sup> Interview notes with author.

<sup>330</sup> Interview notes with author.

<sup>331</sup> Interview notes with author. A senior ICTR official explained that when Rwanda complained that the Tribunal was not helping it enough, the ICTR decided to give more visibility to its activities in Rwanda and established a team to coordinate these activities vis-à-vis Rwanda.

<sup>332</sup> Interview notes with author.

<sup>333</sup> ICTR Press Release of 16 November 2009 <<http://www.ictor.org/ENGLISH/PRESSREL/2009/623.htm>> accessed 22 February 2010.

<sup>334</sup> Interview notes with author. The interviewee stressed that "such professional interaction on a person to person level enables both sides to learn and exchange ideas".

<sup>335</sup> Interview notes with author.

<sup>336</sup> Interview notes with author. Also other capacity building activities of the Tribunal are funded outside the ICTR's regular budget. Tribunal leaders spoke about the financial challenges faced by the ICTR in connection with its capacity building efforts in Rwanda. It was noted that the Tribunal's capacity building initiatives were never funded by the UN, even after Security Council Resolution 1503 was issued in 2003, and the Tribunal had to establish a voluntary Trust Fund to finance its capacity building activities in Rwanda. The Tribunal created the voluntary Trust Fund by appealing to donors, mostly the EU and European countries, but also the US and some African countries. One top ICTR official considered that since the UN mandated the Tribunal to engage in capacity building in Rwanda, it should have provided funding for this purpose under the Tribunal's regular budget. Another senior Tribunal official recalled that the ICTR requested money from the UN, but the UN General Assembly refused to grant it. Eventually, the ICTR received limited funds for this purpose from the EU (about \$3 million) and other entities which contribute to the ICTR Trust Fund. It was

explained that the OTP's training sessions covered areas such as investigation techniques, crime analysis, evidence management and storage, international criminal law, trial advocacy, and indictment drafting.<sup>337</sup> Two other OTP members described the training session which concerned indictment drafting as particularly successful.<sup>338</sup> One of them mentioned that several months after this training, the Rwandan prosecution authorities introduced a new format for their standard indictment, inspired by the ICTR's training.<sup>339</sup> He added that the Rwandans asked for this training because they wanted to improve their system and not for the sake of receiving ICTR cases.<sup>340</sup>

A senior Rwandan official confirmed that as a result of the ICTR's training on indictment drafting, many local prosecutors in Rwanda have improved their capacity. He generally considered the ICTR training activities in Rwanda to be useful, explaining that they are usually prepared jointly by the ICTR and Rwandan officials, and constitute one of several resources the Rwandans are using for their ambitious capacity building program.<sup>341</sup> The Rwandan official added that the ICTR as an institution has not contributed to the development of judicial capacity in Rwanda. Rather, such contribution was achieved through sporadic initiatives undertaken by certain ICTR leaders as a result of their personalities and not because of an institutional obligation imposed on the Tribunal.<sup>342</sup>

According to a senior ICTR official, depending on the availability of funds, the Tribunal is planning future capacity building activities in Rwanda, in areas such as court

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explained that the EU is a major contributor to the ICTR Trust Fund, and it also provides direct funding to some of the ICTR's capacity building projects in Rwanda. For example, the EU (through the EC) funds the ICTR information and documentation centers in Rwanda, which are part of the Tribunal's outreach activities and also contribute to judicial capacity building in Rwanda. Interview notes with author.

<sup>337</sup> Interview notes with author.

<sup>338</sup> This training was held in April 2008 at the ILPD. The interviewees explained that it was conducted through four sessions of three days each, to a total of 150 prosecutors. Its aim was to improve the practices of the prosecuting authorities, not the law. The training was requested by the Rwandan Prosecutor General, who wanted to improve the format of the indictments used throughout Rwanda. Until then, Rwanda has been using an old model for its indictments, which contained only a summary of the charges, without informing the accused of his rights. The Rwandan Prosecutor wanted his indictments to inform the defendants of their rights and better inform them of the accusations. Interview notes with author.

<sup>339</sup> Interview notes with author. The interviewee explained that this new standard format is now required under the internal instructions of the Rwandan prosecution authorities. Copy of new indictment format with author.

<sup>340</sup> Interview notes with author.

<sup>341</sup> Interview notes with author. However, a foreign academic involved in capacity building in Rwanda, criticized the ICTR for not assessing the local needs before conducting training sessions in Rwanda. Referring to the indictment drafting training, he explained that the ICTR started the session by teaching Rwandan prosecutors how to write indictments for international tribunals, which is not what is needed in Rwanda. At one point the trainers received feedback on this matter, and they adapted the program to the local needs. Interview notes with author.

<sup>342</sup> Interview notes with author.



reporting and prison management. He added that the ICTR also plans to train between 250 and 300 Rwandan defence lawyers on key aspects of international criminal law and procedure.<sup>343</sup> Moreover, Tribunal officials mentioned that an “attachment program” is being planned, possibility funded by the EU, under which Rwandan professionals will be seconded to certain sections of the ICTR for three-month terms.<sup>344</sup> One Tribunal official noted that a Memorandum of Understanding regarding this matter was already drafted and is waiting to be signed.<sup>345</sup> According to a senior ICTR official, the Tribunal intends in the future to hold most of its capacity building initiatives at the ILPD (for more details about this national institution see section 4.3 above).<sup>346</sup>

Interviews revealed mixed opinions on whether the ICTR should have engaged earlier in capacity building activities in Rwanda. One senior Tribunal official considered that the ICTR should have engaged in capacity building since its inception, despite the challenges. He noted, however, that some Tribunal officials discouraged the involvement of the ICTR in such activities in Rwanda in its early years. Furthermore, the Rwandan authorities did not cooperate with the Tribunal in those earlier years, and its civil society was too weak to generate the cooperation needed for capacity building.<sup>347</sup> Another senior ICTR official explained that the emotional turmoil and tension in Rwanda in the aftermath of the genocide would have made it difficult for the ICTR to engage in capacity building activities in its early years.<sup>348</sup>

A prominent Rwandan judge explained that the ICTR was reluctant to engage in capacity building in Rwanda before 2003 because it wanted to appear objective, neutral,

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<sup>343</sup> Interview notes with author. The interviewee added, regarding the training of defence lawyers, that the Tribunal already held the first out of five planned sessions, in which 50 lawyers participated, and is searching for funds to conduct the remaining sessions. Regarding the training of court reporters, the ICTR official further explained that at the request of Rwanda, the ICTR has already written a program for training court reporters. In addition, the Tribunal has already demonstrated to Rwandan Supreme Court judges its court reporting technology (known as the “real time” reporting system). The implementation strategy of the program still has to be finalized. A Rwandan Supreme Court Judge confirmed that there are presently discussions about holding ICTR trainings for national court reporters. Interview notes with author.

<sup>344</sup> Interview notes with author.

<sup>345</sup> Interview notes with author.

<sup>346</sup> Interview notes with author. A foreign legal expert, involved in capacity building in Rwanda, confirmed that the ICTR had planned to hold more activities at the ILPD, including training of Rwandan judges, prosecutors and defence attorneys, but could not obtain the necessary funds. He also noted that the ICTR intends to help establish a library at the ILPD, including an electronic-library. The expert added that ICTR staff based in Kigali once assisted the ILPD in conducting a one-day training on international tribunals. Interview notes with author.

<sup>347</sup> Interview notes with author.

<sup>348</sup> Interview notes with author.

and independent from Rwanda. Still, he did not justify this reluctance.<sup>349</sup> Another prominent Rwandan judge added that the ICTR could not have engaged in capacity building activities in Rwanda before 2003 due to its own “teething problems”.<sup>350</sup> A Rwandan lawyer considered that the ICTR could have started its capacity building activities in Rwanda around year 2000, once the Rwandan justice system was sufficiently developed to allow ICTR involvement.<sup>351</sup>

### *Employment of Rwandan Nationals by the ICTR*

Another way in which the ICTR has been contributing to judicial capacity in Rwanda is through employing Rwandans in its various sections since 2003.<sup>352</sup> Rwandans are also involved in the Tribunal as interns and legal researchers.<sup>353</sup> An ICTR judge recalled that the Tribunal, in its early years, employed Rwandans only as translators. However, at a later stage, the Tribunal’s Registry adopted a policy of including Rwandans in other sections of the Registry, such as the WVSS, the Protocol Unit and the Outreach Program. In addition, every ICTR Defence team has Rwandan investigators.<sup>354</sup> This employment policy was also applied in the OTP. The judge stressed that in 1996-1997 it would have been impossible to let a Tutsi attorney cross examine a Hutu witness (or vice versa), but this has changed over time, and today the Tribunal’s OTP employs about 4-6

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<sup>349</sup> Interview notes with author.

<sup>350</sup> Interview notes with author.

<sup>351</sup> Interview notes with author.

<sup>352</sup> This assumes that these Rwandans eventually return to Rwanda with the knowledge they gained at the ICTR. Two Rwandans, who are currently employed by the ICTR, indicated in interviews that they plan to return to Rwanda once the Tribunal winds up. One of them explained that he wanted to teach at a Rwandan university, or become a prosecutor in Rwanda. He stressed that working at the Tribunal has enhanced his knowledge of international law and his understanding of the crimes which were committed in Rwanda. It also developed his ability to be objective and think independently. These skills, he believed, would make him a good prosecutor in Rwanda. Interview notes with author.

<sup>353</sup> This was noted in interviews with ICTR officials. Interview notes with author. In addition, a Rwandan law professor noted that each year since around 2003, six or seven several Rwandan law students engage as legal researchers at the ICTR for periods of two months. These students consequently become interested in international criminal law and the ICTR. Interview notes with author.

<sup>354</sup> Interview notes with author. The ICTR judge explained that the defence teams at the Tribunal pick their own investigators. But since they usually pick Hutus, and some of them may “have a past”, the ICTR instituted within its Registry a screening process for defence investigators, which includes consultations with Rwandan authorities. In other words, Rwanda is asked to approve every defence investigator before an ICTR defence team can employ him or her. The ICTR judge complained that sometimes, after the Rwandans approve a defence investigator, they submit new information suggesting that the investigator was involved in the genocide, and accuse the ICTR of employing genocidaires. It was also noted by a Tribunal official that Rwandans appear on the list of approved defence counsel. Interview notes with author.

Hutu or Tutsi lawyers.<sup>355</sup> A senior OTP official noted that Rwandans are employed by the OTP as trial attorneys and “associate investigators”.<sup>356</sup> Still, two senior Rwandan officials who were interviewed considered it unfortunate that the ICTR did not employ Rwandan prosecutors and investigators before 2003. They also complained that Rwandan judges are not included in the Tribunal’s Chambers, and that Rwandans are not involved as interns in Chambers.<sup>357</sup>

A senior ICTR official noted that when he suggested that Rwandans be employed in the ICTR Chambers, the judges rejected the idea, as they believed that employing them would interfere with the neutrality of the judges.<sup>358</sup> Regarding the possible employment of Rwandan judges, a senior ICTR official considered that the Tribunal could not have involved Rwandan judges because of the risk that they may not be objective.<sup>359</sup> An ICTR judge noted that the bitterness and lack of trust across the ethnic divide in Rwanda in 1994 made it impossible at the time to consider engaging Rwandan judges in the ICTR. But even later, he added, this tension made it problematic to employ Rwanda judges (even when ethnicity was no longer supposed to be a distinguishing factor among Rwandans).<sup>360</sup>

### *Infrastructural Development*

A senior Rwandan official indicated that prison facilities in Rwanda were improved in view of the possibility that the ICTR will transfer its convicts to serve their sentences in

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<sup>355</sup> Interview notes with author. A Rwandan working at the ICTR also confirmed that the ICTR did not want to employ Rwandans in the past, based on its belief that the animosity between Hutus and Tutsis would influence the quality of their work and jeopardize their objectivity. Interview notes with author.

<sup>356</sup> Interview notes with author. The official explained that the associate investigators were qualified attorneys back in Rwanda. At the ICTR, they assist with crime analysis. Their fluency in Kinyarwanda is highly valued in light of the limited language resources at the OTP, a section which has to deal with a lot of material in Kinyarwanda. They may return to the local system to work, which is a way of transferring skills to Rwanda, but some of them may end up employed by other international tribunals.

<sup>357</sup> Interview notes with author. One of the interviewees added that even when Rwandan interns were brought to serve in other ICTR sections, this step was only done for image purposes, and not because they were thought to be able to contribute professionally. This is regrettable, he believed, as it would have been useful to incorporate Rwandans in the Tribunal not only to promote capacity building in Rwanda but also to help the ICTR understand Rwanda. The second interviewee noted that the ICTR could have better contributed to capacity building in Rwanda had it employed more Rwandans, and from an earlier time.

<sup>358</sup> Interview notes with author.

<sup>359</sup> Interview notes with author. The Tribunal official stressed that “it is important that justice is perceived to be done with the highest standards protecting the rights of the accused”.

<sup>360</sup> Interview notes with author. It is noted that following the genocide, ethnic labels have been removed from ID cards. See UN 2000 Human Rights Report on Rwanda (n 54), para. 16.

Rwanda.<sup>361</sup> He added that the improvements were financed by the EU and the Netherlands, not by ICTR.<sup>362</sup> A senior ICTR official confirmed that thanks to the support of the Netherlands, Rwanda has been able to build a prison conforming to international standards. In this light, he added, the ICTR Registrar signed an agreement on the enforcement of sentences with Rwanda. But he also noted that for the ICTR to transfer prisoners to Rwanda, it must be convinced that Rwanda can guarantee their safety.<sup>363</sup>

To satisfy the ICTR's requirements, in addition to enhancing prison facilities, a senior Tribunal official recalled that Rwanda constructed a chamber in its Supreme Court that could host ICTR proceedings. This was done in case the ICTR judges would hold trial sessions in Rwanda, a possibility provided by the ICTR Rules but which never materialized.<sup>364</sup>

## 9. CONCLUSION AND RECOMMENDATIONS

International courts can more effectively fight impunity if their process is complemented by fair national criminal proceedings in the countries they address. They may be able to prosecute dozens of the most highly ranking perpetrators, but in cases of mass atrocities this represents only a small fraction of the criminals. Impunity may still remain the rule in the country of the crimes, if others are not brought to justice.

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<sup>361</sup> Interview notes with author. The Rwandan official explained that Article 26 of the ICTR Statute is very unequivocal in stating that "sentences shall be served in Rwanda". Indeed, it continues with the words "or elsewhere", but the preference for Rwanda is demonstrated by the choice of the word "shall" as opposed to "will" or "may". Nonetheless, to date, no prisoners were transferred to Rwanda. Further, the ICTR unilaterally decided to send its convicts to countries other than Rwanda, without consulting or corresponding with Rwanda on the matter. Until recently, even the notice requirement was not met by the ICTR (that is the requirement in Rule 103 of the ICTR Rules of Procedures and Evidence that the ICTR give prior notice to Rwanda when its convicts are sent elsewhere to serve their sentences). Today, however, Rwanda is served with notices, which is a positive development. Recently, an agreement on the enforcement of sentence in Rwanda was signed between the ICTR and Rwanda, and in November 2008 it was ratified by Rwanda. Nonetheless, such agreement is not required by the ICTR Statute, and the lack of such an agreement was not the factor which should have impeded the transfer of prisoners.

<sup>362</sup> Interview notes with author. The Rwandan official suggested that this is in contrast to the situation in the other African countries with which the ICTR has concluded agreements on enforcement of sentences, including Mali and Benin, which are getting capacity support from the ICTR, including for prison infrastructure development.

<sup>363</sup> Interview notes with author.

<sup>364</sup> Interview notes with author. The Tribunal official noted that this court renovation project started as early as 1997, and was eventually completed years later with EU funding. He added that infrastructure which may be needed for ICTR proceedings and does not necessarily exist in a national courtroom includes interpretation equipment, court reporting systems, audio and video recorders, and other technical equipment. Also see <<http://www.delrwa.ec.europa.eu/en/whatsnew/Cour-Minijust-en.pdf>> accessed 7 July 2009 (noting that the EU provided funds since 2005 for refurbishing Rwanda's Supreme Court, but there was nothing indicating that this was related to the ICTR).

It is important that the international and national processes complete rather than compete with each other. An international court is set up when the national justice system is struggling to re-build what was destroyed as a consequence of the mass atrocities. At that stage, the international court is well placed to support national courts and in particular encourage them to prosecute the atrocities in parallel to the international trials. A calibrated effort to prosecute all perpetrators (or at least all high and mid level ones), by utilizing in parallel national and international courts, will ensure that norms and procedures which were developed in international courts will be applied in national prosecutions where needed. Furthermore, international courts have more resources to attract leading world experts on international criminal law. If the national and international systems work together, the contribution of these world experts (for example in the area of norm development), would be more likely to permeate into the national level. In such an environment the international court will become more relevant and acceptable on the local level, inevitably enhancing its ability to promote accountability in the relevant society. This is especially important when the international court sits outside the country of the crimes, as in the case of the ICTR.

However, in the case of Rwanda, as shown in this report, there was no calculated attempt after the genocide to foster such complementarity between the ICTR and the Rwandan justice system. When the ICTR was established, what was lacking was a comprehensive approach at the international level which promoted the parallel utilization of international and national courts to achieve the goals of international criminal justice. From the outset, the national criminal proceedings in Rwanda developed separately from the ICTR's process, and the International Tribunal, in its first ten years of existence, had almost no impacts on the national system.

This changed to a certain extent in 2004, when the ICTR adopted a procedure for referring cases to national courts. The possibility of receiving cases from the ICTR led Rwanda to amend its due process and sentencing norms to conform to international standards. But the procedural norms which were amended apply only to cases transferred to Rwanda from abroad, of which there have so far been none. Furthermore the adaptation of penalty norms to international standards did not have any practical implications, as capital punishment has not been applied in practice in Rwanda since 1998. The abolition of life imprisonment in isolation may constitute a significant impact of

the ICTR, although there is no evidence that this penalty has been applied in practice in Rwanda.

Nonetheless, it is significant that thanks to its referral procedure, the ICTR encouraged these developments in Rwanda. It is also significant that the referral possibility led to unprecedented levels of cooperation between the ICTR and the Rwandan justice system and to the commencement of capacity building activities by the ICTR in Rwanda. There are other impacts of the ICTR in Rwanda. The possibility that ICTR convicts will serve their sentences in Rwanda led Rwanda to improve its prison facilities to meet international standards. The employment of Rwandans by the ICTR (even if not intended as a capacity building initiative) ensures the transfer of skills to Rwandan nationals. Finally, the ICTR may have had a catalysing effect on the prosecution of war crimes in Rwanda: Thanks to the hand-over of dossiers from the Tribunal's Prosecutor to Rwanda, a war crimes trial against four RPF members was held in Rwanda in 2008. A greater impact in this direction may soften the criticism that Rwanda practices one-sided "victors' justice".

But despite all these impacts, the ICTR and third states refuse to refer cases to Rwanda on the basis that the country does not offer fair trials. In addition, many key players at the ICTR still consider Rwanda's system to mete unfair victor's justice and many influential Rwandans consider the ICTR as a waste of money. Such perceptions, which are unfortunately still quite dominant, prevent a strong coordinated effort of the ICTR and the Rwandan justice system which could together more effectively strengthen the rule of law and the culture of accountability in Rwanda.

It is unfortunate that efforts by international community to encourage complementarity between the ICTR and Rwanda's justice system were made as late as ten years after the atrocities and the establishment of the ICTR. Had the UN, in November 1994, been supportive of encouraging national proceedings in Rwanda in parallel to international trials, it could have designed the ICTR in a way which maximizes its positive impacts on the national system in Rwanda. Had the ICTR itself considered that encouraging national trials was one of its goals, it could have taken measures to achieve this goal, for example by adopting a referral procedure before 2004.<sup>365</sup> It is highly

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<sup>365</sup> This may have been objected to by states that agreed to surrender suspects to the ICTR but would not have agreed to extradite them to Rwanda. However, the ICTR could have solved this tension by, for example, requiring the permission of the state in which the accused was arrested, to his transfer to Rwanda for trial under ICTR supervision.



likely that as a consequence, the Rwandan justice system would have started improving sooner. Perhaps by now it would have been perceived by the international community as conforming to minimum fairness standards. In addition, the cooperation between the ICTR and Rwanda would have been better at an earlier stage, increasing the Tribunal's legitimacy and relevance in Rwanda.

The ICTR could have also maximized its positive impacts on domestic prosecutions in Rwanda by, for example, employing more Rwandans and thereby enhancing Rwanda's judicial capacity (assuming these staff members would later be absorbed by the Rwandan justice system).<sup>366</sup> An ICTR official added that it is clear today that the involvement of Rwandans in the ICTR, both in Arusha and Kigali, has helped to build capacity in Rwanda.<sup>367</sup> It was also suggested that the ICTR, to maximize its positive impacts in Rwanda, could have involved more victims in its process or held some trials in Rwanda.<sup>368</sup>

Some interviewees considered that the ICTR can still take certain measures before its closure to increase its positive impacts in Rwanda. An NGO representative suggested that the Tribunal can attach Rwandan professionals to its staff, including a Rwandan judge to each Chamber.<sup>369</sup> Another NGO representative suggested that the ICTR should, in collaboration with donor states and NGOs, engage in capacity building activities in the form of consultations (rather than training sessions).<sup>370</sup> A senior Rwandan official considered that the more active the ICTR will be in Rwanda, the better it will be for the Rwandan justice system which ultimately seeks to conform to international standards.<sup>371</sup> A prominent Rwandan lawyer suggested that after the Tribunal's closure, its staff could work in Rwanda and help build national capacity.<sup>372</sup> A Rwandan Supreme Court judge noted that to increase its impact in Rwanda the ICTR

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<sup>366</sup> Interview notes with author.

<sup>367</sup> Interview notes with author.

<sup>368</sup> Interview notes with author.

<sup>369</sup> Interview notes with author.

<sup>370</sup> Interview notes with author.

<sup>371</sup> Interview notes with author.

<sup>372</sup> Interview notes with author. The interviewee added that the Rwandan domestic law allows for the employment of foreigner in legal practice. In his view, international justice systems, in principle, should not only prosecute international crimes but should also train local judges to handle such prosecutions.

should send its convicts to serve their sentences in Rwanda.<sup>373</sup> Another suggestion, offered by a Rwandan legal academic, was that the archives of the ICTR be placed in Rwanda after the Tribunal's closure. This, in his view, would increase the national awareness to the jurisprudence of the ICTR and improve the local perceptions of the Tribunal, thereby maximizing its impact and ensuring greater harmonization between ICTR and Rwandan proceedings.<sup>374</sup> The role of the international community can also be important in this regard. As demonstrated in this report, many international actors provided financial and capacity building support to help re-build Rwanda's justice system after the genocide. International support is provided to the Rwandan justice sector in Rwanda until today. But to improve accountability and rule of law in Rwanda, the international community could focus more on strengthening the ties between the ICTR and national justice in Rwanda.<sup>375</sup>

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<sup>373</sup> Interview notes with author. The interviewee also noted that when one commits a crime against an entire community, it is important for the victimized community to see that the perpetrator is punished. Otherwise, there is no impact on the community, and the sentence becomes useless.

<sup>374</sup> Interview notes with author. The interviewee believed that this would contribute to reconciliation and unity in Rwanda, would increase universal awareness to the genocide (as the archives would draw international attention to Rwanda), and that Rwandan and foreign researchers could benefit from the archives.

<sup>375</sup> The EC does this to a certain extent, by funding ICTR outreach and capacity building initiatives in Rwanda.



## ALSO AVAILABLE FROM DOMAC

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