

Yugoslavia and the Prospects for Referring Certain Cases to National Courts," 2002. (Unpublished.)

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## 2 Legal responses to genocide in Rwanda

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*Alison Des Forges and Timothy Longman*

In the aftermath of the 1994 Rwandan genocide, both the international community and the government of Rwanda have placed substantial emphasis on the prosecution of alleged perpetrators, in part because they hope that justice will promote social reconstruction. With trials at the International Criminal Tribunal for Rwanda (ICTR) based in Arusha, Tanzania, in national courts in Belgium and Switzerland, in classical courts in Rwanda, and in an innovative, local judicial system, *gacaca*, the Rwandan genocide has received greater judicial attention than any other case of mass atrocity in recent history. Because of the military defeat of the regime that carried out the genocide and the willingness of many countries to support judicial processes, a very substantial number of the alleged perpetrators have been apprehended and are awaiting trial. Hence, Rwanda might provide an excellent case for determining whether trials do in fact contribute to reconciliation.

Yet each of the judicial initiatives has been beset with problems, and the contribution of the sum of their activities to reconciliation remains unclear. Both international and domestic prosecutions have focused exclusively on the genocide, while war crimes and crimes against humanity allegedly perpetrated by some power-holders in the post-genocide regime have been ignored, compromising the appearance of fairness in judicial processes. The Arusha Tribunal has remained detached from Rwandan society, focusing more on legal processes and contributions to international law than on its potential impact within Rwanda. Domestic prosecutions, meanwhile, have been politicized. Even *gacaca*, which is being promoted as a community-based initiative that will support reconciliation more effectively than classical justice, remains one-sided and closely controlled by the government (see Karekezi et al., Chapter 3 in this volume). Although stopping impunity and building the rule of law remain essential for Rwandan society to unify and avoid future violence, it remains unclear whether prosecutions as they are now being carried out will contribute to this process, or how they will do so.

### Genocide and its aftermath

From April to mid-July 1994, a group of ruthless political leaders bent on holding power launched a genocide against the Tutsi, a minority people who composed some 10 percent of the population of Rwanda. Within hours after a missile brought down the plane carrying the presidents of Rwanda and Burundi on the night of April 6, 1994, government and military officials set in motion a long-planned program to eliminate political rivals to the president and his supporters. The Presidential Guard, elite army troops, and trained civilian militia began to hunt down opposition politicians and civil society activists. They also targeted Tutsi civilians who for years had been accused of serving as "accomplices" to the largely Tutsi Rwandan Patriotic Front (RPF), a guerilla force that began making war on the Rwandan government in 1990. In principle the war had been settled by the Arusha Accords signed in August 1993, but radicals on both sides continued to prepare for a resumption of violence. With the shooting-down of the president's plane and the beginning of killings of civilians, the RPF resumed the armed struggle. Over the following several weeks, government officials, soldiers and police, political leaders, and militia members attacked Tutsi and, to a lesser extent, members of the majority Hutu ethnic group who opposed the new authorities and their genocidal program. By the time the RPF had defeated the government and driven it from the country in July, at least 500,000 people had been slain.<sup>1</sup>

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The slaughter in Rwanda constituted genocide,<sup>2</sup> as the organizers intended to eliminate the Tutsi group, if at all possible, or if not, then to eliminate the maximum number. Although often portrayed as a spontaneous mass slaughter by machete-wielding peasants, the genocide was, in fact, both highly planned and remarkably modern in its organization, making extensive use of the administrative structure of the state. Organizers used the radio to order people throughout the country to hunt down Tutsi and to kill them or hand them over to the authorities for elimination. One radio propagandist promised a day when children would have to look at pictures in books to know what Tutsi looked like, because all would be gone from Rwanda.<sup>3</sup> Using the administrative structure of the state, the leaders of the genocide mobilized a substantial portion of the population, seeking to involve the largest number of people possible in what they came to call a "program of civilian self-defense."

In contrast to many other "administrative massacres,"<sup>4</sup> the Rwandan genocide involved a far larger percentage of the population, yet the emphasis of some authors on popular participation fails to take account of the varieties of participation, as well as the extent of official pressure

needed to obtain such a high level of mobilization.<sup>5</sup> For a great number of people, involvement often constituted nothing more than passing on information to the authorities or to the militia, for example about where Tutsi were hiding. The organizers of the genocide depicted themselves as the legitimate authorities in charge of the country, a claim that was strengthened by the conduct of other governments, the United Nations (UN), and the Organization of African Unity (OAU), all of which treated the genocidal leaders as the government of Rwanda. Representatives of this government were received in Paris and Cairo, and its delegates continued to sit at the table of the UN Security Council where, by chance, Rwanda was a non-permanent member, and to take their places at the OAU summit meeting held during the genocide. Speaking with this mantle of apparent legitimacy, Rwandan officials warned the population that it must act to defend itself against the RPF and Tutsi civilians, even neighbors, who were secretly working to assure RPF victory and death to the Hutu. Officials and soldiers placed substantial pressure on people to demonstrate at least nominal support for the killing. Hutu who rejected the propaganda about Tutsi and who chose not to participate in the genocide were subjected to reproach on the radio and in public meetings, humiliation, fines, imprisonment, and even death.<sup>6</sup> But whether people participated under duress or willingly, they constitute tens of thousands of people, a number that has complicated efforts at rendering justice for the genocide.

International refusal to recognize the genocide was wrong, both morally and legally. When the killing began, evidence of preparations for mass slaughter had been available to the UN and the United States, France, and Belgium for several months. In addition, a UN peacekeeping force in Rwanda to facilitate implementation of the Arusha Accords was reduced from 1,700 to a few hundred soldiers because none of the major international players wanted to risk resources – financial or human – to protect Rwandan civilians from the slaughter.<sup>7</sup> The silence of the international community and its refusal to intervene cleared the way for the Rwandan authorities to expand the killing beyond the capital to the center and the south of the country. By the time international leaders had acknowledged that genocide was taking place, it was too late.<sup>8</sup> The international community intervened only after the RPF victory had driven millions of mostly Hutu refugees into neighboring Tanzania and Congo (then Zaire).<sup>9</sup>

### The International Criminal Tribunal for Rwanda

Even during the genocide, international actors began to talk of the need for justice, an idea that was fed by their sense of guilt. The fact that the

International Criminal Tribunal for the former Yugoslavia (ICTY) was already in existence made the creation of a tribunal an obvious route to administer justice for the Rwandan genocide. Further, since the crimes in Rwanda were so much more blatant and grievous and large in scale than those committed in the former Yugoslavia, failure to create a mechanism comparable to the ICTY would almost certainly have led to accusations of racism. Following the same procedures as those used in the creation of the Hague Tribunal, the UN Secretary General appointed a human rights fact-finding team in August 1994, which found evidence of grave violations of international law, including genocide.<sup>10</sup> Based on these findings, the Security Council adopted Resolution 955 on November 8, 1994, to establish an international tribunal to prosecute "persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994."<sup>11</sup>

The resolution creating the ICTR mandated two purposes for the tribunal. First, the Security Council determined that the crimes committed in Rwanda "constitute a threat to international peace and security" and "that the establishment of an international tribunal . . . will contribute to ensuring that such violations are halted and effectively redressed."<sup>12</sup> By holding trials, the international community would make clear that, whatever the intentions of individual states, the world community of states would not allow the authors of such gross violations of human rights to go unpunished. Second, the resolution called upon the ICTR to help bring peace and reconciliation to Rwanda.<sup>13</sup> This mandate differs from that of the ICTY, where the contributions to peace and reconciliation were discussed in Security Council debates but not specifically included in the resolution that established the tribunal.<sup>14</sup>

Having created the ICTR, the Security Council did little to ensure its successful operation. The tribunal was made an organ of the UN, whose bureaucracy was not only heavy and slow-moving but also unfamiliar with the demands of judicial operations. The UN failed initially to give the tribunal a regular appropriation and obliged it to function on the basis of short-term allocations, which meant that it could hire staff on three-month contracts only. As a result, the tribunal had trouble attracting candidates to work under such demanding conditions in a country still recovering from war. Recruitment followed UN procedures, meaning they were lengthy but not necessarily suited to choosing the most appropriate candidate. Posts often took more than a year to fill, and many candidates were hired, even for posts of great responsibility, without ever being interviewed. Many prosecutors came from academia or

human rights organizations with little or no experience of criminal prosecutions. Similarly, investigators, drawn largely from police forces from around the world, had no experience of investigating crimes of such magnitude. Virtually none of the tribunal's staff, at least in the early years, knew anything about the history and culture of Rwanda.<sup>15</sup>

At the start, the prosecutor's office, which was originally housed in a devastated hotel that was being converted into an office structure, had no logistical and material support. Staff often lacked basic supplies such as pencils and paper, let alone typewriters or computers. They lacked vehicles to go to massacre sites or to travel to interview witnesses. These problems persisted largely because the ICTR had no powerful advocate on the Security Council or UN Secretariat.<sup>16</sup>

As a result of financial and personnel problems, the initial prosecution efforts were weak and disorganized. Investigators and prosecutors relied too much on witnesses identified by the Rwandan government and organizations of genocide survivors. Most of these witnesses were victims or their family members. They could describe attacks, and name some of the assailants, but they possessed no direct information about the organizers of the attacks. Yet it was the organizers, those most responsible for the genocide, who were supposed to be the target of ICTR prosecutions. Other than witness testimony, investigators made no systematic effort to gather documentary and forensic evidence linking alleged suspects to specific crimes.

Not only was evidence poorly presented in many individual cases, but also the office of the prosecutor lacked an overall prosecution strategy. Before the prosecution had fully launched its own investigations in Rwanda, governments that had already arrested suspects, but that did not want to prosecute them, had delivered them into ICTR custody. In its initial arrests, the tribunal paid insufficient attention to the hierarchy of leaders of the genocide and brought in suspects who had played relatively minor roles in it. This meant that resources intended for the "big fish" were squandered on less notorious suspects. Ultimately, because the office of the prosecutor had no overall view of the genocide, it prosecuted lower-level perpetrators without regard to using the record of their criminal activities to implicate more important figures.<sup>17</sup>

The quality of ICTR judges has also created problems. The tribunal is an amalgamation of civil and common law, and trial chamber judges, of whom there are three on each panel, come from both legal traditions. Some judges are former academics or government officials who have no experience of managing a courtroom. Elected by the UN General Assembly, the judges often appear to pay more attention to political concerns than to experience or competence in judicial matters. At one

point the tribunal lacked enough candidates to proceed to the election of new judges, and the deadline for the naming of candidates had to be extended. Moreover, the tribunal has no program to train judges in courtroom management. In the course of trials, judges often interpret the Rules of Evidence and Procedure in different ways according to their background, resulting in debates that consume a great deal of time and slow proceedings.

For the first years of the ICTR's operation, the judges worked on a very relaxed schedule, ordinarily four or four and a half days a week, often for only five hours a day. They took long vacations two or three times a year. As a result, even relatively minor trials commonly dragged on for months or even years.<sup>18</sup> Only in 2003, with the election of a new president for the tribunal, did the pace begin to pick up. Second, and more seriously, poor courtroom management often created degrading situations for witnesses. In the most notorious case, a defense attorney was allowed to ask a rape victim inappropriate and demeaning questions. At one point in the questioning, all three judges began laughing. They were amused, apparently, by the clumsiness of the questioning by the defense counsel, who was not experienced in cross-examination. Their laughter was widely interpreted, however, as insulting and humiliating to the witness. Such careless treatment of witnesses contributed to a refusal on the part of the two major survivors' organizations to cooperate with the ICTR.<sup>19</sup>

Finally, the Registry, which is responsible for the administration and logistics of the ICTR, consumes a disproportionate share of the tribunal's resources. In 1997, the UN Office for Internal Oversight Services criticized the Registry for corruption and inefficiency.<sup>20</sup> A year later, one of the judges publicly complained: "We have struggled against a corrupt and incompetent administration. The administration has provided far more obstacles than services to the bench."<sup>21</sup> Power struggles between the Registry and the other two branches of the ICTR, the Prosecution and the Chambers, have also undermined the effectiveness of the tribunal.<sup>22</sup>

Although the ICTR was created to satisfy the needs of the people of Rwanda for justice, the government of Rwanda has treated it with hostility. In the immediate aftermath of the genocide, the Rwandan government asked the UN to consider forming a tribunal but then, displeased with some aspects of the final Security Council resolution, cast the sole dissenting vote against the tribunal's formation.<sup>23</sup> In the nine years since, relations between the ICTR and the government of Rwanda have remained cool. The reasons for this division are in part ideological: Rwanda objects to the fact that the ICTR has primacy over Rwandan courts, is located in Tanzania rather than Rwanda, and excludes the death penalty as a

punishment. Further, the Rwandan government has objected to corruption, inefficiency, and slowness on the part of the ICTR. It has used criticism of the tribunal for political purposes, to gain international sympathy, and to encourage increased international assistance.

The Rwandan government has also hindered the tribunal's investigation of crimes allegedly committed by RPF soldiers. In defeating the genocidal government, and in violation of international humanitarian law, RPF soldiers reportedly killed thousands of civilians.<sup>24</sup> The ICTR mandate authorizes the tribunal to prosecute such violations, which are known as war crimes and crimes against humanity. When the chief prosecutor announced in 2002 that she had launched investigations of several high-ranking RPF officers for such crimes, the Rwandan government responded by imposing new travel restrictions on Rwandans, making it impossible for some witnesses to leave Rwanda and travel to Arusha to testify in court. As a result, the ICTR had to suspend three trials in June 2002 for lack of witnesses. The chief prosecutor immediately took the matter to the Security Council, which delayed taking any action until December, and then only reminded Rwanda of its obligations to cooperate with the tribunal under Chapter VII of the UN Charter. In August 2003, the Security Council voted to divide the post of chief prosecutor, creating separate prosecutors for the ICTR and ICTY. While this was promoted as a means to improve the operations of the ICTR, some observers worried that it was more a means of appeasing the Rwandan government by removing Chief Prosecutor Carla Del Ponte at a time when she seemed to be moving toward issuing indictments against RPF officials.<sup>25</sup> With the Security Council pressing the ICTR to bring its prosecutions to a swift conclusion, no RPF soldiers have yet been indicted or brought to trial, raising doubts as to whether anyone from the RPF will ever face prosecution in an international court for crimes committed during 1994. This prosecution of accused from only one party to the Rwandan war has naturally given the impression to some people that the tribunal is working in the interest of one side only. The International Crisis Group (ICG) asserted that "the victims of the crimes of the RPF denounce [the ICTR] as an instrument of the Kigali regime, seeing the ICTR as a symbol of victor's justice."<sup>26</sup>

Whatever its limitations, the ICTR has made contributions to international justice and to establishing accountability for the suffering of many Rwandan people.<sup>27</sup> By late 2003, the tribunal had passed judgment on seventeen defendants, one of whom was acquitted. Another fifty suspects were in detention. Many of those prosecuted by the ICTR represent the persons most responsible for the Rwandan genocide, including the former prime minister and other members of his government,

high-ranking military officers, political leaders, and administrative officials. In the first case decided, Jean-Paul Akayesu, the former burgomaster of Taba commune, was found guilty of genocide, the first time such a condemnation had ever been pronounced in an international court. The court also convicted him of rape, ruling that rape was used as a tool of the genocide.<sup>28</sup> The genocide conviction in late 2003 of three figures within the media in Rwanda was also a significant and historic application of international law.<sup>29</sup> ICTR prosecutions helped to isolate past authorities allegedly responsible for the genocide and thus prevented them from establishing a legitimate opposition in exile.<sup>30</sup>

The tribunal's contributions to reconciliation within Rwanda, however, are less clear. As noted in Chapter 10 of this volume, one of the reasons the ICTR has had such a limited impact in Rwanda is due to the fact that most Rwandans have little knowledge of the tribunal's work. In a survey we conducted in February 2002 in four Rwandan communities, 87.2 percent of respondents claimed that they were either not well informed or not at all informed about the tribunal.<sup>31</sup> The tribunal devotes only a very small portion of its budget to publicizing its work, leaving the task instead to organizations such as Internews, an American-based non-governmental organization that has covered the trials and set up programs to help bring this information to Rwanda. In 2002 the ICTR opened a center in the capital, Kigali, to disseminate information about the tribunal. Attractive to a tiny part of the urban elite, the center offers little to the majority of Rwandans, who are illiterate and live in rural areas.

The ICTR suffers from several inherent structural problems that also limit its ability to contribute to the process of reconciliation in Rwanda. In our qualitative research, we found that many Rwandans felt that the work of the ICTR was far removed from their daily lives. Respondents complained that the trials were held far away from Rwanda and were organized using western-style judicial practices that place a heavy emphasis on procedure and have little concern for community interests. As such, the trials have been better vehicles for establishing international law than for contributing to the process of rebuilding Rwandan society. Respondents complained that the tribunal offers survivors of the genocide no formal role other than as witnesses. The fact that many witnesses have felt poorly treated by the ICTR has contributed to negative attitudes toward the tribunal. Many respondents saw the adversarial legal approach applied in the ICTR as foreign to traditional Rwandan methods of conflict resolution, in which communities would come together and determine the nature of events and the punishments and reparations needed to re-establish social equilibrium. Although the majority of the population is not hostile to the ICTR (in contrast to the impression commonly given by

the government), people tend to see it as an activity of the international community conducted primarily for its own benefit, with little relevance to processes of reconciliation in Rwanda.

### Third-party national prosecutions

The creation of the ICTR and its predecessor has added weight to international human rights treaties and has inspired moves to expand the enforcement of human rights law in national jurisdictions. Since many countries are unwilling to try their former national leaders for alleged violations of human rights or international humanitarian law, often formally or informally granting amnesty in hopes that ignoring past violence will promote reconciliation, victims have turned increasingly to other countries to press their cases. The arrest of former Chilean dictator Augusto Pinochet in 1998 in the United Kingdom on a Spanish warrant for crimes he allegedly committed in Chile<sup>32</sup> inspired moves to arrest other national leaders accused of human rights abuses, including Henry Kissinger and Ariel Sharon.

In the aftermath of the Rwandan genocide, several countries have arrested and tried genocide suspects on their territory. To date, two such trials have taken place. In a 1999 trial before a military tribunal in Switzerland, a Rwandan burgomaster was found guilty of violating the Geneva conventions that require civilians to be treated humanely during wars. He was not charged with genocide because at that time Switzerland had no statute against genocide. He was sentenced to life in prison, a punishment that was reduced on appeal to twenty years, and is currently serving his sentence in Switzerland.

The second trial took place in Belgium, where the crime of genocide had been incorporated into the domestic penal code in an extremely broad fashion in an attempt to make the universal prescriptions against genocide and crimes against humanity real and effective.<sup>33</sup> The Belgian case was initiated by a complaint filed by victims of the genocide with the prosecutor. In the civil legal system, plaintiffs are permitted to play a role in the trial. They were represented by their own lawyers, who helped bring evidence against the accused. This importance of the complainant, true also for Rwandan courts, has no parallel in the ICTR, where victims are limited to serving only as witnesses.

The Belgian case came to trial in 2001 with four Rwandans – two nuns, a professor of physics at the National University of Rwanda, and a businessman – facing a jury comprised of ordinary Belgian citizens chosen at random. The jurors appeared to take seriously their responsibility to pass judgment upon Rwandans who were accused of committing genocide

against fellow Rwandans outside Belgian territory. They found the four accused guilty of genocide and sentenced them to jail terms varying from twelve to twenty years. The trial demonstrated the first realization of the concept of universal jurisdiction, which holds that courts everywhere have a duty to investigate and adjudicate grievous crimes, such as genocide and crimes against humanity, because they offend all humankind.

### Judicial processes in Rwanda

The overwhelming majority of those accused of participating in the genocide will be tried in Rwandan courts. When the current government took power in 1994, it considered judicial action against those allegedly responsible for the genocide to be an essential element of social reconstruction. Over the past ten years, the government has devoted considerable money and energy to criminal prosecution of alleged perpetrators, although over time the judicial strategies employed by the regime have shifted. While some cases continue to advance slowly through the classic judicial system, the government has sought to speed up criminal prosecution by transferring most cases to local, popularly elected, non-professional courts known as gacaca.

After taking power in July 1994, the RPF began to arrest large numbers of people suspected of participating in the genocide. As the RPF closed camps for the internally displaced in south-western Rwanda in 1995 and refugee camps in Congo (then Zaire) in 1996, thousands more were arrested, bringing the total number in detention to well over 100,000. The capacity of the legal system to deal with these detainees, however, was severely limited. The war and genocide had devastated the judiciary, with most judges, lawyers, and other judicial officers dead or in exile, and the physical infrastructure of the justice system in shambles. Both the Rwandan government and the international community invested heavily in the revitalization of the court system, training new judges and lawyers and rebuilding offices and courts, but trials were slow to begin.<sup>34</sup>

One issue that slowed the judicial process was the lack of a legal basis for trying individuals on crimes of genocide. Although Rwanda was a signatory of the Genocide Convention, the crime had never been incorporated into Rwandan law. As a result, the government spent several years writing a law to treat genocide suspects, which was eventually adopted on August 30, 1996, and commonly known as the Organic Law. The law created special courts, including a special chamber of the Supreme Court, to try suspects accused of participating in the genocide. The law divides crimes into four categories of offender. Category 1 includes: the leaders of the genocide; those who planned, organized, and supervised

the killing from the national to the local level; and those who killed with particular cruelty. (The law was later amended to make rape a Category 1 crime.) Category 2 includes people who killed or intended to kill under the orders or direction of others. Category 3 includes those who caused serious bodily injury, while Category 4 includes individuals who committed property crimes. According to the Organic Law, all but those found guilty of Category 1 crimes may receive a reduced sentence in exchange for confession and implication of others.<sup>35</sup>

Even after the law<sup>36</sup> was adopted, the Rwandan government delayed beginning trials, perhaps fearing the political consequences of releasing large numbers of those falsely accused,<sup>37</sup> which would anger their base of support among the Tutsi minority, or finding large numbers guilty, which could alienate the Hutu majority. The first genocide trials did not begin until December 1996, and they advanced very slowly. From 1997 through June 2002, 7,211 persons were tried, of whom 1,386 were acquitted. The rate of acquittal rose from 22 percent in 2001 to 27 percent in 2002, while the number condemned to the death penalty fell from 8.4 percent in 2001 to 3.8 percent in 2002. In 2001 and 2002, the pace of the trials slowed as the judicial system turned its attention to implementing the new judicial initiative, gacaca. By early 2003 some 100,000 people were languishing in prison, many of whom had never been formally charged.

The Rwandan government has criticized the international community for investing more money in the ICTR than in rebuilding the judicial system in Rwanda. In an interview with one of the authors, Rwanda's attorney general said that if money invested in the ICTR was "intended to promote rule of law in Rwanda – they're not getting their money's worth." He compared the amount that the United States Agency for International Development (USAID) was planning to invest in gacaca each year – less than \$1 million – with the \$5 million the United States had offered as a reward for information leading to the arrest of a genocide suspect indicted by the ICTR. "It seems like a public relations effort," he said. "They did nothing to stop the genocide, so now they want to appear to be standing up for Rwandans."<sup>38</sup> A number of legal experts and political analysts have echoed these sentiments, arguing that rebuilding Rwanda's domestic judicial system should have been given priority over supporting the ICTR.<sup>39</sup> Law professor Jose Alvarez, for example, argues that

While international tribunals need to be kept as an option of last resort, good faith domestic prosecutions that encourage civil dissensus may better preserve collective memory and promote the mollification of victims, the accountability of perpetrators, the national (and even international) rule of law, and national reconciliation.<sup>40</sup>

Time elapse

Many other observers, however, have raised concerns over whether national prosecutions have in fact been carried out in "good faith."<sup>41</sup> Trials in Rwanda have taken place in an atmosphere of authoritarian rule and continuing violence, and some critics have charged that prosecutions have been influenced by political considerations. Although after it assumed power the RPF created a "Government of National Unity," with positions in the various ministries distributed among the RPF and other political parties, and including both Hutu and Tutsi from throughout the country, many observers believe that real power remained in the hands of a limited group closely associated with RPF leader Paul Kagame (who later became president) and his inner circle of former Tutsi refugees from Uganda. The ICG has called the political situation in Rwanda "the façade of pluralism."<sup>42</sup> Since the RPF took power, civil society and the press have been tightly controlled, and politically motivated arrests and assassinations have remained common.<sup>43</sup> The Rwandan Patriotic Army (RPA), the armed wing of the RPF that became Rwanda's national army after its victory, used extensive force to establish its authority over society through massacres of civilians, usually portrayed as "revenge killings," and arbitrary executions.<sup>44</sup> In late 1996, the RPA invaded Congo in large part to close the refugee camps that the RPF perceived as a continuing threat to Rwandan national security. Thousands of Rwandan refugees died in the bombardment of camps or were shot by the RPA as they fled into the forests.<sup>45</sup> In 1997–1998, the RPA again used extensive violence within Rwanda to quell an insurgency in Rwanda's north-western border region with Congo.<sup>46</sup> The government began a program of forced resettlement, compelling people to leave their dispersed homes and to settle in *imidugudu*, government-sponsored villages where they would ostensibly have better access to services but in reality could be more carefully monitored and controlled.<sup>47</sup>

Against this backdrop, many observers, both inside and outside Rwanda, believe the trials of genocide suspects have been unduly influenced by political considerations.<sup>48</sup> Military and government officials have harassed and intimidated prosecutors and other judicial officials, and have pressured some of them into arresting and, in some cases, convicting individuals on the basis of flimsy evidence. Arbitrary arrests have particularly targeted Hutu, especially if they were perceived to be opponents of the new regime. In the initial trials of genocide suspects, the defendants had few rights, with no legal representation and limited access to their case files, even though they faced capital charges. Military and government officials regularly sought to influence the outcome of trials. On April 24, 1998, despite international condemnation, the government executed by firing squad twenty-two individuals convicted of genocide

crimes. The executions were carried out in several stadiums around the country before large crowds of spectators, emphasizing the political purposes of implementing the sentence in this way.<sup>49</sup>

The problems plaguing Rwanda's judicial system have arisen not simply from the physical limitations presented by the destruction of the judiciary and the finite resources available for rebuilding but also from the politicization of the judiciary. As discussed further in Chapter 8 in this volume, prosecutions have been undertaken as part of the RPF's political and ideological agenda, which holds that Rwandans were basically one people before the advent of colonialism, that hostility between the Hutu and Tutsi has resulted from a colonial experience gone wrong, and that appropriate political action can erase the animosity between the groups. This political action has included memorialization and commemoration of the genocide, general public information in numerous required public meetings, political re-education in "solidarity camps," and a refashioning of national identity symbolized in a new national anthem, flag, and seal, and the reorganization of the political structure. Within this ideology, trials serve to emphasize the destructive nature of ethnic violence in Rwanda and the role of the RPF in bringing order and rule of law to the country.

While the Rwandan government's effort to reshape Rwandan political culture to eliminate divisiveness has been widely lauded, other political motivations have influenced the government's political program and undermined the government's ability to unify the country. As Longman and Rutagengwa argue in Chapter 8, the RPF leaders have a strong sense of their own moral rectitude and great certainty of their right to rule, and they have been willing to use brutal force to maintain their power. The regime has frequently invoked the genocide to deflect responsibility for its own human rights abuses, claiming that protecting against future genocide requires extraordinary means, a position which leaders of many other governments, shamed by their own failures during the genocide, have been willing to accept. The regime has shown no interest in a truth and reconciliation commission that might expose misconduct on all sides but, instead, has pursued a one-sided justice process.<sup>50</sup> Trials of genocide suspects – and a pointed avoidance of substantial legal cases against RPA soldiers or others who have engaged in abuses – have sought to shape public perception to recognize the moral failings of many Hutu leaders while raising the moral standing of the current national leadership. The courts have also been used extensively to intimidate potential critics and opponents of the regime. Initially, potential opponents were arrested under genocide charges, but more recently they have been charged with fostering ethnic hatreds and divisions, as in the notable case of former

president Pasteur Bizimungu, who was arrested in 2001 after trying to form an opposition political party.<sup>51</sup>

Given this politicization of the judiciary, it is not at all clear that investing more in the Rwandan justice system would have promoted the rule of law and encouraged reconciliation in the country. Over time, however, the political strategies of the RPF have shifted, and the performance of the judiciary, at least in treating genocide cases, has improved. The regime has sought to broaden its popular appeal by substantially reducing its use of violence (at least within Rwanda) and holding elections as part of a major decentralization program. It has also recognized that keeping a large number of genocide suspects in prison has become a political liability. The major impetus for developing gacaca as a new judicial strategy came out of a desire to speed up trials of genocide suspects, but it also was driven by discontent with the social impact of the classic judicial approach, with its adversarial nature. As discussed in Chapter 3 in this volume, the gacaca initiative grew out of a series of broad-based meetings organized by President Bizimungu at his residence, Village Urugwiro, in 1998 and 1999. The Village Urugwiro meetings, reminiscent of national conferences held a decade earlier in a number of African countries, brought together several hundred government, business, academic, civil society, and religious leaders to strategize for the country's future. Out of these discussions came a proposal to adapt Rwanda's traditional dispute resolution mechanism, gacaca, to help expedite the prosecution of genocide suspects, to ease their reintegration into the community, and to encourage communities to confront their own involvement in the genocide.<sup>52</sup> While the potential of gacaca to promote reconciliation has been widely lauded,<sup>53</sup> the fact that gacaca remains highly directed by the central government, despite its decentralized structure, and that RPF crimes are strictly excluded from consideration is likely to limit gacaca's impact.

### Conclusions

Whether the pursuit of justice is really promoting social reconstruction and reconciliation in Rwanda remains to be determined. Both the international community and the Rwandan government have placed great faith in prosecutions as a means of fighting impunity and promoting the rule of law, but a variety of problems has limited the potential positive impact of the trials. The ICTR has been beset by severe problems that have slowed its progress. Even its accomplishments, however, are having little impact within Rwanda because its work is almost unknown in the country.<sup>54</sup> Domestic trials have been politicized and many Rwandans

view them as one-sided, which compromises their ability to promote the rule of law.<sup>55</sup> The one-sided nature of gacaca is likely also to compromise its contribution to reconciliation.

Yet holding accountable those who carried out atrocities remains an important step in the social reconstruction of Rwanda. The failure to hold any individuals accountable for violence perpetrated in the past – in massacres in the early 1960s and 1990–1993 – clearly created an environment where genocide was possible. Yet trials are not a panacea. They must be integrated into a broader program of social reconstruction. Trials will be most effective if they are carried out by a regime that is regarded as legitimate – a representative regime chosen through free democratic elections. The political reforms implemented in recent years, however, have sought to constrain democratic freedoms, because the regime fears that democracy can too easily be distorted through ethnic manipulation. Recent elections that the regime promoted as a “transition to democracy” involved considerable intimidation and manipulation, severely compromising the new government's claim to legitimacy.<sup>56</sup> In this context, it is not clear whether prosecutions, particularly one-sided prosecutions, will serve more to unify or divide the Rwandan population.

### NOTES

1. Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999). See also Gerard Prunier, *The Rwanda Crisis* (New York: Columbia University Press, 1995); Timothy Longman, “Rwanda: Chaos from Above.” In Leonardo Villalon and Phil Huxtable, eds. *Critical Juncture: The African State in Transition* (Boulder: Lynne Rienner, 1997); and Timothy Longman, “Democracy and Disorder: Violence and Political Reform in Rwanda.” In David Gardinier and John Clark, eds. *Political Reform in Francophone Africa* (Boulder: Westview Press, 1996).
2. The Convention on the Prevention and Punishment of the Crime of Genocide (United Nations General Assembly Resolution 260 A (III), approved December 9, 1948, entering into force January 12, 1951) defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.”
3. The genocide received important support particularly from Radio Télévision des Mille Collines (RTLM), a quasi-private radio station set up by extremist Hutu with close ties to the highest levels of state power. On the role of the media in the genocide, see this publication from London-based Article 19, *Broadcasting Genocide: Censorship, Propaganda, and State-Sponsored Violence in Rwanda 1990–1994*, London: Article 19, 1996; and Jean-Pierre Chrétien, ed. *Rwanda: Les Médias du Génocide* (Paris: Karthala, 1995).
4. This term from Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997).

5. See, for example, Phillip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with our Families: Stories from Rwanda* (New York: Farrar, Straus, and Giroux, 1998), and Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2001).
6. The actual number of moderate Hutu killed for resisting the genocide is difficult to determine. Clearly, many Hutu were targeted in the initial wave of violence in Kigali, but as the violence spread into the countryside, the focus on Tutsi became more pronounced. Nevertheless, in many communities, a few moderate Hutu were killed in the initial violence as a lesson to others, as demonstrated by the example of Nyakizu in Des Forges, *Leave None to Tell the Story*, 352–431.
7. On the role of the UN, see Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca: Cornell University Press, 2002). Barnett was on leave from his academic position at the time of the genocide working for the UN. See also United Nations, *The United Nations and Rwanda, 1993–1996* (New York: United Nations Department of Public Information, 1996).
8. For a general discussion of the failure of the international community, see Des Forges, *Leave None to Tell the Story*, 595–691. Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 328–389 provides an excellent account of the United States' failure in the face of the Rwandan genocide.
9. On the international humanitarian intervention following the genocide, see Des Forges, *Leave None to Tell the Story*, 595–691, and Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington: Brookings Institution, 2001).
10. Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment," *The American Journal of International Law* 90 (1996): 501–510; Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda: A Lawyers' Committee Report on the ICTR and National Trials" (Washington: Lawyers' Committee for Human Rights, July 1997), 3–4.
11. United Nations Security Council, "Resolution 955," S/RES/955 (1994).
12. *Ibid.*
13. The preamble to the resolution states: "Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for genocide and other above-mentioned violations of international law would enable this aim [bringing effective justice] to be achieved and would contribute to the process of reconciliation and to the restoration and maintenance of peace," UN Security Council, "Resolution 955."
14. On the creation and organization of the ICTR, see Akhavan, "The International Criminal Tribunal for Rwanda," and Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda."
15. Frequent personal observation at the ICTR, 1995–2003, by Alison Des Forges; on the problems of staff competence, see Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda," and International Crisis Group (ICG), "International Criminal Tribunal for Rwanda:

- Justice Delayed" (Nairobi, Arusha, and Brussels: International Crisis Group, June 7, 2001), 11–12. Criticism of the prosecution has come even from the bench. Shortly after the completion of the first case in 1998, Judge Lennart Aspegren criticized the prosecution staff, saying: "In general, they all have very little or no experience with criminal trials." Joakim Goksr, "Fresh Trouble as Judge Curses Rwanda Tribunal," *The Monitor*, May 2, 1998.
16. Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda," section VI, A and B.
17. The lack of a prosecutorial strategy is well developed by the ICG, "Justice Delayed," 12–13; ICG, "Tribunal Pénal International pour le Rwanda: le Compte à Rebours" (Nairobi and Brussels: International Crisis Group, August 1, 2002), 7–8.
18. See ICG, "Justice Delayed," and ICG, "Compte à Rebours."
19. Julia Crawford, "Rwanda Tribunal Witnesses Unhappy with Their Treatment," *Hirondelle News Agency*, May 29, 2001.
20. Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda," section IV, C and D.
21. Goksr, "Fresh Trouble."
22. ICG, "Justice Delayed," 12.
23. Gerald Gahima, "Re-establishing the Rule of Law and Encouraging Good Governance." Paper presented at the 55th Annual DPI/NGO Conference, New York, September 9, 2002; Government of Rwanda, "The Position of the Government of the Republic of Rwanda on the International Criminal Tribunal for Rwanda (ICTR)," *Website of the Rwandan Embassy to the United States*, available on World Wide Web at <http://www.rwandemb.org/prosecution/position.htm>; Victor Peskin, "International Justice and Domestic Rebuilding: An Analysis of the Role of the International Criminal Tribunal for Rwanda," *The Journal of Humanitarian Assistance*, May 20, 2000, available on World Wide Web at <http://www.jha.ac/greatlakes/b003.htm>.
24. Cf. Prunier, *The Rwanda Crisis*, 356–389; Des Forges, *Leave None to Tell the Story*, 692–735; Amnesty International, "Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army, April–August 1994" (London: Amnesty International, October 20, 1994).
25. Fears that the ICTR was being manipulated for political purposes led four leading human rights groups to issue a joint statement warning that "in attempting to improve the efficiency of the Prosecutor's office, the Security Council must ensure that changes do not undermine the independence and impartiality of the ICTR, including in prosecuting charges of war crimes and crimes against humanity against members of the Rwandan Patriotic Army (RPA)." Human Rights Watch, "Leading Rights Groups Urge Security Council to Ensure Management Reforms do not Undermine Rwanda Tribunal" (New York: Human Rights Watch, August 7, 2003).
26. ICG, "Justice Delayed," iii; see also Human Rights Watch, "Rwanda: Deliver Justice for Victims of Both Sides" (New York: Human Rights Watch, August 12, 2002).

27. For an overview of the tribunal's early work, see Brenda Sue Thornton, "The International Criminal Tribunal for Rwanda: A Report from the Field," *Journal of International Affairs* 52: 2 (1999): 639.
28. ICG, "Justice Delayed," 3-5.
29. "ICTR Prosecutor Says This Week's Judgements Are Historic," *Hirondelle News Agency*, December 3, 2003.
30. Payam Akhavan, "The Contribution of the International Criminal Tribunal for Rwanda," *Duke Journal of Comparative and International Law* 7: 2 (spring 1997): 325-348.
31. For more discussion of public perceptions of the ICTR, see Timothy Longman, Phuong Pham, and Harvey Weinstein, "Rwandan Attitudes Toward the International Criminal Tribunal for Rwanda," forthcoming.
32. Ariel Dorfman, *Exorcising Terror: The Incredible Unending Trial of General Augusto Pinochet* (New York: Seven Stories Press, 2002); Diana Woodhouse, ed. *The Pinochet Case: A Legal and Constitutional Analysis* (Oxford: Hart, 2000).
33. Under heavy US pressure, Belgium repealed this law in July 2003, but it is still possible to bring charges of genocide against accused persons under certain circumstances. Jean-Pierre Stroobants, "La Belgique Abroge la Loi de Compétence Universelle," *Le Monde*, July 15, 2003; Benedicte Vaes, "Adieu à la Loi de Compétence Universelle," *Le Soir*, July 14, 2003.
34. Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda."
35. Jean-Paul Biramvu, "Justice et Lutte contre l'Impunité au Rwanda: La Poursuite des Crimes de Génocide et des Crimes contre l'Humanité," in Charles de Lespinay and Emile Mworoha, eds. *Construire l'Etat de Droit* (Paris: Agence Intergouvernementale de la Francophonie, 1997); Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda."
36. In an interview in Kigali, August 27, 2002, Attorney General Gerald Gahima estimated the overall number of acquittals at 25%. Human Rights Watch, *World Report 2002* (New York: Human Rights Watch, 2003).
37. Particularly in the first year or so after the genocide, many people were arrested under apparently false charges. Since the large numbers of accused and the lack of judicial personnel made it impossible to investigate prior to arrest, merely charging someone with genocide crimes was sufficient to have them imprisoned indefinitely. Hence, false accusations were used to settle scores, exact vengeance, or for political purposes.
38. Interview by author with Gerald Gahima.
39. Philip Gourevitch has been particularly supportive of the RPF-dominated government and dismissive of the ICTR. See Philip Gourevitch, *We Wish to Inform You*, 251-255. See also Jose E. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda," *The Yale Journal of International Law* 24 (summer 1999): 365-483, and Madeline H. Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda," *Duke Journal of Comparative and International Law* 7: 2 (spring 1997): 349-374.
40. Alvarez, "Crimes of States/Crimes of Hate," 482.
41. Cf. ICG, "Justice Delayed"; Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda."

42. This claim was asserted by a number of the people we interviewed. It is also strongly supported by the ICG, "Rwanda at the End of Transition: A Necessary Political Liberalisation" (Brussels: ICG, November 2002), 10-11. A detailed list of who is in power is presented in Appendix E of the ICG report. A similar analysis about the actual concentration of power is presented in the annual review of Rwandan politics in the publication by the Center for Central African Studies at the University of Antwerp, Stefaan Marysse and Filip Reyntjens, eds. *L'Afrique des Grands Lacs Annuaire* (Paris: l'Harmattan, 1997-2002).
43. ICG, "End of Transition," 11-16.
44. Des Forges, *Leave None to Tell the Story*, 692-735; Alison Des Forges and Eric Gillet, "Rwanda: The Crisis Continues" (New York: Human Rights Watch and Paris: FIDH, April 1995).
45. Timothy Longman and Alison Des Forges, "Attacked by All Sides: Civilians and the War in Eastern Zaire" (New York: Human Rights Watch and Paris: FIDH, March 1997); Filip Reyntjens, *La Guerre des Grands Lacs: Alliances Mouvantes et Conflits Extraterritoriaux en Afrique Centrale* (Paris: l'Harmattan, 1999).
46. Filip Reyntjens, "Talking or Fighting? Political Evolution in Rwanda and Burundi, 1998-1999" (Uppsala: Nordiska Afrikainstitutet, 1999); Amnesty International, *Rwanda: The Hidden Violence: Disappearances and killings continue* (London: Amnesty International, 1998).
47. Human Rights Watch, "Uprooting the Rural Poor in Rwanda" (New York: Human Rights Watch, May 2001).
48. Cf. Ligue des Droits de la Personne dans la Région des Grands Lacs (LDGL), *Entre la Violence Impunie et la Misère: Rapport sur la Situation des Droits de l'Homme: Burundi, RDC et Rwanda* (Kigali: LDGL, 2002), 144-154; Centre de Documentation et d'Information sur les Procès de Génocide (CDIPG), *Quatre Ans de Procès de Génocide: Quelle Base pour les "Juridictions Gacaca?"* (Kigali: LIPODHOR), 36-38; Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda."
49. CDIPG, *Quatre Ans de Procès de Génocide*, 19-54; Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda."
50. On the need for a truth and reconciliation commission, see Jeremy Sarkin, "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda," *Human Rights Quarterly* 21: 3 (1999): 767-823; Mark A. Drumbl, "Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda," *New York University Law Review* 75: 5 (November 2000): 1221-1326.
51. ICG, "End of Transition," 11-12.
52. Alice Karekezi, "Juridictions Gacaca: Lutte contre l'Impunité et Promotion de la Réconciliation Nationale," *Cahiers du Centre de Gestion des Conflits* 3 (May 2001): 9-96.
53. See, for example, Helena Cobban, "The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law," *Boston Review* 7: 2 (April/May 2001), available on World Wide Web at <http://www.bostonreview.net/BR27.2/cobban.html>; Drumbl, "Punishment, Postgenocide."

54. See survey results in Chapter 10.
55. Cf. LDGL, *Entre la Violence Impunie et la Misère: Rapport sur la situation des droits de l'homme: Burundi, RDC et Rwanda* (LDGL, 2002), 153–154; Lawyers' Committee for Human Rights, "Prosecuting Genocide in Rwanda." In our survey, Hutu respondents overwhelmingly supported the idea of including alleged crimes by the RPF in both the ICTR and gacaca trials.
56. Amnesty International, "Rwanda: Run up to Elections Marred by Intimidation and Harassment" (London: Amnesty International, August 22, 2003); ICG, "End of Transition."

### 3 Localizing justice: gacaca courts in post-genocide Rwanda

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*Urusaro Alice Karekezi, Alphonse Nshimiyimana, and Beth Mutamba*

One day in June 2002, Donatilla Iyankulije, a 27-year-old farmer with no more than a ninth grade education, found herself in the extraordinary position of presiding over a ceremony attended not only by the public but by numerous provincial and national officials, and members of the national and international press. Iyankulije, who lived in the Gishamvu Sector<sup>1</sup> of southern Rwanda, assumed this important public role because she had been chosen as president of a local gacaca court, a new grassroots legal mechanism adopted by the Rwandan government to respond to the legacies of the country's 1994 genocide. The government had selected Gishamvu Sector as one of twelve sectors in the country in which to test the gacaca system, and as president of the gacaca court in one of Gishamvu's three cells, it fell to Iyankulije to preside over one of the inaugural sessions of the gacaca courts held across the country that day.

The Rwandan government's decision to implement gacaca grew out of extensive national-level discussions over the country's future in the late 1990s, in which it was determined that citizen participation in the search for justice would be critical, not only for the manifestation of the truth about what happened in the genocide, but also to the creation of a conducive environment for the reconciliation of Rwandans. Modeled after a traditional Rwandan dispute resolution mechanism but adapted to modern legal sensibilities, gacaca was envisioned as a vast program that would involve a large part of the population either as judges or witnesses.<sup>2</sup> In popular elections held throughout Rwanda in October 2001, Iyankulije was among the 250,000 Rwandans chosen by their fellow citizens to serve as judges known as Inyangamugayo. She then was selected by her fellow Inyangamugayo judges as president of the gacaca court in her cell. After pressure from international scholars, activists, and legal practitioners, the government of Rwanda revised its initial plan and decided to implement gacaca gradually, beginning in one sector in each of Rwanda's twelve provinces, then expanding in November 2002 to one sector in each of the country's districts. Since Gishamvu was the sector chosen to test gacaca in Butare Province, Iyankulije assumed the burden of overseeing