

Genocide Trials and Gacaca Courts

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Abstract

After many decades of impunity, Rwanda has embarked upon a course of transitional justice committed to prosecuting all who are suspected of involvement in the 1994 genocide. The first phase, which began in 1997 and is still continuing, targets the most serious offenders. Some 10,000 have been tried under the system. Confronted with its limitations, Rwanda has devised a second approach, known as gacaca, which focuses on a lower and less heinous level of participation in genocide, and which is inspired by traditional models of local justice. Acting upon legislation adopted in 2001, a pilot phase convinced Rwandan justice officials of the viability of the process throughout the country. The institutions have been fine-tuned, and become fully operational in the course of 2005. Because the pilot phase encouraged denunciation, instead of offering 'closure', the process has actually revealed a much broader popular participation in the atrocities of 1994. Rwandan authorities now say the gacaca process will prosecute more than 1,000,000 suspects.

1. Introduction

'The difficult is what takes a little time; the impossible is what takes a little longer', wrote Fridjof Nansen, the first High Commissioner for Refugees.¹ Accountability for the Rwandan genocide has always seemed to be a case of attempting the impossible. It might well have been otherwise. In 1994, when hundreds of thousands were massacred in the space of a few months in what

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1 Cited in *The Listener*, 14 December 1939, p. 1153. Nansen may have borrowed the words from a personality of the French Revolution, Charles Alexandre de Calonne, who said: 'Madame, si c'est possible, c'est fait; impossible? Cela se fera.' See J. Michelet, *Histoire de la Révolution française* (in seven volumes, 1847–1853; 2nd edn, edited by G. Walter, Gallimard: collection Bibliothèque de la Pléiade, 1952) Vol. I, Pt 2, s. 8. Also known as a slogan of the United States Armed Forces: 'The difficult we do immediately; the impossible takes a little longer.'

was arguably the only ‘real’ genocide since the Holocaust,² what today is a near-universal determination to combat impunity was then a concept still very much in its infancy. The first contemporary experiment in international criminal justice—the International Criminal Tribunal for the Former Yugoslavia (ICTY)—had just been launched, but it still lacked a Prosecutor and was not fully operational. In mid-1994, it seemed unthinkable that a parallel International Criminal Tribunal for Rwanda (ICTR) would not be created, given the existence of the ICTY. To do otherwise would have indelibly stained international justice as good enough for conflicts in the North, but relatively indifferent to those in the South. Yet, in all likelihood, had there been no ICTY at the time, it seems improbable there would have been calls for an international mechanism of accountability to deal with the Rwandan genocide.

Rwandans have consistently rejected any compromise with full accountability, insisting upon criminal prosecution for all alleged perpetrators. Throughout the 1990s, more than 100,000 waited in detention for trials to begin—a source of great social tension and an enormous burden on one of the poorest countries in the world.³ Some 10 years after the genocide, tens of thousands still await trial. Despite the release of 25,000 prisoners in 2003, as of January 2005, the International Committee of the Red Cross estimated that 89,000 were still being detained. Many of these prisoners must have been in custody for the best part of a decade. Yet, it is suggested that even greater numbers remain at large, and that they too will have to be held accountable. The stubbornness of the Rwandans, coupled with the well deserved shame of the international community, may explain why, more than a decade later, we are still struggling to find solutions.⁴ The impossible, truly, is taking a little longer.

- 2 But, as the International Commission of Inquiry on Darfur helpfully points out: ‘The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.’ See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005*, at 4. The authorities remain unsettled as to where the line should be drawn between genocide and the cognate category of crimes against humanity. See, e.g. ICTY Judgment, *Krstić* (IT-98–33-A), Appeals Chamber, 19 April 2004, §§ 41–58; ICTY Judgment, *Blagojevic and Jokić* (IT-02–60-T), Trial Chamber I, 17 January 2005, §§ 633–686.
- 3 According to a UN report in 1999, ‘[w]hile regular food is not provided in the *cachots*, the almost 86,000 detainees in the prisons under the Ministry of Justice alone cost Rwanda 2 per cent of its national budget’. *Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to resolution 1998/69*. UN doc. E/CN.4/1999/33, § 30.
- 4 On the ‘impossibility’ theme, see also W.A. Schabas, ‘Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems’, 8 *Criminal Law Forum* (1997) 523; W.A. Schabas, ‘The Rwanda Case: Sometimes it’s Impossible’, in M.C. Bassiouni (ed.), *Post-Conflict Justice* (Ardsey, New York: Transnational, 2002) 499.

Trials within the Rwandan domestic justice system began in the final days of 1996, a few weeks before the ICTR launched its first trial.⁵ What most justice systems would consider a respectable number of trials were held, and the cases processed by the national judicial system now run well into the thousands. In 1999, Rwanda proposed a new type of tribunal known as *gacaca*, based on indigenous models of local justice, and it spent the next five years in an experimental period, becoming operational during 2005. *Gacaca* was devised as a middle path somewhere between the rigours of full-blown criminal prosecution and the moderate truth commission approach employed in many countries. The development of *gacaca* tribunals was greeted by many observers as a move away from the retributive justice trumpeted by the Rwandan authorities since 1994. In this logic, Rwanda seemed to be increasingly inspired by examples such as the South African Truth and Reconciliation Commission.⁶ Others viewed it as drawing inspiration from 'alternative dispute resolution' mechanisms that have been fashionable among law reformers for many years.⁷ Many warned that informal, indigenous tribunals might not fully respect international due process standards.⁸

Yet, the terrible and totally unexpected result of the *gacaca* pilot process was not to provide the fabled 'closure' but rather to reveal that the numbers of those responsible for genocide may have exceeded 100,000 by a factor of 10. Rather than resolve the outstanding cases, and end the blight of mass detentions under appalling conditions, the initial *gacaca* hearings appear to have opened a Pandora's box. The numbers of suspects continue to grow because the *gacaca* scheme encourages perpetrators to confess and to name their accomplices. On 14 January 2005, Domitilla Mukantaganzwa, executive secretary of the National Service of *Gacaca* Jurisdictions,

5 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber I, 2 September 1998, § 17.

6 E. Daly, 'Transformative Justice: Charting a Path to Reconciliation', 12 *International Legal Perspectives* (2001–2002) 73; E. Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda', 34 *New York University Journal of International Law & Policy* (2002), at 355. Others remain doubtful about how far legal approaches can contribute to reconciliation. M.A. Drumbl, 'Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda', 75 *New York University Law Review* (2000) 1121.

7 M. Day, 'Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, a Case Study of Rwanda', 16 *Georgetown Immigration Law Journal* (2001) 235.

8 P. Wald, 'The Omarska Trial: A War Crimes Tribunal Close-Up', 57 *Southern Methodist University Law Review* (2004) 271. As Carsten Stahn noted, '[s]uch a far-reaching transformation of a country's legal system, allowing legally untrained members of a local community to impose formal criminal sanctions on persons suspected of having committed medium-level or even severe crimes, raises serious concerns relating to the right to be tried by a competent, independent, and impartial tribunal by means of procedures established by law'. C. Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor', 95 *American Journal International Law* (2001) 952, at 964.

announced that 1,000,000 Rwandans were to be tried under the revised *gacaca* system.⁹

The estimates are derived by extrapolating from the list of suspects developed by the 750 *gacaca* tribunals in the pilot phase. But confirmation of the enormity of the suspect pool comes from the ICTR, whose investigators have prepared a database listing 550,000 suspects. It is based on 87,000 genocide files assembled by Prosecutors over the last six to seven years, as part of a project carried out by the German technical assistance department (GTZ). The genocide-related database is to be provided to the *gacaca* tribunals by the ICTR.¹⁰

This is a staggering percentage of the current population of Rwanda, which totals about 7,000,000. But many of those 7,000,000 were not living in Rwanda in 1994, and perhaps half of them were either not yet born or too young to engage criminal responsibility, even if they did participate in atrocities. Charging 1,000,000 Rwandans with genocide amounts to an indictment of perhaps one-third of the country's adult population.

Since the early 1990s, there have been experiments with transitional justice in many countries.¹¹ Rwanda provides its own uniqueness, in the steadfast determination to hold accountable *everyone* suspected of having contributed to the 1994 genocide. In this sense, Rwanda's commitment seems consistent with an understanding that there is a legal duty to prosecute. It also defies those who argue that some middle ground must be found in the interests of reconciliation and 'closure'. For these reasons alone, at a time when transitional justice and rule of law issues are at the centre of the international agenda,¹² the Rwandan case deserves close scrutiny.

9 'Drawing from the experience and figures accruing from the pilot trials, we estimate a figure slightly above one million people that are supposed to be tried under the *gacaca* courts,' Ms Mukantaganzwa told Reuters in Kigali (A. Meldrum, '1 million Rwandans to face killing charges in village courts', *The Guardian*, 15 January 2005).

10 'UN tribunal's database of genocide suspects ready for use', Xinhua News Agency, 20 December 2004.

11 Although international law has struggled to provide a normative framework for the process, there is still enormous variation in terms of practice. Some countries have done simply nothing. Some—Cambodia is an example—have prevaricated for years, publicly pledging commitment to a process yet constantly devising new obstacles, leaving few observers very confident about its sincerity. South Africa and Sierra Leone opted for truth commissions and amnesty. Sierra Leone subsequently reversed itself, agreeing to prosecution by an international tribunal of 'those who bear the greatest responsibility', a concept whose application seems to have more to do with the generosity of international donors in an institution dependent on voluntary contributions than any autonomous legal meaning. The 'international community' ostensibly supported Sierra Leone's efforts at criminal accountability, but actually contributed only enough money for a handful of trials.

12 *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*. UN doc. S/2004/616.

2. Initial Debates about Accountability for Genocide

In September 1994, Rwanda's Minister of Justice, Alphonse-Marie Nkubito, working from a devastated office without windows and with walls decorated only by gunfire, appealed to the international community for assistance in rebuilding the country's devastated justice system. The Rwandan judicial system had never been more than a corrupt caricature of justice, and there was little to 'rebuild'.¹³ Prior to the 1994 genocide, it comprised about 700 judges and magistrates, of whom fewer than 50 had any formal legal training. Of these, the best elements had perished during the genocide, often at the hands of their own erstwhile colleagues. There were only about 20 lawyers with genuine legal education in the country when I visited Rwanda in November 1994 as part of the international response to Minister Nkubito's appeal.¹⁴ Documents furnished at the time by the Rwandan Ministry of Justice noted the utter devastation of both material and human resources perpetrated by the defeated Rwandan government forces during their retreat to the eastern Congo, in June and July 1994.¹⁵ A succession of international missions proposed a series of major aid programmes¹⁶ and, at one point, the Office of the High Commissioner for Human Rights, which had barely begun operations, attempted to assemble *curricula vitae* of foreign lawyers willing to work within Rwanda as judges, lawyers or other judicial officers. But when Minister Nkubito was replaced by his chief of staff, Marthe Mukamureni, in September 1995, the Rwandan government made it clear that large numbers of foreign jurists were not what was required, and that justice in Rwanda would be done by Rwandans, with assistance from abroad playing only a secondary role.

Clearly, faced with the massive arrests that followed the 1994 genocide and, above all, considering the devastation of an already feeble administrative and judicial infrastructure, Rwanda was simply incapable of respecting the provisions of its own criminal law, not to mention its obligations under

13 *Report of the International Commission of Inquiry into Human Rights Violations in Rwanda*, Paris, Brussels, Montréal, 1993; O.-L. Bouvier, 'Magistrature: Sous le diktat de l'exécutif', in 162 *Dialogue* (January 1993), at 4–24.

14 Several international studies were produced at the time: *Pour un système de justice au Rwanda, Rapport d'une mission exploratoire effectuée par l'Hon. Jacques Lachapelle, juge à la Cour du Québec (Chambre civile), et le Pr William A. Schabas, directeur du Département des sciences juridiques*, Université du Québec à Montréal, du 27 novembre au 6 décembre 1994, International Centre for Human Rights and Democratic Development, Montreal; *Rapport de la mission Union Interfrancophone des droits de l'homme/Synergie à Kigali du 15 au 22 octobre 1994; Mission francophone d'évaluation des besoins prioritaires dans le domaine de l'état de droit et des droits de l'homme au Rwanda du 17 au 21 novembre 1994*, Agence de coopération culturelle et technique, Paris; *Report, Joint Mission to Evaluate Needs of Justice System*, UNDP, UNCHR, UNHCHR, USAID, Swiss Cooperation, ACCT, ICJ, IPA, Lisbon Forum, ICHRDD, 2 December 1994.

15 *Projet d'appui à la reconstruction du système judiciaire rwandais du Ministère de la justice*. UN doc. TCB/BT2/8/Add.9, 7 November 1994.

16 *Aperçu de la situation*, in *La lettre hebdomadaire de la Fédération internationale des droits de l'homme*, hors série no 206, June 1995, at 25–26.

international human rights law and international criminal law.¹⁷ In November and December 1994, the prosecutor for the Kigali region, François-Xavier Nsanzuwera, informed me that barely 1,000 cases had been prepared, although many multiples of that number were being held in detention, and the prison population was growing with each day.¹⁸ Thus, the great majority of those in detention were being held illegally. Obviously, nobody had been brought before a judge in order to establish the legality of his or her detention, as required by the letter of the *Code de procédure pénale*, not to mention Rwanda's international obligations.

From 31 October to 4 November 1995, the government of Rwanda convened an international conference to explore the various dimensions of accountability for genocide. At the international conference, South Africans argued strongly that a truth and reconciliation commission, coupled with some form of amnesty mechanism, was the appropriate 'African' approach to accountability for the atrocities that had taken place in Rwanda. Rwanda's president at the time, Pasteur Bizimungu, called for innovative forms of justice but at the same time ruled out any possibility of amnesty. The 1995 Kigali Conference recommended that new mechanisms be created to deal with the genocide cases, including specialized chambers of the existing courts, a classification scheme to separate the main organizers of the genocide from criminals with lesser degrees of responsibility, and a unique approach aimed at encouraging offenders to confess in exchange for substantially reduced sentences.¹⁹

The Rwandan Ministry of Justice proceeded to prepare legislation giving effect to the conference recommendations, and a draft law was approved by the Cabinet in April 1996. The legislation then advanced to the National Assembly for adoption. It was reworked in a parliamentary committee in

17 According to the Rwandan *Code de procédure pénale*, which governed the procedural regime at the time of the first arrests, in the case of an offence involving a possible sentence of six months or more, the accused could be detained in custody pending trial if *des indices sérieux de culpabilité* (serious grounds suggesting guilt) could be shown. See *Code de procédure pénale*, in F. Reyntjens and J. Gorus (eds), *Codes et lois du Rwanda* (2nd edn, Butare, Bruxelles: Université Nationale du Rwanda, 1999), Art. 37, 561–578; W.A. Schabas and M. Imbeau, *Introduction to Rwandan Law* (Montreal: Éditions Yvon Blais, 1997), 60–61. The accused person was required to appear before a judge within five days of issuance of a provisional arrest warrant by an official from the Prosecutor's Office, and the five-day time limit could only be exceeded where this was strictly necessary. Preventive detention could then be authorized by the presiding judge of the court of first instance (Art. 38). Any order of detention remained in force for 30 days, and could be extended on a monthly basis as long as the public interest and the exigencies of the proceedings so required (Art. 41).

18 *Pour un système de justice au Rwanda*, *supra* note 14.

19 Rwanda, Office of the President, Recommendations of the Conference Held in Kigali from 1 to 5 November 1995, on 'Genocide, Impunity, and Accountability': Dialogue for a National and International Response, Kigali, 1995; C. Braeckman, *Terreur africaine* (Paris: Fayard, 1996), 323–337. The author participated in the Kigali Conference and was responsible for delivering its conclusions and final report on 5 November 1995.

July 1996, and was finally adopted on 30 August 1996.²⁰ In early September, the Constitutional Court approved the new statute. The legislation adopted in 1996 defined four categories of offenders.²¹ The first category consisted of the organizers and planners of the genocide, persons in positions of authority within the military or civil infrastructure who committed or encouraged genocide, and persons who committed 'odious and systematic' murders. This category accounted for a relatively small percentage of those who have been detained, and overlapped somewhat with those over whom the ICTR could attempt to establish jurisdiction. The second category covered those not in the first category who had committed murder or serious crimes against the person that led to death. The third category comprised other serious crimes against the person, and the fourth category was made up of crimes against property.

The heart of the legislation was what has been called the 'Confession and Guilty Plea Procedure'. In return for a full confession, offenders in the second, third and fourth categories were to benefit from a very substantial reduction in penalties. Confessions were required to include a complete and detailed description of the offences that the accused admitted to, including information about accomplices and any other relevant fact. The prosecutor had three months in which to confirm the truth of the confession. Even if the prosecutor challenged the truth of the confession, the accused was entitled to submit the matter to the court, which could overrule the decision of the prosecutor not to accept the confession. If the confession was unchallenged during this time, it became a guilty plea and the file proceeded to the sentencing phase.²²

20 Organic Law No. 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990, J.O., 1996, Year 35, No. 17, p. 14. In the Rwandan system, an Organic Law ranks hierarchically immediately beneath the Constitution. Organic Laws are adopted with a view to specifying or completing provisions of the Constitution, according to special procedures which must be rigorously respected.

21 See Judgment and Sentence, *Kambanda* (ICTR-97-23-S), Trial Chamber I, 4 September 1998, § 18.

22 The 1996 legislation has been referred to regularly in judgments of the ICTR, generally within the context of sentencing convicted persons. The Prosecutor has often cited the national legislation with reference to Art. 23(1) ICTRSt., which directs: 'The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda' (UN doc. S/RES/955, annex). The Prosecutor has argued that offenders at the ICTR are, by and large, within category 1 of the Rwandan legislation. Were they to be tried in Rwanda, they would be exposed to the death penalty or life imprisonment, and this is invoked to justify a harsh sentence at the ICTR. Actually, Art. 23(1) ICTRSt. was intended to ensure respect of the *nulla poena sine lege* principle. In other words, its purpose is to protect the defendant, rather than to justify severe punishment. See, on this point, W.A. Schabas, 'Perverse Effects of the *Nulla Poena* Principle: National Practice and the Ad Hoc Tribunals', 11 *European Journal of International Law* (2000) 521.

3. Genocide Trials before National Courts under the 1996 Legislation

Trials under the new legislation began before Specialized Chambers of the ordinary Rwandan Courts in the final week of December 1996. International observers had been impatient to see the trials begin. The resolution on the situation in Rwanda adopted by the UN General Assembly at the end of 1996 ‘urge[d] in particular that the processing of the cases of those in detention be brought to a conclusion expeditiously’.²³ Moreover, the General Assembly ‘[n]ote[d] with deep concern the reports of the Human Rights Field Operation in Rwanda which state that government officials without legal authority to arrest or imprison continue to do so in several parts of the country, that detainees are held for very long periods before trial and that acute overcrowding threatens the safety of those in detention’.²⁴ But when the trials finally started, there was much criticism that the proceedings were not fair. The Field Office of the High Commissioner for Human Rights delivered a devastating initial verdict on the trials.²⁵ Amnesty International was also highly critical of the first trials, noting that the new legislation was inconsistent with international standards because it failed to ensure state-funded counsel for indigent defendants in capital cases.²⁶ *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. The late-1997 report to the General Assembly by the High Commissioner was rather more charitable.²⁷

Some of the harsh initial judgments about the shortcomings in the trials were made by lawyers trained in common law jurisdictions, who misunderstood certain aspects of the ‘civil law’ approach that Rwanda had inherited from Belgium and France. They were shocked, for example, at the relative

23 Situation of Human Rights in Rwanda, GA Res. 51/114, § 10.

24 *Ibid.*, § 11.

25 C. Tomlinson, ‘UN Report Blasts Rwanda Trials’, *Associated Press*, 11 January 1997.

26 ‘Rwanda Unfair Trials: Justice Denied’, April 1997 (AI Index AFR 47/008/1997).

27 ‘The steps taken towards bringing the perpetrators of the genocide to justice and compensating civil claimants are to be welcomed. Progress has been made since the commencement of the genocide trials, including the increased number of witnesses testifying in court; the improvement in detainees’ access to case files; and the increase in the granting of reasonable requests for adjournments However, several aspects of the proceedings remain cause for concern, in particular the lack of full respect for some fair trial guarantees as required by Rwandan law and article 14 of the International Covenant on Civil and Political Rights, and the lack of legal representation in many cases, as well as a general lack of opportunity for category-one defendants to cross-examine witnesses. These shortcomings can be particularly serious given the fact that if found guilty, under Rwandan law, the accused may face the death penalty . . .’ (§§ 64–65 of the *Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda*. UN doc. A/52/486, annex). See also Decision 5(53) of the Committee for the Elimination of Racial Discrimination, adopted 18 August 1998, § 10.

brevity of the trials, and the reliance on written evidence, and the lack of cross-examination. By contrast, trial observers who came from 'civil law' traditions were relatively sanguine and even rather impressed with the proceedings. I attended the January 1997 trial of Froduald Karamira, as an observer for the International Secretariat of Amnesty International. From my standpoint, the proceedings had all the appearances of fairness, and the presiding judge gave the accused and his lawyer every chance to rebut the charges. Karamira's so-called defence convinced nobody. It consisted essentially of accusations that the prosecution witnesses were liars. One witness, who was missing an ear and an eye, told the court how Karamira had manned a barricade close to his home in a Kigali suburb and ordered armed thugs to execute a defenceless woman. Another described how she had called Karamira on behalf of her employer, a Tutsi, asking him for protection. The Tutsi was a prominent local businessman and neighbour of Karamira. But Karamira hung up the phone and minutes later militia members came to the house to kill the unfortunate man and his family. Karamira denied accusations that he had fomented ethnic hatred. In fact, Karamira was credited with coining the slogan 'Hutu Power'. He mobilized racists in different political parties around a common programme of genocide. When Karamira challenged the court to furnish proof, the Prosecutor played a damning tape recording of a racist speech Karamira had delivered in a Kigali soccer stadium in October 1993.²⁸

A. *The Records*

The guilty plea and confession concept set out in the 1996 legislation had the desired effect. Only 500 prisoners confessed in 1997 but, by the end of 1998, the number had grown to 9,000. By the end of 1999, there were 15,000 confessions and by early 2000, more than 20,000. In other words, the whole idea was a good one and the experience might well provide a useful model to other post-conflict societies where there are very large numbers of offenders. However, the Rwandan justice system had trouble exploiting the great volume of confessions, and was unable to process them promptly.²⁹ Had there been greater certainty that a guilty plea and confession would lead to prompt treatment of the case and, eventually, release, there might well have been many more confessions. Moreover, things were not helped by the inability of the Rwandan authorities to separate those who had confessed from those who had not. In order to encourage confession, it was surely necessary to remove those participating from the general prison population, so as to reassure them of safety and protect them from reprisals. Once again, had this been better organized, the confession programme might have been much more successful.

According to the High Commissioner for Human Rights, between 3 January and 22 August 1997, judgments were delivered with respect to 174

²⁸ The judgment in *Karamira* is reported: *Ministère Public v. Karamira*, 1 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Kigali, 14 February 1997) 75.

²⁹ 'Gacaca, A Question of Justice', December 2004 (AI Index: AFR 47/007/2002), at 18.

defendants.³⁰ In his report to the United Nations, prepared in early 2000, Special Representative Michel Moussalli said some 2,406 persons had been tried by the special genocide courts, of whom 348 (14.4 per cent) were sentenced to death, 30.3 per cent to life imprisonment, 34 per cent to jail terms of between 20 years and one year, and 19 per cent acquitted.³¹ He added: 'There is much to applaud in this process.'³² Jacques Fierens has reported that 346 accused were tried in 1997, 928 in 1998, 1,318 in 1999, 2,458 in 2000, 1,416 in 2001 and 727 in 2002.³³ Assuming comparable numbers for 2003 and 2004, that gives a total of approximately 10,000 who have been tried for genocide-related offences in Rwanda.

Assessing the record is like determining whether the proverbial glass is half-empty or half-full. Considering the impoverishment of Rwanda's justice system prior to the genocide, and the resource problems that continue to confront development in that country, 10,000 trials is an impressive figure by any standard.³⁴ It is better than the record of many European countries following the Second World War. Arguably, Rwanda has done more in this respect, in the 10 years following the end of the conflict, than did the national courts of Germany, Italy and Austria from 1945 to 1955. Rwanda's experience recalls Georges Clemenceau's comment at the Paris Peace Conference when the creation of the first international criminal tribunal was being debated: 'The first tribunal must have been summary and brutal; it was nevertheless the beginning of a great thing.'³⁵

Yet, with something like 80,000 accused still languishing in prison in January 2005, it could take another 80 years just to prosecute those who are detained. The message sent by the 'international community' seems to have been directed at mildly discouraging Rwanda from its insistence on prosecuting all cases of genocide.³⁶

30 *Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda*. UN doc. A/52/486, annex, § 63.

31 *Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to Commission resolution 1999/20*. UN doc. E/CN.4/2000/41, § 136.

32 *Ibid.*, § 137.

33 See, in this *Journal*, J. Fierens, 'Gacaca Courts: Between Fantasy and Reality'. According to Amnesty International, the decline in the number of trials in recent years is a consequence of reduced donor funding: 'Gacaca, A Question of Justice', December 2004 (AI Index: AFR 47/007/2002), at 16.

34 See M.H. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', 7 *Duke Journal of Comparative and International Law* (1997) 349; C.M. Carroll, 'An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994', 18 *Boston University International Law Journal* (2000) 163.

35 A.S. Link (ed.), *The Papers of Woodrow Wilson*, Vol. 56 (Princeton: Princeton University Press, 1987), 534.

36 In his 1999 report, Special Representative Michel Moussalli 'commend[ed] the Government of Rwanda for its creative efforts to hasten the reduction of the caseload' and he 'encourage[d] the Government of Rwanda to persevere in these efforts and to ensure that all such measures are

B. The Case Law

The genocide trials held pursuant to the 1996 legislation have generated an impressive body of reported case law, published as an initiative of the Brussels-based *Avocats sans frontières*. Beginning in 2002, these have been published in volumes of several hundred pages, the fifth volume appearing in 2004. The 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. They will be of great practical use to Rwandan judges and lawyers engaged in the ongoing prosecutions, and establish principles for interpretation of the national legislation dealing with genocide prosecutions. Moreover, they are surely of interest to historians of the genocide. Some of the more lengthy judgments present fascinating detailed accounts of specific episodes during the months of April, May and June 1994.³⁷ Perhaps most importantly, the judgments 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.

The judgments show that the confession and guilty plea scheme that underpinned the 1996 legislation works in practice. There are reported judgments in which an accused has confessed, pleaded guilty, apologized to the victims and denounced accomplices.³⁸ In some cases, the confession procedure was not invoked, or its strictures not respected; nevertheless, the courts tended to view a confession, guilty plea and expression of remorse as mitigating circumstances with respect to sentencing.³⁹ Confessions were not always accepted, because they were made too late, or because the courts judged

in conformity with established human rights standards' (*Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to resolution 1998/69*. UN doc. E/CN.4/1999/33, § 76). The Special Representative proposed to the Rwandan authorities that 'serious consideration should be given to releasing, on humanitarian grounds, the sick and the elderly, minors and children for whom alternatives to imprisonment can be found, and those identified as having case files belonging to the lower categories according to the Organic Law, where the length of their pre-trial detention exceeds that of the sentence they are likely to receive' (*ibid.*, § 77). The General Assembly, in its 1998 Resolution on Rwanda, similarly '[w]elcome[d] and encourage[d] the release of minors, elderly prisoners, prisoners suffering from terminal illnesses and suspects with incomplete files, who were detained for their alleged involvement in the genocide and other abuses of human rights...' (*Situation of Human Rights in Rwanda*. UN doc. A/RES/53/156, § 14).

37 *Ministère Public v. Barayagwiza*, 3 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (Conseil de guerre, Kigali, 26 November 1998), 309.

38 *Ministère Public v. Murindangwe*, 1 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Kibungo, 28 July 2000), 63.

39 *Ministère Public v. Nzirasano & Munyakazi*, 1 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Nyamata, 9 September 1998), 147; *Ministère Public*

them to be contradictory or insincere.⁴⁰ There are also examples of confessions being withdrawn at the hearing.⁴¹ One court of first instance applied the confession procedure, even though it had not been invoked and, for this reason, the decision was overturned by the Court of Appeal.⁴²

Several cases address the issue of *nexus*, i.e. of a common crime determined to have no connection with the genocide, and therefore one outside the jurisdiction of the special tribunals.⁴³ Many reported judgments conclude with acquittals, occasionally at the request of the Prosecutor—a positive sign that some form of justice is being done.⁴⁴ Amnesty International has cited figures indicating that approximately 20 per cent of the more than 7,000 persons tried between 1996 and 2002 were acquitted.⁴⁵ In one case, a Court of Appeal reversed a conviction by the trial court, finding it had refused to hear the evidence of relevant witnesses ‘par crainte de la manifestation de la vérité.’⁴⁶

The case reports consist of decisions of the special chambers of the courts of first instance throughout the country, of the regional Courts of Appeal and of the War Council (*Conseil de guerre*). The first ones are from early in 1997, and the latest reported decisions are from 2003. Several decisions include participation by the *partie civile*, and result in awards of damages as well as convictions. In some cases, the Rwandan state is also condemned as being jointly and severally liable, because it was incapable of preventing the massacres.⁴⁷

v. Bizuru et al., 3 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Kibungu, 22 September 2000), 175; *Ministère Public v. Nsabimana*, 5 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Kibungu, 3 February 2000), 139.

40 *Ministère Public v. Ndikubwimana*, 2 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Butare, 7 July 1997), 9. See also *Ministère Public v. Ndererehe & Rwakibibi*, 2 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Nyamata, 21 October 1999), 181.

41 *Ministère Public v. Namahirwe*, 2 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Byumba, 19 November 1997), 23; *Ministère Public v. Nduwunwami*, 2 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Cyangugu, 6 October 1997), 35; *Ministère Public v. Munyawera et al.*, 2 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Gikongoro, 28 March 1997), 45.

42 *Ntimugura et al. v. Ministère Public*, 5 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (C.A., Cyangugu, 24 July 2002), 261.

43 *Ministère Public v. Sebishyimbo et al.*, 2 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (C.A. Ruhengeri, 30 December 1998), 263.

44 *Ministère Public v. Mukansangwa*, 3 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Nyamata, 31 July 2000), 221; *Ministère Public v. Munyaneza*, 5 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Gitarama, 17 August 1998), 117.

45 ‘Gacaca, A question of justice’, December 2004 (AI Index: AFR 47/007/2002), 17.

46 *Munyangabe v. Ministère Public*, 3 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (C.A. Cyangugu, 6 July 1999) 255, at 261.

47 *Ministère Public v. Munyangabo et al.*, 4 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* (1st inst., Gikongoro, 10 June 1998), 89.

4. The Gacaca System

In February 1997, Vice-President Paul Kagame declared that alternative methods of transitional justice ought to be considered in Rwanda, giving as an example some form of community service. The following year, President Pasteur Bizimungu established a Commission to examine possible mechanisms for increasing public participation in judicial proceedings. The 15-member Commission was chaired by the Minister of Justice, and its conclusions, published on 8 June 1999, were to establish ‘gacaca’ courts⁴⁸—an idea that had been mooted as early as the 1995 conference in Kigali. *Gacaca* is a word in kinyarwanda, the national language of Rwanda, that literally means ‘the grass’ or ‘the lawn’. As Jeremy Sarkin has explained, ‘[t]he name [gacaca] is derived from the word for “lawn”, referring to the fact that members of the gacaca sit on the grass when listening to and considering matters before them.’⁴⁹ It was an ancient dispute resolution method used at the local level, administered by respected local leaders or elders.⁵⁰ Historically, it dealt mainly with disputes concerning property matters, such as inheritance and family law issues, although there is apparently some evidence of the system being used in a criminal law context. The system fell into some obscurity when European justice models were imported, following colonization by the Germans in the 1890s, and their subsequent replacement by the Belgians under a League of Nations mandate. *Gacaca* may have enjoyed some resurgence following independence, and it continued to function as a mechanism to resolve disputes on the local level, subject to review by the formal courts. Following the genocide, in 1994, the Minister of Justice proposed that *gacaca* be revived in order to relieve the struggling judicial system of the burden of minor cases.⁵¹

The Transitional National Assembly of Rwanda adopted Organic Law no. 40/2000 of 16 January 2001, ‘on the Establishment of “Gacaca Jurisdictions” and the Organization of Prosecutions for Offences Constituting the Crime of

48 L.D. Tully, ‘Human Rights Compliance and the Gacaca Jurisdictions in Rwanda’, 26 *Boston College International and Comparative Law Review* (2003) 385, citing an unpublished paper by Stef Vandeginste.

49 J. Sarkin, ‘The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide’, 45 *Journal of African Law* (2001) 143, at 159. See also J. Sarkin, ‘Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s Approach in the New Millennium of Using Community Based Gacaca Tribunals to Deal with the Past’, 2 *International Law Forum* (2000) 112, at 118; I.T. Gaparayi, ‘Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of the Gacaca Tribunals’, 1 *African Human Rights Law Journal* (2001) 78, at 83.

50 The phenomenon has been studied by F.-X. Nzanzuwera, who was formerly a prosecutor in Kigali. See F.-X. Nzanzuwera, *Les juridictions ‘gacaca’, une réponse au génocide rwandais ou le difficile équilibre entre châtement et pardon, La répression internationale du génocide rwandais* (Brussels: Bruylant, 2003).

51 L.D. Tully, *supra* note 48, at 396–397.

Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994.⁵²

In many respects, the legislation was built upon the 1996 Organic Law, which continued in force, as amended by the *gacaca* law. Like the 1996 legislation, the 2001 statute was predicated upon encouraging perpetrators to admit guilt and express remorse. To this extent, it also resembled alternative approaches to accountability like truth and reconciliation commissions. In addition to the temporal jurisdiction (which, incidentally, corresponds to Rwanda's unsuccessful proposal with respect to the ICTR), the *gacaca* courts

52 The 2001 Organic Law began with a lengthy preamble which read, in part: 'The establishment of such a legal system is justified by the fact that offences that constitute the crime of genocide or crimes against humanity were committed publicly in full view of the population. This non-dissimulation resulted from the fact that the public authorities, whose role is to plot the course for the population to follow, themselves incited the population commit crimes in order to generalize participation in them and thus be able to leave no survivors. This inspired the population, manipulated by the politicians, not even to attempt to conceal its criminal actions, since it was confident it was following the path indicated by the very persons who should have apprehended the population. For that reason it is essential that all Rwandans participate on the ground level in producing evidence, categorizing the perpetrators of the offences by taking into consideration the role they played, and establishing their punishments without applying the classic system of repression of offences, but instead, re-establishing peace and the return of citizens who were manipulated to commit crimes to the right path. As a result, the population who witnessed the atrocities committed shall achieve justice both for the victims and the persons suspected of being perpetrators of the offences, a justice based on evidence and not on passion. This justice shall be implemented within the framework of the '*gacaca* jurisdictions', meeting at the cell, sector, commune, and prefecture level and composed of honourable persons appointed by their neighbours.' The preamble continued with a list of objectives of the *gacaca* courts: 1) Find out the truth about what happened since residents shall be called upon as eyewitnesses to the acts committed in their cells, and they shall compile a list of victims and perpetrators. 2) Accelerate the prosecution of genocide since those who know what happened shall testify in the presence of their neighbours on their hills. In addition, the trials shall be resolved by almost 11,000 '*gacaca* jurisdictions', while 12 specialized chambers used to take on this task. Finally, it should be hoped that the defendants can no longer seek to deny the evidence as a delaying tactic since they will be in front of eyewitnesses to their actions. 3) Continue the eradication of the culture of impunity by using any method that makes it possible to identify a person who took part in the tragedy, since once the truth is known, none of those who were complicit shall escape punishment, and the people will understand that an offence results in the conviction of the criminal without any exception whatsoever. 4) Punish those who played a part in the tragedy, reconcile the Rwandans, and strengthen their unity since the '*gacaca* jurisdictions' system shall induce the residents of the same cell, sector, commune, and prefecture to collaborate in judging those who participated in the genocide, to discover the victims, and restore their rights to innocent people. The '*gacaca* jurisdictions' system shall thus be the basis for collaboration and unity, especially since, once the truth is known, there shall no longer be any suspicions of guilt. The perpetrator shall be punished, and justice shall be rendered both to the victim and to any innocent imprisoned person who will be reintegrated into Rwandan society. 5) Prove the capacity of the Rwandan society to settle its own problems through a legal system based on Rwandan custom, since, although the cases that the '*gacaca* jurisdictions' will have to hear, are different from these that are normally resolved within the *gacaca* framework, these jurisdictions fit well into the custom of settling differences by arbitration, even amicable arbitration.

were also similar to the Specialized Chambers in that they applied the four-tier categorization of crimes. Category 1 consisted of planners, organizers and framers of genocide or crimes against humanity; and was broadly similar to category 1 in the 1996 legislation, where this designation had the consequence of exposing the offender to capital punishment. The 2001 law added the crime of rape to category 1. Category 1 offences were excluded from the jurisdiction of the *gacaca* courts and were to be judged by the ordinary courts according to the system set out in the 1996 law. Category 2 consisted of homicide or attempted homicide and category 3 of 'serious attacks without the intent to cause the death of the victims'. Category 4 comprised crimes against property.

The Belgian colonizers had left behind a highly organized and very centralized system of local government that has persisted to the present day. The lowest level is the cell or *cellule*, of which there are more than 9,000 in Rwanda. A cell may consist of less than 100 people and averages perhaps 500. Cells are grouped within the country's 1,500 sectors, and then these are organized into districts. The *gacaca* system is based upon this structure of local government, with a separate court or tribunal established for each cell and each sector. The *gacaca* court consists of a General Assembly, a Bench and a Coordinating Committee. The General Assembly at the cell level is made up of all inhabitants aged 18 years or more. The General Assembly of each *cellule* elects 24 people over the age of 21 of 'high integrity', known as *inyangamugayo*. Five members of the elected group serve as delegates to the General Assembly at the sector level, with the remaining 19 serving on the Bench at the cell level. Five members of the Bench comprise the coordinating committee. Based on the 2001 legislation, approximately 250,000 elected officials are required for the system.

Elections for judges were held in October 2001, and hearings began in mid-2002. Some preliminary experiments, known as *pre-gacaca*, presented encouraging results and appear to have convinced many sceptics to give the scheme a chance.⁵³ Special Representative Mousalli described the *pre-gacaca* proceedings:

The first stage of this process involved the identification, review, completion and establishment of files for the 3,434 prisoners from Kibuye. The 544 files which contained no or very little evidence of participation in the genocide, (17 per cent) were kept for the second phase: presentation of the detainees to the population. These detainees were then presented to the public one by one, over a period of six weeks, and members of the population were invited to give testimony in favour or against the person in question. Of the 544 detainees, the population decided that 256 (47 per cent) should be released.⁵⁴

From 2002 to 2004, Rwanda conducted a 'pilot phase' of the *gacaca* programme. Initially, in June 2002, *gacaca* tribunals were organized for only 80 cells,

53 *Ibid.*, §§ 22–25.

54 *Ibid.*, § 25.

but this was enlarged to 750 in November 2003. By this point in time, there were functioning *gacaca* tribunals in at least one sector of each district in the country. A third phase, involving the entire country, was originally scheduled to begin in March 2004, but it was postponed, initially because of the genocide commemoration activities of April 2004, and subsequently because of the adoption of new legislation. The enabling legislation for the *gacaca* tribunals was amended in 2004, by Organic Law no. 16/2004 of 19 June 2004. The structure of the tribunals was simplified somewhat, eliminating two levels of superior jurisdiction, and reducing the number of judges required to about 170,000. The categories of offender are redefined yet again. Category 1, which is excluded from the *gacaca* jurisdiction, has been slightly expanded to include crimes of torture, indignity to a dead body and a somewhat broader range of crimes of sexual violence. Categories 2 and 3 are merged.

In January 2005, the president of the National Service for Gacaca Jurisdictions said that suspects who have pleaded guilty and asked for forgiveness would be judged by the *gacaca* tribunals beginning in February 2005. 'We will start with trials of people who have confessed,' said Domitilla Mukantaganzwa. 'We should have completed all phase one hearings before the genocide anniversary [of the 1994 genocide] which is commemorated on April 7 each year,' she added. Approximately 60,000 case files were ready and in a position to proceed in January 2005.⁵⁵ The system will not be fully operational until 2006.

There have been a few perfunctory references to the *gacaca* proceedings in judgments of the ICTR.⁵⁶

5. Conclusion

Rwanda continues to struggle with the appropriate approach to accountability. This history of prosecutions since 1994 reveals a number of conflicting values, and these have influenced evolution in the various approaches. There are contending interests within Rwanda. 'Survivors' are by and large unwavering in their determination to prosecute. On the other hand, the vast majority of the population appear to fall into the perpetrator camp, where there is less enthusiasm for uncompromising justice. To some extent, the current plan to prosecute more than 1,000,000 seems almost implausible. Can the majority of Rwandans really have voted for a government that plans to prosecute a large proportion of the electorate for genocide? It has always been expected that as some form of democracy or majority rule took over in Rwanda, there would be no heart for further prosecutions. But that is not what seems to be happening.

⁵⁵ '60,000 genocide cases ready for Rwandan courts', Xinhua News Agency, 8 January 2005.

⁵⁶ Judgment, *Kamuhanda* (ICTR-95-54A-T), 22 January 2004, § 395; Judgment, *Gacumbitsi* (ICTR-2001-64-T), 17 June 2004, §§ 73 and 77-78.

At the same time, there are odd messages of reconciliation. One of them is Rwanda's abandonment of the death penalty. In April 1998, following the first trials under the 1996 legislation, some 22 accused were executed publicly in football stadiums. There had been a debate in the cabinet about the wisdom of capital punishment, but the hard-liners prevailed. Yet, since then, there have been no executions, despite the fact that many hundreds have had death sentences imposed. Although the 2004 legislation maintains the death penalty in the case of 'category 1' offenders, there is at present little likelihood that it will be actually carried out. Thus, for seven years, Rwanda has forsaken capital punishment in terms of its actual practice. This surely reflects an understanding, if only an implicit one, that harsh, retributive punishment is not the way forward.

After many decades of impunity, Rwanda has embarked upon a course of transitional justice that seems committed to leaving no serious crime unpunished. The first phase, which began in 1997 and is still continuing, targets the most serious offenders. Some 10,000 have been tried under the system. Confronted with its shortcomings, Rwanda devised a second approach, known as *gacaca*, which focuses on a lower and less heinous level of participation in genocide. Although it defers symbolically to traditional models, it is really nothing more than a very decentralized system of justice administered by non-professionals at the local level. Time will only tell whether this is realistic, but we should have the answers within the next few years. Should Rwanda succeed with this approach, it will stand as an example for others who claim, in the post-conflict environment, that large-scale prosecution is impossible. The Rwandan experiment is contributing a new element to the ongoing debate between those who brook no compromise in dealing with impunity, and others who argue that reconciliation, cultural differences or simple pragmatism militate in favour of moderation.