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Mark A. Drumbl

Washington and Lee University School of Law, drumblm@wlu.edu

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Post-Genocide Justice in Rwanda

*M.A. Drumbl*¹

drumblm@wlu.edu

Abstract

The Rwandan genocide triggered a vast number of criminal and quasi-criminal prosecutions. Rwanda therefore constitutes an example of a robust and rapid implementation of criminal accountability for atrocity. Rwanda, moreover, departed from other countries – such as South Africa – by eschewing a truth and reconciliation process as part of a transitional justice process. This chapter unpacks three levels of judicialization that promoted criminal responsibility for atrocity in Rwanda: the ICTR, specialized chambers of national courts, and gacaca proceedings. The ICTR indicted roughly 90 individuals, the national courts convicted in the area of 10,000 defendants (with some proceedings remaining ongoing), while approximately one million individuals proceeded through gacaca. The ICTR and gacaca proceedings have been concluded for several years already. This article summarizes these proceedings, discusses the outcomes and assesses their impact. In addition, this article examines how these three layers of judicialization interfaced with each other.

Keywords

trials – genocide – international criminal law – sentences – convictions – crimes against humanity

¹ Parts of this chapter draw from, condense, and update the author's prior publications *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) (specifically pages 71–96) and “Justice Outside of Criminal Courtrooms and Jailhouses”, in *Arcs of Global Justice* (eds. deGuzman and Amann, Oxford University Press, 2018).

1 Introduction

Between April and July 1994, approximately 500,000 to 800,000 people were massacred in genocidal pogroms in Rwanda. This is a staggering amount of death in a country with a total population at the time of around 8 million. Many of the killings were unspeakably brutal. They were in no way depersonalized through technology: a study conducted by the Rwandan government concluded that nearly 38% of victims were murdered by machete, 16.8% by club, and 14.8% by firearm; other means of murder included grenades, swords, knives, drowning, sticks, rock, and barehanded assault.²

The perpetrators of the violence were members of the majority Hutu ethnic group, many of whom were ordinary citizens radicalized by an extremist government. The overwhelming majority of victims were members of the minority Tutsi group. The Hutu comprised approximately 85% of Rwanda's population, the Tutsi 14%. The genocide was quelled when a Tutsi army (the RPA), based in neighboring Uganda, ousted the genocidal Hutu government and seized power in July 1994. The RPA's General, Paul Kagame, currently serves as Rwanda's Head of State.

William Schabas notes that in the many years that have ensued Rwanda "insisted upon holding perpetrators accountable [...] while many other post-conflict societies have delayed, postponed and even prevaricated."³ As a result of this commitment, Rwanda instituted national trials within chambers specially established within the regular court system and, subsequently, proceedings within neo-traditional venues called *gacaca* for genocide. The international community, for its part, formally prosecuted higher-ranked offenders at the International Criminal Tribunal for Rwanda (ICTR), sited in Arusha (Tanzania). A handful of states foreign to Rwanda also conducted national proceedings, at times based on principles of universal jurisdiction, against Rwandan nationals who generally shared some connection to those states.

In short, the Rwandan genocide has triggered a vast number of criminal and quasi-criminal prosecutions. While redress for Holocaust-era crimes of the 1940's continues to be an ongoing pursuit, including against defendants aged in their nineties, accountability in the sense of penal proceedings for Rwanda's genocide has largely wrapped up. The little country of Rwanda, then, represents a robust and rapid implementation of criminal accountability for atrocity. Rwanda, moreover, departed from other countries, such as South Africa, by

2 *Dénombrement Des Victims Du Genocide: Rapport Final*, Ministère de l'Administration locale, de l'Information, et des Affaires sociales 26 (2002).

3 W A Schabas, 'Post-Genocide Justice in Rwanda: A Spectrum of Options' in P Clark and Z D Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (CUP 2009) 207.

eschewing a truth and reconciliation process as part of a transitional justice process.

This chapter unpacks three levels of judicialization that promoted criminal responsibility for atrocity in Rwanda. To recap, these three layers are: the ICTR, specialized chambers of national courts, and *gacaca* proceedings. The ICTR indicted roughly 90 individuals, the national courts convicted in the area of 10,000 defendants (with some proceedings remaining ongoing), while roughly one million individuals proceeded through *gacaca*. The ICTR and *gacaca* proceedings have been concluded for several years already. This chapter will not discuss a fourth level, namely, the handful of proceedings conducted extraterritorially – for example, in Canada, Belgium, France, and Germany.⁴

Rwanda's domestic pursuit of extensive criminal prosecutions in the aftermath of genocide is all the more remarkable in light of the absolute destruction that the genocide wrought to the country's legal system and legal profession. Schabas was among the first foreign experts to arrive in Rwanda in the wake of the genocide. He recalls:

In September 1994, Rwanda's then-Minister of Justice, Alphonse-Marie Nkubito, working from an office whose windows had been knocked out, and whose walls were decorated only by gunshots, appealed to the international community for assistance in rebuilding the country's devastated justice system. [...] There were only around 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.⁵

I worked as a public defender in Kigali, Rwanda's capital, in 1998. At the time, nearly 130,000 detainees accused of genocide-related crimes were crammed into prisons with the capacity to hold about 15,000. I worked in a prison that housed approximately 9,000 suspects. At the time, here's how I described the setting:

They [the prisoners] stand, sit and sleep in one courtyard. Overcrowding is so pronounced that one had to step over and on bodies in order to cross to the other side of the courtyard. Bunkbeds layered on top of each other finger the sky, hooked together with clothes lines from which the

4 Discussion can be found at Helen L. Trouille, "France, Universal Jurisdiction and Rwandan *génocidaires*: The *Simbikangwa* Trial", 14:1 *Journal of International Criminal Justice* (2016) pp. 195–217; Leila Sadat, "Transjudicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity", 22:3 *Leiden Journal of International Law* (2009), pp. 543–562.

5 Schabas, *supra* note 3, at 212.

prisoners' pink correctional uniforms hang. Between the beds narrow pathways wind through the congestion.⁶

The massive nature of the genocide, and the staggering number of genocide suspects, did more than, to draw from Hannah Arendt, "explode the limits of law";⁷ they also exploded the capacity of whatever infrastructure that remained.

Schabas was a catalyst in developing the domestic Organic Law that ultimately would form the basis for prosecutions for genocide and crimes against humanity in the specialized chambers of the national court system.⁸ To be sure, the many proceedings conducted thereunder oozed with due process concerns; their contribution to reconciliation, moreover, is unclear. Notwithstanding these limitations, Rwanda's attempts to thwart impunity, develop an historical record, and promote accountability in the wake of a genocide that implicated broad swaths of the population as perpetrators represents for Schabas "one of the most principled manifestations of the commitment of international human rights law and policy".⁹ While Schabas' endorsement may tend towards the optimistic, and contrasts with others who take a dimmer view,¹⁰ the fact remains that Rwanda took post-conflict justice very seriously. This Chapter unpacks these modalities of post-conflict genocide justice in Rwanda.

2 The ICTR

The United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) through Resolution 955 in November 1994. The Security Council elected to site the ICTR in Arusha (Tanzania). Rwanda, then a member of the Security Council, did not support the ICTR in part because of its location outside Rwanda and because it could not award the death penalty as a sentence.

6 Mark A. Drumbl, "Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials", 29 *Columbia Human Rights Law Review*, 545, 572 (1998).

7 Hannah Arendt and Karl Jaspers, *Correspondence 1926–1969*, New York, HBJ, 1992, p. 54.

8 In Rwanda, the term "Organic Law" refers to laws that rank higher in normativity to ordinary laws, and are secondary only to the Constitution.

9 Schabas, *supra* note 3, at 207.

10 See, e.g. Lars Waldorf and Scott Strauss (eds), *Remaking Rwanda: State Building and Human Rights After Mass Violence* (University of Wisconsin Press 2011).

The ICTR has primacy over national institutions. It has jurisdiction over genocide, crimes against humanity, and war crimes.¹¹ The ICTR has sentenced 59 of its 90 indictees. Seventeen of these are life sentences. In *Nchamihigo*, an ICTR Trial Chamber held that:

[A] sentence of life imprisonment is generally reserved for those who planned or ordered atrocities and those who participated in the crimes with especial zeal or sadism. Offenders receiving the most severe sentences also tend to be senior authorities.¹²

The ICTR Appeals Chamber in *Nchamihigo* (a defendant who had been a deputy prosecutor, so not a senior authority within the government) ultimately reversed some of the convictions and substituted a term sentence of 40 years. Life sentences however, have been routinely imposed against senior government authorities, along with persons who did not hold government positions. Examples include a tea factory director, and a high-level official in the *Interahamwe* militia – a group of zealots who supported the genocidal cause with avidity and committed many horrendous massacres.

Among the ICTR's 42 determinate sentences, the median sentence is 25 years and the mean sentence is 24.67 years.¹³ The shortest determinate sentence issued by the ICTR is 6 years, while the maximum is 47 years. In addition, at the ICTR, 14 individuals have been acquitted, 5 referred to national jurisdictions for trial, 2 deceased prior to or during trial, and 2 indictments withdrawn before trial.

Article 23(1) of the ICTR Statute, which limits penalty to imprisonment, stipulates that, in determining the terms of imprisonment, the ICTR shall have recourse to the general practice regarding prison sentences in the courts of Rwanda. The ICTR has concluded that although it has an obligation to consider such practice, this provision does not imply an obligation to conform thereto.¹⁴ No obligation arises to take into account the sentencing practice of national

11 Articles 2, 3, and 4 of the Statute of the International Criminal Tribunal for the Prosecution of 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 Neighbouring States, Between Jan. 1, 1994 and Dec. 31, 1994. S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (1994).

12 The Prosecutor v. Siméon Nchamihigo ICTR-01-63-T (Judgment, 12 November 2008), para. 388.

13 All of the ICTR data are compiled and analyzed by Professor Barbora Holá (Free University of Amsterdam) and shared with the author on January 7, 2017 (results on file with the author).

14 The Prosecutor v. Semanza ICTR-97-20-A (Judgement, 20 May 2005), paras. 345, 347, 377; Bikindi v. The Prosecutor ICTR-01-72-A (Judgement, 18 March 2010), para. 148.

jurisdictions other than Rwanda.¹⁵ Although sentences in similar cases adjudicated at the ICTR are instructive, these antecedents are not binding as benchmarks.¹⁶ When it comes to determining sentence, ICTR judges took into account “the gravity of the offence and the individual circumstances of the convicted person.”¹⁷ A convict may be incarcerated for a term up to life. Since there is no mandatory minimum sentence, ICTR judges therefore have the power to impose any sentence ranging from one-day imprisonment to life imprisonment for any crime within their jurisdiction. In the initial years of its work, the ICTR sentenced somewhat erratically. Greater consistency emerged over time,¹⁸ at least in the case of the identification of principles to guide gravity and individualization of sentence. D’Ascoli concludes that among the most influential factors in the quantum of sentence are the type of crime, the victimization, superior position of the convict, and abuse of authority.¹⁹

ICTR trials have raised international awareness of what happened in Rwanda in 1994 and have developed an historical record. Far more muddled is the evidence that ICTR trials have contributed to reconciliation in the country. ICTR jurisprudence certainly has advanced and clarified numerous aspects of international criminal law. This jurisprudential contribution is significant. For example, the *Akayesu* decision provided a sophisticated definition of ethnicity (for the purposes of proving genocide) and also advanced a progressive understanding of sexual violence in which rape was constructed as a tool of genocide.²⁰ The *Musema* decision extended command responsibility outside of the military context and into a private corporate environment.²¹ In *Barayagwiza*, the ICTR issued the first verdict ever to media leaders for inciting genocide and differentiated statements of ethnic pride (protected by virtue of freedom of expression) from incitement to hate (not protected by freedom of expression).²² The

15 *Bikindi v. The Prosecutor* ICTR-01-72-A (Judgement, 18 March 2010), para. 154.

16 *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T (Trial Judgement and Sentence, 24 June 2011), para. 6190.

17 Statute of the ICTR, *supra* note 11, article 23(2).

18 Silvia D’Ascoli, *Sentencing in International Criminal Law* (Hart 2011); Barbora Holá, Catrien Bijleveld and Alette Smeulers, ‘Consistency of International Sentencing: ICTY and ICTR Case Study’ (2012) 9 *European Journal of Criminology* 539–52; Kai Ambos, *Treatise on International Criminal Law – Volume II* (Oxford University Press 2014) 268; Barbora Holá, Alette Smeulers and Catrien Bijleveld, ‘International Sentencing Fact and Figures: Sentencing Practice at the ICTY and ICTR’ (2011) 9 *Journal of International Criminal Justice* 411–39.

19 D’Ascoli, *supra* note 18, at 259–60.

20 *Prosecutor v. Akayesu*, Case No. ICTR-96-4 (ICTR Appeals Chamber, 2001, affirming judgement of ICTR Trial Chamber).

21 *Prosecutor v. Musema*, Case No. ICTR-96-13-T (ICTR Appeals Chamber, Nov. 16, 2001).

22 *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, Case No. ICTR-99-52-T (ICTR Trial Chamber, Dec. 3, 2003).

Nyiramasuhuko case involved one of the first convictions of a woman for genocide and crimes against humanity, including on charged of ordering mass rape.²³

The ICTR has wound down its activities. The International Residual Mechanism for Criminal Tribunals (UNMICT), a separately created entity, picks up the outstanding work, including criminal proceedings. The UNMICT assumed responsibility for the supervision of all sentences pronounced by the ICTR as of 1 July 2012, including the process of early release of convicts. The ICTR delivered its last trial judgment on 20 December 2012, in the *Ngirabatware* case.²⁴ Its last Appeals Judgement was delivered in December 2015 in the *Nyiramasuhuko* case. ICTR and UNMICT sentences are enforced in States that have signed cooperation agreements and in accordance with international standards of detention and the applicable law of the enforcing State. ICTR convicts have for example been incarcerated in Mali, Bénin, Italy, and Sweden (nearly all in Mali and Bénin, however).

3 Chambres Spécialisées

3.1 *Criminal Charges*

The 1996 Organic Law, which generated the legal basis for prosecutions in the national and military courts of Rwanda for genocide and crimes against humanity, initially created four categories of culpability.²⁵ These were: (a) Category 1 (planners, organizers, those in positions of authority, notorious murders (with zeal or excessive malice), sexual torturers and rapists); (b) Category 2 (perpetrators of intentional homicide or serious bodily assault causing death); (c) Category 3 (perpetrators of other serious assaults); and (d) Category 4 (perpetrators of property offenses). War crimes were excluded from the jurisdiction of the Organic Law.

Article 14 of the initial Organic Law dealt with punishment. It linked the severity of punishment, as well as its form, to the gravity of the offense as represented ordinarily by the category of culpability. Category 1 offenses, initially sanctioned by death, became punished by life imprisonment after Rwanda's abrogation of the

23 Prosecutor v. Nyiramasuhuko et al. ICTR-98-42-A (ICTR Appeals Chamber, December 14, 2015).

24 The Prosecutor v. Ngirabatware ICTR-99-54-T (Judgement and Sentence, 20 December 2012).

25 Organic Law No. 8/96 on the organization of prosecutions for offenses constituting the crime of genocide or crimes against humanity committed since 1 October 1990 (Journal Officiel No. 17 du Sept 1, 1996) (establishing categories of offenders, punishments, a trial and appellate structure, and limiting jurisdiction to events occurring from October 1, 1990, to December 31, 1994).

death penalty in 2007. Part of this involved a dance between the ICTR, whose judges refused to refer cases to the courts of Rwanda through the transfer mechanism (having the death penalty on the books in Rwanda barred transfer), and national authorities in Rwanda.²⁶ The Organic Law encouraged defendants to confess their guilt through a detailed guilty plea schematic.

Article 17 of the Organic Law permitted additional sanction by stripping the convict of certain civic rights. This could be permanent (*dégradation civique perpétuelle et totale* (sometimes referred to as *définitive*) or limited either in scope or temporal duration (*dégradation civique limitée*). Examples of those civic rights or privileges stripped through *dégradation civique* include: the right to vote; other political rights (such as to be a candidate); an inability to serve as an expert or witness in trials or to be deposed judicially other than for the giving of simple facts (although it has been held that proceedings from previous trials may be admissible);²⁷ the right to carry arms; to serve in the armed forces; to be police; and to teach or to be employed in any educational institution as professor, monitor, teacher, or supervisor.²⁸

In a December 2002 report, Amnesty International compiled statistics regarding a total of 7,181 persons that had been adjudged in Rwanda since 1997.²⁹ Amnesty International found that 9.5% of defendants were sentenced to capital punishment, 27.1% to life imprisonment, 40.5% to fixed prison terms, and that 19.1% were acquitted. Longitudinally, the Amnesty International study demonstrates the following trends: decline in capital punishment sentences from 30% of perpetrators in 1997 to 3.4% in 2002 – with steady annual declines; decline in life imprisonment 32.4% in 1997 to 20.5% in 2002, and increase in fixed prison terms from 27.7% in 1997 to 47.2% in 2002.³⁰ These trends arise from a number of factors, including that the initial trials focused on the more notorious killers and that with the passage of time increased recourse was made of guilty pleas.

I conducted a qualitative review of the published judgments (in French) of the Rwandan genocide courts.³¹ The database of judgments I reviewed was

26 The referral of cases to Rwanda was contemplated by Rule 11bis of the ICTR Rules of Procedure and Evidence.

27 *Ministère Public v. Nteziryayo (Emmanuel) et al.* (November 30, 2001, 1^{ère} instance, Butare), RMP 44223/S8/KA, RP 84/2/2001, p. 21.

28 *Ministère Public v. Kabirigi et al.* (Dec 10, 1998, 1^{ière} instance, Kibuye), RMP 51.498/S4/C.M./KBY/97, RP Ch. Sp.005/01/97, pp 29–30. Article 66 of the Rwandan Code of Criminal Procedure defines *dégradation civique* and this definition is incorporated by the 1996 Organic Law.

29 Amnesty International, *GACACA: A QUESTION OF JUSTICE 17* (December 2002) (AI Index: AFR 47/007/2002) (referencing Liprodhor statistics).

30 *Id.*

31 See Mark A Drumbly, *Atrocity, Punishment, and International Law* 77–80 (2007).

compiled and maintained by *Avocats sans frontières* (ASF) and were published in bound volumes and posted on line on their website.³² These judgments comprise a large, representative sample from across Rwanda. In the cases I reviewed, when aggregated, defendants received the following sentences (largely consonant with the Amnesty International findings): 15% death, 30% life imprisonment, 55% fixed terms. Among the fixed terms, I calculated the median term to be 11 years, and the mean term 15.25 years.

The domestic Rwandan courts identified factors to consider in quantifying sentence in individual cases. Aggravating factors often are assumed from the grisly nature of the conduct. What is more, in the Rwandan context aggravating factors already are implied in the severity of sanction insofar as the factors that go to identifying liability for a Category 1 offense (such as senior position, zeal, organizing, notoriousness, and particular brutality (*méchanceté excessive*)) correspond to those factors that judges pursuing retributive goals could be expected to turn to in order to fix sentence within an entirely discretionary sentencing structure. My review of the early case-law reveals recourse to the following as mitigating factors: (a) partial, incomplete, tardy, or irregular guilty pleas; (b) minor status; (c) *contrainte* (coercion); and (d) individual characteristics, such as that the defendant sheltered Tutsi during the genocide,³³ lack of education,³⁴ the defendant's weak physical health,³⁵ and that the defendant did not organize the attacks.³⁶

3.2 *Civil Sanctions*

In the case of virtually all convicted defendants, specialized chambers of national courts also issued orders for restitution/compensation based on collateral private lawsuits (*parties civiles*) filed by the victims and/or surviving family members. No civil damage awards could be issued if the accused had been

32 <http://www.asf.be/FR/Frameset.htm>.

33 *Ministère Public v. Munyangabo et al.* (June 10, 1998, 11^{ème} instance, Gikongoro), RMP 98809/S2/MP/97 R.P. 0017/1/GIRO (“habituellement elle est d'un esprit compatissant comme en témoigne le fait d'avoir caché trois enfants Tutsis jusqu'à l'arrêt de la guerre.”).

34 *Ministère Public v. Siborugirwa et al.* (Oct. 22, 1999, 11^{ème} instance, Gitarama); *Ministère Public v. Sibomana et al.* (Dec. 3, 1998, ch. sp. 11^{ème} instance Rushashi), RMP 110 502/NK.A/J.T., RP 017/S1/98.

35 *Ministère Public v. Siborugirwa et al.* (Oct. 22, 1999, 11^{ème} instance, Gitarama) at pp. 14, 16.

36 *Ministère Public v. Munyangabo et al.* (June 10, 1998, 11^{ème} instance, Gikongoro), RMP 98809/S2/MP/97 R.P. 0017/1/GIRO p. 13 (“[il] n'a pas fait parti des personnes qui ont préparé l'attaque”); *Ministère Public v. Rukeribuga et al.* (Dec. 17, 2001, 11^{ème} instance, Kibuye), RMP 51336/S4/G.M./NSE/97, RP Ch.Sp. 19/01/00 (“diminution de peine car responsabilité moindre par rapport a ses coauteurs at qualité de délinquant primaire.”).

acquitted on all charges: the awards remain contingent on a criminal conviction. In theory, *partie civile* claims pushed in a restorative and compensatory direction. In light of the impecuniousness of the defendants, however, the awards ended up largely serving only expressive or symbolic purposes.

In one judgment, a Rwandan national court adopted a complex grid of damages,³⁷ in Rwandan francs, to attach to the kinds of losses and injuries documented:

Moral damages:	10 million Rwanda francs for the loss of a mother or a father 8 million for a child 5 million for a sibling 3 million for another close relative (e.g. uncle, aunt, nephew, niece)
Material damages:	300,000 for a cow, 20,000 for a goat, 2,000 for a chicken, 1,000 for a rabbit 2 million for a house built out of wood and thatch 5 million for a house built out of bricks with metal doors 5 million for household articles 1 million for the harvest

While moral damages refer to harms and pain arising from the loss of certain relatives, material damages refer to goods and property that have been pilaged, stolen, or destroyed. In the mid 2000's the exchange rate for the Rwandan franc to the US dollar was about 1 to 575. Hence an award of one million Rwandan francs amounted to approximately US \$1,700 – a sum larger than the then *per capita* annual GDP in Rwanda.

The *partie civile* claims conveyed considerable narrative value. The text of the Rwandan civil judgments reads very differently than the text of the criminal judgments. The civil judgments foreground the victims rather than the defendant. The storytelling is much more about the victims, the details of their suffering, and exactly what they lost.

37 *Ministère Public v Nteziryayo (Emmanuel) et al.* RMP 44223/S8/KA, RP 84/2/2001 (30 November 2001) 1 ière instance, Butare.

4 Gacaca

Historically, *gacaca* was a form of local dispute resolution that percolated throughout Rwanda. *Gacaca* means “justice on the grass” in Kinyarwanda.³⁸ *Gacaca* was traditionally deployed to referee property disputes, regulate small-scale violence, and redress conflict among neighbors. With its prisons bulging with suspects in the wake of the genocide, Rwanda’s government was hard pressed to assess how exactly to process such a large volume of individuals. Beginning in earnest in the mid-2000s, the government turned to *gacaca* to this end.

Traditionally *gacaca* was informal, local, and somewhat organic. It was also starkly patriarchal. The Rwandan government, however, formalized and modernized *gacaca* through national legislative enactments (an Organic Law, routinely amended), mandated the election of lay judges, required the participation of women, and established a detailed organizational structure. This transformation yielded many benefits; along the way however it also morphed *gacaca* from a restorative system to more of a retributive system. In the end, “*gacaca* for genocide” materially departed from traditional *gacaca*.

The Organic Law on Gacaca Jurisdictions, first enacted in 2001 and subsequently amended (including important amendments in 2004 and 2007), created the *gacaca* tribunals and, like the 1996 Organic Law for the specialized chambers, limited the jurisdiction of *gacaca* tribunals to charges of genocide and crimes against humanity committed between October 1, 1990 and December 31, 1994.³⁹ These laws created categories of offenders and linked punishments to the specific category. In this regard, the approach was once again similar that of the 1996 Organic Law for the specialized chambers of national courts (discussed in the previous section and to which some *gacaca* indictees are referred). Article 51 of the 2004 *gacaca* legislation created three categories

38 See Adrien Katherine Wing & Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 280 n.321 (2002).

39 Organic Law establishing the organization, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1st, 1990 and December 31, 1994, Nos. 40/2000 (January 26, 2001) and 33/2001 (June 22, 2001). For amendments, see e.g. Organic Law No 10/2007 of 01/03/2007 modifying and complementing Organic law No 16/2004 of 19/6/2004 establishing the organization, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1st, 1990 and December 31, 1994 as modified and complemented to date. /2001 (June 22, 2001).

of offenders. Category 1 offenders were excluded from the *gacaca* courts.⁴⁰ It specified prison sentences and determined their length through a detailed sentencing grid. The *gacaca* legislation, however, also diversified sanction by introducing the possibility of community service, which was made available for certain defendants who admitted to their crimes.⁴¹ So, for example, a convict could serve part of the sentence in jail, part in community service, and part released, albeit in suspended sentence. A very detailed schematic was set out in this regard. For example, Article 14 of the 2007 amendments to the Organic Law provided as follows:

Defendants falling within the second category referred to in the first, second and third paragraph of article 11 of this organic law,⁴² who:

1° refused to confess, plead guilty, repent and apologise, or whose confessions, guilt plea, repentance and apologies have been rejected, incur a prison sentence of thirty (30) years or life imprisonment

2° confessed, pleaded guilty, repented and apologised after being included on the list of the accused and whose confession, guilt plea, repentance and apologies have been accepted, incur a prison sentence ranging from twenty-five (25) to twenty-nine (29) years, but:

- a) they serve a third (1/3) of the sentence in custody;
- b) a sixth (1/6) of the sentence is suspended;
- c) half (1/2) of the sentence is commuted into community service.

3° confessed, pleaded guilty, repented and apologised before being included on the list of the accused, incur a prison sentence ranging from twenty (20) to twenty-four (24) years, but:

- a) they serve a sixth (1/6) of the sentence in custody;

40 Organic Law establishing the organization, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1st, 1990 and December 31, 1994, No. 16/2004 (June 19, 2004), art. 2(2).

41 *Dégradation civique* also was contemplated as an adjunct sentence (article 15 of the 2007 amendments to the Organic Law).

42 The three subcategories of the second category referred to are as follows:

1° the well known murderer who distinguished himself or herself in the area where he or she lived or wherever he or she passed, because of the zeal which characterized him or her in the killings or excessive wickedness with which they were carried out, together with his or her accomplices

2° the person who committed acts of torture against others, even though they did not result into death, together with his or her accomplices;

3° the person who committed dehumanising acts on the dead body, together with his or her accomplices.

- b) a third (1/3) of the sentence is suspended;
- c) half (1/2) of the sentence is commuted into community service

The 'list' is a list of individuals drawn up by the prosecutor for indictment. Clearly the intent is for persons to come forward and confess before being investigated or targeted by the prosecutor.

Community service was initially conceptualized as a way to promote reconciliation and managerial ends while ensuring that a huge chunk of the workforce was not idling away in prison but, rather, was put to use to motor the country's post-conflict transition and also learn some practical skills. Community service was thereby presented as a sentencing option that was less onerous than imprisonment, and therefore served as an inducement to confess. Sanctions were established in the event of a convict's failure to perform community service.⁴³

In principle, community service could involve the convict going directly to the victims and offering labor or donating produce as recompense for the harms that had been inflicted – in other words, working to rebuild destroyed homes and farms, to till the land, and to ameliorate public services in the region. In practice, however, this would be mightily complex, entail significant monitoring costs, and trigger poignant emotional reactions. Some survivors would not want the perpetrator around; service relationships would be difficult to supervise, control, and manage. So, in practice, the government instead began to favor broad community service projects – *travaux d'intérêt général* (TIG) – and the use of labor camps. These projects involved agricultural work and building roads, houses, and infrastructure. The work was not specifically undertaken with specific connection to the place where the convicts had committed their crimes. It involved the convicts (also known as *tigistes*) working in groups.

Gacaca involved the local community sitting in judgment of persons accused of having committed mass atrocity within the same community. *Gacaca*

43 Article 17 of the 2007 amendments provided penalties in case of default by the convicted person to properly carry out community service:

In case of default by the convicted person to properly carry out community service, the concerned person is taken back to prison to serve the remaining sentence in custody.

In that case, the Community Service Committee in the area where the convicted person is carrying out community service shall prepare an ad hoc report and submit it to the Gacaca Court of the Sector where community service is perlodged which will fill in the form to return the defaulting person to prison.

In case this is not possible, that report shall be submitted to the Gacaca Court that tried the person serving his or her community service.

A Presidential Order shall establish and determine modalities for carrying out community service.

judges were elders and “people of integrity” (*Inyangamugayo*) elected from local communities throughout Rwanda. They were laypersons who received some limited legal training. One hundred and seventy thousand judges sat in approximately 10,000 panels *in toto*. These were composed at the lowest level (that of the *cellule*) of 9 judges with 5 deputies. There also were two higher levels of panels at the *secteur* and appellate levels (each of these two levels had about 1,500 panels). Suspects were to be brought to the villages where they were alleged to have committed their crimes. Practically speaking, the decentralized nature of the *gacaca* process facilitated access to justice by reducing transportation costs (and language barriers) for witnesses and victims. At the proceedings, the public could raise issues – discursively – that exceeded the microscopic truths that would arise at trials. They could ask questions of suspects, to which the suspects are permitted to reply. However, the judges were empowered to control the discussion, the flow of evidence, and maintain order at the proceedings. In the end, although the judges primarily adjudicated, they also acted as mediators to help the gathered community attain both legal and *extra*-legal goals. Defense lawyers were excluded, purportedly to ensure the open, participatory nature of the proceedings.

The Rwandan government created *gacaca* tribunals for several reasons. One was managerial, namely, to accommodate the sheer number of suspects. A second reason was to diversify the legal response to genocide by invoking mechanisms more steeped in reconciliation, reconstitution, and reintegration. This diversification, in theory at least, would depart from repression and retribution, a development which was deemed particularly appropriate for lower level offenders. Consequently, the Rwandan government touted both retribution and reconciliation as goals of *gacaca* adjudications; and the *gacaca* framework noted the importance of penalties that permit convicts to “amend themselves” and reintegrate into Rwandan society.⁴⁴ A third reason was simply to “disclose the truth,” although the *gacaca* process, whether traditional or in modified form for the genocide, is not a truth and reconciliation commission.⁴⁵ A fourth reason pertained to sovereignty, namely the Rwandan government’s perception that Rwanda needs to develop “by itself” solutions to the genocide and its consequences.⁴⁶ A fifth reason was participatory – to open up a local democratic space for discussion and decision-making on issues that

44 2004 Organic Law, *supra* note 40, pmb1 (“Considérant qu’il importe de prévoir des peines permettant aux condamnés de s’amender et de favoriser leur réinsertion dans la société rwandaise sans entrave à la vie normale de la population”). See also *Tribunaux gacaca et travail d’intérêt général*, 13–14 REFORME PÉNALE ET PÉNITENTIAIRE EN AFRIQUE 1–2 (mai 2001) (on file with author).

45 2004 Organic Law, *supra* note 40, pmb1.

46 *Ibid.*

relate to the suspect, but also on a broader array of legal and non-legal matters that radiate from the genocide. In this sense, *gacaca* could promote what some have called “African-style democracy,” which envisions a “democracy built on such practices as consensus building and populist input [... which] begin at the village level.”⁴⁷ In sum, *gacaca*’s purposes were broad, touching on the legal, the social, and the political. This meant that the sharp due process critiques that many outsiders (in particular liberal legalists concerned with fair trial rights, provision of defense lawyers, and criteria of evidentiary admissibility) delivered against *gacaca* could be contextualized. Phil Clark puts it well:

[T]he dominant [international] discourse on *gacaca* is severely flawed for two main reasons: first, because it mistakenly views *gacaca* exclusively as a legal institution, which can be analysed solely through the legal statutes that underpin it; and second, because it interprets formal, deterrent justice as the only objective of *gacaca*, while neglecting more crucial aims, particularly reconciliation, and more negotiated processes during hearings. -In short, the dominant discourse fails to account for the hybrid nature of *gacaca* and the hybrid methods and objectives it embodies. We therefore require a more nuanced interpretation of *gacaca* and its objectives if we are to offer more appropriate suggestions as to how *gacaca* may be reformed to aid its effectiveness as a tool of post-genocide reconstruction.⁴⁸

The *gacaca* trials ended in 2012. Estimates vary wildly, but it is commonly noted that approximately one million people went through the system.

5 Conclusion

Three layers of penal jurisdiction filled Rwandan post-conflict spaces. These were: the ICTR, the national courts, and the neo-traditional *gacaca*. This chapter has discussed each separately. But it is important to note that the three layers did not operate in parallel, but intersected in a variety of ways. In her 2015 book, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda*, Nicola Palmer demonstrates how these different layers each were

47 Matthew Todd Bradley, “The Other”: Precursory African Conceptions of Democracy, 7 INT’L STUD. REV. 407, 413 (2005).

48 Phil Clark, *Hybridity, Holism and “Traditional” Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, GEORGE WASHINGTON INTERNATIONAL LAW REVIEW, December 2007.

animated by the pursuit of different goals.⁴⁹ For example, Palmer finds that ICTR judges and lawyers were motored by the consolidation and development of the jurisprudence of international criminal case-law. The national courts, she determines, were spirited by advancing judicial competence, credibility, independence, and domestic reform. And, finally, the many *gacaca* tribunals were animated by the goal of establishing local narratives of who did what to whom and why.

Insofar as manufacture of case-law serves as the primary ambition of the ICTR, Palmer's research intimates that the ICTR may have strayed from its initial retributive, deterrent, and reconciliatory aspirations. While certainly incapacitating the genocidal leadership, however, the ICTR over time came to curry more of a bureaucratic function, to wit, creating a clarified body of law. The ICTR's legacy is not life in Rwanda, as Palmer notes, but the life of international law, the development of precedent, and the construction of persuasive authority. The lack of congruence between the objectives of the ICTR, on the one hand, and the two domestic systems (which themselves are incongruent) is a very valuable insight. Whether the intense turn to criminal law in the aftermath of the Rwandan genocide – regardless of the layer at which this occurred – attained retributive, deterrent or expressive goals remains debated. The same could certainly be said of the turn to penal law in the aftermath of any episode of massive human rights abuses.

Biography

Mark Drumbl is the Class of 1975 Alumni Professor at Washington and Lee University, School of Law, where he also serves as Director of the University's Transnational Law Institute. He has held visiting appointments and has taught intensive courses at law schools world-wide, including Oxford University (University College), Université de Paris II (Panthéon-Assas), Free University of Amsterdam, University of Ottawa, Masaryk University, Trinity College-Dublin, University of Western Ontario, University of Melbourne, Monash University, Vanderbilt University, University of Sydney, and the University of Illinois. Professor Drumbl's research and teaching interests include public international law, global environmental governance, international criminal law, post-conflict justice, and transnational legal process. His work has been relied upon by the Supreme Court of Canada, the United Kingdom High Court, United States Federal Court, and the Supreme Court of New York.

49 Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (OUP, 2015).