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Rwanda's Domestic Trials for Genocide and Crimes Against Humanity

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Rwanda's Domestic Trials for Genocide and Crimes Against Humanity

*by Carla J. Ferstman**

Rwanda has embarked on the challenge of bringing the perpetrators of genocide to justice. Legislation which organizes the prosecution of genocide suspects and the compensation of victims has been enacted. Judges are being trained, prosecutors prepare case files, new suspects are arrested, and survivors continue to fear repercussions.

Large scale violence in Rwanda was brought on by a blend of enforced ethnic intolerance, constructed hierarchies, social inequalities, and material scarcity. For many generations, common language, culture, and religion kept categorizations of Hutu, Tutsi, and Twa mutable. Political construction of divisive ethnic identities helped create the environment which allowed for the surge of human atrocity.

Background to the Genocide

After the April 6, 1994, downing of the airplane carrying the Rwandan and Burundian presidents, an estimated one million Rwandans, mainly Tutsis and Hutu political moderates, were systematically murdered by Hutu extremists in the span of a few months. The entire governmental apparatus, including the Presidential Guard (*Gendarmérie*), the local police force, and the civilian administration, mobilized the population toward active participation in the genocide. *Interahamwe* militia, the youth unit trained by the Presidential Guard, carried out a significant number of the murders, set up roadblocks, and distributed arms and killing lists to civilians who were rewarded for their complicity. Organizers encouraged their communities to kill the Tutsi families living amongst them. Broadcasts by *Radio Télévision Libre des Milles Collines* contributed to the genocidal frenzy by furthering the campaign of hate. The international community, despite desperate calls for assistance from world leaders, proved unable or unwilling to take measures to halt the genocide. Although the *International Convention on the Prevention and Punishment of Genocide* (ICPPG) obliges the contracting parties to undertake to prevent and punish genocide, the world failed to take action to prevent the atrocities which occurred in Rwanda.

Effect on the Rwandan Justice System

The killings, lootings, and vandalism virtually destroyed the justice system. Most equipment was damaged, leaving trained agencies involved in the investigative or judicial process inoperable. Even if the judicial system in place before the war had remained intact, it would have been

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Conscientious Objection in the Americas

*by Raymond J. Toney**

On October 7, the Inter-American Commission on Human Rights heard arguments in the case of Luis Gabriel Caldas Leon, who refused to perform military service in the Colombian Armed Forces for reasons of conscience. The fundamental issue raised by *Caldas* is whether conscientious objection to military service is a protected manifestation of Article 12 rights of the American Convention on Human Rights.

Mr. Caldas completed his secondary studies in 1993 and was then selected to perform obligatory military service as established by Law 48 of 1993 and Article

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unable to cope with the unprecedented number of victims and defendants from the genocide.

Despite this, Rwandans viewed the ailing justice system as one of the only ways to reconcile the population and end the impunity of genocidal perpetrators. This view was maintained knowing that the political context and prevailing ideologies were such that

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parties, be they defendants, victims, or civil claimants, would not necessarily receive favorable judgments from domestic courts. The rule of law was supposed to heal the collective ills that afflicted Rwandans, who were physically, psychologically, and spiritually destabilized by genocide. The need to effectively end impunity prevented serious thought of amnesty or other non-judicial remedies.

Within a short time after the genocide, there existed an acute necessity for a criminal justice system to maintain order and prevent future killings and vigilantism. The lack of competent agencies within Rwanda capable of satisfying these exigencies forced the military to prepare case files, and arrest and detain suspects, even though they were not legally competent, nor trained in criminal investigations. Even when competent inspectors were involved, progress was slow. Judicial police inspectors stationed at communal offices found detention centers overcrowded with hundreds of illegally detained suspects, none of whom had been interrogated by a competent authority. Centers were not constructed with the proper facilities for long term incarceration. Health and sanitation became growing concerns.

Inspectors faced line-ups of witnesses waiting to make statements, and detained persons demanding that their stories be verified. If the inspector attempted to release a genocide suspect for want of evidence, he feared the wrath of the survivor population. When he arrested others, he feared reprisals.

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New judges had to be trained to fill vacant positions in approximately 145 cantonal courts, 12 first-instance courts, four courts of appeal, and one supreme court. Laws and systems to allow for the proper functioning of the courts also had to be created. The new government's commitment to adhere to the agreements set out in the Arusha Accords signed on October 30, 1992, required the institution of certain judicial bodies such as a new Supreme Court (Articles 27-33) and a High Judicial Council (Articles 37-39). The Council commenced activities in April 1996, but the nomination of judges began months later.

Rwanda signed the ICPPG but failed to enact domestic legislation in accordance with the Convention. The government was faced with the difficult question of how to proceed in bringing the authors of genocide and crimes against humanity to justice. During preliminary debates held in Kigali in November 1995, two ideas developed: forming an independent special tribunal for the trial of genocide suspects; and setting up a specialized chambers to fit within the standard Rwandan justice system.

Proponents of the 'independent special tribunal' theory argued that the extraordinary circumstances of the Rwandan genocide merited a tribunal with the flexibility to determine its own rules of evidence and procedure without being limited by the constraints of the traditional system which was not equipped to handle a situation of this magnitude. Those who argued for a specialized chambers within the ordinary jurisdiction of first instance courts hoped to stretch limited human and material resources, while making the necessary adjustments to powers and procedure as required. Ultimately, first-instance and military courts did establish specialized cham-

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bers. The *Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990* was promulgated on September 1, 1996, symbolizing the approach of justice, retribution, and the end of impunity. Persons accused of genocide, crimes against humanity, and crimes connected thereto, committed between October 1, 1990, and December 31, 1994, are, on the basis of their acts of participation, classified into one of four categories:

I. planners, organizers, instigators, supervisors, and leaders of the crime of genocide or of a crime against humanity;

persons who acted in positions of authority at the national, prefectoral, communal, sector, or cell level, or in a political party, army, religious organization, or militia and who perpetrated or fostered such crimes;

notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;

perpetrators of acts of sexual torture;

II. perpetrators, conspirators, or accomplices of intentional homicide or serious assault against the person causing death;

III. other serious assaults against the person;

IV. offenses against property.

Plea-bargaining, though rare in inquisitorial systems, was enacted to encourage defendants to confess, to support reconciliation, and to hasten what was clearly going to be a time-consuming process. To be considered legally valid, confessions require a detailed description of all offenses committed, information regarding accomplices and co-conspirators, an apology, and an offer to plead guilty to all offenses. It is not clear from the wording of the law to whom the apology must be given—to victims, to the State, or to Rwandans at large; nor is it clear what actions are necessary to constitute a legally valid apology.

Penalties for conviction on charges committed between October 1, 1990, and December 31, 1994, are as follows (see box):

CATEGORY OF CRIME	FOUND GUILTY BY TRIAL	CONFESSED PRIOR TO PROSECUTION	CONFESSED POST PROSECUTION
I	Death Penalty	Death Penalty	Death Penalty
II	Life Imprisonment	7-11 yrs. incarceration	12-15 yrs. incarceration
III	As provided by the Penal Code	1/3 of the penalty a tribunal would normally impose	1/2 of the penalty a tribunal would normally impose
IV	Civil damages	Civil damages	Civil damages

Category I offenders do not benefit from any sentence reduction, even when conferring a valid confession. The only exception occurs in the circumstance where an accused, who does not appear on the published list of Category I suspects, offers a legally valid confession for actions which correspond to the Category I classification scheme. In this limited scenario, the applicant would be placed in Category II.

Problems of Rwanda's Criminal Justice System

Short-term trends in judicial decision-making demonstrate the types of problems the justice system is encountering, as well as progress in overcoming these obstacles. Rwanda has begun to address some procedural problems raised by the first trials. The enormity of the task, coupled with the dearth of human and material resources, arguably prevents defendants from receiving a trial without 'undue' delay, and prevents civil claimants from securing prompt redress. Initial investigations, compilation of case files, decisions to arrest and detain, trial and appellate proceedings, rendering of decisions, and the eventual imposition of definitive sentences are a continual challenge for the Rwandan judicial system.

The advantages of independent legal advice prior to a suspect's arrest, as a means of safeguarding the reliability of confessions, are clear. With approximately 33 lawyers in Rwanda, only 16 of whom are in private practice, Rwandan suspects almost never have counsel present during interrogations. Allegations of mistreatment in procuring confessions are not infrequent, though the courts have not developed a mechanism to test the veracity of the allegations. In the matters of Déogratias Bizimana and Egide Gatanazi, whose trials took place on December 27, 1996, when they were convicted and sentenced to death, both alleged that their confessions were the product of mistreatment during interrogations. Each was asked to prove the allegation, which was virtually impossible given the lack of prison medical records, the failure to subpoena the person(s) alleged to have caused the mistreatment, the significant passage of time since the alleged incident, and lack of defense counsel.

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Lawyers are overworked and have difficulty reaching some of the genocide suspects. For a detainee to arrange legal counsel, he must contact the prison director and arrange for a letter to be sent to a specific lawyer or lawyer's organization, or must arrange counsel through a family member. The two main obstacles to obtaining counsel continue to be lack of finances and unavailability of counsel.

Avocats Sans Frontiers set up a legal assistance program whereby some defendants benefited from lawyer consultation and representation at trial. Clients, however, continue to struggle to contact the organization. Lawyers must travel to more remote and less secure prefectures. The service provided by *Avocats Sans Frontiers* is the only tangible international effort to date that specifically addresses representation, and is unable to provide services for all of those awaiting trial.

Reliance on the confessions procedure is the only way domestic trials could ultimately succeed. The prospect of holding 100,000 full trials

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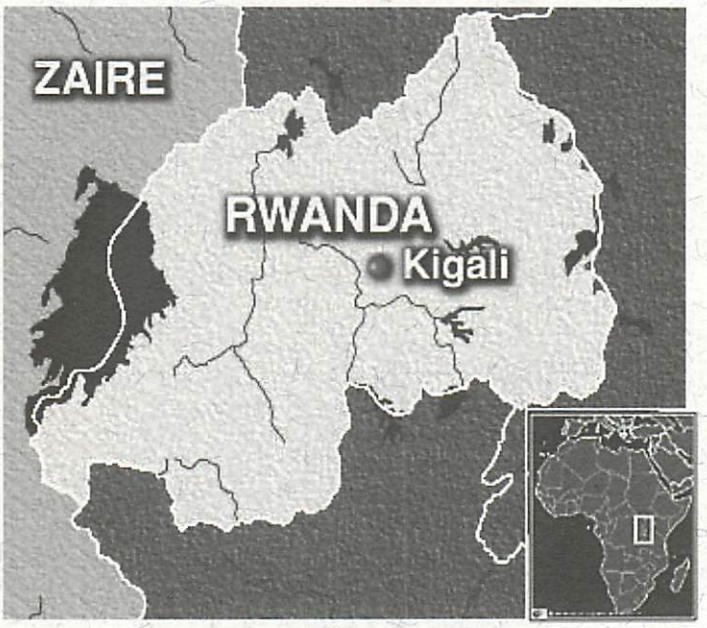
is more than a daunting task – it is a virtual impossibility. Unfortunately, very few defendants have availed themselves of the confession procedure. Although trials commenced in December 1996, the first time a court accepted a confession was May 2, 1997, in Byumba Prefecture, where nine defendants pled guilty and had their sentences reduced accordingly. By the end of June 1997, only 25 defendants had offered valid confessions, constituting a marked increase in the procedure's use. The procedure's failure to attract large numbers of applicants derives from the stringent conditions the applicants must satisfy as well as the defendants' reluctance to confess. According to Rwandan authorities, some defendants doubt their confessions will actually lead to sentence reductions, and fear for their personal safety in a penitentiary system which does not separate those who confess from other defendants.

Rwandan law specifies that formal notice of the charge must be served on the accused a minimum of eight days prior to the court appearance, and must indicate the nature, date, and place of the allegations, and the law allegedly contravened. Notice provisions are distinct from rights to full disclosure of the factual and legal basis of the charges, rights which ensure the ability to mount an effective defense. Prosecuting and investigating authorities bear an obligation to disclose collected material connected with criminal proceedings, as well as information which may assist the accused in exonerating him or herself. Although the penal code does not articulate the right to full disclosure, Article 14(3)(a) of the *International Covenant on Civil and Political Rights* (ICCPR), to which Rwanda is bound, affirms the right of the accused to be informed "in detail" of the nature of the alleged offense. The Court studies the case file prior to the commencement of the oral proceedings; written statements therein serve as the bulk of the evidence before the Court. Though Rwandan procedure allows for witnesses to testify orally, the general practice is to rely primarily on written statements. While there is no law preventing the photocopying of the case file for distribution to the accused, this is not done due to logistical difficulties. In order for the accused to see the file, s/he must arrange to see it at the court registry. Though there is no specified time limit, in many instances the accused receives only a few hours with the file. For example, Bizimana, who appeared in the Kibungo specialized chambers on December 27, 1996, was given notice of the trial date ten days in advance and was given the opportunity to read his case file only one day prior to trial. He requested an adjournment on this basis. On January 10, 1997, in Butare Prefecture, three defendants also requested an adjournment on the basis that they did not have enough time to read their case files and prepare their defense. Similar requests were made in other prefectures. In many of these cases, requests for adjournments were denied, because trial judges understood that literal compliance with the notice provisions was the only disclosure obligation owed to the accused. On January 30, 1997, in Gitarama Prefecture, a lawyer retained by Mukankusi requested an adjournment on the basis that he had not even seen the case file. In denying the adjournment request, the Court reproached the accused for not having contacted the lawyer sooner, and for trying, albeit unsuccessfully, to delay the proceedings.



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Since these first trials, defendants have in general had greater access to their case files, and the conditions under which they have studied their case files have improved. The Court of Appeal, however, upheld a decision denying an adjournment request on the basis that ten days was sufficient for an accused to find a lawyer and prepare a defense. The analysis focused on the narrow requirement of notice, and did not find a broader disclosure requirement. Given the time an accused normally spends in protective custody prior to trial, better access to case files provided by Rwandan justice officials would heighten the accused's ability to understand the evidence and prepare a defense.

Legal assistance not only ensures that the defense of the accused is properly prepared and presented, but also guarantees respect for the defendant's procedural rights, which might be inadvertently threatened. The role of the defense lawyer as the 'watchdog of procedural regularity' is invaluable, and a significant improvement in the quality of the trial was noted in those cases where defendants were represented by counsel.

The organic law provides that genocide defendants enjoy the same rights of defense given to other persons subject to criminal prosecution, including the right to the defense counsel of their choice, though not at government expense. Interpretation of this law has confirmed that a defendant has a right to appear with counsel, but has not created an obligation on the courts to inform the unrepre-

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sented defendant of this right, nor has it obliged the State to facilitate the accused's exercise of this right. No uniform approach has been taken by the courts to deal with defendants who request additional time to retain counsel. In some instances, the bench might question the accused on efforts taken to obtain counsel, and then decide whether or not, given the circumstances, it is appropriate to grant additional time. This method was used in Byumba, in response to Bizimutima's request for additional time. The Court granted a nine-day adjournment after verifying the veracity of the request. In other cases, compliance with the notice provisions have been held to prevent the accused from successfully arguing for additional time. Eight days have been allotted to secure counsel, and any failure to locate representation within that time period will not delay the proceedings.

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Niyonzima, appearing before the Gikongoro specialized chambers on January 28, 1997, was denied additional time to find a lawyer because 'sufficient' time had passed since his receipt of official notice of the charge. On January 14, 1997, in Kigali, an international lawyer in court on another matter offered to represent Ndikubwami, but the Court prevented the lawyer from so doing because he did not have official authorization from the Ministry of Justice to represent the defendant. The Court denied the request for an adjournment to seek authorization.

Article 14(3)(e) of the ICCPR establishes the rights to examine prosecution witnesses and to obtain the attendance and examination of defense witnesses. Rwandan law, as in other civil law jurisdictions where the case file forms part of the evidence before the court, allows for the admission of untested hearsay evidence in criminal proceedings. The case file is compiled at the pre-indictment stage by a prosecutor whose conclusions usually carry considerable weight with the court and often contain statements of witnesses who do not appear at the trial hearing. Rwandan procedure specifies that evidence can be established by any means of fact or law after due hearing of the parties, with Article 76(6) specifically providing for the interrogation of witnesses. In more recent trials, more prosecution witnesses have appeared in court to present their evidence, whereas they were absent in earlier trials. One can never underestimate the victim's trauma in testifying in a genocide proceeding, but the possible imposition of the death penalty necessitates stringent application of procedural safeguards for the processing of evidence.

Eight days have been allotted to secure counsel, and any failure to locate representation within that time period will not delay the proceedings.

Although courts are receptive to defense evidence, defendants do not necessarily know that they have the right to call witnesses. When they do request that witnesses be called, there is no practical system in place to help assure that the witnesses, who are often afraid to come forward, actually present themselves in Court. Detention, moreover, makes it difficult to arrange for witnesses' attendance. Although the parties, to a certain extent, offer and present evidence, the inquisitorial system imposes a duty on courts to collect all relevant evidence. Article 18 of the Code of Criminal Procedure holds that in search of the truth, the tribunal has the duty to seek out additional evidence, be it to complete the evidence of the prosecution, the complainant, or the accused.

While Article 14(5) of the ICCPR guarantees the right of everyone convicted of a criminal offense to have "his conviction and sentence" reviewed to a higher tribunal, the organic law provides only a limited review of questions of law or flagrant errors of fact. Once the facts place a defendant in a particular category, the mandatory sentence applicable to the given category applies.

Conclusion

Clearly, changes in many areas beyond the legal arena will be required to bring about lasting reconciliation in Rwanda. Nevertheless, the assignation of responsibility, both at the level of the individual perpetrator, as well as at the level of the political and hierarchical structure (which nurtured the violence), is required to end impunity. There is ample room for both international and domestic trials in Rwanda. If accepted by Rwandans, however, domestic trials would play a larger role in the difficult reconciliation process. The Government of Rwanda must see it as their obligation to promote and facilitate the respect for procedural rights, because any failure to do so will affect the legitimacy of the trials, thereby limiting their influence. The task of trying the vast number of accused while adhering to procedural safeguards is overwhelming, especially in view of the fragile legal infrastructure. What is required, however, is an unparalleled resolve by Rwandan authorities and the population at large, strong enough to rebel against a culture of impunity, revenge, and hatred. Only this resolve can succeed in leading Rwanda in the direction of a new beginning.

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For more information regarding the Rwanda Domestic Trials, please see Ms. Ferstman's extended article on our website.