

5-15-2013

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Recommended Citation

Taylor Friedlander, *Mediation as the Key to the Successful Transfer of the Case of Jean-Bosco Uwinkindi from the Jurisdiction of the ICTR to the Republic of Rwanda*, 13 Pepp. Disp. Resol. L.J. Iss. 3 (2013)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol13/iss3/3>

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Mediation as the Key to the Successful Transfer of the Case of Jean-Bosco Uwinkindi from the Jurisdiction of the ICTR to the Republic of Rwanda

Taylor Friedlander*

INTRODUCTION

The leaves of banana trees make a distinct sound when they are stirred by the wind. It is almost like a whisper. Just outside the capital city of Rwanda, there is a place so quiet that silence is often the only sound you hear. This place is the Kayenzi Church.¹ It once was a place of worship, but today it serves as a memorial site to commemorate victims of the Rwandan genocide.² If you were to visit the site and step down into the basement, there would be the creaking of stairs sighing beneath your weight, and a gasp might escape your lips if it does not get caught in your throat. The sight that meets your eyes will be an expanse of bones, piled in stacks that touch the ceiling. These bones are laid to rest in memory of the 2,000

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1. The Kayenzi Church is located in the sector of Nyamata, outside Rwanda's capital city, Kigali. Prosecutor v. Uwinkindi, Case No. ICTR-2001-75-I, Indictment, ¶ 2 (Sept. 11, 2001), available at <http://www.unictr.org/Portals/0/Case/English/Uwinkindi/indictment/uwinkindi.pdf>.

2. *Nyamata Memorial Site*, KIGALI MEMORIAL CENTRE, <http://www.kigalimemorialcentre.org/old/centre/other/nymata.html> (last visited Feb. 20, 2012).

victims whose lives were lost at and around the church,³ merely a fraction of the estimated 500,000 to 1 million people killed.⁴

There was not one person, but many who carried out the murders that took place at the Kayenzi Church during the Rwanda genocide. The first section that follows will provide the historical background of Rwanda genocide and the International Criminal Tribunal for Rwanda (ICTR), which would subsequently be created to try the most high-profile suspects involved in perpetrating the genocide. The second section will focus on one suspect in particular, Jean Bosco Uwinkindi, providing background on his case. The third section will explain how four different systems of justice should be involved in prosecuting Uwinkindi in order to fulfill the objectives of justice held by both Rwanda and the international community. The fourth section will focus on the reason why Uwinkindi's case is important to Rwandan jurisprudence, as it is the first case in history to be transferred from the ICTR to the jurisdiction of the National Judiciary of Rwanda. This section also will analyze the reasons why the ICTR decided to transfer the case, and will suggest that mediation should be used to make the execution of the transfer process as smooth as possible. The fifth and final section will provide a brief conclusion, emphasizing the hopeful outlook for the relationship between the ICTR and National Judiciary of Rwanda, especially if mediation techniques are utilized in the future.

I. HISTORICAL BACKGROUND OF THE RWANDA GENOCIDE AND THE ICTR

A. *Historical Background of the Rwanda Genocide*

The Rwanda Genocide may have been carried out in 1994, but the seeds of hatred that led to the atrocities were sown long before. Two ethnic groups, the Tutsis and the Hutus, lived in Rwanda together for centuries, but

3. According to the International Criminal Tribunal of Rwanda's (ICTR) indictment of Uwinkindi, 2,000 corpses were found at or near the Kayenzi Church. Uwinkindi, Case No. ICTR-2001-75-I, Indictment, ¶ 25. However, according to the Kigali Memorial Center, 2,500 people were killed at or near the church. *Nyamata Memorial Site*, supra note 2. The disjunction between these estimates is due to the fact that investigations of the genocide sites were often conducted by untrained observers. ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY* 16 (Human Rights Watch, 1999).

4. PHIL CLARK, *THE GACACA COURTS, POST GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS I* (Cambridge University Press, 2010). It is difficult for researchers to gauge accurately the number of people killed during the genocide due to lack of census data prior to 1994 and the fact that death tolls are "usually informed more by emotion than fact." DES FORGES, supra note 3, at 15–16. However, even with conservative estimates as to the number of Tutsis killed, it is believed that at least 500,000 lost their lives. *Id.*

not as equals.⁵ Around 1000 AD, the Hutu people arrived in Rwanda and inhabited the land,⁶ but were dominated by the Tutsi's militaristic conquest in 1500 AD.⁷ Rwandan society settled into a clearly defined hierarchy polarized between "Hutus," the subordinates, and "Tutsis," the minority class of people who ruled over their many subjects.⁸ However, these identities were not set in stone: a Tutsi could become a Hutu by losing prestige, while a Hutu could become a Tutsi by acquiring wealth.⁹ During this domination, Hutus were brewing resentments against the Tutsis, but it was not until Belgium colonized Rwanda that those sentiments reached a boil.¹⁰

Belgium gained colonial control of Rwanda in 1919 and instituted policies that deepened the divide between the majority Hutus and minority Tutsis.¹¹ The most notable policy was the issuance of ethnic identity cards in 1933.¹² Whereas before, identification as a Tutsi or Hutu could change with life circumstances, such identification was now permanently etched into government documents.¹³ For years, Belgium encouraged the belief amongst Rwandans that Tutsis were the superior minority class.¹⁴ However, after World War II, Rwanda was placed under a United Nations trusteeship,

5. CLARK, *supra* note 4, at 16.

6. *Id.* at 15. Prior to the arrival of the Hutus, the Twa, a people of hunter-gatherers, had inhabited Rwanda. *Id.* Today, the Twa make up approximately one percent of the Rwandan population. *Id.*

7. *Id.*

8. *Id.* at 16.

9. *Id.*

10. *See id.* at 16–17. While Belgium has left the longest lasting colonial impact on Rwanda, Germany was the first country to colonize Rwanda. *Id.* at 16. In 1894, German colonists arrived at Rwanda and began to forge an alliance with the Tutsis, the apparent and actual leaders. *Id.* Belgium then gained control of Rwanda under a League of Nations mandate in 1919 and continued to foster a relationship with the Tutsi leaders. *Id.*

11. *Id.* at 16. In addition to issuing of ethnic identity cards, Belgium also required the Hutus to participate in forced labor for government projects, under the supervision of the Tutsis. *Id.* at 16–17.

12. *Id.* at 16.

13. *Id.* at 16–17. Prior to Belgium's colonial rule, status as a Hutu or Tutsi was fluid. One factor used to determine whether a person was a Hutu or a Tutsi was the number of cows owned: a person with ten or more head of cattle was deemed a Tutsi, and with any fewer, was categorized as a Hutu. *Id.* at 17. By this standard, two people related by blood could be classified as belonging to different races based on their prosperity levels. As a result, it was not uncommon that family members turned on their own kinsmen during the genocide when Hutus were pitted against Tutsis. *Apocalypse*, KIGALI MEMORIAL CENTRE, <http://www.kigalimemorialcentre.org/old/genocide/rwanda/thegenocide.html> (last visited Feb. 20, 2012).

14. *See id.* at 16–17.

designed to lead Rwanda to independence.¹⁵ With Rwanda's autonomy on the horizon, Belgium reevaluated its alliance with the Tutsis, realizing that once Rwanda became self-governing, the Hutu majority would most likely seize control.¹⁶ As a result, Belgium shifted its alliance to the Hutu majority, aiding them in their transition to power.¹⁷

In 1959, the Parti du Mouvement de l'Emancipation des Bahutu (PARMEHUTU), a Hutu political party, came into power with the support of Belgium,¹⁸ and exiled over 700,000 Tutsis from Rwanda between 1959 and 1973.¹⁹ The PARMEHUTU also incited mass killings of more than 100,000 Tutsis by characterizing them as Hutu oppressors.²⁰ Not wanting to be seen as subversive, many Rwandans were afraid to speak out against the totalitarian governance of the PARMEHUTU, thereby fostering a culture of impunity.²¹ Tutsis were treated as second-class citizens,²² a legacy that President Juvenal Habyarimana continued once he came into power in 1973.²³ Habyarimana proclaimed that the number of civil service jobs and school placements should reflect the ethnic makeup of the country.²⁴ This policy greatly reduced the opportunities for Tutsis to find placements in universities and well-paid jobs.²⁵

15. *Id.* at 17.

16. *Id.*

17. *Id.*

18. *Id.* at 18.

19. *Path to a "Final Solution"*, KIGALI MEMORIAL CENTRE, <http://www.kigalimemorialcentre.org/old/genocide/rwanda/political.html> (last visited Feb. 20, 2012).

20. See IMMACULÉE ILIBAGIZA, *LEFT TO TELL: DISCOVERING GOD AMIDST THE RWANDAN HOLOCAUST* 15 (Hay House, Inc., 2006). See also CLARK, *supra* note 4, at 18.

21. *Id.*

22. See ILIBAGIZA, *supra* note 20, at 15.

23. See *id.* at 18.

24. *Id.* The ethnic composition of Rwanda prior to the genocide was 85% Hutu, 14% Tutsi, and 1% Twa. *Id.* The Twa are a minority tribe in Rwanda. See *infra* note 6.

25. ILIBAGIZA, *supra* note 20, at 18. Immaculée Ilibagiza, a survivor of the Rwandan genocide, was denied a scholarship to fund her secondary education based on her racial background, despite being ranked as one of the top two students in a class of sixty. *Id.* at 17–18.

While the Tutsis suffered within Rwanda, the Tutsi diaspora that lived beyond the borders shared a similar plight.²⁶ As refugees, they were denied basic rights to which their neighbors were entitled.²⁷ If a revolution may be justified by the oppression of a minority, then the deprivation that the Tutsis suffered both in Rwanda and beyond its borders would be sufficient to spur an uprising. On October 1, 1990, the Rwandan Patriotic Front (RPF), a group of Tutsi diaspora living in Uganda, invaded Rwanda with the intent of reclaiming the homeland they had been expelled from.²⁸ A civil war erupted, and in the midst of peace negotiations, then President Juvenal Habyarimana was killed when his plane was shot down on April 6, 1994.²⁹ The President's death triggered the genocide that followed.³⁰ Although the United Nations had a presence in Rwanda, with the UN Assistance Mission for Rwanda (UNAMIR) stationed in the country, it failed to act.³¹ Over the next three months, Rwanda descended into genocidal violence until the RPF won the civil war and declared victory on July 18, 1994, thereby ending the

26. See STEPHEN KINZER, *A THOUSAND HILLS: RWANDA'S REBIRTH AND THE MAN WHO DREAMED IT* 35 (John Wiley & Sons, Inc., 2008). Rwandan refugees in Uganda were forced to live in remote refugee camps, where they were provided rations by a relief truck every one to two weeks. *Id.* at 12. After a year, many refugees found themselves uprooted, without explanation, and forced to resettle in a new location. *Id.*

27. See *id.* at 35.

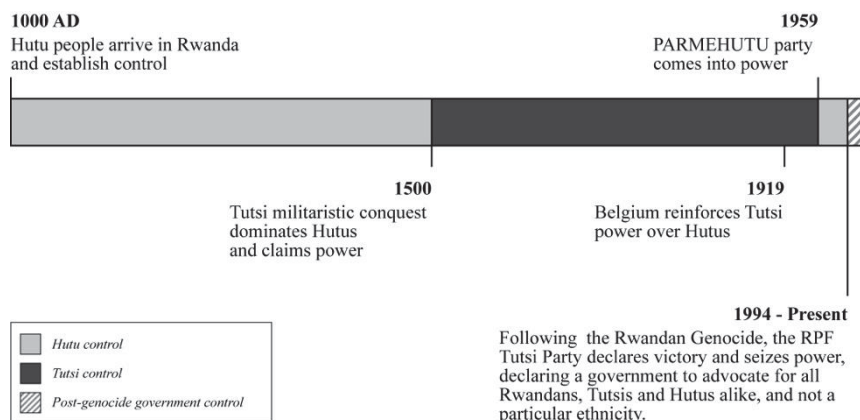
28. CLARK, *supra* note 4, at 12–13; *The RPF Invasion*, KIGALI MEMORIAL CENTRE, <http://www.kigalimemorialcentre.org/old/genocide/rwanda/invasion.html> (last visited Feb. 20, 2011).

29. KINZER, *supra* note 26, at 137–39. The party responsible for President Habyarimana's death was never determined, although some theories implicate the RPF's involvement. *Id.* at 139.

30. CLARK, *supra* note 4, at 14. President Habyarimana's death did not cause a spontaneous outburst of violence, but rather, was the triggering event for a premeditated plan of violence against the Tutsis to be carried out. *Id.*

31. DES FORGES, *supra* note 3, at 595–99. An informant, codenamed "Jean-Pierre," reported to the Force Commander of the United Nations Assistance Mission for Rwanda (UNAMIR) (then stationed in the country) that 1,700 soldiers were being trained in the Rwandan army for the purpose of exterminating the Tutsis. Although the Force Commander of UNAMIR, Romeo Dallaire, wrote a code cable on January 11, 1994 to the UN headquarters in New York, it failed to respond. FRED GRUNFELD & ANKE HUIJBOM, *THE FAILURE TO PREVENT GENOCIDE IN RWANDA: THE ROLE OF BYSTANDERS* 95–97 (Martinus Nijhoff 2007).

genocide.³² Following the ceasefire, thousands of Tutsi exiles returned to their home country³³ and the rule of Rwanda fell to a new regime that sought to represent both the Tutsis and Hutus without bias towards any one group.³⁴ After centuries of being ruled by a government dominated by either the Hutus or the Tutsis, Rwanda had a government that, for the first time,



refused to align itself with a racial identity. The graphic below indicates the rise and fall of Tutsi and Hutu regimes preceding the RPF's new form of leadership.

32. KINZER, *supra* note 26, at 177. Although the RPF victory put an end to the genocidal violence to be carried out by the PARMEHUTU, the RPF also committed atrocities and were accused of carrying out massacres and executions against civilians. The lack of prosecution against the RPF is beyond the scope of this article. DES FORGES, *supra* note 3, at 16.

33. *Id.* at 311. Many of the Tutsi exiles returning to Rwanda had left as children or were born outside Rwanda and had never before stepped foot in their homeland. *Id.*

34. KINZER, *supra* note 26, at 186. After the RPF declared victory, it established a government with both Hutu and Tutsi leaders in order to gain popular support, especially from Hutu Rwandans. *Id.* Although the RPF consisted primarily of Tutsis, there were also several members of Hutu descent. *Id.* The RPF selected one of its most prominent Hutu members as the new president as a strategic move to gain support for the new regime. *Id.* Today, Rwanda's government strongly discourages people from making any reference to race, and the very words "Hutu" and "Tutsi" have become taboo. See Richard Grant, Paul Kagame: Rwanda's Redeemer of Ruthless Dictator?, THE TELEGRAPH (July 22, 2010, 9:00 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/rwanda/7900680/Paul-Kagame-Rwandas-redeemer-or-ruthless-dictator.html>. The current president, Paul Kagame, declared that the people of his country should no longer be divided by race, as they "are all Rwandans now." *Id.*

This new leadership was optimistic, but it would have to lead a war-torn nation faced with the challenge of prosecuting 100,000 cases of people accused of genocide.³⁵

B. *Historical Background of the ICTR*

i. History of the ICTR

In the wake of the genocide, not one of Rwanda's courts remained standing, and of the approximately 800 lawyers and judges in Rwanda before the genocide, only 40 were still alive.³⁶ The genocide had destroyed the national judiciary. The United Nations therefore saw not only a practical need for establishing a criminal tribunal to try the cases of genocide,³⁷ but a symbolic one as well. Given that genocidaires were accused of committing crimes against humanity that violated international law, their cases were of international stature and merited trial by an international tribunal.³⁸ In response to this need, the United Nations Security Council passed Resolution 955 to create the ICTR, with one of its major goals being to "[send] a strong message to Africa's leaders and warlords" against the impunity that led to Rwanda's genocide, and to thereby "[provide] an example to be followed in other parts of the world where these kinds of crimes have also been committed."³⁹ Thus, the ICTR was focused not only on justice at a national level within Rwanda, but also at an international level.

35. *Post Genocide Justice*, KIGALI MEMORIAL CENTRE, <http://www.kigalimemorialcentre.org/old/genocide/rwanda/justice.html> (last visited Feb. 20, 2012).

36. Jesse Melman, *The Possibility Of Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda's Rule 11bis to Permit Transfer to Rwandan Domestic Courts*, 49 FORDHAM L. REV. 1271, 1277 (2010).

37. Special Rapporteur for Rwanda of the United Nations Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, ¶¶ 79, 81, S/1994/1157 (Nov. 14, 1994) (by René Degni-Ségui) (describing Rwanda's need for international assistance with judicial and law enforcement personnel, as well as the need for an International Court and local courts "to try persons responsible for genocide, in order to stop, or at least reduce, acts of reprisal").

38. S.C. Res. 955, preamble, U.N. Doc. S/RES/955 (Nov. 8, 1994) ("[T]he establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed . . .").

39. *General Information*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unicttr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Feb. 20, 2012).

As the Security Council prepared for the creation of the ICTR, Rwanda advocated that the tribunal should be located in Rwanda.⁴⁰ However, in the wake of the genocide, the Security Council feared that Rwanda would not be secure enough to support an international tribunal, and therefore, placed the ICTR in Arusha, Tanzania, despite protests by Rwandan officials.⁴¹ Consequently, the decision to locate the ICTR in a different country came at the cost of distancing Rwandans from the justice being carried out on behalf of the crimes suffered in their country.⁴²

Although under Resolution 955, the ICTR and the National Judiciary of Rwanda have concurrent jurisdiction over crimes of genocide, the ICTR has primacy, meaning that it can compel Rwanda or any other jurisdiction to transfer a case to its own jurisdiction.⁴³ As a result, the ICTR has the authority to try the cases of the most serious offenders, while most of the victims are unable to attend the hearings or even learn about the process. The net effect is that the victims are left to feel as though the justice process does not address their interests. In fact, it was not until 1998 that Rwanda's radio system was able to establish a service to inform Rwandans about the progress of the trials.⁴⁴

Rwanda was not alone in resisting a policy that gave international courts superior jurisdiction over that of national courts. National governments frequently want to prosecute the perpetrators who carried out atrocities within their countries and are often reluctant to relinquish jurisdiction over such crimes to international tribunals.⁴⁵ It follows naturally then that the ICTR's policy of primacy undermined the autonomy of Rwanda's national judiciary in its ability to hear cases of Rwandan genocidaires.

The national courts of Rwanda may only hear a case that the ICTR has asserted jurisdiction over if that case has been formally transferred from the ICTR to the National Judiciary of Rwanda. In order for this transfer to take place, the National Judiciary of Rwanda must comply with the stipulations set out in the ICTR Rules of Evidence and Procedure under Rule 11*bis*.⁴⁶

40. Melman, *supra* note 36, at 1279 (citing U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453 (Nov. 8, 1994)).

41. Melman, *supra* note 36, at 1279.

42. DES FORGES, *supra* note 3, at 746.

43. S.C. Res. 955, Article 28(2)(e), U.N. Doc. S/RES/955 (Nov. 8, 1994) (declaring that states shall comply with requests made by the Trial Chamber of the ICTR with requests for "[t]he surrender or the transfer of the accused to the International Tribunal for Rwanda").

44. DES FORGES, *supra* note 3, at 742.

45. Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 646 (2010).

46. Rules of Procedure and Evidence for the International Criminal Tribunal of Rwanda, Rule 11*bis* (June 29, 1995).

Thus, a motion to transfer a case from the ICTR to the National Judiciary of Rwanda will hereinafter be referred to as an “11*bis* motion.” The ICTR granted the first 11*bis* motion on June 28, 2011 for the case of Jean Bosco Uwinkindi, which is discussed more thoroughly in the second and third sections of this article.

ii. Effects of the ICTR: Successes and Shortcomings

Over the course of the fifteen years that the ICTR has been actively trying genocidaires, it has completed a total of thirty-eight cases.⁴⁷ While this number may seem miniscule when compared to the thousands of cases prosecuted by the National Judiciary of Rwanda,⁴⁸ it is important to note that domestic courts and international courts have fundamentally different objectives. Domestic courts handle a broad spectrum of cases—from the trivial to the most serious—and therefore have an exponentially larger caseload. As a result, they must balance priorities of efficiency and justice. Conversely, international courts adjudicate a narrowly selected caseload of high profile crimes, and consequently, are in a position to prioritize justice over efficiency.⁴⁹

A major policy consideration driving international justice is the idea that adjudicating high profile crimes may impact the global community in such a manner as to deter future atrocities.⁵⁰ The ICTR embodies this ideology, and charges itself with the duty to pass on the lessons learned from the Rwanda genocide in order to prevent a repetition of such crimes that may be committed in other parts of the world.⁵¹ Therefore, the ICTR is not only attempting to bring justice to Rwanda for the crimes that taint its past, but

47. *Completed Cases*, INTERNATIONAL CRIMINAL TRIBUNAL OF RWANDA, <http://unictr.org/Cases/tabid/77/Default.aspx?id=4&mnid=4> (last visited Feb. 20, 2012).

48. *Post Genocide Justice*, KIGALI MEMORIAL CENTRE, <http://www.kigalimemorialcentre.org/old/genocide/rwanda/justice.html>.

49. Bibas & Burke-White, *supra* note 45, at 651–52 (“[I]nternational law targets a few high-level, highly public, politically salient mass atrocities, which often arise out of political instability.”).

50. See Bibas & Burke-White, *supra* note 45, at 651–52 (“[I]nternational criminal justice, which can use a few cases to send messages, is better than domestic criminal justice at the more symbolic functions of punishing, vindicating victims, teaching, healing, and reconciling.”).

51. *General Information*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Feb. 20, 2012). The ICTR has made landmark decisions that shape international criminal justice today: it applied the United Nations 1948 Convention Against Genocide for the first time in history. Adama Dieng, *Capacity-Building Efforts of the ICTR: A Different Kind of Legacy*, 9 NW. U. J. INT’L HUM. RTS. 403, 404 (2011).

also is hoping to create a deterrent effect that will be of worldwide benefit in the future.

Supporters of the ICTR believe that its activities have had the desired deterrent effect. Since its inception, fifteen countries have turned over discovered genocidaires within their borders to the ICTR, which the ICTR believes has resulted in “a progressive realization in these countries that they cannot allow fugitives from international justice in their domain.”⁵² While the ICTR claims to have benefitted the international community, whether Rwanda has benefitted as a nation is another issue altogether.

The ICTR’s proceedings had the unintended effect of undermining a sense of justice among Rwandans at national and local levels. Criminals prosecuted by the tribunal, charged with the most severe crimes in international criminal jurisprudence, usually enjoy a better quality of life in the ICTR’s prison facilities than individuals accused of lesser crimes and held in Rwandan courts. The ICTR itself reports that prisoners receive “meals that are prepared under the supervision of a qualified dietician and medical officer,” as well as “periods of common activity such as religious observance, educational classes or physical exercise.”⁵³

Meanwhile, genocidaires tried in Rwanda were often underfed, only had access to dirty drinking water, and lived in cells where they were often compelled to sleep in latticework formations because of the lack of space.⁵⁴ Although Rwanda’s prison conditions have improved drastically in recent years, during the years immediately following the genocide, the conditions were dismal.⁵⁵ While international and regional agreements advocate for living conditions that allow prisoners to maintain their health and dignity,⁵⁶

52. *General Information*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unicttr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Feb. 20, 2012).

53. *Detention of Suspects and Convicted Persons*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unicttr.org/AboutICTR/FactSheets/DetentionofSuspectsandConvictedPersons/tabid/114/Default.aspx> (last visited Feb. 20, 2012).

54. CLARK, *supra* note 4, at 50.

55. CLARK, *supra* note 4, at 99. While Rwanda’s prison conditions were some of the worst in the world in the years immediately following the genocide, those conditions have improved dramatically as a result of aid provided by the Red Cross and the Dutch government. *Id.* Such assistance has enabled Rwanda to construct additional prison facilities. *Id.* While in the year 2000, there were approximately 120,000 prisoners held in overcrowded penitentiaries, this number decreased as genocidaires completed their prison sentences, easing the overcrowding, and thereby improving living conditions. *Mpanga, a Stronghold for the UN in Rwanda*, INTERNATIONAL JUSTICE TRIBUNE (May 4, 2008, 11:00 PM) <http://www.rnw.nl/international-justice/article/mpanga-stronghold-un-rwanda>. As of 2008, approximately 58,000 prisoners were being held in facilities throughout Rwanda. *Id.*

56. African Commission on Human and Peoples’ Rights, Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, ¶ 4, Sept. 22, 2002, http://www.achpr.org/english/declarations/declaration_ouagadougou_en.html.

Rwanda's lack of resources in the wake of the genocide made compliance with such standards unattainable. As a result, there was a stark contrast between the ideal living conditions for prisoners provided by the ICTR to individuals accused of the worst crimes, versus the conditions experienced by those accused of lesser crimes and held in Rwanda's penitentiaries. The high quality of life provided to suspects being prosecuted by the ICTR when compared to the quality of life experienced by Rwandan prisoners—or even by Rwandans living freely but in poverty—made many question whether the ICTR was truly delivering justice.

When the Security Council called for the establishment of the ICTR, its placement in Tanzania instead of Rwanda was based on the belief that a court could derive integrity from its geography. At the time, the Security Council and United Nations believed that establishing the Tribunal in Tanzania, which was more secure than Rwanda, would better facilitate the deliverance of justice.⁵⁷ However, as international criminal justice evolved, it became clear that international justice could leave behind a more powerful legacy when the court delivering justice is embedded in the community where the crimes occurred.⁵⁸ For this reason, the United Nations Special Court for Sierra Leone, another site of international criminal trials, is located within its own boundaries, despite the fact that Sierra Leone was scarcely more secure than Rwanda following the genocide.⁵⁹ While the family and friends of victims of the Sierra Leone tragedy are able to benefit from an international court in-country, the family and friends of the victims of the Rwanda genocide have experienced a strained relationship with the ICTR.

The ICTR's location in Arusha, Tanzania limits the positive effects that Rwanda can garner from the Tribunal. This distance of the Tribunal from the country where the genocide took place prevents the healing effects of justice from being fully experienced in Rwanda, as the developments of the cases are not readily accessible to Rwandans. While a local paper in Tanzania, THE ARUSHA TIMES, dedicates a page to Tribunal developments,⁶⁰

57. Interview with Martin Ngoga, Prosecutor General of Rwanda, Umubano Hotel in Kigali, Rwanda (July 7, 2011).

58. Id. International courts that are located in-country (also termed "international domestic courts" or "semi-internationalized courts") are "proximate to the events in question, have the best access to relevant evidence, and may be able to play a positive role in the local processes of reconciliation." Therefore, courts that are located in country have the ability to provide a significant impact on international criminal justice. William W. Burke-White, *A Community of Courts: Toward A System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 24 (2002).

59. Interview with Martin Ngoga, *supra* note 57.

60. Dieng, *supra* note 51, at 407–08.

Rwandan knowledge of the proceedings is limited by whether Rwandan journalists are able to report on them. As a result, by the time that the results of a case reach Rwandans, it is not uncommon for Rwandans to feel that they were not part of the justice process.⁶¹ This sentiment often intensifies when Rwandans learn of the ICTR's decisions to acquit suspects. In October 2011, members of Ibuka, one of Rwanda's largest support organizations for genocide survivors,⁶² expressed outrage when the ICTR acquitted Casmir Bizimungu and Jerome Bicomumpaka, two government ministers suspected of committing genocide.⁶³ Ibuka's frustration likely stems from the attenuated relationship between the ICTR and the Rwandan community as a result of its contentious history and geographic distance.

Additionally, the distance of the ICTR's location in Tanzania from Rwandan lawyers and advocates has made it more difficult for those individuals to argue that the allocation of resources be divided equally between the ICTR and the International Criminal Tribunal for Yugoslavia (ICTY). The ICTY was created at the same time as the ICTR, and the two tribunals share the same resources, including personnel.⁶⁴ Between the 1999 and 2003, which proved to be one of the most turbulent times in the relationship between Rwanda and the ICTR, Carla del Ponte served as the Prosecutor General for both the ICTR and the ICTY.⁶⁵ Del Ponte spent the vast majority of her time working on ICTY matters in the Hague, and as a result, Rwandan advocates felt that justice was not being carried out on their behalf;⁶⁶ in fact, Rwanda called for her resignation several times.⁶⁷ In 2003, Hassan Bubacar Jallow, a Gambian lawyer, was assigned the post of Prosecutor General and charged with responsibility for the ICTR only, and not the ICTY.⁶⁸ This appointment acknowledged Rwanda's need for a Prosecutor General who would dedicate sufficient time and effort only to Rwanda's genocide cases, thereby contributing to an ease in tensions between the ICTR and Rwanda. The relationship between Rwanda and the ICTR will likely continue to improve as the ICTR takes more actions that

61. DES FORGES, *supra* note 3, at 742.

62. IBUKA, <http://www.ibuka.rw> (last visited Feb. 20, 2012).

63. James Karuhanga, *Ibuka Considers Protests Over ICTR Acquittals*, NEW TIMES (Oct. 5, 2011), <http://www.newtimes.co.rw/news/index.php?i=14769&a=45890>.

64. *Registrars of ICTR and ICTY Sign Statement of Cooperation*, INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA (Sept. 21, 2001), <http://www.icty.org/sid/7952>.

65. *See Interview with Carla del Ponte*, HIRONDELLE NEWS (Sept. 16, 2003), <http://www.hirondellenews.com/content/view/692/26/>.

66. *Interview with Martin Ngoga*, *supra* note 57.

67. *Interview with Carla del Ponte*, *supra* note 65.

68. *Office of the Prosecution*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/AboutICTR/ICTRStructure/OfficeoftheProsecution/tabid/104/Default.aspx> (last visited Feb. 20, 2012).

acknowledge Rwanda's needs and expectations. For this reason, the ICTR's recent decision to transfer a case, for the first time in history, from the ICTR to the National Judiciary of Rwanda may have pivotal effects in the relationship between the ICTR and Rwanda. A discussion of this case and the transfer decision follows.

II. THE CASE OF PASTOR JEAN BOSCO UWINKINDI

On June 28, 2011, the ICTR made a precedential decision to transfer the case of Jean Bosco Uwinkindi from its jurisdiction to the National Judiciary of Rwanda. Uwinkindi's story is one defined by a series of transfers, the first of which took place on a personal and spiritual level. During the Rwanda genocide, some pastors had a greater desire to serve their political interests than to serve their penitents. Jean Bosco Uwinkindi was one such pastor, and so he transferred his priorities from being spiritual guide to becoming a political player. As a radical member of the PARMEHUTU, Uwinkindi is accused of advocating for the extermination of Tutsis, whom he referred to as the *inyenzi*,⁶⁹ meaning "cockroaches" in Kinyarwanda, the native language of Rwandans.⁷⁰

Uwinkindi is accused of organizing a group of killers that lived at a church and would lead Tutsis there to meet their deaths.⁷¹ The group, under the leadership of Uwinkindi, is accused of a series of atrocities,⁷² such as allowing Tutsi women and children to stay at the church under the guise of refuge, only to have them murdered.⁷³ Additionally, Uwinkindi is accused of ordering his men to stop fleeing Tutsis at roadblocks and to execute them,⁷⁴ and for hunting Tutsis who were seeking refuge in swamps.⁷⁵

In July 1994, when Uwinkindi fled Rwanda, the remains of approximately 2,000 men, women and children were found at or near the

69. Prosecutor v. Uwinkindi, Case No. ICTR-2001-75-I, Indictment, ¶ 3 (Nov. 9, 2001), <http://unictr.org/Portals/0/Case%5CEnglish%5CUwinkindi%5Cindictment%5Cuwinkindi.pdf>.

70. KINZER, *supra* note 67, at 34.

71. *Uwinkindi*, Case No. ICTR-2001-75-I, Indictment, ¶ 3. The church was known as the Kayenzi church, located in the sector of Nyamata, a rural area outside Kigali. *Id.* ¶ 2. Uwinkindi directed attackers in groups: one such group contained approximately one hundred people. *Id.* ¶ 4.

72. *See id.* ¶ 29–30.

73. *Id.* ¶ 11. The women and children were murdered brutally using traditional weapons such as machetes. It is alleged that on one occasion, after a woman was killed by gunfire, Uwinkindi ordered that traditional weapons be used instead in order to conserve their firearms. *Id.* ¶ 24.

74. *Id.* ¶ 8.

75. *Id.* ¶ 18, 21.

church where he and his men conducted their operations.⁷⁶ Today, the church is a memorial, holding the clothing and bones of those that were murdered.⁷⁷ While the bones are kept underground in the basement of the church, the garments are kept above ground and stacked in waist-high piles on the pews. In one of these piles, there may be the clothing of Uwinkindi's wife and two children; they were Tutsis, and suffered the same fate as those who shared their ethnic identity.⁷⁸

III. THE PROSECUTION OF UWINKINDI AND THE FOUR JUSTICE SYSTEMS INVOLVED

To adequately bring Uwinkindi to justice, he should be touched by four justice systems. The first system that will be discussed is the ICTR, and the second system to be discussed is *gacaca*, a traditional Rwanda justice system that will be introduced and discussed in this section. The third system of justice is mediation, which can be used to encourage reconciliation between the perpetrators of genocide and the family and friends of those victimized. Finally, the fourth system of justice that this section addresses is the National Judiciary of Rwanda, which will handle Uwinkindi's case once it is officially transferred from the ICTR.

A. *The ICTR: the First System of Justice Involved in Uwinkindi's Prosecution*

In 2001, the ICTR indicted Uwinkindi for genocide,⁷⁹ conspiracy to commit genocide, and crimes against humanity.⁸⁰ Uwinkindi evaded arrest for nine years until he was discovered and arrested on June 30, 2010 in

76. *Id.* ¶ 25.

77. *Nyamata Memorial Site*, *supra* note 2.

78. *Uwinkindi*, Case No. ICTR-2001-75-I, Indictment, ¶ 25.

79. The definition of genocide used by the ICTR is "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." See Statute of the International Criminal Tribunal of Rwanda (hereinafter ICTR statute), art. 2 (Nov. 4, 1994). This definition reflects the definition given to genocide in Article 6 of the Rome Statute for the International Criminal Court. *Id.*

80. *Uwinkindi*, Case No. ICTR-2001-75-I, Indictment.

Uganda.⁸¹ On June 28, 2011, the first *11bis* motion was granted in the history of the ICTR to transfer Uwinkindi's case from the ICTR to Rwanda's national courts.⁸² However, before this motion was granted, another system of justice, known as *gacaca*, carried out proceedings to bring Uwinkindi to justice.

B. Gacaca Courts: the Second System of Justice Involved in Uwinkindi's Prosecution

Gacaca is derived from a Kinyarwanda word meaning "the grass," and is a traditional justice system that developed in Rwanda.⁸³ Case hearings took place outdoors in full public view as a community-based forum of dispute resolution.⁸⁴ Professional lawyers are barred from participating, and the judges, elected from the community, have minimal legal training.⁸⁵ Rwanda's decision to use *gacaca* to hear genocide cases was controversial. *Gacaca* traditionally had been used to resolve disputes over offenses like cattle rustling, and there were doubts as to whether a justice system typically used for resolving relatively simple wrongs could be applied to complex cases of genocide.⁸⁶ Ultimately, the government's decision to implement *gacaca* was based on necessity. By 2000, only 2,500 cases had been heard by the national court system, less than 3% of the total backlog.⁸⁷ At this rate, most accused genocidaires would have died by the time the court was ready to hear their cases.⁸⁸ In response, Rwanda passed legislation in 2001 to approve the use of *gacaca* courts for addressing crimes committed during

81. *Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Trial Chamber, June 28, 2011), <http://www.unictr.org/Portals/0/Case%5CEnglish%5CUwinkindi%5Cdecisions%5C110628.pdf>.

82. *See generally id.*

83. CLARK, *supra* note 4, at 14. Although an ancient system of justice, *gacaca* is constantly evolving to comport with the contemporary needs of Rwandan society. Prior to the Belgian colonial era, *gacaca* was based on unwritten laws, but became more formalized under Belgium's colonial rule: evidence was collected, and judgments rendered based on the testimonies given. *Id.* at 52–54.

84. *Id.* at 1, 14, 52.

85. *Id.* at 3.

86. U.N. COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN RWANDA SUBMITTED BY THE SPECIAL REPRESENTATIVE, MR. MICHEL MOUSSALLI, PURSUANT TO RESOLUTION 1998/69, ¶ 51, E/CN.4/1999/33 (Feb. 8, 1999).

87. CLARK, *supra* note 4, at 56.

88. *Id.*

the genocide.⁸⁹ By 2010, *gacaca* tried its last cases.⁹⁰ In total, an estimated one million cases were tried through *gacaca*.⁹¹

While the use of *gacaca* courts increased the rate at which cases were tried, and greatly eased the backlog of cases, some human rights groups argue that such gains in efficiency should not come at the cost of sacrificing due process.⁹² Genocide suspects are denied the right to legal counsel in *gacaca* proceedings, and some suspects, including Uwinkindi, have been tried *in absentia*.⁹³ Uwinkindi was tried *in absentia* by *gacaca* courts on two occasions, though the *gacaca* Appeals Chamber later vacated these decisions.⁹⁴

Although *gacaca*'s judgment of Uwinkindi was later rendered void, the process of reaching that judgment helped to foster reconciliation in the Rwandan community by allowing family and friends of the victims to communicate the events they witnessed.⁹⁵ In *gacaca*, the process of uncovering the truth may be as important as the truth itself.⁹⁶ Speaking in general terms, there are three separate processes undertaken in uncovering the truth after a conflict: "truth-telling," "truth-hearing," and "truth-shaping."⁹⁷ Truth telling is the public articulation of the truth, usually comprised of testimony by witnesses.⁹⁸ During Uwinkindi's *gacaca* hearings, witnesses to his crimes likely had the opportunity to testify as to what they saw, and as a result, experience a sense of catharsis through that process. Truth-hearing is the process by which the person listening to the

89. *Id.* at 3. In 2001, more than 250,000 *gacaca* judges were elected to hear the overload of genocide cases. *Id.*

90. *Id.* at 6.

91. *Id.* at 51, fn. 8. While about one million cases have been tried by *gacaca*, there is debate as to the exact number of suspects that have been tried, as a single suspect may be accused of multiple crimes, thereby meriting multiple cases. *Id.*

92. *Id.* at 174. Human Rights Watch (HRW), was one of the more vocal groups that advocated against *gacaca* due to its lack of due process rights for suspects. *Id.* at 34.

93. *Id.* at 160. Due to the diffuse nature of the *gacaca* courts, the central government of Rwanda is often uninformed of developments within *gacaca*. As a result, suspects have been tried in *absentia*, even on occasions in which the central government would have otherwise intervened to prevent such hearings from taking place.

94. *Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Prosecutor's Request for Referral to the Republic of Rwanda at 12, ¶31, fn. 43. Uwinkindi was convicted by a *gacaca* court on two occasions: in May 2009 in the sector of Kayumba, and in August 2009 in the sector of Ntarama. *Id.* However, the appeals chamber court of *gacaca* vacated both decisions, holding that it violated the Rwanda Transfer Law. *Id.*

95. See CLARK, *supra* note 4, at 63.

96. *Id.*

97. *Id.*

98. *Id.* at 34.

truth-teller receives the content.⁹⁹ For friends and families of victims who have yet to learn how certain victims died, the process of truth-hearing has a healing effect.¹⁰⁰ Family and friends of Uwinkindi's victims would have experienced a sense of closure by listening to the witnesses share their experiences. Finally, truth-shaping is the process by which parties external to the truth-telling, such as historians, journalists, and the public at large, receive information and interpret it.¹⁰¹ To *gacaca* judges, truth-shaping is important to the extent that it teaches moral lessons to Rwandans and makes clear a policy of punishing those guilty of crimes.¹⁰²

Gacaca, unlike the ICTR, brings justice to genocidaires using alternative dispute resolution techniques that have proven to be effective in reconciling the family and friends of victims with the perpetrators responsible for the deaths of their loved ones. *Gacaca* judges serve distinct roles as mediators by helping the family and friends of victims to communicate with the accused perpetrators, who in turn, may voice apologies or recount events.¹⁰³ This type of exchange between victims and perpetrators is absent from ICTR proceedings. While *gacaca* judges are helpful in serving as mediators, professional mediators outside the *gacaca* framework have also been helpful in fostering reconciliation in Rwanda.

C. Mediation of Apology and Forgiveness: the Third System of Justice that Should Be Involved in Uwinkindi's Prosecution

The concept of using mediation to foster apology and forgiveness, and thereby instill a sense of justice, is elucidated in the documentary, *As We Forgive*,¹⁰⁴ which explores Rwanda's process of reconciliation after the genocide. *As We Forgive* portrays how a mediator, Pastor Guhegi, helped to reconcile two Rwandans, identified by their first names: Rosaria and Saveri.¹⁰⁵ Saveri had killed Rosaria's sister and her sister's children during the genocide.¹⁰⁶ After Saveri served prison time as punishment for his

99. *Id.* at 34.

100. *Id.* at 34.

101. *Id.* at 192.

102. *Id.*

103. *Id.* at 168.

104. *AS WE FORGIVE* (Image Bearer Pictures 2008).

105. *Id.*

106. *Id.*

crimes, he was released.¹⁰⁷ The documentary portrays how a mediator, Pastor Gahigi, helped Rosaria and Saveri reconcile and live together in the same community.¹⁰⁸ Rosaria was devastated by the loss that Saveri had inflicted on her.¹⁰⁹ They had been friends before the genocide, but when the civil war commenced, Saveri turned on Rosaria and her family.¹¹⁰ Even after Saveri had served his sentence, Rosaria still held resentment against him for her suffering.¹¹¹

Pastor Gahigi, acting as a mediator between Rosaria and Saveri, helped to foster reconciliation between the two.¹¹² Rosaria supported herself by growing a cereal crop called sorghum.¹¹³ After harvesting her crop, Rosaria had to carry out the process of separating the seeds from the harvested plant.¹¹⁴ Alone, Rosaria would neither be able to process her harvest before pests destroyed it, nor could she afford to hire workers to help her.¹¹⁵ Pastor Gahigi suggested that Saveri, as a step towards reconciling with Rosaria, offer to help her process her harvest.¹¹⁶ Rosaria accepted, and perhaps as a result of Saveri's labor contribution, she was eventually able to release some of her resentment towards him.¹¹⁷ His act of volunteering both helped Rosaria and allowed her to trust him more.¹¹⁸ The dynamic that arose as a result of the Pastor Gahigi's mediation is represented in Appendix 1, and is a specific example of the more general dynamic of mediated apology, forgiveness, and reconciliation.

Legal scholar Lee Taft describes apology as valuable because it "offers the offender a vehicle for expressing repentance and the offended an opportunity to forgive."¹¹⁹ Unfortunately, the geographic distance between Rwanda and the ICTR in Tanzania prevented any type of mediation between the family and friends of the victims of the genocide and the genocidaires charged by the ICTR. However, with Uwinkindi's transfer to the jurisdiction of the National Judiciary of Rwanda, there is more of a

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See id.*

118. *See id.*

119. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L. J. 1135, 1138 (2000).

possibility of interaction between him and the family and friends of victims. Unlike Saveri, Uwinkindi most likely will not be in a position to perform labor contributions for the loved ones of his victims, but he may be able to make a verbal apology, should he feel such a sentiment. Taft emphasizes that apology is essential for both the offender and the offended to heal and to move forward,¹²⁰ and so the ICTR and National Judiciary of Rwanda should make efforts towards involving a mediator to encourage a verbal exchange between Uwinkindi and the loved ones of his victims.

D. The National Judiciary of Rwanda: the Fourth System of Justice Involved in Prosecuting Uwinkindi

While a primary focus of the *gacaca* courts and mediators is fostering reconciliation, the National Judiciary of Rwanda has a broader set of goals. The national judiciary is concerned not only with reconciliation, but also with how it is perceived by the international community and the Trial Chambers of the ICTR. In order for the ICTR to transfer cases to national courts, the ICTR Trial Chamber must be satisfied “that the accused will receive a fair trial in the courts of the State concerned.”¹²¹ Aside from Rwanda, the only country that the ICTR has transferred a case to is France.¹²² In determining whether to allow a case to be transferred from the ICTR to the court of another country, the ICTR holds Rwanda to a different standard than that of European countries. While the adequacy of the judiciaries in European countries is evaluated based on whether those countries’ laws comply with ICTR standards, the adequacy of the Rwandan judiciary is evaluated based not only on Rwanda’s laws, but also on how Rwanda enforces those laws.¹²³ The separate standard that Rwanda is held to, compared to European countries, likely has also been a source of tension between Rwanda and the ICTR.

120. *Id.* at 1138.

121. Rules of Procedure and Evidence for the International Criminal Tribunal of Rwanda, Rule 11bis (June 29, 1995).

122. Two cases have been transferred to France’s jurisdiction. *See* Prosecutor v. Bucyibaruta, Case No. ICTR-05-85, Decision on Prosecutor’s Request for Referral to France (Trial Chamber, Nov. 20, 2007), <http://www.unictr.org/Portals/0/Case%5CEnglish%5CBucyibaruta%5Cdecisions%5C071120.pdf>; Prosecutor v. Munyeshyaka, Case No. ICTR-05-87, Decision on Prosecutor’s Request for Referral to France (Trial Chamber, Nov. 20, 2007), <http://www.unictr.org/Portals/0/Case%5CEnglish%5CMunyeshyaka%5Cdecisions%5C071120.pdf>.

123. Melman, *supra* note 36, at 1298, 1302–03.

Uwinkindi's case is one of several that the National Judiciary of Rwanda has been attempting to gain jurisdiction over for the past five years. The climactic granting of the *11bis* motion to transfer Uwinkindi's case from the ICTR to Rwanda indicates that the national judiciary, in the eyes of the ICTR, is now competent to deliver justice.¹²⁴ By the time Uwinkindi's case is heard, he will have been touched by three of the four systems that handle post-genocide justice: the ICTR, the *gacaca* courts, and the national judiciary. It has not been formally determined whether a form of mediation to foster apology and forgiveness will be used in Uwinkindi's case. However, in addition to helping heal family and friends of victims in the genocide, mediation in Uwinkindi's case would also improve the relationship between the ICTR and the National Judiciary of Rwanda. A discussion of this relationship, in the context of the ICTR's decision to grant the *11bis* motion in Uwinkindi's case, follows.

IV. ANALYSIS OF THE DECISION TO TRANSFER UWINKINDI'S CASE FROM THE ICTR TO THE NATIONAL JUDICIARY OF RWANDA

Prior to granting the *11bis* motion in Uwinkindi's case, the ICTR had a confirmed track record of denying requests to transfer cases to Rwanda. In 2008, the ICTR entertained and denied a number of *11bis* motions, including those made in the cases of Jean Baptiste Gatete, Yussuf Munyakazi, Gaspard Kanyarukiga, and Fulgence Kayishema.¹²⁵ Although the ICTR praised

124. Uwinkindi's case may also set precedent for other cases to be transferred from the ICTR to the National Judiciary of Rwanda. The prosecutor of the ICTR has already requested the transfer of three more accused genocidaires now that the case of Uwinkindi appears to have opened the door for the granting of *11bis* motions. James Karuhanga & Edmund Kagire, *Rwanda: ICTR Refers Another Genocide Suspect to Local Courts*, ALL AFRICA (Feb. 24, 2012), <http://allafrica.com/stories/201202240184.html>. The transfer decision in Uwinkindi's case may even affect the decisions of other countries in evaluating whether to extradite alleged genocidaires to Rwanda. In the past, national courts deciding whether to extradite alleged genocidaires to Rwanda had based their decisions on the precedent set by the ICTR's denial of *11bis* motions. *Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 42. Now that the *11bis* motion was granted in the case of Uwinkindi, foreign jurisdictions may begin transferring cases to Rwanda.

125. *See* Prosecutor v. Gatete, Case No. ICTR-2000-61, Decision On Prosecutor's Request for Referral to the Republic of Rwanda (Trial Chamber, Nov. 17, 2008), <http://www.unict.org/Portals/0/Case%5CEnglish%5CGatete%5Cdecisions%5C081117.pdf>; Prosecutor v. Munyakazi, Case No. ICTR-97-36, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (App. Chambers, Oct. 8, 2008), <http://www.unict.org/Portals/0/Case%5CEnglish%5CMunyakazi%5Cdecisions%5C081008.pdf>; Prosecutor v. Kanyarukiga Case No. ICTR-2002-78, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (App. Chamber, Oct. 30, 2008), <http://www.unict.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdcisions%5C081030.pdf>; Prosecutor v. Kayishema Case No. ICTR-01-67, Decision on Prosecutor's Request for Referral to

Rwanda for aspects of its justice system that inspired confidence in its ability to hear transfer cases—such as its impartiality, the ability to guarantee adequate representation to defendants, and ensuring humane treatment of the defendants—the ICTR nonetheless acknowledged what it classified as flaws in the National Judiciary of Rwanda.¹²⁶

The primary reasons that the ICTR cited for the denying the 11*bis* motions were the risk that a defendant in a transfer case could be subject to life imprisonment with solitary confinement and the lack of an adequate witness protection program.¹²⁷ The ICTR was not cooperative with the National Judiciary of Rwanda in resolving the sentencing issue, but was cooperative in helping Rwanda to create an adequate witness protection program. Within this section, Part A will discuss the issue of sentencing, while Part B will discuss the issue of Rwanda's witness protection program, as well as other areas that the ICTR and Rwanda have been able to cooperate on in a positive way. Part C will then offer suggestions to help the ICTR and National Judiciary of Rwanda better cooperate with each other in a manner that embodies the spirit of the progress made on Rwanda's witness protection program.

A. *Life Imprisonment with Solitary Confinement as a Possible Sentence in a Transfer Case*

Although Rwanda passed legislation in July 2007 to prevent the imposition of the death penalty, under its Death Penalty Abolition Law,¹²⁸ the ICTR was not convinced that this legislation would guard against the possibility of defendants in transfer cases being subject to life imprisonment

the Republic of Rwanda (Trial Chamber, Dec. 16, 2008), <http://www.unicttr.org/Portals/0/Case%5CEnglish%5Ckayishema%5Ctrial%20chamber%5C081216.pdf>.

126. See *Gatete*, Case No. ICTR-2000-61, Decision on Prosecutor's Request for Referral to the Republic of Rwanda ¶¶ 28, 30, 60–64, 83; *Munyakazi*, Case No. ICTR-97-36, Decision on Prosecutor's Request for Referral to the Republic of Rwanda ¶¶ 20, 38, 40; *Kanyarukiga*, Case No. ICTR-2002-78, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 16, 27, 31.

127. See *Gatete*, Case No. ICTR-2000-61, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 60–64; see also *Munyakazi*, Case No. ICTR-97-36, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 20, 38, 40; *Kanyarukiga*, Case No. ICTR-2002-78, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 16, 27, 31.

128. Death Penalty Abolition Law, Organic Law No. 31/2007, art. 2 (Rwanda) (2007).

with solitary confinement.¹²⁹ Rwanda's Death Penalty Abolition Law allows for life imprisonment with special provisions.¹³⁰ The ICTR argued that one such special provision that could be allowed under this law is life imprisonment with solitary confinement. Such a punishment would breach Article 7 of the International Covenant on Civil and Political Rights (ICCPR), to which Rwanda is a party.¹³¹

While Rwanda's legislation on transfer cases specifically bars life imprisonment with solitary confinement, the ICTR nonetheless held that Rwanda's Death Penalty Abolition Law created an unacceptable level of ambiguity.¹³² Therefore, a major reason why the ICTR refused to transfer a case to Rwanda was the fear that it would impose a sentence of life imprisonment with solitary confinement on a defendant.¹³³ Even after Rwanda eliminated this ambiguity by passing a law in 2008 that modified the Death Penalty Law such that life imprisonment with "special provisions" could not be applied to transfer cases, the ICTR was still not satisfied.¹³⁴ The ICTR expressed the concern that Rwanda's law, though on the books, might not be properly enforced.¹³⁵ As a result, the ICTR did not have confidence that Rwanda would take sufficient safeguards against such a sentence of life imprisonment with solitary confinement.¹³⁶

129. See *Gatete*, Case No. ICTR-2000-61, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 60-64; see also *Munyakazi*, Case No. ICTR-97-36, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 20, 38, 40; *Kanyarukiga*, Case No. ICTR-2002-78, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 16, 27, 31.

130. Death Penalty Abolition Law, *supra* note 128.

131. See *Mental Illness, Human Rights, and US Prisons*, HUMAN RIGHTS WATCH, (2009) <http://www.hrw.org/news/2009/09/22/mental-illness-human-rights-and-us-prisons>. The Human Rights Watch (HRW) has interpreted Article 7 of the International Covenant on Civil and Political Rights (ICCPR), prohibiting torture and inhuman and degrading treatment or punishment, to include solitary confinement). *Id.* The international community as a whole affirms the HRW's stance on this point. See *Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 51.

132. See *Gatete*, Case No. ICTR-2000-61, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 9. Article 21 of Rwanda's Transfer Law provides that "life imprisonment" shall be the heaviest penalty, without any reference to imprisonment "with special provisions." Additionally, Article 9 of the Transfer Law states that "[a]ll legal provisions contrary to this Organic Law are hereby repealed." Despite the language of the Transfer Law, the Trial Chamber held that given the potential ambiguity created by the conflicting laws, the possibility that life imprisonment in solitary confinement might be applied as a punishment was grounds for denial of the Rule 11bis motion. *Id.*

133. *Id.*

134. *Kayishema* Case No. ICTR-01-67 Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 27.

135. *Id.*

136. *Id.* ¶ 14.

The ICTR's hardened refusal to grant an *11bis* motion prior to the Uwinkindi case raises questions as to the ICTR's motivation. The ICTR's press releases focused on the United Nations' progress in working towards achieving international justice, rather than on Rwanda's healing.¹³⁷ In a children's book released by the ICTR designed to educate children about the Rwanda genocide, the only mention of post-genocide justice is in reference to the ICTR without any mention of the *gacaca* courts or of the National Judiciary of Rwanda.¹³⁸ Perhaps one of the reasons that the ICTR was reluctant to transfer cases to Rwanda was to uphold the stature of the mechanism charged with arresting the pivotal suspects bearing the greatest responsibility in the genocide. It was only after key changes arose in the United Nations Security Council's stance towards the ICTR that the ICTR became willing to loosen its grip on the most pivotal cases and allowed Rwanda's jurisdiction to have the chance of trying them.

On December 22, 2010, the Security Council passed Resolution 1966, calling for the ICTR to expedite its completion strategy.¹³⁹ The ICTR had fallen behind in its timeline of activities. According to Security Council Resolutions 1503 and 1534, passed in 2003 and 2004 respectively, the ICTR was supposed to have completed all trial activities by 2008, and all work as a whole in 2010.¹⁴⁰ Security Council Resolution 1966 acknowledged that the completion dates had not been met and envisaged December 31, 2014 as a more realistic date for completion.¹⁴¹

Under Resolution 1966, the ICTR will be replaced with a Residual Mechanism, to be instituted July 1, 2012.¹⁴² Under the structure of the Residual Mechanism, the staff of the Registry and the Prosecutor's Office will be significantly reduced, limiting its capacity to hear as many cases.¹⁴³ With the combination of the ICTR's impending staff reduction and pressure to complete its work, political undertones motivated the ICTR to transfer

137. See generally *Press Releases*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/tabid/64/default.aspx> (last visited Feb. 20, 2012).

138. *ICTR Cartoon Book*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/Portals/0/English/News/Cartoon%20Book/ICTR%20Cartoon%20Book%202011.pdf> 53-43 (last visited Feb. 20, 2012).

139. S.C. Res. 1966, ¶ 3 U.N. Doc. S/RES/1966 (Dec. 22, 2010).

140. S.C. Res. 1503, ¶ 7 U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

141. S.C. Res. 1966, ¶ 3, U.N. Doc. S/RES/1966 (Dec. 22, 2010).

142. *Id.* ¶ 1.

143. S.C. Res. 1966, Annex 1, art. 14-15, U.N. Doc. S/RES/1966 (Dec. 22, 2010).

Uwinkindi's case to Rwanda. Likely, the transfer is part of a trend to ease the ICTR's own caseload.

Since the ICTR's 2008 *11bis* motion decisions, Rwanda did not make any additional significant changes to its laws in order to further clarify that a penalty of life imprisonment with solitary confinement would not be imposed on defendants in transfer cases. Yet, in the case of Uwinkindi, the ICTR did not express concern over the imposition of life imprisonment with solitary confinement, while the ICTR had been preoccupied with this issue in four cases from 2008. The opinion in the Uwinkindi case cited no new developments in law or circumstances with respect to the sentencing issue, but rather, employed a new set of reasoning to the same set of facts.

Whereas before, the ICTR saw potential for ambiguity in the dual application of the Death Penalty Abolition Law and the Transfer Law, in the case of Uwinkindi, the ICTR found that Rwanda's "Transfer Law on penalties is consistent with . . . this Tribunal, which allows for a maximum penalty of life imprisonment."¹⁴⁴ Given the fact that the ICTR's political climate experienced dramatic developments between 2008 and the granting of the *11bis* motion in the 2011 Uwinkindi case, it is likely that the ICTR's change of heart towards Rwanda's supposedly ambiguous legislation stemmed more from the ICTR's own shift in goals towards expediting its work, than any additional clarifications on the part of Rwanda.

The ICTR, as an entity of the United Nations and not Rwanda, does not have a duty to consult with the Rwanda judiciary in executing its duties. There appears to have been little discussion between the ICTR and Rwanda in addressing Rwanda's laws on the penalty of life imprisonment. The net effect of this lack of discussion is a sentiment that the ICTR acts independently of Rwanda and Rwandans—a negative consequence that the ICTR should seek to avoid. While the communication between the ICTR and National Judiciary of Rwanda regarding the supposed ambiguity of Rwanda's laws reflects elements of a disharmonious relationship, there are other areas of the relationship between the ICTR and Rwanda that have proven to be cooperative, especially over the past several years.

B. Rwanda's Witness Protection Program, and Other Areas of Collaboration Between the ICTR and Rwanda

In recent years, the ICTR has begun allowing Rwanda to be more involved in the process of its international justice. Despite the past conflicts that have arisen between the ICTR and the National Judiciary of Rwanda,

144. *Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 49.

relations have improved as the ICTR and Rwanda have increased their collaborative efforts. The ICTR has set up thirteen satellite centers throughout the country,¹⁴⁵ created an internship program for Rwandan students,¹⁴⁶ and has supported Rwanda in establishing and strengthening of its Witness Protection Unit (WPU).¹⁴⁷ While the ICTR's rationale concerning the sentencing issue discussed previously is symptomatic of the ICTR's lack of trust of the National Judiciary of Rwanda and desire to serve the ICTR's own interests of fostering international justice, the collaborative efforts between the ICTR and Rwanda reflects potential for developing a more trusting relationship that serves both the interests of the ICTR and Rwanda.

Specifically, assistance with the WPU in Rwanda made the ICTR feel more confident that the National Judiciary of Rwanda would be able to provide for the protection of witnesses testifying in-country.¹⁴⁸ Based in largely on Rwanda's development of the WPU, the ICTR granted the *11bis* motion in the case of Uwinkindi, believing that international justice would still be carried out effectively with the transfer of his case to Rwanda. The National Judiciary of Rwanda, in turn, was satisfied in having the ability to prosecute his case in-country.

The ICTR also commended Rwanda for making changes in its legislation that would make it easier for witnesses to testify in transfer cases without worrying about the consequences of their testimony. When the ICTR handled the 2008 *11bis* motions, the ICTR held that Rwanda's Genocide Ideology Law could make defense witnesses afraid to testify. As a result, the ICTR held that the defense may not be able to call a sufficient number of witnesses due to fear of testifying.¹⁴⁹ This is especially true in light of Rwanda's law against genocide ideology, under which any person

145. Dieng, *supra* note 51, at 408.

146. *Id.* at 410.

147. *Id.* at 411–12.

148. Although the ICTR advocates for protection of witnesses, the ICTR itself has been accused of subpar treatment of witnesses in its own proceedings. For example, while European witnesses testifying at trials were placed in hotels, Rwandan witnesses were instead placed in dorm rooms. Such treatment on the part of the ICTR towards Rwandans has contributed to the feeling of disapproval on the part of some members of the Rwandan community towards the ICTR. *Survivors and Post Genocide Justice in Rwanda: Their Experiences, Perspectives, and Hopes*, AFRICAN RIGHTS AND REDRESS (Nov. 2008), <http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>, at 55–59.

149. *Kanyarukiga*, Case No. ICTR-2002-78, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 26, 27.

making statements either supporting or denying the Rwanda genocide may be subject to punishment.¹⁵⁰

The ICTR held that “regardless of whether [witnesses’] fears are well-founded,” the fact that witnesses may be unwilling to testify for the defense in a transfer case raised serious doubts as to whether a fair trial could be executed. However, Rwanda addressed this problem by amending its Transfer Law in 2009 to include immunity for “anything said or done in the course of a trial.”¹⁵¹ As a result, defense witnesses would not have to be afraid of testifying in a manner that would violate Rwanda’s Genocide Ideology Law. This change was a factor in the ICTR’s decision to grant the *11bis* motion in *Uwinkindi* and is an example of how communication between the ICTR and Rwanda lead to improved legislation and policies within Rwanda.

However, there are also areas in which the ICTR’s lack of clear communication with Rwanda has been frustrating. This is particularly true with respect to the issue of video-link technology, which could be used in a transfer case to help witnesses outside Rwanda provide testimony. Some defense witnesses residing outside Rwanda, and holding refugee status would be unable to testify in-country because travelling to Rwanda could cause them to lose their refugee status.¹⁵² One possible solution that the ICTR considered in 2008 while evaluating *11bis* motions was video-link testimony. Although the ICTR held that video-link testimony would likely be authorized for cases in which witnesses residing outside Rwanda could not testify in person, it nonetheless held that it was “not a completely satisfactory solution.”¹⁵³ The ICTR held that direct witness testimony is preferable to that of video link.¹⁵⁴ Thus, in 2008, the ICTR held that it would disadvantage the defense if its witnesses were to testify by video-link while most of the witnesses for the prosecution were to testify in person.¹⁵⁵

However, when the ICTR evaluated the *11bis* motion for the case of *Uwinkindi* in 2011, it had a different attitude towards video-link testimony

150. See Shannon E. Powers, *Rwanda’s Gacaca Courts: Implications for International Criminal Law and Transitional Justice*, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 23, 2011), http://www.asil.org/insights110623.cfm#_ednref23 (citing Law Relating to the Punishment of the Crime of Genocide Ideology, Organic Law No. 18/2008 art. 2–3 (Rwanda) (2008)).

151. *Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, ¶ 61.

152. *Munyakazi*, Case No. ICTR-97-36, Decision on Appeal Against Decision on Referral Under Rule 11bis, ¶ 46.

153. *Id.* ¶ 42. The Appeals Chamber agreed with the Trial Chamber that video link would not be a completely satisfactory solution. *Id.*

154. *Id.*

155. *Id.*

than it did in 2008. Whereas before, the ICTR held that the use of video-link testimony would be a disadvantage when compared to in-person testimony, the ICTR held in *Uwinkindi* that the availability of video-link facilities would provide sufficient availability of witnesses for the defense.¹⁵⁶ Thus, the ICTR held that video-link facilities could in fact be used to allow witnesses unable to travel to Rwanda to testify, without disadvantaging the defense.¹⁵⁷ The ICTR's change in disposition towards the use of video link technology and subsequent granting of the *11bis* motion may be due, in part, to the Security Council's mounting pressure on the ICTR to complete work in Rwanda. Thus, even in the area of witness testimony, there is still potential to improve communication and collaboration between the ICTR and Rwanda.

C. Using Mediation to Improve the Relationship Between the ICTR and Rwanda

In order for the ICTR and Rwanda to better communicate and collaborate with respect to conflicts that may arise with the transfer of the *Uwinkindi* case to Rwanda's national jurisdiction, the use of a neutral third party mediator should be considered. Although the ICTR called for the African Commission on Human and People's Rights (ACHPR) to facilitate the transfer of the *Uwinkindi* case to the National Judiciary of Rwanda, ICTR indicated that the role of the ACHPR would be to monitor the proceedings of the National Judiciary of Rwanda.¹⁵⁸ However, it would behoove the ICTR to reconsider the role that the ACHPR should play. As a monitoring mechanism, the ACHPR might be one-sided in communicating to the ICTR the status of the national judiciary's proceedings, without fully informing the National Judiciary of Rwanda of concerns that the ICTR may develop. This problem was encountered in February 2012, when the ICTR indicated that the transfer of the *Uwinkindi* case to Rwanda's jurisdiction would be delayed pending an unlikely appeal being made by *Uwinkindi*'s defense (which was ultimately dismissed), and also due to a delay in the

156. *Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 113.

157. *Id.* Under the amendments made to Rwanda's Transfer Law in 2009, testimony could also be provided by witnesses outside Rwanda through depositions or by testifying before a judge sitting in a foreign jurisdiction. *Id.* ¶ 112.

158. *Id.* ¶ 35.

institution of the ACHPR in Rwanda.¹⁵⁹ In the transfer case of Uwinkindi, and those that will likely follow, a mediation forum would enable the National Judiciary of Rwanda to make its concerns heard, and afford the ICTR the opportunity to respond accordingly.

Another issue that may require mediation in the case of Uwinkindi and subsequent transfer cases is in reconciling the family and friends of victims with the alleged perpetrators.¹⁶⁰ One of the benefits of *gacaca* was that the family and friends of victims had the opportunity to confront the alleged murderers, and thereby relinquish some of their anger by hearing confessions firsthand. While the *gacaca* judges acted as mediators between the suspects and the public, the ICTR and national judiciary may wish to consider incorporating the mediation aspect of *gacaca* into the proceedings.

Additionally, if Uwinkindi or another transferee was acquitted, or eventually released from prison, the dilemma would exist as to where that person would relocate. Currently, the ICTR provides safe-houses for persons who have been acquitted by the ICTR, but are unable to reintegrate into Rwanda society, likely because of fear of persecution by family and friends of genocide victims.¹⁶¹ In order to address the issue of post-trial acquittals, the ICTR may want to encourage the use of mediators like Pastor Guhegi in *As We Forgive* in order to help exonerated suspects reintegrate into life in Rwanda without fear of being persecuted by the public at large. Mediation would also foster healing on part of the family and friends of the victims, as Rosaria was able to release resentment towards the man who murdered her sister and her sister's children. While the transfer of the Uwinkindi case to the national jurisdiction of Rwanda is of momentous significance, it could make an even greater impact with the integrated use of mediation.

V. CONCLUSION

One of the important aspects of a public trial is the effect that it has on the community at large. Public trials often offer a means by which apology

159. Edmund Kagire, *Rwanda Dismayed by Further Delay of Uwinkindi's Transfer*, THE NEW TIMES (Feb. 25, 2012) <http://in2eastfrica.net/rwanda-dismayed-by-further-delay-of-uwinkindi-transfer/>; *Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion (Appeals Chamber, Feb. 23, 2012).

160. See Address by Judge Khalida Rachid Khan, President of the ICTR, to the United Nations Security Council - Six Monthly Report on the Completion Strategy of the ICTR Dec 7, 2011, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/Portals/0/tabid/155/default%20.aspx?id=1244>.

161. See *id.*

can be offered to the community. It is through the discourse between the offended and the offender that healing can begin to take place. An apology is the experience and expression of remorse for the violation of a rule.¹⁶² As legal scholar Lee Taft explains, “The expression of contrition provides a legitimate moral reason for the offended party to grant forgiveness.”¹⁶³ As a result, apology allows forgiveness to take place, which is the “overcoming of resentment.”¹⁶⁴ The overcoming of resentment, in turn, leads to healing.¹⁶⁵

The transfer of Uwinkindi’s case will aid the process of forgiveness and healing on part of the Rwandan people by embodying elements of *gacaca*. In *gacaca*, there is not only an “active, sometimes acknowledgement of crimes committed,” but also a process of mediation in which family and friends of victims are able to begin letting go of past offenses committed against their loved ones, knowing that justice is being served.¹⁶⁶ Allowing Rwandans to bear witness as their own country prosecutes Uwinkindi can help in the process of forgiveness across the country, more than if the case were tried in Tanzania. With the presence of the ACHPR or another neutral entity to serve as a mediator between the National Judiciary of Rwanda and the ICTR it will be possible to strive towards national reconciliation as well as international justice.¹⁶⁷ Despite the tension that has characterized the relationship between the ICTR and the National Judiciary of Rwanda in the past, its future has the potential for harmony and cooperation.

162. Taft, *supra* note 120, at 1139–40.

163. *Id.* at 1144.

164. *Id.* at 1143.

165. *Id.* at 1145.

166. CLARK, *supra* note 4, at 43.

167. *See infra*, Appendix 1.

Appendix 1

Dynamic of Forgiveness



Dynamic of Forgiveness, as Applied to "Lady and Genocidaire"



Dynamic of Forgiveness, as Applied to the Rwandan Judiciary and ICTR

