Africa and the Future of International Criminal Justice
AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

VINCENT O. NMEHIELLE (Ed.)

eleven international publishing
To all victims of mass atrocities in Africa who continue to yearn for true justice, peace and good governance from their leaders.
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PART I
FROM RWANDA TO SIERRA LEONE

The Impact of the United Nations International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone on Impunity in Africa
2 **THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE SPECIAL COURT FOR SIERRA LEONE ON IMPUNITY IN RWANDA AND SIERRA LEONE**

*Sigall Horovitz*

2.1 **Introduction**

From April 7 to July 18, 1994, about a million people were slaughtered in Rwanda in what has been considered the fastest genocide in history. Most victims were Tutsi civilians, who were often tortured and raped before being killed, mostly by Hutus. Meanwhile, across the continent, the West African state of Sierra Leone was in the midst of a decade-long civil war. Rebels and pro-government forces murdered and amputated civilians, brutally raped women, and forced children to fight. These unspeakable atrocities compelled the international community to respond by establishing the International Criminal Tribunal for Rwanda (“ICTR” or “Tribunal”) in November 1994, and the Special Court for Sierra Leone (“SCSL” or “Court”) in January 2002. By trying and punishing the individuals who committed these atrocities, the international community sought to send a message that impunity cannot be tolerated for such acts and the rule of law must prevail.1

But was this message received in Rwanda and Sierra Leone? Such an assessment can be difficult to make, especially in light of the relatively short time that has elapsed since the atrocities and their international prosecution, precluding any significant findings about the recurrence of similar violence over time or levels of norm compliance in the relevant countries. In view of this challenge, this chapter seeks to make this assessment through

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1 These international courts also have other goals which will not be addressed in this chapter, such as to contribute to national reconciliation processes in their target countries.
identifying a more “tangible” domestic impact of the ICTR and SCSL: their impact on domestic atrocity-related proceedings in Rwanda and Sierra Leone.\(^2\)

The chapter’s point of departure is that domestic accountability processes are necessary in order to effectively fight impunity and advance the rule of law in the aftermath of mass atrocities, even when an international criminal court becomes involved. This is because the limited mandates and resources of international courts allow them to prosecute only a small fraction of the perpetrators in each mass atrocity case. For example, the ICTR prosecuted so far around seventy defendants and the SCSL only ten. Both courts are about to conclude their activities. Such a small number of prosecutions, even if targeting top level perpetrators, may undermine the ability of these international courts to reduce impunity and improve the rule of law in Rwanda and Sierra Leone, unless their trials are complemented by genuine and fair national prosecutions (or other effective accountability processes). Thus, the position of this chapter is that international courts increase their chance to reduce impunity in their target countries when they encourage domestic atrocity-related proceedings in these countries.

It is stressed, however, that the ICTR and SCSL were not designed to proactively encourage national trials. Even when the UN Security Council adopted a resolution urging the ICTR to complete its work and to that end refer cases to national jurisdictions, it did not provide it with clear guidelines or resources to collaborate with Rwandan courts.\(^3\) In the case of the SCSL, although its “hybrid” structure was expected to contribute to the strengthening of Sierra Leone’s justice system, the Court lacked the mandate and resources to create links with the national judiciary. In addition, by refraining from challenging the national amnesty regime, the SCSL precluded itself \textit{a priori} from encouraging domestic prosecutions of the wartime atrocities. However, as shown below, the ICTR and SCSL still had some impact on national atrocity-related prosecutions in their target countries, or at least on the relevant domestic norms and capacities that are required for handling such proceedings. By identifying elements of this impact, I hope to deepen our understanding of whether and how these international courts contributed to reducing impunity and improving the rule of law in Rwanda and Sierra Leone.

\(^2\) The present chapter was presented at an international conference titled “Africa and the Future of International Criminal Justice” at the University of the Witwatersrand, Johannesburg, on July 14-16, 2010. The research leading to this chapter has received funding from the European Union’s Seventh Framework Programme under grant agreement no. 217589 (Impact of International Criminal Procedures on Domestic Criminal Procedures in Mass Atrocity Cases (DOMAC)). The research was conducted from mid-2008 to mid-2010, and the chapter therefore does not refer to subsequent developments.

In particular, this chapter will identify the impact of the ICTR and SCSL in Rwanda and Sierra Leone in the following four areas: (1) rates of and trends in domestic prosecutions of atrocity crimes; (2) the domestic application of international norms in atrocity-related proceedings; (3) domestic sentencing practices in relation to atrocity crimes; and (4) national capacity to handle domestic atrocity-related proceedings. These four areas of focus were chosen as indicators of whether the ICTR and SCSL have encouraged domestic accountability processes in their target countries. It is stressed that the impact of international criminal courts on national justice systems can extend beyond atrocity cases, especially when the international courts encourage the development of domestic norms and institutions that affect all criminal cases. To promote a better appreciation of the overall impact of the ICTR and SCSL on impunity and the rule of law in their target countries, areas where their domestic impact extends beyond atrocity-related proceedings will also be emphasized.

Sections 2.2 and 2.3 focus on the cases of Rwanda and Sierra Leone, respectively, while section 2.3 presents some concluding remarks. But before proceeding, a brief comment on methodology is warranted. Interactions between international courts and national judiciaries are not always documented. Furthermore, judicial decisions in Rwanda and Sierra Leone are often unpublished. These factors made it hard to identify the domestic impact of the ICTR and SCSL. To overcome these methodological difficulties, I interviewed over fifty professionals affiliated with the ICTR, the SCSL, or the national justice systems of Rwanda and Sierra Leone. The interviewees were selected based on their seniority and knowledge of the relevant justice systems. They included top judicial policy makers and prominent lawyers at the international and national levels, as well as experts who contribute to the development of the relevant national judiciaries. Since many of the interviewees did not want the information they provided to be attributed to them, they are referred to in generic terms such as “a senior Sierra Leonean official”, or “an ICTR judge”. The interviewees were asked open-ended questions which allowed them to describe in detail the interactions between the international and national judicial responses to the atrocities, and the effects of these interactions on the domestic level. Thus the interviews provided important information on which this chapter is partly based. Additional sources of information included UN and NGO documents, international and national jurisprudence, academic articles, news reports, etc.

My own professional background is also relevant. Between the years 2003 and 2010, I served in legal positions both at the ICTR and SCSL. This first-hand knowledge of the work of these courts and the ways in which they interact with domestic jurisdictions, guided my choice of interviewees and questions, and helped me understand the answers.
2.2 THE ICTR AND RWANDA

2.2.1 Background to Domestic Response to the Atrocities

Before addressing the impact of the ICTR on the Rwandan justice system, it is important to note Rwanda’s own remarkable judicial response to the atrocities. Immediately after the genocide, the Rwandan government arrested masses of suspected genocide perpetrators. In 1996, it started prosecuting them in national courts under a newly enacted law criminalizing genocide and crimes against humanity (“Genocide Law of 1996”). When conventional criminal justice proved too slow, Rwanda established community-based “gacaca” courts. By mid 2006, gacaca courts took over the vast majority of the country’s genocide-related cases, leaving to the ordinary (conventional) courts only cases involving the gravest crimes and the most senior suspects. As of the time of writing, gacaca courts have prosecuted about a million genocide-related cases (including cases concerning property offences). Ordinary courts, it is estimated, handled slightly over 10,000 genocide cases.

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4 Organic Law No. 08/96 of 30/8/1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October, 1990 [Rwanda] (hereinafter: “Genocide Law of 1996”). The term “organic law” in Rwanda refers to laws that are normatively superior to regular laws, secondary only to the Constitution.


6 The Genocide Law of 1996, supra note 4, classified genocide-related crimes into four categories, depending on the level of the perpetrator and gravity of the crime. Category I included the most serious crimes and offenders, which continued to be sent to ordinary courts even after the gacaca courts were established. For a more detailed discussion of the classification of genocide crimes in Rwanda see footnote 48 below and accompanying text.

7 Gacaca courts started their “data-collection” activities in mid-2002. Their trials started in March 2005, initially in 752 “pilot” locations but from July 2006 gacaca trials were held in over 9,000 locations throughout Rwanda. As of March 2010, about a million people have been judged. See Hirondelle News, Gacaca Closure Postponed One More Time (March 31, 2010) <www.hirondellenews.com/content/view/13340/332/> (Accessed May 16, 2010).

2 The Impact of the International Criminal Tribunal For Rwanda and the Special Court for Sierra Leone on Impunity in Rwanda and Sierra Leone

However, both gacaca and ordinary courts in Rwanda have been internationally criticized for failing to meet minimum fair trial standards and meting “victor’s justice” against Hutus while Tutsis enjoy impunity.9 Whether or not these claims are justified, identifying the ICTR’s impact on Rwandan judicial proceeding can help us understand the extent and nature of its contribution to accountability and rule of law in Rwanda. The remainder of this section focuses on the impact of the ICTR on atrocity proceedings before Rwandan ordinary criminal courts, and not gacaca courts.

2.3 ICTR Impact on Prosecution Rates and Trends

2.3.1 Genocide Prosecutions

Rwanda’s ambitious attempt to prosecute all genocide perpetrators was a result of the strong political will of its post-genocide governments to establish accountability for the genocide. Rwandan officials and lawyers stressed that the ICTR did not play a role in encouraging national prosecutions of genocide perpetrators.10 Nonetheless, even if the ICTR had little or no impact on rates of genocide trials in Rwanda, it had some influence on certain trends in Rwandan atrocity-related proceedings. For example, in 2005, when the ICTR Prosecutor transferred dossiers (investigation files) to the Prosecutor General of Rwanda, he ultimately encouraged Rwandan ordinary courts to (re-)engage in prosecuting high or mid level genocide suspects.11 A senior ICTR official stressed that this transfer of evidence also encouraged Rwanda to start seeking the extradition of genocide suspects from third states, as all of the suspects whose dossiers were transferred from the ICTR resided outside Rwanda.12


10 Interview notes with author.

11 In 2005, the Prosecutor of the ICTR transferred to the Rwandan authorities about 35 dossiers (investigation files) of suspects who were investigated but never indicted by the ICTR. See Letter from Hassan B. Jallow, Chief Prosecutor, ICTR, to Kenneth Roth, Executive Director, Human Rights Watch, 2 (June 22, 2009) <hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response.pdf> (Accessed August 21, 2009) (hereinafter “Letter from ICTR Prosecutor to HRW”). Since these suspects have not been formally charged by the Tribunal, it was within the Prosecutor’s discretion to transfer their dossiers to Rwanda, without requiring the ICTR judges’ authorization.

12 Interview notes with author.
Even when one of these dossiers concerned “revenge crimes” allegedly committed by four officers of the Tutsi-dominated Rwandan Patriotic Front ("RPF"), Rwanda took the matter seriously and prosecuted RPF members for crimes committed against Hutu civilians in 1994. This domestic prosecution of RPF crimes, which in my view constitutes an important impact of the ICTR on Rwanda, is discussed in the following paragraphs.

### 2.3.2 War Crimes Prosecutions

As opposed to genocide and crimes against humanity, war crimes do not fall under the jurisdiction of gacaca courts. Thus, soldiers and militia members affiliated with the previous Hutu-dominated regime are not prosecuted in Rwanda for war crimes. However, they are tried for the “greater” crime of genocide. But what about offences committed by combatants who opposed the former regime, which do not amount to genocide but may qualify as war crimes? These cases fall under the jurisdiction of Rwanda’s military courts. Indeed, several dozen members of the RPF, who fought against former government forces, were tried in military courts for crimes related to the war.

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13 Letter from ICTR Prosecutor to HRW, supra note 11 at 2.
15 In June 2009, Rwanda’s Minister of Justice stated that a total of 42 RPF soldiers were prosecuted in Rwanda as of April 2007 for crimes perpetrated in connection with the war. See Official website of the Republic of Rwanda, Ministry of Justice, ‘RPF Never Ignored to Punish Soldiers Guilty of War Crimes’ <www.minjust.gov.rw/spip.php?article133> (Accessed July 26, 2009) (hereinafter: “RPF Never Ignored War Crimes”). Referring to this statement, the ICTR Prosecutor added that “of these 42 RPF soldiers on this list, 19 were actually prosecuted for offences committed in 1994 falling within the jurisdiction of the ICTR with the rest being prosecuted for offences committed post-1994 against civilians suspected of being genocidaires. Of the 19 soldiers, 12 were convicted and sentenced to various terms of imprisonment, 5 were acquitted and the remaining two cases did not proceed due to the absence of the accused persons”. See Letter from ICTR Prosecutor to HRW, supra note 11. However, Human Rights Watch provided slightly different statistics. See HRW, Law and Reality, supra note 8 at 4. (“According to government statistics, only 32 soldiers have been brought to trial for crimes committed against civilians in 1994, with 14 found guilty and given light sentences”). For details about each of the trials, including names of defendants and the sentences they received, see HRW, Law and Reality supra note 8, Annex 2, at 103-109.
In this area, the ICTR may have had a more discernible impact on Rwandan proceedings than in the area of genocide trials: In 2008 the ICTR Prosecutor deferred to Rwanda a case concerning four RPF officers suspected of committing war-crimes in Rwanda in 1994, including executing thirteen catholic priests in the Kabgayi Cathedral. The allegations were investigated by the ICTR but the four were eventually not indicted by the Tribunal. By deferring to Rwanda the jurisdiction over the RPF officers, the ICTR Prosecutor encouraged Rwanda to prosecute them: They were eventually tried before a military court in Kigali in June 2008 for war-crimes charges. The trial, referred to as the “Kabgayi Trial”, was the first war-crimes prosecution in Rwanda, as previous prosecutions of RPF crimes in Rwanda concerned ordinary (although war-related) crimes. Several interviewees noted that Rwanda would not have held the Kabgayi Trial had it not been for the ICTRs involvement.

The Kabgayi Trial was held in public. The defendants included Brigadier General Gumisiriza and three junior officers. Gumisiriza and one of the junior officers were acquitted, while the two remaining officers, who admitted to having shot the victims, were convicted and sentenced to five years of imprisonment. Representatives of the ICTR Prosecutor who monitored the Kabgayi Trial reported that it complied with fair trial standards. However, Human Rights Watch complained about the short proceedings and light sentences, and called the trial “a political whitewash”. The Rwandan Justice Minister responded that a “five years sentence is not a small punishment for a person who admitted to have committed the crime.” Human Rights Watch also criticized the Rwandan government for prosecuting the four officers only because the ICTR prepared a case against them, and complained that neither Rwanda nor the ICTR anticipate further prosecutions of RPF members.

Nonetheless, in the author’s view, a national war-crimes trial against RPF officers (including a high ranking commander) is a significant event, even if it was exceptional and conducted only to prevent ICTR trials of RPF officers. Besides, the threat of international
trials is a legitimate means by which international courts can encourage national trials. After all, the principle of complementarity enshrined in the Rome Statute of the International Criminal Court ("ICC") encourages states to prosecute their own atrocities in order to avoid being subjected to proceedings before the ICC.

2.4 ICTR Normative Impact

2.4.1 ICTR’s Referral Procedure and Rwanda’s Transfer Law

Although the ICTR was created in 1994 as an ad hoc tribunal, the Security Council established a deadline for its activities only nine years later, through its Resolutions 1503 (2003) and 1534 (2004). These resolutions define what is known as the ICTR’s “completion strategy”. In particular, they request the ICTR to complete its investigations by 2004, first-instance trials by 2008, and all work by 2010. The resolutions also request the ICTR to submit a progress report to the Security Council every six months. Until then, explained a senior ICTR official, the Tribunal operated with no real strategy or time limit in mind.

To enhance compliance with the newly imposed deadlines, Security Council Resolution 1503 urged the ICTR to transfer cases involving mid and low level accused to “competent national jurisdictions, as appropriate, including Rwanda”. Consequently, Rule 11bis of the ICTR Rules of Procedure and Evidence was amended in 2004 to allow the referral of cases from the ICTR to national jurisdictions, including to states “in whose territory the crime was committed”. The amended ICTR Rule 11bis provides that “[i]n determining whether to refer the case … the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out”.

Rwanda wanted to receive cases from the ICTR. In 2007, it adopted Organic Law No. 11/2007 to regulate cases transferred from the ICTR or third states (“Transfer Law”). The Transfer Law implemented domestically many of the ICTR’s due process standards, requiring their application in cases transferred to Rwanda from the ICTR or third states.
Since no cases have been transferred to Rwanda from the ICTR or third states, as of the time of writing, the Transfer Law has not yet been applied. Nonetheless, it is significant that the ICTR (thanks to its referral procedure) has encouraged Rwanda to improve the due process norms provided by its domestic laws.

Interestingly, Rwanda was not required by ICTR Rule 11bis to adopt the Transfer Law, but it wanted to send a clear message that defendants transferred from abroad will receive a fair trial in Rwanda. The Transfer Law also went an extra length by providing that ICTR evidence and established facts would be admissible in Rwandan proceedings. The application of these provisions could significantly increase the ICTR's impact on Rwandan case law. Moreover, the Transfer Law encourages cooperation between Rwanda and the ICTR. Thus, it allows the ICTR to provide technical assistance to Rwandan courts and to monitor the trials, and regulates the remand of cases to the ICTR upon a revocation of the referral order. These provisions, if applied, can also enhance the ICTR's domestic impact in particular on due process standards.

The ICTR's referral procedure also encouraged Rwanda to amend some of its sentencing laws to meet the requirements set by the ICTR for referring cases. These important Rwandan legal developments are discussed below in connection with the ICTR's sentencing impact.

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28 Hirondelle News, Rwanda Wants to Detain Defendants, to Try Them and to Possess the Archives (December 11, 2007) <www.hirondellenews.com/content/view/5466/92/> (Accessed May 16, 2010) ("…'the position of the Rwandan government is that the most possible cases must be transferred to Rwandan courts for trial,' stated Joseph Nsengimana. 'Having cooperated with the ICTR, Rwanda should not be subordinated to other national systems,' he said. According to him, the transfer of cases to Kigali 'will reinforce the policy of the government in the organization of the reconciliation, which is central to the mandate of the ICTR'. Joseph Nsengimana estimated that 'there should not be any doubt about the will of Rwanda to take the cases of the tribunal and to supervise the sentences imposed by the tribunal'…"). Also see Institute for War & Peace Reporting, Rwandan Tribunal Under Pressure to Wind Up (January 29, 2007) <www.iwpr.net/report-news/rwandan-tribunal-under-pressure-to-wind-up> (Accessed May 16, 2010). "Rwanda's UN representative Joseph Nsengimana told the Security Council that although there was still a lack of capacity in the national judicial system, he thought it was time for Rwanda to 'regain full national ownership of the process of administration of justice for crimes committed during the genocide'. Nsengimana added that the Rwandan government has been working with the tribunal to prepare for the transfers."

29 Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the ICTR and from Other States [Rwanda] (hereinafter: "Transfer Law").

30 Transfer Law supra note 29, Arts. 13-17. While the Transfer Law does not adopt all of the ICTR's due process norms, it covers the most important ones such as those concerning the rights of an accused.

31 It is noted that after this chapter was finalized, the ICTR Appeals Chamber approved the referral of a case to Rwanda. See Appeals Chamber decision Jean Uwinkindi v. Prosecutor Case No. ICTR-01-75-AR11bis (Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions) (December 16, 2011) upholding the Trial Chamber's decision in Prosecutor v. Jean Uwinkindi Case No. ICTR-2001-75R11bis (Decision on Prosecutor's Request for Referral to the republic of Rwanda) Rule 11bis of the Rules of Procedure and Evidence, (June 28, 2011).

32 Transfer Law, supra note 29, Arts. 7-12.

33 Transfer Law, supra note 29, Arts. 18-20.
2.4.2 Other International Norms in Rwanda

The above legal developments in Rwanda were clearly encouraged by the ICTR's referral procedure. But there were additional post-genocide legal developments in Rwanda which at first glance could seem attributable to the ICTR. For example, Rwandan law, similarly to the ICTR Statute, defines genocide according to the definition provided in the 1948 Genocide Convention, and recognizes the principle of command responsibility in relation to international crimes. In addition, the Rwandan Constitution of 2003 and Code of Criminal Procedure as amended in 2004, explicitly safeguard certain due process guarantees which are also provided in the ICTR Rules, for example the right of the accused to legal counsel.

However, there is no evidence that Rwanda was influenced by ICTR norms when it adopted the definition of genocide, the principle of command responsibility, or the above procedural norms. Two prominent Rwandan legal experts recalled that Rwandan officials consulted many international law experts in connection with country's legal reforms of 2004, including ICTR staff members. But the reforms were ultimately inspired by international instruments such as the Universal Declaration on Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"), and not necessarily by ICTR norm. Indeed, a logical explanation for the similarities between certain Rwandan and ICTR norms is that they were both inspired by the same international instruments, such as the 1948 Genocide Convention, the UDHR and the ICCPR, as well as by international customary norms, for example in the case of command responsibility.

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35 Gacaca Law of 2004, supra note 5, Art. 53. Also see Law No. 33bis/2003 of 06/09/2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes [Rwanda], Art. 18. In this context, see ICTR decision in Prosecutor v. Hategekimana, Case No. ICTR-00-55B, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, December 4, 2008 (hereinafter: “Hategekimana Appeals Decision of 4 December 2008”), para. 12 (“the Appeals Chamber is satisfied that command responsibility is recognized under Rwandan law, in particular the *Gacaca* Law and the Organic Law No. 33bis/2003, and that the Trial Chamber therefore erred in assuming that Rwandan law does not recognize command responsibility”).
37 Interview notes with author.
38 Interview notes with author.
39 Indeed, the Rwandan Constitution reaffirms Rwanda’s adherence to the 1948 Genocide Convention, UDHR and ICCPR. See Rwandan Constitution of 2003, supra note 36, preamble, para. 9. The principle of command responsibility is a well-established norm of customary international law. See e.g. Prosecutor v. Delalić et al., Case No. ICTY-96-21-T, Trial Judgment (November 16, 1998), paras. 333, 734.
Nonetheless, the fact that Rwanda consulted ICTR members at the time may suggest that it considered ICTR norms to be a possible source of inspiration for national laws. In addition, Rwanda’s increased awareness of international norms may (at least partly) be attributable to the work of the ICTR. In any event, further research in this area could perhaps reveal stronger links between the ICTR and the above legal developments in Rwanda.

2.4.3 Domestic Application of ICTR Jurisprudence

As far as the manner in which international norms (substantive or procedural) are applied and interpreted by Rwandan courts, interviews suggested that the ICTR’s jurisprudence had little (if any) impact. A senior Rwandan prosecutor explained that Rwandan courts do not need to resort to certain doctrines followed by the ICTR, such as command responsibility and joint criminal enterprise, because they mostly deal with perpetrators who directly committed the crimes, and can easily access witnesses and evidence that connect the suspects to the crimes. A Rwandan Supreme Court judge added that Rwanda follows the civil law system, where little reference is made to case-law or precedents and thus the ICTR jurisprudence is not referenced. This was also confirmed by a senior ICTR prosecutor. However, the prosecutor suggested that this could change as the ICTR is exposing Rwandans to its jurisprudence through training activities, outreach programs, and the distribution of CD-ROMs containing ICTR decisions and judgments. Indeed, a Rwandan attorney noted that he anticipates a wider use in Rwanda of the ICTR’s jurisprudence in the next few years.

A foreign legal expert based in Rwanda rejected the argument that there are no references to ICTR jurisprudence in Rwandan cases because Rwanda follows the civil law system. He stressed that European courts which follow the civil law system often refer to decisions of higher courts. In his opinion, there are no references to ICTR jurisprudence because of the lack of experienced lawyers and the low level of legal education in Rwanda. Another foreign legal expert based in Rwanda suggested that Rwandans may not be aware that they can refer to the ICTR in domestic trials. However, this last opinion is not convincing as Rwandan judges have been referring to foreign judgments in constitutional cases.

40 Interview notes with author.
41 Interview notes with author. But the judge added that Rwandan judges are beginning to see the importance of comparative law, and in some constitutional cases have been referring to South African jurisprudence.
42 Interview notes with author.
43 Interview notes with author.
44 Interview notes with author.
45 Interview notes with author.
46 See supra note 41.
Finally, it should be noted that most genocide-related judgments in Rwanda focus mostly on factual rather than legal matters. This may provide another explanation as to why ICTR norms had such a limited impact on Rwandan case law.

2.5 ICTR Sentencing Impact

2.5.1 Abolition of the Death Penalty

The Genocide Law of 1996 classified genocide-related crimes into four categories, depending on the level of the perpetrator and gravity of the crime, with Category I including the most serious crimes and offenders, followed by Categories II, III and IV. The law also provided that Category I convicts were “liable to the death penalty.”

It is recalled that in 2004, Rule 11bis of the ICTR Rules was amended to allow the referral of cases to national jurisdictions. According to this rule, a condition for referring a case to a national jurisdiction is that the accused will not receive capital punishment in that jurisdiction. In 2007, shortly before the ICTR judges were requested for the first time to refer a case to Rwandan courts, Rwanda abolished the death penalty. Most interviewees considered that the ICTR encouraged Rwanda to abolish the death penalty, by prohibiting the application of such penalty in transferred cases. This is despite the fact that ICTR Rule 11bis does not require the receiving state to abolish altogether the death penalty but only to refrain from applying it to transferred cases.

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47 Schabas, Genocide Trials, supra note 8 at 889. Interestingly, there was some indications that references were made by a Rwandan court to facts (but not norms) established by the ICTR: A senior Rwandan prosecutor noted that during the Rwandan trial against former Rwandan Justice Minister Agnes Ntamabyario, references were made to factual findings made by the ICTR about meetings where Ntamabyario was present with Justin Mugezi (who is accused before the ICTR). Interview notes with author.

48 Genocide Law of 1996, supra note 4, Art. 2. Category I included: (i) “the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity”, (ii) individuals “in positions of authority” who committed or encouraged these crimes, (iii) “notorious murderers” who committed the crimes with particular zeal or malice, and (iv) “persons who committed acts [of] sexual torture”. Category II covered persons who committed murder or violent crimes resulting in death and did not fall within Category I. Category III offenders included those who committed serious crimes against the person. Finally, Category IV covered property offenders. These categories were modified later in the Gacaca Law of 2001, supra note 5 and the Gacaca Law of 2004, supra note 5.


50 Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty [Rwanda]. Rwanda not only abolished the death penalty, but also ratified the Second Optional Protocol to the ICCPR regarding the abolition of the death penalty.

51 Interview notes with author.
2 The Impact of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone on Impunity in Rwanda and Sierra Leone

It is noted that before 2007 the death penalty applied in Rwanda not only to Category I genocide crimes but also to ordinary crimes such as murder. According to a foreign legal expert based in Rwanda, the Rwandan government obtained public support for the abolition of the death penalty by stressing that there were as many as 500 or 600 people on death row in Rwanda. The population agreed that it was too inhumane for the president to sign the deaths of that many people. Still, noted the expert, victims’ groups in Rwanda criticize the abolition of the death penalty. A Rwandan lawyer insisted that the abolition of the death penalty was only partly attributable to the ICTR, as Rwandans have been ready for years to abolish this penalty. He noted that domestic pressure to abolish the death penalty started building up after a public execution in Rwanda of 22 genocide convicts, in 1998, which was perceived negatively by the population. Indeed, this was the last time the death penalty was applied in Rwanda, although this punishment was abolished only nine years later.

2.5.2 Exclusion of Life Sentence in Isolation

When the death penalty was abolished in Rwanda in 2007, life sentence in isolation replaced it as Rwanda’s maximum punishment. In 2008, the ICTR judges denied five requests to refer cases to Rwanda. One of their bases for denying the requested referrals was that the penalty of life imprisonment in isolation, which could be imposed in Rwanda in cases transferred from the ICTR, amounts to cruel and inhuman treatment and therefore breaches international norms.

52 Interview notes with author. In this context it is interesting that a senior ICTR official recalled a conversation he had several years ago with Rwanda’s President Kagame, where the latter indicated that he was not opposed to abolishing the death penalty, but needed time to consult with the people of Rwanda about taking such a step. At the time, there was still a lot of emotion in the country, and a decision by the President to abolish the death penalty may not have been supported by the local population. Interview notes with author. Amnesty International reported that 682 genocide perpetrators were on death row by mid-2002. See AI, Gacaca: A Question of Justice supra note 9 at 17 (referring to statistics by Liprodhor).


54 For a discussion on Rwanda’s inclination toward abolishing the death penalty irrespective of the ICTR’s impact see Audrey Doctor, The Abolition of the Death Penalty in Rwanda, 10 Human Rights Review 99, 105 (2009).


56 See e.g. Kanyarukiga Appeals Decision of October 30, 2008, supra note 55 at para. 15.
In December 2008, Rwanda excluded the penalty of life sentence in isolation from cases transferred from the ICTR and third states, and in April 2010, its parliament expunged this penalty from Rwandan law altogether. According to interviews, the discussions in Rwanda about abolishing the penalty were encouraged by the ICTR’s refusal to refer cases, and Rwanda’s will to receive cases from the ICTR in the future.

2.5.3 Plea Bargains and Acquittals

As noted above, the Genocide Law of 1996 imposed the death penalty on those convicted for Category I genocide crimes. The law also provided sentencing guidelines in relation to the other categories: It set life imprisonment as the maximum penalty for Category II crimes, applied the sentencing standards of the Rwandan Penal Code to Category III crimes, and subjected Category IV crimes to civil damages only. Importantly, the law offered significant sentence reductions to Category II and Category III defendants who confessed. Statistics published by Amnesty International indicate that sentences imposed by Rwandan ordinary court in genocide cases became more lenient each year since these trials started taking place in early 1997 and until 2002. The acquittal rate in these cases, according to Amnesty International, almost tripled itself from 1997 (8.9%) to 2002

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58 Interview notes with author.

59 Genocide Law of 1996, supra note 4, Art. 14. The law’s sentencing guidelines were modified later in the Gacaca Law of 2001 and the Gacaca Law of 2004, see supra note 5. For the types of crimes that fell within each category, see supra note 48.

60 Category II convicts who confessed before their trial started could receive sentences of between 7 and 11 years in prison, instead of the maximum life imprisonment. If they confessed during their trial, they could receive between 12 and 15 years imprisonment. Category III convicts could have their sentence reduced by two thirds if they confessed before their trial started, or by half if they confessed during their trial. Sentence reductions were not allowed in Category I cases, where the death penalty applied. See Genocide Law of 1996, supra note 4, Arts. 15-16. These provisions were modified later in the Gacaca Law of 2001 supra note 5 and the Gacaca Law of 2004, supra note 5.

61 AI, Gacaca: A Question of Justice, supra note 9 at 17 (referencing statistics by Liprodhor). The report explains that between early 1997 and mid-2002, Rwandan ordinary courts completed genocide trials concerning 7,181 defendants. It provides an annual breakdown of the sentences imposed in these genocide cases and identifies the following trends: (i) a gradual decline in the percentage of death penalties (from 30.8% in 1997 to only 3.4% in 2002); (ii) a gradual decline in the percentage of life imprisonments (from 32.4 to 20.5%); (iii) an increase in fixed prison terms (from 27.7 to 47.2%); (iv) the acquittal rate almost tripled itself (from 8.9 to 24.8%). Thus, there was an annual decline in the percentage of death penalties and life sentences against an annual increase in the percentage of fixed prison terms.
Sentencing statistics relating to post-2002 genocide cases in Rwandan ordinary courts were difficult to find but it is likely that these trends did not change.\(^{63}\)

Could the sentencing trends in Rwanda genocide cases have somehow been affected by the ICTR’s sentencing practices? Scholar Mark Drumbl provides two possible explanations for the gradual movement towards more lenient sentences in Rwandan genocide cases: first, the perpetrators prosecuted in earlier trials were more notorious than those prosecuted later, and second, recourse to guilty pleas became more popular with time.\(^ {64}\) Indeed, by law, confessions in genocide cases in Rwanda almost automatically lead to sentence reductions.\(^ {65}\) At first glance the confession procedure in Rwandan genocide cases may seem similar to the plea bargaining practices of the ICTR, in the sense that the convict’s sentence is reduced in return for a confession. However, in Rwanda, sentence reductions are prescribed by law and automatically follow valid confessions, while the ICTR employs a conventional plea practice, characteristic to common law systems, where the sentence reduction is negotiated. In addition, it seems unlikely that the ICTR encouraged the use of guilty pleas in Rwanda, because the confession procedure was introduced in Rwanda for its own domestic reasons – mainly to reduce the burden on the national prisons. According to a prominent Rwandan lawyer, the introduction of this practice in Rwanda was not an impact of the ICTR but rather a more general influence of international law.\(^ {66}\) Or, we can accept Drumbl’s second explanation for the gradual leniency of sentences, namely, that the perpetrators prosecuted in the earlier trials were more notorious than those prosecuted later.\(^ {67}\)

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\(^{62}\) Id.

\(^{63}\) With regard to acquittal rates, it is noted that in a 2008 decision, the ICTR noted that “The acquittal rate in Rwanda in genocide cases is considerable. Many accused of Hutus origin have been acquitted by the ordinary courts, including cases where convictions are overturned on appeal.” The supporting footnote stated that “The Chamber does not take a position on the exact percentage of acquittals, which may differ according to whether not only the ordinary courts but also Gacaca proceedings are included in the calculation. It simply observes that the acquittal rate is considerable. Of ten cases reported in Volume VII (2004-2005) of Recueil de jurisprudence contentieux du genocide (supra note 28 above), five involved an acquittal of some type. In The Prosecutor v. Yussuf Munyakazi, Counsel for the Republic of Rwanda referred to an acquittal rate in his country of “close to 40 per cent” (T. 24 April 2007 p. 31, see also pp. 37, 38).” See Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78, Decision on Request for Referral to the Republic of Rwanda, June 6, 2008, at para. 37.

\(^{64}\) However, Drumbl stressed that Amnesty International did not provide information about the factors the domestic courts consider in sentencing. See Mark A. Drumbl, Atrocity, Punishment and International Law 16 (2007) (hereafter “Drumbl, Atrocity and Punishment”) As noted above supra note 4, the Genocide Law of 1996 imposed the death penalty in relation to Category I crimes. In relation to Categories II and III it also provided sentencing guidelines but allowed the judges a certain amount of discretion.

\(^{65}\) The Rwandan Genocide Law of 1996, supra note 4, as well as the Gacaca Laws of 2001 and 2004, supra note 5, offer reduced sentences to defendants who confess to and apologize for having perpetrated genocide-related crimes.

\(^{66}\) Interview notes with author.

\(^{67}\) See Drumbl, Atrocity and Punishment supra note 64.
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Focusing specifically on acquittal rates, it is noted that, as of May 2010, the ICTR acquitted eight out of 39 accused suggesting a 20.5% acquittal rate. According to Amnesty International, the acquittal rate in genocide cases before Rwandan ordinary courts in 2002 was 24.8%. There are indications that the same or a higher acquittal rate characterized genocide cases in subsequent years. Thus, the acquittal rate in genocide cases both at the ICTR and in Rwandan ordinary courts is over 20%. But despite this similarity, there is no evidence that the ICTR had any impact on Rwandan courts in this regard.

2.6 ICTR Capacity Impact

Another important result of the ICTR's referral procedure is that since its adoption, the Tribunal has been carrying out various activities in Rwanda aimed at enhancing local capacity to handle transferred cases. This is done mainly through the Tribunal's Prosecution but also through its Registry and Chambers. These activities, as well as other means by which the ICTR has affected Rwandan judicial capacity, are discussed in the following paragraphs.

2.6.1 Training Activities and Consultations

It is recalled that Security Council Resolution 1503 of August 2003 urged the ICTR to transfer cases to “national jurisdictions… including Rwanda”. To this end, the resolution called on the international community “to assist national jurisdictions… in improving their capacity”. According to senior ICTR officials, Resolution 1503 was understood by

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68 These figures relate to accused that had final judgments in their case and to genocide-related cases and not to any contempt of court cases.
69 AI, Gacaca: A Question of Justice, supra note 9 at 17 (referencing statistics by Liprodhor).
70 Prosecutor v. Kanyaruciga, Case No. ICTR-2002-78, Decision on Request for Referral to the Republic of Rwanda, June 6, 2008, para. 37. The ICTR Trial Chamber noted that “[t]he acquittal rate in Rwanda in genocide cases is considerable. Many accused of Hutus origin have been acquitted by the ordinary courts, including cases where convictions are overturned on appeal.” The supporting footnote stated that “[t]he Chamber does not take a position on the exact percentage of acquittals, which may differ according to whether not only the ordinary courts but also Gacaca proceedings are included in the calculation. It simply observes that the acquittal rate is considerable. Often, cases reported in Volume VII (2004-2005) of Recueil de jurisprudence contentieux du genocide … five involved an acquittal of some type. In The Prosecutor v. Yussuf Munyakazi, Counsel for the Republic of Rwanda referred to an acquittal rate in his country of 'close to 40 per cent'…”
71 As of May 2010, the ICTR acquitted eight accused out of 39 accused that had final judgments in their case, suggesting a 20.5% acquittal rate (these figures relate to genocide-related cases and not to any contempt of court cases). In Rwandan ordinary courts, the acquittal rate in genocide cases was 24.8%, at least as of mid-2002, see supra note 69 and accompanying text. I will assume this remained the rate afterwards, as statistics pertaining to subsequent years are lacking (see supra note 70 above and accompanying text).
72 UNSC Res 1503, supra note 3. The resolution also noted “that the strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular”.

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Tribunal officials as mandating the ICTR for the first time to engage in capacity building in Rwanda.\textsuperscript{73} Rwandan and ICTR officials explained that since 2006, the Tribunal’s Prosecution has been training Rwandan prosecutors and investigators in areas such as investigation techniques, crime analysis, evidence management and storage, international criminal law, trial advocacy, and indictment drafting.\textsuperscript{74} These trainings are mainly funded by the European Union (“EU”).\textsuperscript{75} Some of them (but not all) are intended to facilitate the transfer of cases to Rwanda.\textsuperscript{76}

Two members of the ICTR Prosecution regarded a training session which concerned indictment drafting as particularly successful.\textsuperscript{77} One of them mentioned that several months after this training, the Rwandan prosecution authorities introduced a new format for their standard indictment, inspired by the ICTR training.\textsuperscript{78} He added that the Rwandans asked for this training because they wanted to improve their system and not for the sake of receiving ICTR cases.\textsuperscript{79} A senior Rwandan official confirmed that as a result of the ICTR training on indictment drafting, many local prosecutors in Rwanda have improved their capacity. He generally considered the ICTR training activities in Rwanda to be useful, explaining that they are usually planned jointly by the ICTR and Rwandan officials, and constitute one of several resources the Rwandans are using for their ambitious capacity development.

\textsuperscript{73} Interview notes with author. Before 2003, the ICTR did not generally engage in capacity development in Rwanda. However, it carried out outreach activities in Rwanda earlier, mainly through its documentation centers, the first of which was established in Kigali in 2000. Outreach activities can contribute to national capacity: for example, if lawyers and law students learn about the ICTR’s work and norms through its outreach activities, this in turn will enhance their capacity as legal professionals.

\textsuperscript{74} Interview notes with author.

\textsuperscript{75} Also, other capacity-building activities of the Tribunal are funded outside its regular budget. Senior ICTR officials spoke about the financial challenges faced by the Tribunal in connection with its capacity-building efforts in Rwanda. Even after Security Council Resolution 1503 was adopted in 2003, the UN refused to fund the Tribunal’s capacity-building initiatives. Consequently, the ICTR established a voluntary Trust Fund by appealing to donors, mostly the EU and European countries, but also the US and some African countries, to finance its capacity-building activities in Rwanda. The EU is a major contributor to the ICTR Trust Fund, and it also provides direct funding to some of the ICTR’s capacity-building projects in Rwanda. Interview notes with author.

\textsuperscript{76} A senior ICTR official explained that eventually the ICTR and Rwanda managed to build a relationship which allows capacity building projects to take place even when they are not related to the referral of cases to Rwanda. Interview notes with author.

\textsuperscript{77} Interview notes with author. The interviewees explained that the training was held in April 2008, conducted through four sessions of three days each, and given to a total of 150 local prosecutors. Its aim was to improve prosecutorial practices. The training was requested by the Rwandan Prosecutor General, who wanted to improve the format of the indictments used throughout Rwanda. Until then, Rwanda has been using an old model for its indictments, which contained only a summary of the charges, without informing the accused of his rights. The Rwandan Prosecutor General wanted the indictments to inform defendants of their rights and better inform them of the accusations.

\textsuperscript{78} Interview notes with author. The interviewee explained that this new standard format is now required under the internal instructions of the Rwandan prosecution authorities. Copy of new indictment format with author.

\textsuperscript{79} Interview notes with author.
building program.\textsuperscript{80} There is no empirical evidence that these trainings directly strengthened the Rwandan justice system, but if they encouraged local prosecutors to include in their indictments more details about the charges, they may have contributed to improving the rights of defendants in Rwanda.

The Tribunal’s Registry and Chambers also engage in capacity building in Rwanda, explained ICTR members, particularly by holding seminars and training sessions for Rwandan judges and defense lawyers. So far, the ICTR trained about 50 Rwandan defense lawyers on key aspects of international criminal law and procedure, and plans to train about 200 more defense lawyers once it secures the necessary funding. The ICTR official stressed that the main sponsor for these activities is the EU. Depending on the availability of funds, the ICTR will implement additional capacity building programs.\textsuperscript{81} A prominent Rwandan judge recalled that in 2007 he attended an ICTR seminar on criminal procedure.\textsuperscript{82} It was also noted in interviews that ICTR staff periodically lecture to Rwandan law students, as well as provide them with books and assistance in setting up libraries.\textsuperscript{83}

The ICTR official explained that from about mid 2006, Tribunal representatives have been meeting their Rwandan counterparts to discuss and design possible capacity building programs.\textsuperscript{84} A senior Rwandan official confirmed that Rwandan judges, prosecutors, and defense attorneys plan activities together with ICTR members.\textsuperscript{85} Both an ICTR official and a Rwandan Supreme Court Judge indicated that ICTR training sessions for Rwandan court reporters are currently being considered.\textsuperscript{86} Moreover, Tribunal officials mentioned that an “attachment program” is being planned, possibility funded by the EU, under which Rwandan professionals will be seconded to certain sections of the ICTR for three-month terms.\textsuperscript{87}

Another area which the ICTR is currently assisting Rwanda to develop is the area of witness protection. It is recalled that in 2008 the ICTR denied five requests to transfer cases

\textsuperscript{80} Interview notes with author. However, he added that the ICTR as an institution has not contributed to the development of judicial capacity in Rwanda. Rather, such contribution was achieved through sporadic initiatives undertaken by certain ICTR leaders as a result of their personalities and not because of an institutional obligation imposed on the Tribunal.

\textsuperscript{81} Interview notes with author.

\textsuperscript{82} Interview notes with author.

\textsuperscript{83} Interview notes with author.

\textsuperscript{84} Interview notes with author. A senior ICTR official explained that when Rwanda complained that the Tribunal was not helping it enough, the ICTR decided to give more visibility to its activities in Rwanda and established a team to coordinate these activities vis-à-vis Rwanda.

\textsuperscript{85} Interview notes with author.

\textsuperscript{86} Interview notes with author.

\textsuperscript{87} Interview notes with author.
to Rwanda. The ICTR’s refusal to transfer cases was based on two grounds: the unavailability of fair trials in Rwanda and a penalty structure which violates international law. The latter ground was discussed earlier, in connection with the ICTR’s sentencing impact. The former ground is based on the Appeals Chamber’s finding that the defendants may be unable to obtain witnesses to testify on their behalf in Rwanda, because such witnesses may fear being harased, subjected to gacaca trials, or charged with the crime of “genocide ideology”. Senior ICTR prosecutors explained that they have subsequently continued to collaborate with the Rwandan authorities in order to address the weaknesses identified by the Tribunal’s judges, with the intention of eventually applying again for the transfer of cases to Rwanda. Thus, noted one ICTR official, Tribunal and Rwandan officials are together considering ways to improve Rwanda’s witness protection scheme. One issue under discussion is whether the ICTR should be allowed to provide protection measures to defense witnesses who reside outside Rwanda and are reluctant to come to Rwanda to testify in national trials. As part of this capacity building program, a three-day workshop on witness protection issues was given by ICTR officials to Rwandans, in November 2009 in Arusha. The program’s main aim was to move the current witness protection system in Rwanda out of the prosecutor’s office, to be administered by an objective body so that it could be trusted by defense witnesses. Another aim of the program was to generally improve the protective measures available to witnesses in Rwanda.

88 See supra note 55. It is stressed that when this chapter was finalized, these five were the only referral requests made by the ICTR Prosecutor. At a later stage, however, three additional requests were made. In December 2011, the ICTR approved the first referral of a case to Rwanda. See supra note 31.
89 Id.
90 See, e.g., Munyakazi Appeals Decision of October 8, 2008, supra note 55 at para. 37; Kanyarukiga Appeals Decision of October 30, 2008, supra note 55 at para. 26. The ICTR judges also added that many of the potential defence witnesses live abroad and will refuse altogether to enter Rwanda for these reasons. See Munyakazi Appeals Decision of October 8, 2008, supra note 55 at para. 40; Kanyarukiga Appeals Decision of October 30, 2008, supra note 55 at para. 31. Moreover, the ICTR judges suggested that the witness protection scheme in Rwanda is underfunded and understaffed, and that “the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda”. See Munyakazi Appeals Decision of October 8, 2008, supra note 55, para. 38; Kanyarukiga Appeals Decision of October 30, 2008, supra note 55 at para. 33. Charges of “genocide ideology” could be made under a Rwandan law from 2007, which imposes a sentence of 10 to 25 years’ imprisonment for manifesting “genocidal ideology”. According to Amnesty International, the law’s terms are “vague and ambiguous”, and it “could potentially stifle freedom of expression, and restrict the ability of the accused to put forward a defence in criminal trials”. See AI 2009 World Report, supra note 9.
91 Interview notes with author. Rwanda as well, has called the ICTR to refer cases to its national courts. See Hirondelle News, Kigali Reiterates Its Requests to Try ICTR Cases (June 5, 2009) <http://allafrica.com/stories/200906230906.html> (Accessed June 24, 2009).
92 Interview notes with author.
The above mentioned ICTR activities, it must be stressed, can improve Rwanda’s judicial capacity to handle not only atrocity cases but also any other criminal cases.

2.6.2 Employment of Rwandans by the ICTR

The ICTR has also been contributing to Rwanda’s judicial capacity by employing Rwandans since 2003. ICTR officials stressed that Rwandans are also involved in the Tribunal as interns and legal researchers. An ICTR judge recalled that the Tribunal, in its early years, employed Rwandans only as translators. However, at a later stage, the ICTR adopted a policy of including Rwandans in other sections, such as the Witness and Victims Support Section, the Protocol Unit, the Outreach Program, and the Prosecution. In addition, every ICTR Defense team has Rwandan investigators. The judge stressed that in 1996-1997 it would have been impossible to let a Tutsi attorney cross examine a Hutu witness (or vice versa), but this has changed over time and today the ICTR Prosecution employs several Hutu and Tutsi lawyers. A senior ICTR prosecutor noted that Rwandans serve in the Prosecution as trial attorneys and “associate investigators.” Still, two senior Rwandan officials criticized the ICTR for not employing Rwandan prosecutors and investigators before 2003, and for not including Rwandan judges until today.

A senior ICTR official considered that the Tribunal cannot involve Rwandan judges because they may not be (or may not be perceived to be) objective. According to an ICTR official, this is because they may not be (or may not be perceived to be) objective. This assumes that these Rwandans eventually return to Rwanda with the knowledge they gained at the ICTR. Two Rwandans, who are currently employed by the ICTR, indicated in interviews that they plan to return to Rwanda once the Tribunals winds up. One of them explained that he wanted to teach at a Rwandan university, or become a prosecutor in Rwanda. He stressed that working at the Tribunal has enhanced his knowledge of international law and his understanding of the crimes which were committed in Rwanda. It also developed his ability to be objective and think independently. These skills, he believed, would make him a good prosecutor in Rwanda. Interview notes with author.

A Rwandan law professor noted that each year since about 2003, six or seven Rwandan law students engage as legal researchers at the ICTR for periods of two months. These students consequently develop an interest in international criminal law and the ICTR. Interview notes with author.

Interview notes with author. A Rwandan working at the ICTR also confirmed that the ICTR did not want to employ Rwandans in the past, based on its belief that the animosity between Hutus and Tutsis would influence the quality of their work and jeopardize their objectivity. Interview notes with author.

Interview notes with author. The prosecutor explained that the associate investigators were qualified attorneys back in Rwanda. At the ICTR they assist with crime analysis. Their fluency in Kinyarwanda is highly valued in light of the limited language resources at the Tribunal’s Prosecution, a section which has to deal with a lot of material in Kinyarwanda. These employees could return to the local system to work, which will be a way of transferring skills to Rwanda. However, some of them may end up being employed by other international tribunals.

Interview notes with author.

Interview notes with author.

Interview notes with author.

Interview notes with author.
judge, the bitterness and lack of trust across the ethnic divide in Rwanda in 1994 made it impossible for the Tribunal to engage Rwandan judges in its early years. But even later and until today such tension makes it problematic for the ICTR to employ Rwandan judges.101

2.6.3 Infrastructural Development

The ICTR Statute provides for the possibility that the sentences imposed by the Tribunal be served in Rwanda.102 According to a senior Rwandan official, prison facilities in Rwanda were improved in view of the possibility that the ICTR will transfer its convicts to serve their sentences in Rwanda. He added that the improvements were financed by the Netherlands, not by ICTR.103 An ICTR official confirmed that thanks to Dutch support, Rwanda has been able to build a prison conforming to international standards. In this light, the ICTR Registrar signed an agreement on the enforcement of sentences with Rwanda.104 However, as of the time of writing, no ICTR prisoner had been transferred to Rwanda. The Tribunal official explained that the ICTR must be convinced that Rwanda can guarantee the safety of its prisoners before it transfers them to Rwanda.104

Another ICTR official noted that, in addition to improving prison facilities to meet the Tribunal’s standards, Rwanda also developed a chamber that could host ICTR proceedings in its Supreme Court. This was done in anticipation that ICTR judges would hold trial sessions in Rwanda, a possibility provided by the ICTR Rules but which never materialized.105

101 Interview notes with author.
103 Interview notes with author. The Rwandan official suggested that this is in contrast to the situation in the other African countries with which the ICTR has concluded agreements on enforcement of sentences, including Mali and Benin, which are getting capacity support from the ICTR, including for prison infrastructure development.
104 Interview notes with author. According to a Rwandan official, the provision on sentence enforcements in Art. 26 of the ICTR Statute is very unequivocal in stating that “sentences shall be served in Rwanda”. Indeed, it continues with the words “or elsewhere”, but the preference for Rwanda is demonstrated by the choice of the word “shall” as opposed to “will” or “may”. He expressed frustration that notwithstanding this provision, as of the time of the interview, no prisoners were transferred by the ICTR to Rwanda, even after an agreement on the enforcement of ICTR sentences in Rwanda came to force in November 2008. He added that such an agreement was not required by the ICTR Statute, and thus ICTR prisoners could have been transferred to Rwanda even before November 2008. Interview notes with author.
105 Interview notes with author. The ICTR official noted that this court renovation project started as early as 1997, and was eventually completed years later with EU funding. Also see <www.delrwa.ec.europa.eu/en/whatsnew/Cour-Minijust-en.pdf> (Accessed July 7, 2009, noting that the EU provided funds since 2005 for refurbishing Rwanda’s Supreme Court, but there is nothing in this item suggesting that this had any relation to the ICTR).
2.6.4 Final Remarks on Capacity Building

In light of ongoing capacity building activities by the ICTR in Rwanda, it may be premature to conclude to what extent the Tribunal has contributed to Rwanda's judicial capacity. But it can still be argued that had the ICTR started its capacity building activities in Rwanda at an earlier period, its domestic impact would have been greater by the time of writing these lines. While the length of time the Tribunal has been engaged in capacity building activities in Rwanda is only one out of several factors that can increase its impact on Rwanda, it is nonetheless an important one for several reasons: First, given the anticipated closure of the ICTR, capacity building activities starting in 2000 would have lasted more than double the duration of those that commenced in 2007. Had the training started earlier, not only would they have influenced more issues and people, but they may have also been able to benefit from a greater “improvement curve” due to more lessons learned over a longer period of time. Moreover, given the state of the Rwandan justice system in the immediate aftermath of the genocide, Rwanda would have benefited much more from judicial capacity building activities in those years than in any other period. Further, the willingness of the Tribunal's mandate-providers and supporters to fund or otherwise assist such activities may have eroded over time, both because of the ICTR's expected closure and Rwanda's reduced need for capacity building.

However, interviews revealed mixed opinions on whether the ICTR should have engaged earlier in capacity building activities in Rwanda. One senior Tribunal official expressed his personal view that the ICTR should have engaged in capacity building since its inception, but explained that some Tribunal officials discouraged such an approach at the time. Further, the Rwandan authorities did not cooperate with the Tribunal in those years, and Rwanda's civil society was too weak to generate the cooperation needed for capacity building.106 Another senior ICTR official explained that the emotional turmoil and tension in Rwanda in the immediate aftermath of the genocide would have made it difficult for the ICTR to engage in capacity building activities at the time.107

Rwandans also expressed mixed views about this matter, but were generally more inclined than ICTR officials to accept that the ICTR’s capacity building activities in Rwanda could have started earlier. A Rwanda lawyer suggested that the ICTR could have started its capacity building activities in Rwanda around the year 2000, once the Rwandan justice system was sufficiently developed to allow ICTR involvement.108 A Rwandan Supreme Court

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106 Interview notes with author.
107 Interview notes with author.
108 Interview notes with author.
judge understood that the ICTR was reluctant to engage in capacity building in Rwanda before 2003 because it wanted to appear objective, neutral, and independent from Rwanda. But he did not justify this reluctance. Another prominent Rwandan judge added that the ICTR could not have engaged in capacity building activities in Rwanda before 2003 due to its own “teething problems.”

2.7 **The SCSL and Sierra Leone**

2.7.1 **Background to Domestic Response to the Atrocities**

In sharp contrast to Rwanda’s judicial response to the genocide, Sierra Leonean national courts hardly prosecuted any of the war’s atrocities. In fact, such proceedings were prevented by a blanket amnesty provided in the Lomé Peace Agreement of July 1999 (“Lomé Amnesty”). The Lomé Amnesty exempts perpetrators from prosecution by national courts for atrocities pre-dating the peace agreement. In lieu of such prosecutions, the peace agreement called for the creation of the Truth and Reconciliation Commission (“TRC”). While truth commissions can establish some degree of accountability through providing a historical account of the atrocities and associating them with certain groups and individuals, it remains questionable whether the TRC contributed to the eradication of impunity in Sierra Leone. Eventually, as discussed in further detail below, Sierra Leonean courts tried only 88 low level suspects for relatively minor war-related crimes committed in 2000 (whereas the war’s worst atrocities were committed before July 1999). Still, a showing that the SCSL somehow affected Sierra Leonean accountability processes can enhance our understanding of whether and how the Court contributed to reducing impunity and improving the rule of law in Sierra Leone. The remainder of this section focuses on the SCSL’s impact on atrocity proceedings before Sierra Leonean criminal courts, and not the TRC.

109 Interview notes with author.
110 Interview notes with author.
112 Ibid, Art. XXVI (1).
2.8 SCSL Impact on Prosecution Rates and Trends

It is noted at the outset that the potential of the SCSL to influence domestic proceedings in Sierra Leone was a priori limited as domestic proceedings (at least for pre-Lomé crimes) were prevented by the Lomé Amnesty. The creators of the SCSL did not consider it their task to encourage national trials in Sierra Leone, and accordingly, did not mandate the Court to achieve this aim. Indeed, as shown below, the SCSL did not so far encourage the initiation – or even discussions about the initiation – of Sierra Leonean proceedings addressing pre-Lomé atrocities. A senior SCSL official considered that it is better not to have national trials if the local system cannot offer fundamental guarantees. Even if international standards of justice are provided by law, national trials should only be held if these standards are applied in practice, including protection to victims and witnesses. In Sierra Leone, added the Court official, there are concerns of fairness towards the accused and witnesses, and it may take time until fair trials are possible. However, the same official noted that the creators of international courts should bear in mind that the international cases may eventually have to be handed over to national courts. They should therefore plan in advance how to ensure that national courts are ready to receive such cases.114

On May 27, 2008, the Rules of Procedure and Evidence of the SCSL were amended to allow the Court to transfer cases to national courts, but the SCSL Prosecution never requested (or indicated that it would request) the Court’s judges to refer cases to Sierra Leonean courts. Such a referral request, or an indication that one was being contemplated, could have encouraged national discussions about the need to abolish or restrict the Lomé Amnesty to enable Sierra Leonean courts to prosecute crimes addressed by the SCSL. However, in contrast to the parallel ICTR rule on case referrals, the relevant SCSL rule does not allow the Court to monitor or recall cases after having transferred them to national courts. This, combined with the lack of fair and efficient criminal proceedings in Sierra Leone, militated against such a request by the SCSL Prosecution. It is noted in this context that, according to a Sierra Leone Supreme Court judge, national discussions about prosecuting post-Lomé crimes never took place in Sierra Leone.115

In one of its earliest decisions, the SCSL Appeals Chamber ruled that the Lomé Amnesty was inapplicable to cases before international courts or national courts applying universal jurisdiction.116 But the decision did not address the issue of the amnesty’s applicability to cases before the national courts of Sierra Leone, perhaps because this issue was not raised before the SCSL

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114 Interview notes with author.
115 Interview notes with author.
judges, or because they did not consider it within their interest or authority to encourage national prosecutions. Still, had the SCSL staff wanted to encourage national discussions about abolishing or restricting the Lomé Amnesty, its outreach or capacity building initiatives could have included a public discussion about the status of blanket amnesties under international law and the above Appeals Chamber’s decision (even if it did not specifically address the issue of the amnesty’s applicability to national cases). Such public activities could have been especially effective given the lack of local reactions to the SCSL’s amnesty decision.

The SCSL fell short of encouraging national prosecutions in Sierra Leone not only regarding pre-Lomé atrocities, but also regarding post-Lomé atrocities (which are not covered by the amnesty). In fact, a Sierra Leonean lawyer suggested that the SCSL may have encouraged national courts to remain inactive about one of the main post-Lomé atrocities: the abduction of 500 UN peacekeepers. The local lawyer considered that this event was not subject to national criminal proceedings in Sierra Leone because it was addressed by the SCSL.117 Legally speaking, the two court systems can address the same event so long as each system deals with different defendants. Thus, since the SCSL only pursued the highest leaders of the crimes, the national courts could have prosecuted the mid-level commanders (and foot-soldiers) involved in the abduction. But if the lawyer is right, the handling of this event by the SCSL discouraged national courts from addressing it.

2.9 SCSL Normative Impact

2.9.1 Substantive/Procedural Norms

The SCSL is authorized by its Statute to prosecute certain Sierra Leonean domestic crimes, and, when amending or adopting SCSL Rules, be guided by domestic criminal procedures.118 However, the Court refrained from resorting to domestic norms. A SCSL judge considered that the Court thus missed an important opportunity to interpret and develop national law, as well as to promote a public debate on whether Sierra Leonean courts can prosecute certain atrocities.119 According to two senior members of the SCSL, who are

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117 Interview notes with author. It is noted that only the top-level perpetrators are prosecuted by the SCSL while the mid and low level perpetrators who were involved in the abduction were never prosecuted.
118 SCSL Statute, Arts. 5 and 14(2).
119 Interview notes with author. Another senior member of the SCSL suggested that the Court’s first Prosecutor refrained from charging the accused with national crimes because he assumed that the Lomé Amnesty would require the SCSL judges to cancel the charges. At the same time, however, the interviewee noted that it would have been useful to have charged some of the SCSL’s defendants for the domestic crime of setting fire to property (under Art. 5 of the SCSL Statute), as eventually their burning acts became unpunishable. Interview notes with author.
familiar with the Sierra Leonean justice system, the SCSL has not been able to encourage the national system to improve procedural or substantive criminal norms.\textsuperscript{120}

An examination of domestic atrocity-related trials, which took place in Sierra Leone after the establishment of the SCSL, further suggests that the SCSL had no normative impact on national criminal proceedings. In 2005 and 2006, the High Court in Freetown held two trials against a total of 88 individuals for war-related crimes which were perpetrated after the Lomé Peace Agreement (and therefore not covered by the Lomé Amnesty).\textsuperscript{121} Both trials concerned low level perpetrators,\textsuperscript{122} who were accused of relatively minor crimes committed in connection with insular incidents of hostilities. All 88 accused were charged with multiple domestic crimes, as international crimes are not covered by Sierra Leonean law.

The first trial concerned the shooting of demonstrators on May 8, 2000, where at least 20 people were killed. The 57 defendants were members of the political party of the Revolutionary United Front (“RUF”), the rebel faction that started Sierra Leone’s civil war when it attacked the country from Liberia in 1991. They were charged with 81 counts of murder, conspiracy to commit murder, and shooting with intent to murder.\textsuperscript{123} The judgment was rendered in April 2006.\textsuperscript{124} Of the 57 defendants, only ten were convicted.\textsuperscript{125} But before their appeal was heard, they were released as a political gesture by the President of Sierra Leone, Ahmad Tejan Kabbah of the Sierra Leone People’s Party (“SLPP”). The exact reasons for their release are unknown. A Canadian lawyer who provided pro bono assistance to the defendant suggested that there was no political will to continue the trial. Another defense lawyer who was involved in this case suggested that the defendants were “unceremoniously released when the former ruling government wanted to use them to disrupt the 2007 general elections”.\textsuperscript{126}

The second trial concerned the abduction by rebels of 11 British soldiers near Freetown on August 8, 2000. The 31 defendants were members of the West Side Boys (“WSB”), a splinter group of the rebel faction Armed Forces Revolutionary Council (“AFRC”) which was

\textsuperscript{120} Interview notes with author.
\textsuperscript{121} A valuable source of information about these trials was Clare da Silva, a Canadian lawyer who provided pro bono assistance over a number of years to the defendants.
\textsuperscript{122} The high level perpetrators who were arrested by the national authorities in 2000 were either transferred for trial to the SCSL (e.g. Foday Sankoh), or released before the national trials commenced (e.g. Mike Lamin).
\textsuperscript{123} The political party of the RUF was the Revolutionary United Front Party (“RUF/P”).
\textsuperscript{124} The accused were all arrested between May and November 2000. The case was committed to the High Court in Freetown on May 29, 2002. The trial started on June 7, 2005 and the hearings lasted until December 2005.
\textsuperscript{125} They were convicted of 15 counts of conspiracy to commit murder and received a sentence of ten years for each count to be served concurrently.
\textsuperscript{126} Interview notes with author.
involved in Sierra Leone’s civil war. The WSB members were charged with 31 counts of conspiracy to commit murder, robbery with violence, wounding with intent, and wounding. The High Court rendered its judgment on April 5, 2006, convicting seven of the 31 defendants. All seven have appealed within the prescribed time-limit, but are still detained at the time of writing (four years later), waiting for their appeal to be considered. In addition to this miscarriage of justice, other due process violations were common throughout the proceedings. The first trial was also rife with due process violations.

It may also be useful to examine a third national trial in Sierra Leone, which concerned a 2003 armed attack committed by elements of the AFRC on a military installation outside Freetown. The attack took place after the official end of the war, and was regarded as a coup attempt by the ruling party at the time, the SLPP. It accordingly involved treason charges. But the trial can still teach us something about the quality of war-related domestic proceedings in Sierra Leone because, even if it did not concern atrocities against civilians, it addressed political violence similar to that which prevailed during the war (i.e., a rebel faction that fought the government during the civil war is now attacking the same government). The trial judgment was rendered by the High Court in Freetown on December 20, 2004. Of the 15 defendants, ten received the death penalty, one was sentenced to ten years of imprisonment, and four were acquitted. The SLPP was still in power when the trial

127 The AFRC was created by officers who left the army in 1997 and joined the RUF in fighting against government forces.
128 They were convicted of ten counts of conspiracy to commit murder, and sentenced to ten years for each count to be served concurrently, starting from the date of conviction (six years after the accused were arrested and four years after their case was committed to the High Court).
129 According to Clare da Silva, there seems to be little political interest in moving this trial forward.
130 Clare da Silva explained that while the arrests were made in 2000, and the case committed to the High Court on May 29, 2002, charges were not made known to the accused until several years later. Also see OCHA, Humanitarian Situation Report on Sierra Leone (July 2004) <www.reliefweb.int/rwb/nfs/db-900sid/EVIU-63HJ457OpenDocument> (Accessed May 30, 2009) (“On 21 July an incident occurred within the Pademba Road Prison in central Freetown, involving 33 former-West Side Boys. The insurgents have been held in the Prison for over two years without charge and were scheduled to appear in court. At the last minute, they were notified by the High Court that their case had once again been postponed indefinitely and thus should not appear in court. Upon receiving the message the indictees became highly agitated and started yelling that they ‘must go to court today’. This situation led the prison authorities to contact the [Sierra Leone Police] who subsequently deployed anti-riot elements at the Prison location.”).
131 It was stressed by Clare da Silva that the accused first received legal representation around the time the trial started in June 2005, about five years after they were arrested in 2000. Also, the sentences were to start from the date in which the case was committed to the High Court (two years after the accused were arrested).
132 Johnny Paul Koroma, the former leader of the AFRC, was arrested by the national authorities in connection with this event, but escaped two months before he was indicted by the SCSL (for wartime atrocities). The author obtained information about this case from Clare da Silva, who provided pro-bono assistance to the accused in this case. See also, Amnesty International, Sierra Leone: Amnesty International expresses dismay at 10 death sentences for treason (December 21, 2004) <www.amnesty.org/en/library/asset/AFR51/009/2004/en/dom-AFR510092004en.html> (Accessed May 30, 2009) (hereinafter: “AI Expresses Dismay”).
judgment was issued. A Canadian lawyer who assisted the defense criticized the fairness of the proceedings. She also noted that the court convicted individuals who were merely present at the crime scene but had no other links to the crimes. In addition, the imposition of the death penalty only weeks after the TRC recommended its abolition attracted criticism.

Four years after the High Court’s judgment, the Sierra Leonean Court of Appeals overturned the convictions, revoked the death penalties, and acquitted all the defendants. A senior SCSL official noted that although the acquittal was considered in Sierra Leone as a victory of justice, it was based on a technical detail, namely, the lack of corroboration of an accomplice’s testimony. It is noted that by the time the appeals judgment was rendered, Sierra Leone’s ruling party was the All People’s Congress (“APC”), which replaced the SLPP after winning the 2007 elections. Since the APC had some affiliation to the AFRC, the appellate court may have been influenced by political pressure to issue an acquittal. Regardless of whether it was justice or politics, there is nothing indicating that the SCSL had any impact on the proceedings in this case.

According to a Sierra Leonean lawyer, some of the defense attorneys in the above national cases were also involved with the SCSL. However, no references to SCSL norms were made during the national proceedings. The lawyer explained that referring to SCSL norms in national trials would have been useless, as the bench would not have applied such provisions. This is unfortunate, in my view, as perhaps some of the due process violations would have been avoided if SCSL procedural norms had been more influential in domestic proceedings.

134 Id. See also, AI Expresses Dismay, supra note 132.
135 Interview notes with author.
136 On August 11, 2007, Sierra Leone held nation-wide presidential and parliamentary elections, which were considered internationally as credible and peaceful. The APC, the opposition party since 1992, won a parliamentary majority taking 59 of 112 seats, while the previously ruling SLPP took 43 seats. Ernest Bai Koroma of the APC was elected as Sierra Leone’s president. This outcome reportedly “marked a smooth democratic transition from one government to the other”. See The Human Rights Commission of Sierra Leone, “First Annual Report on the State of Human Rights in Sierra Leone 2007” (March 2008). Copy with author.
137 For example, the APC chief presidential bodyguard is former AFRC combatant Idriss Kamara (nicknamed “Leather Boots”). It is noted that the APC party was previously in opposition to the SLPP government, and it was the latter which requested the creation of the SCSL.
138 In addition, criminal proceedings were initiated in recent years against former RUF spokesman Omrie Golley. He was arrested in 2006, when the SLPP was in power, and charged with an attempted coup. Golley was in pre-trial detention for 22 months, at which stage the charges against him were dropped and he was released by the current APC government. Similar to the acquittal of ten soldiers on death row, the dropping of the treason charges against Omrie Golley could be a result of either improved justice standards or political pressure. Either way, nothing indicates that this development is attributable to the SCSL.
139 Interview notes with author.
2.9.2 Jurisprudential Impact

The Sierra Leonean lawyer explained that in addition to lacking references to SCSL norms, domestic proceedings in Sierra Leone also lack references to SCSL case-law. He suggested that the development of criminal law in Sierra Leone is generally discouraged, and national courts do not normally rely on new jurisprudence, especially when it relates to human rights issues. He added that national judges and lawyers lack knowledge of SCSL jurisprudence. As for certain doctrines followed by the SCSL, such as command responsibility and joint criminal enterprise, the local lawyer noted that there was no need to apply them in the above national cases as they concerned the direct conduct of the accused.

2.9.3 Possible Future Impact

Sierra Leone's national law currently does not cover international crimes. The SCSL has not made any formal attempts to encourage Sierra Leone to criminalize international crimes, but at least two of its prosecutors (including a Sierra Leonean national) have been lobbying the Sierra Leonean government to domestically implement the Rome Statute. If their advocacy efforts prove successful, and international criminal law norms are consequently internalized into Sierra Leonean law, such norm internalization could be regarded as an impact of the SCSL on Sierra Leone's justice system. But interviewees explained that even if Sierra Leone implements the Rome Statute domestically, the implementing legislation would not apply to atrocities committed during the country's civil war of 1991-2002 as it could only have a prospective effect. Still, the introduction of such a domestic law would have an important general effect on the national justice system, and signal that Sierra Leone no longer tolerates impunity for atrocities.

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140 Interview notes with author.
141 Interview notes with author.
142 Interview notes with author. It is noted that Sierra Leone has ratified the Rome Statute. However, as Sierra Leone is a dualist country, the Rome Statute must be incorporated into its national law before it can be applied domestically.
143 While this internalization is encouraged not by the SCSL directly but rather by its staff members acting in their personal capacity, it could still be considered an SCSL impact because it was made possible by the Court's presence in Sierra Leone. Further, one of the advocates of this norm internalization is a Sierra Leonean, whose increased awareness to the importance of domesticating international criminal norms may have stemmed from his work at the SCSL.
144 Interview notes with author.
145 However, as of the time of writing, it is too early to tell whether the advocacy efforts of the SCSL prosecutors will succeed.
The maximum sentence in Sierra Leone is the death penalty, which was last applied in 1998 in connection with treason charges. The SCSL, consistent with international law, cannot impose the death penalty. It has so far imposed sentences ranging from 15 to 52 years imprisonment. Sentences issued by the Sierra Leonean courts in the above-mentioned atrocity-related national trials were much lower. One reason for this difference could be that the crimes addressed by the national courts were of lesser gravity than those addressed by the SCSL. But still, a senior government official in Sierra Leone considered that the sentences imposed at the SCSL were too high even for the atrocities it addressed. This is particularly interesting considering that in Sierra Leone the death sentence is applicable by law to ordinary crimes such as murder (even if it has not been applied in practice since 1998).

It is recalled that the High Court in Freetown convicted and sentenced to death ten persons in 2004, in connection with the 2003 coup attempt. Following this ruling, Amnesty International lobbied for the abolition of the death penalty in Sierra Leone by calling for “an end to the discrepancy [in sentencing practices] between national courts and the Special Court for Sierra Leone”. Thus, the SCSL sentencing norms are used by human rights groups in their efforts to advocate for the abolition of the death penalty in Sierra Leone. However, aside from “allowing” its sentencing norms to be used in this manner, the SCSL has not been actively encouraging Sierra Leone to abolish the death penalty. A Sierra Leonean human rights activist explained that the SCSL has also refrained from encouraging national actors to advocate for the death penalty’s abolition.

As discussed above, the death sentences imposed by the High Court of Freetown were reversed on appeal in 2008. A subsequent news article reported that it was “the first successful appeal against a death penalty… opening the possibility of an eventual end to capital punishment [in Sierra Leone]”. However, despite this expression of hope, and the TRC’s recommendation in 2004 that the death penalty be abolished, capital punishment still exists.
in Sierra Leone. Amnesty International reported that attempts made in August 2008 by civil society groups to pressure the Sierra Leonean Constitutional Review Commission to abolish the death penalty were unsuccessful, and that Sierra Leone abstained, in December 2008, on a UN General Assembly resolution calling for a worldwide moratorium on executions.152

While the SCSL did not have an impact thus far on Sierra Leone’s sentencing norms, it may still have such an impact in the future, if, for example, activists will persuade the government to abolish the death penalty by stressing the discrepancies between the SCSL penalty norms and local standards.

2.11 SCSL Capacity Impact

As the SCSL’s mandate comes to its end, it is increasingly becoming engaged in capacity building initiatives in Sierra Leone.153 Some of these initiatives are motivated by the Court’s desire to leave behind a legacy.154 Others are inspired by the Sierra Leonean members of the SCSL who want to see their national system improve. There are also capacity building activities that have resulted from the Court’s need to ensure the long term fulfillment of its ongoing residual obligations. Thus, for example, the SCSL has recently become involved in helping Sierra Leone establish a national witness protection program. This and other SCSL activities that can strengthen the judicial capacity of Sierra Leone are discussed in the following paragraphs. It is stressed that while these activities do not necessarily focus on enabling national prosecutions of the war’s atrocities, they are important in that they can help enhance Sierra Leone’s capacity to handle complex criminal proceedings, thereby strengthening the national criminal system as a whole.

2.11.1 National Witness Protection Scheme

As noted above, the SCSL has recently become involved in supporting the establishment of a national witness protection program in Sierra Leone. According to a SCSL official, this two year program is led by the SCSL Witness and Victims Section (“WVS”) and funded

152 AI 2009 World Report, supra note 9.
153 Thus, the SCSL President reported to the UN Security Council in 2007 that “[t]he Court was continuing to transfer expertise to Sierra Leoneans through a number of programmes, including training on courtroom interpretation, witness protection and detention standards.” See Security Council, Department of Public Information (News and Media Division), Special Court for Sierra Leone Faces Funding Crisis, as Charles Taylor Trial Gets Underway; Security Council Told Today in Briefing by Court’s Senior Officials, U.N. Doc. SC/9037 (June 8, 2007).
154 Id. (the SCSL President stating that “It should come as no surprise that, as the Court approaches the end of its mandate, legacy issues are one of its top most priorities”).
by the Oak Foundation. WVS has already provided the Government with a layout of the infrastructural requirements, personnel needs, a tentative budget, and draft legislation. It is also preparing for the program’s implementation process, including holding training sessions for the Sierra Leone Police with trainers from a UK police force. According to the SCSL official, the Government is receptive to the Court’s suggestions, and Sierra Leone’s President and other senior officials agree that there is a need for a national witness protection program.

Another SCSL official explained that the national interest in a witness protection plan was a result of the SCSL’s presence and process. Sierra Leoneans requested the SCSL to encourage their local authorities to set up a witness protection system on the national level. According to yet another SCSL official, a national witness protection scheme would allow the Sierra Leonean authorities to deal better with ordinary criminal cases, as today even basic contact with witnesses is lacking. It is noted that an official of the Sierra Leonean judiciary, who was generally critical of the SCSL, referred with satisfaction to the SCSL’s intention to establish a national witness protection program.

2.11.2 Other Training Activities and Consultations

A top SCSL official noted that in late 2008 the Court has embarked on about 20 different training programs for Sierra Leoneans, from teaching the anti-corruption commission how to use “insider witnesses” in their proceedings, to holding a course on defensive driving given by the SCSL’s transport unit. Any skill which exists in the SCSL is being transferred to relevant Sierra Leoneans. The SCSL plans to continue on this path until it winds up, he added. According to other SCSL members, a Legacy Working Group has been established within the Court, in which national institutions participate. The group’s primary aim is to ensure skill transfer to the national level. The SCSL has assessed the needs of national institutions, such as prisons, police, and the Attorney General’s office. It is now training the personnel in these institutions in the needed areas. The Court is also training investigators of the national Human Rights Commission and Anti-Corruption

155 Interview notes with author. Also see SCSL Press Release, November 5, 2009 <www.sc-sl.org/LinkClick.aspx?fileticket=kJuOgoLU2E%3d&tabid=53> (Accessed December 3, 2009) (referring to a one-month training program given by the SCSL to local officers with the assistance of UK trainers).
156 Interview notes with author. The official added that since such activities were not budgeted for in advance, the SCSL had to fund-raise for this initiative.
157 Interview notes with author.
158 Interview notes with author.
159 Interview notes with author.
Commission, as well as court reporters. Additional capacity building initiatives of the SCSL in Sierra Leone, explained a Court official, include conducting seminars about international humanitarian law at the law school of Foray Bay College and at the local Bar School. This is done every year or two.

Moreover, a SCSL staff member mentioned that the Court is encouraging the establishment of a public defense office at the national level, which would select and assign duty counsel, and which would largely rely on the local bar association. A senior Sierra Leonean official confirmed that the government has been encouraged by the SCSL to create a national public defender’s office.

SCSL officials have also focused on developing a legal and institutional framework to prosecute future international crimes: As noted above, SCSL officials are promoting the domestic implementation of the Rome Statute. In addition, a SCSL official indicated that there are discussions within the SCSL about encouraging the establishment of a war crimes office under Sierra Leone’s Ministry of Justice. It is also noted that the SCSL intends to leave behind its physical building for local use.

### 2.11.3 Employment of Sierra Leoneans by the SCSL

The SCSL’s reliance on national staff has a strong capacity building component. It could ensure that once the Court completes its work, Sierra Leone will be left with professionals capable of supporting a rule of law society. More than half of the SCSL’s staff members are Sierra Leoneans. While many of them are in non-professional posts, such as drivers, security guards and cleaners, others are placed in senior professional positions. In addition, both the Defense and Prosecution recruit young Sierra Leonean lawyers as “Junior Professional Consultants,” and there is an internship program for Sierra Leoneans at the SCSL. Further, Sierra Leonean police officers and investigators are seconded to the

160 Interview notes with author.  
161 Interview notes with author.  
162 Interview notes with author.  
163 Interview notes with author.  
164 Interview notes with author.  
165 The official explained that while there is no political will to hold national cases for past atrocities, such a war crimes office may be useful in future cases of atrocities. Interview notes with author.  
166 A Sierra Leonean lawyer, who was involved with the SCSL, explained that the Defence teams at the SCSL were initially hesitant to employ Sierra Leoneans. However, when the Registry allocated resources for this purpose (out of a special EU fund) the Defence teams began recruiting young Sierra Leonean lawyers as “Junior Professional Consultants”. This was done to build domestic capacity, but also to reinforce the Defence teams. From 2007, the lawyer added, the Prosecution also began admitting national lawyers as Junior Professional Consultants. Interview notes with author.
SCSL for 90 day periods, sensitizing them to complex criminal investigations and evidence handling techniques.\textsuperscript{167}

Two senior SCSL officials explained that by employing nationals, the Court exposes them to international standards of trial conduct, including with regard to evidence management and court administration, and that this will eventually bring knowledge and expertise into the Sierra Leonean system.\textsuperscript{168} Also a SCSL judge considered that by employing nationals, the SCSL creates an important impact on national capacity.\textsuperscript{169} However, SCSL officials also stressed that there is a risk that nationals working at the SCSL would not return to the national system after the Court winds up, preferring instead to seek international jobs. For example, it is unlikely that the Sierra Leonean judges at the SCSL will later serve with the Sierra Leonean judiciary. From this perspective, the Court may be depleting national capacity instead of improving it.\textsuperscript{170}

Moreover, a Sierra Leonean lawyer indicated that too few local lawyers were involved in the SCSL’s process to be able to influence national criminal proceedings. When several local lawyers tried to participate in criminal proceedings before national courts in a manner influenced by their previous practice before the SCSL, their approach was too foreign for their local colleagues to accept. In his view, had more national lawyers been involved in the work of the SCSL, a more significant local impact would have resulted.\textsuperscript{171} Another interviewee, a Sierra Leonean human rights activist, also suggested that some Sierra Leoneans who had worked at the SCSL and subsequently returned to the national judiciary, did not eventually use the skills they acquired at the SCSL to improve processes at the national level.\textsuperscript{172}

\textbf{2.11.4 Final Remarks on Capacity Building}

The SCSL’s geographical location, combined with the institutional support it receives from the Government of Sierra Leone, provide it with an excellent opportunity to engage in

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\textsuperscript{167} See International Center For Transitional Justice, Prosecutions Case Studies Series: The Special Court for Sierra Leone Under Scrutiny (Tom Perriello & Marieke Wierda, March 2006). “Some human rights observers have expressed concern privately about police involvement [with the SCSL], given the negative track record of the police during the conflict, but in general the officers conducted themselves well and generated no complaints. Two of the officers who spent extended time working with the [SCSL Office of the Prosecution] have returned to top positions in the police, one as the third-highest ranking member of the office and another as director for the Eastern District.” The report also highlights that Sierra Leonean police officers have been working as investigators at the SCSL since it became operative, and were responsible for the arrests of five of its indictees within a matter of hours in March 2003.

\textsuperscript{168} Interview notes with author.

\textsuperscript{169} Interview notes with author.

\textsuperscript{170} Interview notes with author.

\textsuperscript{171} Interview notes with author.

\textsuperscript{172} Interview notes with author.
local capacity building initiatives. However, while most interviewees agreed that the SCSL should contribute to capacity building in Sierra Leone, they expressed mixed views on whether the Court is in fact achieving this aim.\textsuperscript{173} An official of the Sierra Leonean judiciary, who was generally very critical about the SCSL, did not consider that the Court has significantly contributed to national capacity.\textsuperscript{174} When asked about a recent training the SCSL has given to national court reporters, the official complained that only a limited number of nationals were trained, and that the training was too short to be significant.\textsuperscript{175} The local judiciary official was also critical about the SCSL’s intention to leave behind the court-house building to the national judiciary, noting that the national system does not have the available means to maintain the building.\textsuperscript{176}

Moreover, a SCSL judge expressed uncertainty as to the willingness of Sierra Leone’s national judges to learn from the experience of the SCSL.\textsuperscript{177} Another SCSL judge, who tried once to interest the former Chief Justice of Sierra Leone in establishing a liaison between national and SCSL judges, explained that there was little interest among both judiciaries.\textsuperscript{178} According to a senior SCSL official, the Court had unsuccessfully attempted to hold training sessions in cooperation with the local bar association.\textsuperscript{179} Such formal or informal liaisons, including training sessions involving both international and local legal professionals, could have helped increase the SCSL’s impact on domestic capacity to handle war related prosecutions. However, according to SCSL officials, the Court is expected to increase its capacity building activities as it winds up its work.\textsuperscript{180} Therefore, it may be premature to draw conclusions about the Court’s contribution to capacity building in Sierra Leone, because its

\subsection*{2.12 Conclusion}

International courts can only prosecute a handful of perpetrators in each mass atrocity case. Therefore, to effectively fight impunity in their target states, the international community should adopt a comprehensive approach which promotes the parallel utilization

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\textsuperscript{173} Interview notes with author.
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\textsuperscript{175} Interview notes with author.
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\textsuperscript{177} Interview notes with author.
\textsuperscript{178} Interview notes with author.
\textsuperscript{179} Interview notes with author.
\textsuperscript{180} Interview notes with author. It should also be noted that any capacity building activities undertaken by the SCSL were not mandated by the Court’s creators and were therefore not budgeted for in advance. This forces the Court’s staff to continuously raise funds to finance capacity building initiatives. It also means that such initiatives are designed according to their personal vision, and not as part of an organized comprehensive plan aimed at enhancing national capacity (and willingness) to try perpetrators of war-related crimes.
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of international and national accountability processes. While such a comprehensive approach can (and should) be implemented through a variety of means, one way to encourage fair and genuine national accountability processes is to ensure that the relevant international court has a positive impact on domestic procedures. It is also important that the international and national processes complement rather than compete with each other. An international court is set up when the national justice system is struggling to rebuild what was destroyed as a consequence of the mass atrocities. At that stage, the international court is well placed to support national courts and in particular encourage them to prosecute the atrocities in parallel to its own trials. A calibrated effort to prosecute all perpetrators (or at least the high and mid level ones), by utilizing in parallel national and international courts, will ensure that norms and procedures developed in international courts will be applied domestically where needed.

Furthermore, international courts have more resources to attract leading world experts on international criminal law. If the national and international systems work together, the contribution of these experts (for example in the area of norm development), would be more likely to permeate into the national level. In such an environment the international court will become more relevant and acceptable on the local level, inevitably enhancing its ability to promote accountability in the relevant society. As noted above, the impact of international criminal courts on national justice systems can be linked specifically to (the quantity and quality of) domestic atrocity-related proceedings, or more broadly relate to the national criminal justice system as a whole. The position of this chapter is that both types of impact are avenues through which international criminal courts can reduce impunity and improve the rule of law in their target countries.

Focusing on the ICTR and SCSL, this chapter has identified the influences of these international courts on judicial procedures in their target countries. As shown above, the SCSL’s impact on the Sierra Leonean justice system was relatively limited. This suggests, according to the point of view of this chapter, that the Court’s contribution so far to reducing impunity and improving the rule of law in Sierra Leone was also limited. Indeed, Sierra Leone’s national amnesty regime limited the potential impact that the SCSL could have had on domestic atrocity-related proceedings, but the Court could have tried to encourage national prosecutions by sending a clearer message on the domestic level that international law is developing in the direction of prohibiting such blanket amnesties from covering international crimes, even in national courts. It could have also tried to create better links with national judicial institutions, even informally, for example, through its current or former Sierra Leonean staff members. In addition, by steering away from applying domestic law, the SCSL missed an opportunity to contribute to national normative developments. Thus, even years after the Court’s establishment, it has not managed to
encourage accountability for past atrocities in Sierra Leone. Nonetheless, the SCSL did (and still does) have a certain degree of impact on national capacity to handle criminal proceedings in Sierra Leone.

In Rwanda, where mass domestic prosecutions address the atrocities, the ICTR may not need to encourage national trials in order to reduce impunity and improve the rule of law. Rather, it could play a role in helping Rwanda improve the quality of the national accountability procedures. It is recalled that the Rwandan justice system has been internationally criticized for being unfair and imposing victor’s justice. If the critics are correct, then accountability may not be achieved in Rwanda until the quality of domestic justice is improved. But even if the critics are wrong, and Rwanda’s justice system does offer fair trials and treats citizens equally, their criticism can still undermine the struggle to achieve accountability for the atrocities. This is because the mere perception of the international community that Rwanda’s domestic justice system is unfair will prevent third states from extraditing to Rwanda the many perpetrators who still live freely outside Rwanda. As most of them will not be prosecuted in their countries of residence, due to lack of political will or judicial jurisdiction, the attainment of accountability for Rwanda’s atrocities can be adversely affected. Thus, even if the critics are wrong, by helping or motivating Rwanda to further strengthen its judiciary, the ICTR could encourage more favorable international perceptions about Rwandan justice and thereby increase its own contribution to accountability and rule of law in Rwanda.

A senior Rwandan prosecutor considered that if the UN Security Council wanted the ICTR to have an impact on national trials in Rwanda, it should have opted for a model of an international court that was more complementary to national proceedings.\(^1\) However, research shows that other existing models of international courts were not necessarily more successful in encouraging national trials. For example, the ICC, even though its jurisdiction is complementary to national courts, has thus far not been able to encourage national atrocity-related prosecutions in its target states.\(^2\) Also the SCSL, as demonstrated above, despite having jurisdiction over domestic crimes and including national judges, did not encourage national atrocity-related proceedings in Sierra Leone.

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\(^{1}\) Interview notes with author.

\(^{2}\) Sigall Horovitz, *Uganda: Interaction Between International and National Responses to the Mass Atrocities* (DOMAC Report, forthcoming); Sigall Horovitz, *DR Congo: Interaction Between International and National Responses to the Mass Atrocities* (DOMAC Report, forthcoming); Sigall Horovitz, *Sudan: Interaction Between International and National Responses to the Mass Atrocities* (DOMAC Report, forthcoming). However, there is evidence that the ICC has had some success in encouraging domestic atrocity-related proceedings in Colombia, where the ICC has not commenced investigations as of the time of writing, but indicated that it might do so. See, e.g., Alejandro Chehtman, *The Impact of the ICC on Colombia: Positive Complementarity on Trial* (DOMAC Report, forthcoming).
By contrast, as this chapter demonstrates, the ICTR has managed to encourage significant normative and capacity developments in Rwanda, include strengthening due process guarantees, improving capacities to handle atrocity proceedings, and promoting the abolition of the death penalty and life imprisonment in isolation. The ICTR also motivated the improvement of Rwandan prison facilities and, importantly, encouraged a national war-crimes trial involving RPF defendants. The Tribunal managed to generate many of these domestic effects by introducing a procedure for referring cases to national jurisdictions. Domestic influences of the ICTR were also enabled by its proactive Prosecutor, who cooperated with the Rwandan authorities by sharing evidence against suspects who had not yet been indicted by the ICTR.\textsuperscript{183} Significantly, Rwanda’s own approach was also crucial in this regard. Many of the ICTR’s domestic influences were enabled by Rwanda’s policy of accountability for past atrocities. Further, Rwanda’s judicial authorities, by repeatedly making adjustments to meet the ICTR’s requirements for transferring cases and evidence, despite the challenges facing a justice system being (re-)built almost from scratch, played a significant role in enabling ICTR domestic influences. These conditions, which were lacking in Sierra Leone, may explain variations in the respective domestic influences of the ICTR and SCSL. But the position of Sierra Leone was clear from the time the SCSL was established. Thus, as suggested above, to more effectively contribute to accountability and rule of law in Sierra Leone, the SCSL should have made greater efforts to influence the national justice system.

It is stressed that the domestic impact of the ICTR and SCSL may need to be re-assessed later, given that both courts are still engaged in capacity building activities as they prepare for closure. However, I hope that by identifying their domestic impact to date, this chapter has enriched our understanding of whether and how these international courts have contributed so far to reducing impunity and improving the rule of law in Rwanda and Sierra Leone.

\textsuperscript{183} It is noted that, in addition, the ICTR Statute’s provisions on prisoner transfers have led to domestic influences.