The United States as an Essential Forum for Litigating and Chronicling the Genocide in Rwanda

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THE UNITED STATES AS AN ESSENTIAL FORUM FOR LITIGATING AND CHRONICLING THE GENOCIDE IN RWANDA

Matthew C. Kane*

Abstract

Over several months in 1994, hell descended on Rwanda. The country and its people experienced unfathomable tragedy, the likes of which the rest of the world simply cannot comprehend. Since the Rwandese Patriotic Front (RPF) seized power from the architects of the genocide, the country has made significant steps in terms of nation building. Rwanda has experienced tremendous economic growth and is widely considered to have one of the lowest levels of official corruption on the continent.¹ The people themselves are different—perhaps most fundamentally, the majority of the current population had not yet been born when death became routine.² Yet in 2021, the United States deported two individuals to Rwanda after stripping them of their U.S. citizenship for failure to disclose involvement in the genocide.³ Despite radical changes in Rwanda and around the globe in the last quarter century, the vestiges of the genocide remain, affecting much of the present social and political discourse in Rwanda. Traditional legal systems simply were not


² See Rwanda, CIA WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/rwanda/ [https://perma.cc/753Q-QP32] (last visited Feb. 18, 2023) (providing that 60.05% of the population is under twenty-four years of age).

equipped to deal with such mass atrocities. As a result, unique transitional justice mechanisms were implemented, and other countries, including the United States, have served as forums for additional litigation involving the genocide.

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INTRODUCTION

Law facilitates a unique type of memory preservation, particularly in cases involving mass atrocities. Given many societies’ well-founded preoccupation with wide-spread traumatic events and the corresponding desire to see some type of justice meted out on the perpetrators, international criminal law and international tribunals have increased the relevance of law in the evolution of the collective memory of such events.4 “As an aim for criminal law, the cultivation of collective memory resembles deterrence in that it is directed toward the future, where enhanced solidarity is sought. But like retribution, it looks to the past, to provide the narrative content of what is to be shared in memory.”5 Cases capturing the public eye may serve as a societal “gut-check,” causing the populace to reconsider fundamental principles and alter long held beliefs.6 However, much depends on the legal system, the skill of the judges and attorneys involved, and the means of recording and disseminating information. Indeed, in an attempt to control the outcome or narrative, judicial proceedings may perpetuate governmental policies or agendas, intentionally or as a result of deeply embedded biases.7 In such cases, the effect on individual and collective memory may be flawed at best.8 Legal proceedings also provide a forum for voices that might otherwise be silenced, overlooked, or ignored.9 Such individual perspectives may have significant merit or may primarily reflect the spin the defendant wishes to advance to avoid conviction.10 While a broader context is often introduced, the priority is to see justice served rather than document a particular event, leading to a cursory overview rather than a nuanced analysis of the setting. Additionally, legal proceedings tend to be formalized, the product of a specific legal structure that both limits the scope of the narrative and regulates the emotions of the participants. Thus, the content and outcome of a case should be examined with a skeptical eye, recognizing both the limitations of the law in constructing

6. Id. at 2.
7. See Stewart Motha & Honni van Rijswijk, Introduction: A Counter-Archival Sense, in Law, Memory, Violence: Uncovering the Counter-Archive 1, 2 (Stewart Motha & Honni van Rijswijk eds., 2016).
10. See id. at 141.

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a historical record while appreciating that it does, in fact, contribute to the individual and collective memories regardless of such shortcomings.

In the aftermath of the genocide in Rwanda, various transitional mechanisms were engaged to address the challenges associated with the mass violence and extraordinarily large number of defendants. The International Criminal Tribunal for Rwanda (ICTR), Rwandan courts, and Gacaca, while providing some justice, did not, and cannot, address every genocide related case. Many of the limitations of these institutions, however, do not exist in external forums. In particular, U.S. courts have provided opportunities for individualized justice and distinct memorialization of testimony and evidentiary materials not assembled elsewhere.

This Article introduces a wide compilation of U.S. federal cases identified by the author as involving various aspects of the genocide. It concludes by comparing and contrasting issues identified in the U.S. cases with those at the ICTR and, to a lesser degree, those in Rwandan national courts and the Gacaca. Upon review of these cases, one may quickly ascertain that the U.S. federal courts, despite significant challenges, provide a unique forum for obtaining justice and establishing a diverse historical record about the genocide and more recent political concerns in Rwanda.

I. TRANSITIONAL JUSTICE IN RWANDA

Post-genocide, Rwandan courts were in a state of utter disarray, without a single operable court.11 If those responsible for such atrocities were to be held accountable, alternatives had to be implemented.

A. The ICTR

In 1994, the ICTR was created by United Nations Security Council Resolution 955 to enable “the prosecution of persons responsible for serious violations of international humanitarian law.”12 The Resolution set out elements of the crimes for genocide, crimes against humanity, and war crimes.13 The Office of the Prosecutor would successfully obtain sixty-one convictions to just fourteen acquittals.14 Nonetheless, the ICTR has been criticized for, among other issues, its extraordinary cost, limited

12. S.C. Res. 955, ¶ 8 (Nov. 8, 1994).
13. Id. annex arts. 2–4.
number of trials, and limited attention to sexual violence.\textsuperscript{15} Additionally, only Hutu (with the exception of one Belgian) were prosecuted—no member of the RPF, or any Tutsi for that matter, was tried before the tribunal.\textsuperscript{16}

**B. Domestic Courts**

The genocide left the national legal system of Rwanda in an extremely weakened state. “[T]he judiciary existed more in theory than in practice, with fewer than 400 surviving judges, prosecutors and investigators. Some of those lawyers who survived were charged with taking part in the genocide.”\textsuperscript{17} As a result of the lack of legal practitioners and infrastructural issues, only 1,292 individuals had been tried by 1998; meanwhile, some 130,000 suspects remained in detention.\textsuperscript{18} In addition, there were significant concerns regarding the arbitrary nature of arrests and potential wrongful convictions.\textsuperscript{19} While the national judicial system has seen improvement, “outcomes in high-profile genocide, security, and politically sensitive cases appeared predetermined.”\textsuperscript{20}

**C. Gacaca Courts**

Given the extraordinary number of detainees awaiting trial for genocide related offenses, the government created a novel “grassroots” process.\textsuperscript{21} Adopting historic local customs, the *Gacaca* provided a relatively quick and informal means of resolving lower-level cases.\textsuperscript{22} “Prior to colonialism, *Gacaca* courts were a tool of communal mediation

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\textsuperscript{16} Id. at 80–86.

\textsuperscript{17} Jason Strain & Elizabeth Keyes, *Accountability in the Aftermath of Rwanda’s Genocide*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 94 (Jane Stromseth ed., 2003); see also Melman, supra note 11, at 1277 (providing an even lower figure of surviving jurists).


\textsuperscript{21} Jean-Damascène Gasanabo et al., *Rwanda’s Inyangamugayo: Perspectives from Practitioners in the Gacaca Transitional Justice Mechanism*, 14 GENOCIDE STUD. & PREVENTION 153, 155 (2020) (“*Gacaca* is a Kinyarwanda word that loosely translates to ‘justice on the grass.’”).

\textsuperscript{22} Id. at 155.
and conflict resolution for civil disputes throughout rural Rwanda . . . . [V]illage elders would listen to the disputes of all parties and would then agree upon a solution, including appropriate reparations.”

Over the course of ten years, the Gacaca completed over a million cases. Such efficiency, however, lead to a number of concerns, including the untrained lay judges, the lack of legal counsel, and the exclusion of crimes committed by the RPF. Worse yet, the government used the proceedings against critics and political opponents.26

The ICTR, Rwandan courts, and Gacaca, while providing some justice, simply do not address every genocide related case. However, many of the limitations of these institutions do not exist in external forums. In particular, U.S. courts have provided opportunities for individualized justice and distinct memorialization of testimony and evidentiary materials not assembled in any other forum.

II. THE ECLECTIC ASSORTMENT OF CASES LITIGATED IN THE UNITED STATES

There are many explanations for the United States’ failure to intervene or even focus its attention on Rwanda during the genocide. Some have argued that the United States simply lacked a strategic interest in Rwanda and thus had little incentive in responding.27 Ambassador David Scheffer, who was in the U.S. State Department at the time, recalls that the government was looking at the events in Rwanda as a conflict between two sides, hoping that a negotiated outcome could still be reached.28 At the same time, the U.S. government was committed to avoiding the failures in Somalia that resulted in the loss of military personnel.29 Meanwhile, the media was focused on the O.J. Simpson trial and the Harding-Kerrigan scandal, and when it finally turned to the genocide most of the coverage was on refugee camps outside Rwanda rather than the atrocities within the country.30

23. Id.
24. Id. at 154.
26. Id. at 309.
29. Id.
Nonetheless, the United States has subsequently addressed the genocide in a variety of ways. President Clinton visited Kigali and offered an apology for the lack of international intervention. The United States became an ardent supporter of the ICTR, advocating for its creation and support from the United Nations, while providing millions of dollars to fund its operations. It has opened its doors to refugees from various sides of the conflict. And, somewhat surprisingly, the United States federal court system has repeatedly served as a forum for substantial litigation relating to the genocide.

The roughly two dozen cases addressed by U.S. courts vary widely in their nature, depth of treatment, and ultimate outcome. Some arose very soon after the genocide while others have only recently concluded. Ultimately, while the U.S. federal court system is not the perfect venue for litigating the genocide, it has provided an opportunity for victims to seek redress and for defendants to have a meaningful opportunity to argue their positions. The applicable standard of proof applied in these cases is wide ranging, and often the analysis serves only as background for the opinions and orders issued by the courts. Some cases are relatively known, others, all but ignored. Regardless, an overview of identified cases provides a starting point for analysis of U.S. litigation of the genocide.

A. Extradition Proceedings

Perhaps the most well-known and discussed U.S. federal case was the extradition of Elizaphan Ntakirutimana to the ICTR. Ntakirutimana, the former president of the Seventh Day Adventist Church for Rwanda, was indicted by the ICTR for genocide and related crimes, accused of luring large numbers of Tutsis to his church complex before instigating their slaughter and subsequently hunting down those who hid in other locations. The magistrate judge in Laredo, Texas, where Ntakirutimana had immigrated, initially determined that he could not be extradited because: (1) extradition required a treaty, and the legislative act authorizing the extradition was unconstitutional; and (2) alternatively, the “request for surrender, and the supporting documents, did not provide probable cause to support the charges.” The government submitted additional information and a district court judge determined that the request was constitutionally permitted and sufficient evidence had been presented to find that probable cause did exist. The Fifth Circuit agreed and Ntakirutimana was extradited to the ICTR, where he was ultimately found guilty of aiding and abetting genocide and crimes against humanity (extermination). He was sentenced to ten years and released on December 6, 2006 after completing his sentence.

B. Prosecutions

The U.S. federal government has brought a variety of criminal cases against Rwandans that involve factual determinations, or, at a minimum, discussion of the genocide. The majority have been cases involving immigration fraud of one form or another. Such fraud cases have been

39. Ntakirutimana, 184 F.3d at 423 (citing In re Ntakirutimana, 988 F. Supp. at 1042, 1044).
44. See the eleven cases cited infra Section II.C.
used as “tools for targeting aliens who concealed participation in human rights violations” and “present evidentiary and legal issues relevant to the development of U.S. criminal law in the substantive areas of torture, war crimes, extrajudicial killing, and genocide.” In each case, the defendant has been accused of some form of misrepresentation relating to immigration paperwork or interviews regarding his or her involvement in the genocide.

Jean-Marie Vianney Mudahinyuka was sentenced to fifty-one months after having pled guilty to making false statements when applying for a visa and during an interview with an immigration official, and for assaulting a federal officer during his arrest. Upon completion of his sentence, the government sought to expedite his deportation to Rwanda; he responded by applying for withholding of removal under the Convention Against Torture, contending he was likely to be persecuted and tortured if he was returned. The immigration judge declined on two grounds: first, that his conviction for assaulting a federal officer was a particularly serious crime, and second, based on his “participation in the persecution of Tutsis in the 1994 Rwandan genocide.” The Seventh Circuit affirmed on the first ground and thus did not address the second. As a result of the adverse determination, Mudahinyuka sought to have his sentence set aside, claiming he would have never pled guilty had he known he would be deported to Rwanda, but the court found the application to be untimely.

Beatrice Munyenyezi was charged with wrongful procurement of citizenship, based on her alleged failure to disclose her membership in the Mouvement révolutionnaire national pour le développement (MRND) party and the Interahamwe, as well as her active participation in the oppression and murder of other Rwandans during the genocide. Her original trial resulted in a hung jury; on retrial she was convicted and

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46. Id.
48. Id. at *3.
49. Id. at *2.
50. Mudahinyuka v. Holder, 444 F. App'x 901, 902 (7th Cir. 2010).
sentenced to 120 months. Her sister, Prudence Kantengwa, was alleged to have lied about her membership in the MRND, her husband’s role as director of the Service central de renseignement, and her knowledge of a roadblock in Butare, Rwanda. She was convicted of two counts of making false statements on her visa and asylum applications and four counts of lying and obstructing justice and sentenced to twenty-one months. After serving her sentence, Munyenyezi was deported on April 16, 2021, and is currently in custody facing genocide charges in Rwanda.

On August 6, 2015, Peter Kalimu was charged with unlawful procurement of naturalization and making false statements to the Department of Homeland Security. The indictment provided a high-level overview of the genocide and specifically alleged that Kalimu “had participated in, and had committed acts of violence against Tutsis.” Remarkably, despite such allegations, the government did not object to his pretrial release, and the Court granted the request. Two and a half years later, Kalimu pled guilty to failing to disclose that he had gone by the name of Fidele Twizere in Rwanda, and, again, was allowed to remain released on his own recognizance. On August 18, 2018, Kalimu was sentenced to time served (although it is not clear that he was ever actually incarcerated) and two years of supervised release.


58. Id. at 2.


eventually agreed to have his citizenship revoked\textsuperscript{63} and was deported on October 21, 2021.\textsuperscript{64}

Notably, during its investigation of Kalimu, the government sent a Homeland Security agent and a Justice Department historian to Rwanda to obtain copies of \textit{Gacaca} records that identified Kalimu’s activities during the genocide, information it would include in its response to Kalimu’s sentencing memorandum.\textsuperscript{65} Those 246 pages from the \textit{Gacaca} proceedings are now digitized and available through the court’s electronic case file system.\textsuperscript{66} The prosecution summarized the information obtained from the \textit{Gacaca} records in its response to Kalimu’s sentencing memorandum:

Within these records, the name Fidele Twizere, appears on multiple occasions. Two cases indicate that Twizere was among a group of individuals that were issued weapons which were then used by others to commit murder and looting. It was also reported that the defendant associated with individuals who committed acts of genocide. It was further reported that the defendant was involved in looting by stealing a goat and other personal property from certain individuals.\textsuperscript{67}

The court in the case against Lazare Kobagaya noted: “The substance of the indictment is that defendant ‘participated’ in the genocide which occurred in Rwanda in 1994 and then made false statements in connection with his application for citizenship.”\textsuperscript{68} Specifically, he was accused of “genocidal activities against members of the Tutsi ethnic/social group,” and failure to disclose such activities in his naturalization and visa applications.\textsuperscript{69} While convicted of visa fraud (the jury was hung on the naturalization count), the case was ultimately dismissed after the government identified a potential issue with the clarity of the legal instructions that the jury received regarding whether

\begin{itemize}
  \item[63.] Joint Motion, United States v. Kalimu, No. 21-CV-176 (W.D.N.Y. Apr. 20, 2021), ECF No. 12.
  \item[65.] Memorandum, Kalimu, No. 15-CR-146 (W.D.N.Y. Aug. 1, 2018), ECF No. 52.
  \item[66.] Id.
  \item[67.] Id. at 6 (exhibit references omitted).
\end{itemize}
materiality was an element of the offense . . . [and] identified information provided by a witness, which when considered in conjunction with the lack of clarity in jury instructions, would likely warrant a new trial. 70

Jackson Nkesha was charged with one count of attempting to reenter the United States without permission after having been previously deported. 71 The limited background provided in an order relating to his motion to dismiss notes that he lost all of his other family members in the genocide. 72 The government ultimately dismissed the indictment, although the reason for the dismissal is unclear. 73

Gervais Ngombwa fled Rwanda for a refugee camp in Tanzania in June 1994. 74 He made a number of false statements in the resettlement process, including statements to the United States Immigration and Naturalization Service that he was related to a moderate Hutu politician that was sympathetic to the Tutsi. 75 Based on various misstatements, he was permitted to immigrate to the United States, ultimately becoming a citizen in 2004. 76 Several years later, Rwandan authorities informed the Department of Homeland Security of their belief Ngombwa had been involved in the genocide. 77 Ngombwa was ultimately convicted of immigration fraud; however, the court, in contemplating an appropriate sentence, examined broader relevant conduct, which included Ngombwa’s role in the genocide. 78 Specifically, the court determined that he “actively participated in the Rwandan genocide.” 79 Ngombwa had “personally killed numerous Tutsis, transported and directed the Interahamwe to kill Tutsis, looted Tutsi property and led brutal attacks on groups of Tutsis seeking refuge in locations such as the local church, a priests’ compound, the Kanzenze commune office, and Kayumba Hill.” 80 The court ultimately sentenced Ngombwa to 180 months, an

72. Id.
75. Id. at 551.
76. Id. at 550.
77. Id. at 551.
79. Id.
80. Id.
increase of approximately five years above the recommended sentence for the offense. 81

Most recently, Jean Leonard Teganya was convicted of immigration fraud and perjury related to statements denying affiliations with the MRND and Interahamwe in his asylum application. 82 Teganya had entered the United States illegally but sought asylum once arrested. 83 During the genocide, however, he had worked as a medical student at the Butare University Hospital. 84 Coordinating with members of the Interahamwe and military, he identified, searched for, and captured Tutsi patients and employees. 85 These individuals were then removed from the hospital and killed. 86 He was ultimately found to have participated in the murders of three Tutsi people at the hospital and two Tutsi students he discovered in the dormitory he was living in. 87 Teganya also participated in five rapes of two Tutsi women who were hiding in the hospital. 88

Immigration violations are not, however, the only types of criminal cases that the U.S. government has prosecuted. In 2006, the government brought a capital case against Francois Karake, Gregoire Nyaminani, and Leonidas Bimenyimana. 89 On March 1, 1999, two American tourists and several other individuals were killed by members of the Liberation Army of Rwanda in the Bwindi Impenetrable Forest of southwest Uganda. 90 After a four-year investigation and lengthy negotiations between the United States and Rwanda regarding extradition, the defendants, all three of whom were Hutu and had fled Rwanda after the RPF took control of the country, arrived in the United States for the death penalty case. 91 While the government’s ultimate stance is unclear, the court noted that there was at least some suggestion that the government intended to “offer evidence at the penalty phase regarding a protracted civil war where acts of genocide resulted in the death of hundreds of thousands of

81. Ngombwa, 893 F.3d at 551.
84. Id. ¶ 10.
85. Id. ¶ 12.
86. Id. ¶ 8.
88. Id.
90. Karake, 443 F. Supp. 2d at 12; see also Karake, 370 F. Supp. 2d at 276.
Rwandans.”92 The case was eventually dismissed after the court suppressed the confessions attributed to the defendants “extracted only after countless hours of repetitive questioning over a period of many months, during which time they were subjected to periods of solitary confinement, positional torture, and repeated physical abuse.”93

C. Immigration Appeals and Violations

Short of criminal prosecution related to immigration issues, a number of cases have reached the federal courts on immigration related appeals. Asylum seekers, denied their applications by the Board of Immigration Appeals, have sought review from federal appeals courts. Marie Claire Mukeshimana,94 Jean Wyclif Ndayisaba,95 Jean Maire Vianney Mudahinyuka,96 Jean Bosco Ndayshimiye,97 Speciose Murekatete,98 Evariste Murangwa,99 Leopold Munyakazi,100 and Hilaire Diallo Karangwa101 all lost their appeals. However, Michel Niyibizi,102 Allen Mukamusoni,103 and Jeanette Uwase104 succeeded in having their cases remanded for further consideration. Pacifique Gahamanyi also lost an appeal of a final Board of Immigration Appeals (BIA) decision, although the more interesting aspects of his case are addressed in an order denying his writ of habeas corpus, which sought his release given an extended period of detainment pending completion of his removal proceedings.105

96. Mudahinyuka v. Holder, 444 F. App’x 901, 906 (7th Cir. 2010).
98. Id.
99. Murangwa v. Mukasey, 310 F. App’x 965, 967 (9th Cir. 2009).
103. Mukamusoni v. Ashcroft, 390 F.3d 110 (1st Cir. 2004).
104. Uwase v. Ashcroft, 349 F.3d 1039, 1045 (7th Cir. 2003).
D. Civil Suits

There have been a number of civil suits addressing the genocide in one form or another. The case filed by Louise Mushikiwabo and other Rwandan plaintiffs against Jean Basco Barayagwiza was initiated in the Southern District of New York on May 17, 1994, while the genocide raged in Rwanda.106 Barayagwiza held a leadership position in the Coalition pour la défense de la République, a Hutu political party, and was part owner of Radio Télévision Libre des Mille Collines (RTLM), a radio station which provided names and details of Tutsis, who were then hunted down and killed by Hutu militia.107 The district court entered a default judgment in 1996 finding Barayagwiza responsible for the deaths of multiple relatives of each plaintiff and awarded over $100 million to the plaintiffs.108

Robert Winthrop Johnson II was one member of the three-person Rwanda Working Group based in Washington, D.C., engaged to assist the Hutu government with public relations and immigration support in July 1994.109 He and his partners were ultimately sued for return of the retention funds by the RPF after it was recognized by the United States as Rwanda’s legitimate government.110 While his partners settled, Johnson was found liable for conversion (i.e., improperly retaining the funds) and breach of fiduciary duty.111

Innocent Likonga Kasongo succeeded in a Federal Tort Claims Act case against an American government clinic for the death of his wife after the clinic failed to diagnose and treat his wife for deadly side effects of a drug used to treat HIV and AIDS.112 To provide context for its determination, the court recounted Kasongo’s testimony, discussing how his wife, a Tutsi, faced persecution in Kinshasa in retaliation for the Tutsi Rwandan government’s support of an attempt to overthrow Mobuto Sese Seko, the longtime ruler of the Democratic Republic of the Congo (DRC).113 When they fled to Rwanda, Kasongo became the target of

110. Johnson, 409 F.3d at 370.
111. Id. at 371.
113. Id. at 763–64.
ethnic violence, “experienc[ing] difficulties because his physical experience [sic] led people to believe he was Hutu.” 114 The court then explained: “Although Mr. Kasongo did not testify as to the significance of Tutsi and Hutu lineage, the court assumes familiarity with the Rwandan genocide of 1994, in which hundreds of thousands of Tutsi, along with Hutu sympathisers, were slaughtered before Tutsi rebel forces overthrew the Hutu government in July 1994.”115

In 2010, the widows of President Juvenal Habyarimana and Cyprien Ntaryamira filed claims against President Paul Kagame and others, alleging Kagame and the RPF were responsible for the deaths of their husbands.116 Ultimately, the U.S. government, at Rwanda’s request, filed a “Suggestion of Immunity” that the court deferred to and the case was dismissed.117

III. CONCerns ASSOCIAted WITH LITIGATION OF THE GENOCIDE IN U.S. COURTS

Having gained some perspective on the types of cases litigated in U.S. courts, it becomes necessary to examine problems with such proceedings. There are a number of valid concerns that arise when one examines the litigation of the Tutsi genocide in U.S. federal courts, ranging from prosecutorial discretion in determining what charges to file to costs and other practical concerns.

A. Failure to Try Defendants for Genocide

Several of the cases involve prosecution for immigration fraud, which requires proof that the individual committed or aided in genocide or, at a minimum, extensive examination of that individual’s role in the genocide. As stated by one court, “[r]ealistically, the prosecution involves a case within a case—before the charged offense can be proven, defendant’s participation in the genocide must be proven.”118 However,
of great concern is the fact that the government elected not to file genocide charges against these individuals.\footnote{119} Arguments have been made that the United States has violated its obligations to try genocide by failing to implement statutes which would permit trial of genocidaires, regardless of nationality.\footnote{120} That broader debate is unnecessary here, as Kobagaya\footnote{121} and Munyenyezi\footnote{122} were both U.S. citizens. The United States has a legal obligation to prosecute its citizens for genocide, or transfer them to a competent authority for prosecution.\footnote{123} The government has suggested that Munyenyezi was “not on trial for genocide because the jurisdictional element to the U.S. genocide statute was expanded only after the Rwandan genocide.”\footnote{124} While, in 2007, the scope of jurisdiction of the statute was clearly expanded to encompass any person in the United States, the original version of the statute, passed in 1988, authorized jurisdiction where “the offense is committed within the United States; or the alleged offender is a national of the United States.”\footnote{125} Plainly, at least Kobagaya and defendant herself was a genocidist and/or aided and abetted the same) involves heinous conduct that is incomprehensible and unspeakable in its brutality”). But see United States v. Kantengwa, No. 08-10385, 2010 WL 3023871, at *5 (D. Mass. July 29, 2010) (noting the disagreement over the scope of the trial but finding that the genocide was relevant only to “historical background” and what “Kantengwa’s statements about what she saw (or didn’t see) at the blockade at Butare”). 119. See, e.g., United States v. Kobagaya, No. 09-10005-01, 2011 WL 1466475, at *1 (D. Kan. Apr. 18, 2011); Indictment at ¶ 1, United States v. Kobagaya, No. 09-CR-10005, (D. Kan. Jan. 13, 2009), ECF No. 1; Munyenyezi, 2010 WL 2607161, at *2. See generally Nicholas P. Weiss, Somebody Else’s Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals, 45 CASE W. RES. J. INT’L L. 579 (2012). 120. See Lee A. Steven, Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of its International Obligations, 39 VA. J. INT’L L. 425, 430–31 (1999) (arguing that the United States is in violation of its duty to prosecute under the overly restrictive language of the Genocide Convention Implementation Act); Jordan J. Paust, Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials, 34 HOUS. J. INT’L L. 57, 84 (2011). 121. See Kobagaya, 2011 WL 1466475, at *1. 122. See Munyenyezi, 2010 WL 2607161, at *1–2. 123. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (explicitly providing that genocide “is a crime under international law which they undertake to prevent and to punish,” that “persons committing genocide . . . shall be punished,” and that they will implement “the necessary legislation to appropriately punish genocide”). 124. U.S. District Judge Revokes Beatrice Munyenyezi’s U.S. Citizenship, U.S. DEP’T. OF JUST. (Mar. 2013), https://www.justice.gov/criminal-hrsp/file/1119816/download [https://perma.cc/8Z9U-9Y8U]. 125. The 2007 amendment included a provision granting jurisdiction if “after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States.” Zachary Pall, The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for
Munyenyezi were citizens when prosecuted for immigration fraud; thus, even the pre-amendment language would be sufficient to confer jurisdiction.\textsuperscript{126} Conviction for lesser crimes based upon participation in the genocide is unfair to both the criminal defendant and the genocide victims. The defendant is essentially on trial for an uncharged crime and may well be sentenced much more harshly based on the idea, whether or not proven, that he or she was involved in genocide. Conversely, the victims (and humanity more broadly) see the perpetrator charged only for less morally repugnant immigration crimes while avoiding responsibility and appropriate punishment for much more heinous acts. Indeed, at Teganya’s sentencing, the judge specifically noted “The basic question is: Do I sentence him as a liar or do I sentence him as a murder, [sic] or a rapist, or a genocide participant?”\textsuperscript{127} The judge sentenced Teganya, apparently based on the first question, to just over eight years.\textsuperscript{128}

**B. Relatively Poor Results of Government Cases**

The failure to prosecute genocide is not the only troubling aspect of cases where the government is a party. Of all criminal cases brought by the government, some ninety-three percent are convicted either by trial or as the result of a plea agreement.\textsuperscript{129} While there is by no means a sufficient number for a meaningful statistical conclusion, it is worth observing that of the five cases relating to immigration fraud, two—Nkesha and Kobagaya—resulted in dismissals.\textsuperscript{130} Additionally, all three defendants in the Karake case saw their case dismissed.\textsuperscript{131} Similarly,

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\textsuperscript{126} See United States v. Kobagaya, No. 09-10005-01, 2011 WL 1466475, at *1; Munyenyezi, 2010 WL 2607161, at *1–2. Perhaps the argument could be made that these individuals cannot be exposed to prosecution because they were not U.S. citizens at the time they allegedly committed genocide. However, unlike a typical \textit{nullum crimen sine lege} argument, the question is not about what constitutes a crime, but purely a matter of whether jurisdiction exists. Seemingly, an individual obtaining citizenship is accepting that federal courts have jurisdiction over them when the fact of nationality is the only jurisdictional requirement.

\textsuperscript{127} Alanna Durkin Richer, Rwandan in US who Lied About Role in Genocide Gets 8 Years, AP NEWS (July 1, 2019), https://apnews.com/article/04542952d5943668f601f974 [https://perma.cc/5U4L-W9AT].

\textsuperscript{128} Id.


\textsuperscript{130} Motion to Dismiss Indictment Without Prejudice, United States v. Nkesha, No. 10-CR-90-1 (D. Vt. May 27, 2011), ECF No. 51; Order Granting Motion to Dismiss Indictment, Kobagaya, No. 6:09-CR-10005, ECF No. 410.

current rates of reversal for BIA appeals hover around ten percent. However, as noted above, of the nine cases identified where appeals courts reviewed BIA denials, three were reversed. The ICTR, despite contentions of victors’ justice, also has a relatively low conviction rate—in light of the recent reversals in favor of Augustine Ndindiliyimana and Francois-Xavier Nzuwonemeye, the ICTR has dropped below eighty percent.

C. Significant Cost

Obviously, trying cases—particularly in the federal criminal system, which attempts to provide adequate representation—is expensive, and one would anticipate substantially higher costs in cases involving the Tutsi genocide. The Kobagaya case provides some specific insight. There, the court, in addressing the defendant’s concerns about payments to African witnesses, noted that the “defendant has been provided, at taxpayer expense, with two counsel plus assistants and investigators, all for the purpose of insuring that he will receive the best possible defense.” On the heels of the dismissal, the expense of the case became an issue of inquiry for the media. Defense counsel stated that estimates of the cost ranged between $1 and $2 million. The government spent almost $400,000 on translators, travel, meals, hotels, witnesses, and transcription; in addition the appointed defense counsel fees and costs totaled more than $350,000. Similarly, Munyenyezi’s attorney, a

132. Immigration Law Advisor, U.S. DEP’T OF JUST. 5 (Jan. 2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/27/vol8n01.pdf [https://perma.cc/SXT2-E7BS] (2012 – 9.3%, 2013 – 10.9%). An eight-year average provides a slightly higher reversal rate of 12.6%. Id. at 6. Asylum numbers, at least for 2013, were a 12.5%, a modest increase over the 10.9% average. Id.


former federal prosecutor, estimated that her investigation and trial cost between $3.5 and $4 million. However, such costs pale in comparison to the estimated $10 to $26 million spent for each defendant at the ICTR.

D. Practical Concerns

The costs of litigation are driven in large part by many practical issues. While the cases discussed above range from the historic—Barayagwiza was brought within months of the genocide—to recent—the First Circuit issued opinions denying Munyenyezi and Kantengwa’s appeals in March 2015, the simple fact is that all have involved acts committed a continent away, sometimes as much as two decades ago. In addition, “[l]anguage barriers, differences in customs and international relations issues all add other complexities that must be navigated.”

1. Witness Issues

The ICTR encountered a variety of issues relating to the appearance of Rwandan witnesses before the tribunal. Such challenges included location, availability, treatment, protection, and cultural concerns. For instance, the ICTR flew a small airplane from Arusha to Kigali twice a week to transport witnesses and personnel. When the ICTR fell out of favor with the Rwandan government, it suddenly became virtually impossible for Rwandan witnesses to leave the country. The ICTR also took significant steps to ensure the confidentiality and protection of many witnesses.
witnesses. Nonetheless, several witnesses and their families were killed, although their deaths have never been explicitly attributed to their testimony. The ICTR has also noted cultural concerns: “[I]t is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be ‘decoded’ in order to be understood correctly.” Additionally, witnesses might well be suffering from post-traumatic or extreme stress disorders that were considered by the Tribunal when weighing testimony.

United States courts expressed many of the same concerns. The Kobagaya court noted that “approximately 50 African witnesses will testify” at trial and many of the key witnesses were either still in Rwanda or in other foreign countries. The court pragmatically stated: “Locating witnesses in Rwanda or another African country is not easy . . . . Even if the witness can be located, securing his or her presence in the United States can be problematic and time-consuming.” It continued:

Does the court continue or interrupt the case so that a crucial defense witness can be brought to the United States or so that counsel can travel to Africa to take the witness’ deposition? . . . What becomes of other witnesses, many of whom have come from Africa just for the trial, some of whom may have been involved in the Rwandan genocide? These are not matters of speculation. They are the subject of ongoing discussions between the court, counsel and officials of the U.S. Marshal’s service and immigration authorities.

Similarly, in Munyenyezi, the court recognized that because the “government’s factual assertion that the defendant participated in the Rwandan genocide” was essential to the prosecution, key witnesses


145. Koosed, supra note 142, at 278 (quoting Prosecutor v. Akayesa, Case No. ICTR 96-4-T, Judgment, ¶ 155 (Sept. 2, 1998)).

146. Id. at 279 (quoting Akayesa, Case No. ICTR 96-4-T, Judgment, ¶ 143).


149. Id. at *4.
resided in Rwanda and both sides would have to travel to Rwanda to “investigate, marshal evidence and make arrangement for witnesses to come to the United States.”

In Munyakazi’s case, the government sent three agents to Rwanda. They interviewed twenty-two witnesses and went to great lengths to avoid Rwandan governmental interference, including last-minute disclosures of witnesses they sought to interview and identification and meeting with witnesses who had not previously had discussions with the government.

In Kantengwa, the defendant sought early disclosure of witnesses to allow for adequate investigation “into events that occurred sixteen years ago in Africa,” but the government contended that early disclosure could endanger the safety of witnesses. Although the magistrate judge initially agreed with Kantengwa, but the district court judge determined that early disclosure was a matter of the “government’s grace” as “[t]he government cannot be compelled to do what Congress has said it does not have to do.”

The Karake court had a different perspective:

As the Court has had to repeatedly admonish the government, in the view of the obstacles that confront defense counsel representing foreigners charged with committing capital offenses over six years ago in a remote Ugandan park, the government cannot expect to satisfy its discovery obligations by producing the bare minimum.

2. Documentary Evidence

While nothing compared to the most complex ICTR cases, the scope of the documentary review is another potential issue, as the Munyenyezi court noted, there are thousands of pages from the

152. See id. at 294–95. See also United States v. Ngombwa, No. 14-CR-123, 2017 WL 508208, at *8–9 (N.D. Iowa Feb. 7, 2017), aff’d, 893 F.3d 546 (8th Cir. 2018) (similarly discussing efforts to corroborate witness testimony, ask open-ended questions rather than directing the witnesses, and avoiding Rwandan governmental influence on witnesses).
154. Id. at *4. Kantengwa also raised the issue of bias of the prosecution witnesses. While the U.S. government denied having offered awards to cooperating witnesses, it stated that it could not speak for the Rwandan government. Id.
international tribunals that had to be reviewed. Unsurprisingly, the provision of records has been an issue. Early in her criminal prosecution, Kantengwa sought various records from the government, including lists of suspected *genocidaires* used by the U.S. State Department during its review of Kantengwa’s visa application. Kantengwa argued, and the court agreed, that her absence from the lists was exculpatory. The government argued that it was not seeking to prosecute Kantengwa for war crimes or her participation in any genocidal act, rather, it contended, Kantengwa was using her case to “fish” for information regarding her brother’s involvement in the genocide. The court agreed that the lists were likely uninformative but also that they could be produced with little imposition on the government and subject to protective orders to allay the government’s concerns. The court reasoned, however, that the government could prosecute for any motive as long as there was a legitimate basis for the prosecution.

3. Translation Issues

The ICTR initially faced substantial difficulties with translation issues. In particular, the tribunal suffered from an inability to obtain translators who could simultaneously translate from Kinyarwanda to English. Instead, English-speaking counsel would have questions translated to French and then from French into Kinyarwanda. The answer would then be translated from Kinyarwanda to French and then from French into English.

Translation concerns also surfaced in U.S. litigation. Such issues were central to the court’s view of the confessions proffered by the government in the *Karake* case. “It is not . . . just a question of competence. Rather it is a question of ‘whether the translated statements fairly should be


159. *Id.*

160. *Id.* at *2 n.7.

161. *Id.* at *2.

162. *Id.* at *1–2, *4.


164. *Id.*

165. *Id.* I personally endured this time-consuming process during my time in the Office of the Prosecutor. Occasionally, like the childhood game “telephone,” the answer would not actually be responsive to the original question. I can also distinctly recall a conversation with Judge Erik Mose, who stated that he had timed the process on multiple occasions and even the simplest questions required approximately seventy-five seconds to answer.

considered the statements of the speaker.”167 This question included issues of who provided the interpretation, what motives the interpreter might have, the interpreter’s qualification and skill, and whether actions subsequent to the conversation were consistent with the translated statements.168 The court found that the interpreter was actually a part of the Rwandan investigative team and that there was evidence to indicate the translations were inaccurate, incomplete, and unreliable.169 While the district court and the court of appeals eventually confirmed that such concerns did not bar extradition,170 the magistrate judge first reviewing Ntakirutimana’s challenge was concerned as “there was no indication of how the interviews were conducted since the witnesses presumably spoke the language of Rwanda, Kinyarwanda, and there was no indication that the interviewers were fluent in that language.”171

4. Reliance on Experts

The ICTR has received substantial attention for its reliance on experts.172 Given the temporal and geographic remoteness and general lack of familiarity with the genocide, experts are also regularly employed in federal litigation. In Kantengwa, the court noted that “the government must be permitted to use expert testimony to place Kantengwa’s actions in context for a jury that is unlikely to be familiar with this relevant and horrific chapter of Rwandan history.”173 The court in Kobagaya also recognized that jurors would be unlikely to have much familiarity with the genocide, saying:

At trial, defendant will be held to answer not just for events which occurred in 2005 and 2006, but, as a practical matter,

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167. Id. (citation omitted) (quoting United States v. Nazemian, 948 F.2d 522, 527 (9th Cir. 1991)).
168. Id. (citing Nazemian, 948 F.2d at 527).
169. Id. at 92–93.
171. Id. at *20; see also SCHEFFER, supra note 28, at 121.
172. Peter Robinson, So You Want to Be an International Criminal Lawyer?: Getting and Defending A Case at the International Criminal Tribunal for Rwanda, 14 NEW ENG. J. INT’L & COMP. L. 277, 290 (2008) (“One peculiar feature of the ICTR is its use, or some would say misuse, of expert witnesses. At the ICTR, an expert witness can testify to facts which he or she has read in a book, heard through third parties, or concluded from other facts. The broad scope of expert testimony allows such witnesses to virtually opine on the guilt or innocence of the accused, and to substitute subjective judgments for evidence tested by cross-examination.”). But see Kellye L. Fabian, Proof and Consequences: An Analysis of the Tadic & Akayesu Trials, 49 DEPAUL L. REV. 981, 1028–29 (2000) (comparing the use of experts in the Tadic and Akayesu trials and concluding that the expert’s qualifications and testimony were much more appropriate at the ICTR).
also for events which took place some 17 years earlier, in Africa, more specifically in an African country which probably will not be a household word to some or all of the jury and who will not recall the genocide (if they even were aware of it in the first place).\footnote{United States v. Kobagaya, No. 09-10005-01, 2010 WL 4065827, at *1 (D. Kan. Oct. 15, 2010) (emphasis in original). The court continued: “In contrast, the Nuremberg War Crimes trials were held from 1945 to 1949 and concerned events occurring between 1939 and 1945 which were fresh in the minds of the majority of persons in the civilized world.” \textit{Id. See also} United States v. Kobagaya, No. 09-10005-01, 2011 WL 1466475, at *1 (D. Kan. Apr. 18, 2011); United States v. Kobagaya, No. 09-10005-01, 2011 WL 1559540 (D. Kan. Apr. 25, 2011) (discussing qualifications of experts and scope of relevant testimony).}

Of course, reliance on experts brings a new set of challenges. While the \textit{Kobagaya} court determined it would allow various experts to testify, “this case does not call for a ‘battle of the experts.’”\footnote{Kobagaya, 2010 WL 4065827, at *1 n.2.} The court clarified: “Whether the number of persons killed in the genocide was 500,000 or 800,000 or some other number is not an issue the jury will have to decide, so dueling expert opinions on that or similar points will not help the jury and will not be permitted.”\footnote{Id.} In \textit{Mudahinyuka}, the court endorsed the rejection of Mudahinyuka’s expert, who was a graduate student with limited recent exposure to the Rwandan judicial and prison systems, while allowing testimony from Professor Schabas, an authority in the international criminal law field, supporting the government’s contentions.\footnote{Mudahinyuka v. Holder, 444 F. App’x 901, 903 (7th Cir. 2010).} Similarly, the court in \textit{Ngombwa} permitted the use of a government expert to testify on “matters of Rwandan history and culture likely unfamiliar to the jury.”\footnote{United States v. Ngombwa, No. 14-CR-123, 2016 WL 111434, at *10 (N.D. Iowa Jan. 10, 2016).}

Kantengwa also challenged the use of an expert, contending that a jury should be able to reach a factual conclusion as to whether the roadblock did, in fact, exist.\footnote{United States v. Kantengwa, No. 08-10385, 2012 WL 4591891, at *3 (D. Mass. Oct. 3, 2012), aff’d, 781 F.3d 545 (1st Cir. 2015).} The court, however, determined that “it is not evident or likely that the typical juror (or judge) would recognize the association between a roadblock and the program of mass genocide that led U.S. officials to implement a special process for screening all Rwandan visa applicants.”\footnote{Id.} She also challenged the use of hearsay accounts of researchers used to produce an expert’s historical account of the genocide; however, the court noted that the expert could rely on such evidence to form an opinion as it would be independently admissible.\footnote{Id.}
IV. BENEFITS OF LITIGATION OF THE GENOCIDE IN U.S. COURTS

Despite the significant concerns related to U.S. litigation involving the genocide, the cases provide substantial justification for their existence.

A. An Open and Impartial Forum

As discussed above, the ICTR, Rwandan national courts, and Gacaca have all suffered from one limitation or another. The ICTR had limited capacity, limited jurisdiction, and did not try any member of the RPF. The Rwandan judiciary was in complete disarray following the genocide and continues to suffer from at least an appearance of bias when dealing with politicized cases. The Gacaca simply excluded cases involving the RPF. As a result, the U.S. federal courts present an alternative for those who find themselves without other recourse.

B. History of the 1994 Genocide

While the ICTR is tasked with the promotion of peace and reconciliation in addition to the administration of justice in a given case, the U.S. federal courts are not burdened by this dual role, which presents a unique opportunity to obtain a fresh perspective on the genocide.


183. Thus, the court in the Mushikiwabo case concluded that the plaintiffs had exhausted other remedies because they could not obtain justice in Rwanda given the state of the Rwandan legal system at that time. Mushikiwabo v. Barayagwiza, No. 94 CIV. 3627, 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996).

184. Haskell & Waldorf, supra note 182, at 61.

185. Id. at 53–54.

186. Parker Patterson, Partial Justice: Successes and Failures of the International Criminal Tribunal for Rwanda in Ending Impunity for Violations of International Criminal Law, 19 Tul. J. Int’l & Comp. L. 369, 370 (2010) (citing S.C. Res. 955, supra note 12, pmbl.); Haskell & Waldorf, supra note 182, at 78–79 (“The ICTR’s failure to prosecute RPF crimes, along with the Rwandan government’s refusal to acknowledge those crimes, helps give credence to those who dismiss the Tribunal and its genocide rulings as a political weapon of the RPF to dominate the Hutu. Prosecuting RPF crimes at the ICTR would have exposed the government’s misrepresentations and would have recognized that both Tutsi and Hutu suffered in 1994.”).

187. The flip side of historical events being recorded in United States case law is that the record might be less reliable than that developed in the ICTR or Rwandan courts. Perhaps the most obvious potential problem can be identified in the Mushikiwabo case, where a default judgment was entered and thus the “facts” were derived exclusively from the statements and other evidence provided by the plaintiffs, without being subject to cross-examination or other defense scrutiny. Mushikiwabo, 1996 WL 164496, at *1.
1. A Primer on the Genocide

The U.S. cases deliver a solid, judicially rendered “primer” on the 1994 genocide against the Tutsis, introducing a new audience of U.S. judges, lawyers, jurors, and those following the trials in the media to the tragedy in Rwanda, while providing yet another source to counter any that might seek to one day deny the existence of the genocide. A review of the various cases provides:

[T]he Rwandan conflict was precipitated by years of ethnic strife in a country where 84% of the population was Hutu and 14% was Tutsi. On April 6, 1994 President Habyarimana, along with the President of Burundi and other government officials, were killed when their aircraft crashed upon approach to the airport in Kigali, Rwanda. Following this event, a massive wave of killing took place in Rwanda that resulted in the deaths of an estimated 500,000 to one million individuals. Initial investigation by the United Nations, various governments, journalists and nongovernmental organizations established overwhelming evidence that the execution of Tutsis by Hutus was planned months in advance of the plane crash, was motivated by ethnic hatred and was committed with the intent to destroy, in whole or part, the Tutsi minority. Most of the acts were carried out by members of Hutu militia groups, members of the transitional government of Rwanda, local leaders, members of the national police, communal police, civilians and other pro-Hutu sympathizers.188

“[T]he Rwandan Patriotic Front (RPF), composed largely of Tutsi refugees who had spent decades in exile, defeated the Rwandan government, made up primarily of Hutu, who form the great majority of

188. In re Surrender of Ntakirutimana, No. L-98-43, 1998 WL 655708, at *18 (S.D. Tex. Aug. 6, 1998); see also Ndayisaba v. Holder, 457 F. App’x 552, 553 n.1 (6th Cir. 2012) (“Rwanda has been the source of ongoing ethnic conflict between members of the majority Hutu and minority Tutsi tribes. In April 1994, President Juvenal Habyarimana of Rwanda, a Hutu, was killed when his aircraft crashed due to an artillery attack. The crash triggered a wave of violence by the Hutus against the Tutsis, which resulted in the deaths of between 500,000 and one-million persons.” (quoting Ntakirutimana v. Reno, 184 F.3d 419, 421 (5th Cir. 1999))); Munyakazi v. Lynch, 829 F.3d 291, 293 (4th Cir. 2016) (quoting State Department summary of the genocide); Rwanda v. Johnson, 409 F.3d 368, 370 (D.C. Cir. 2005) (exploring a unique aspect of the Hutu government’s activities during the genocide, as it sought to “get its views clearly and dramatically presented to the international community” to “[encourage the comprehension and support of American authorities of Rwanda’s cause,” and “foster the perception that [the RPF] constituted a marginal group, perhaps even a minority, foreign-manipulated, terrorist group”); United States v. Ngombwa, 893 F.3d 546, 550–51 (8th Cir. 2018), aff’d No. 14-CR-123, 2017 WL 508208, at *3–4 (N.D. Iowa 2017).
the Rwandan population."\footnote{189} U.N. peacekeepers stood by powerless to stop; only the RPF takeover ended the violence.\footnote{190}

Ultimately, the U.S. courts have served as another forum to conclude that genocide did, in fact, occur. Thus, the court in \textit{Mushikiwabo} expressly concluded that “the defendant’s actions were part of a coordinated genocidal effort with officials of the Rwandan government and thus defendant both acted in pursuit of genocide and under color of law.”\footnote{191}

2. Specific Incidences of the Genocide

The federal courts have also addressed specific events within the genocide. In \textit{Ntakirutimana}, the district court found “probable cause” that Ntakirutimana had committed genocide based on affidavits from multiple witnesses describing Ntakirutimana’s role at his church complex and later when tracking down Tutsis hiding in the nearby Bisesero region of Rwanda.\footnote{192} Several recalled how he refused “pleas for help from Tutsi who were hiding in the Mugonero Complex” and that he “himself . . . had encouraged Tutsis to seek refuge at the Complex.”\footnote{193} Witnesses stated that he was “present at the massacre and that he was armed and in the...
company of those attacking the Tutsis,” that his car led the attackers, and that he shot into a group of Tutsis at the complex.194 He was also seen transporting attackers to and from the Bisesero region daily, providing food and drink to the armed attackers, and instructing them to kill Tutsis when he spotted their hiding places.195

In reviewing Munyakazi’s asylum request, the government sent agents from both the Immigration and Customs Enforcement and the Department of Homeland Security to Rwanda to investigate his role in the genocide.196 The key question was Munyakazi’s location on April 19, 1994, the day the Tutsi population of Kirwa, a town in the Southern Province, was exterminated.197 While he testified he remained at his home for most of the 19th and the next several days, the agents’ report concluded:

Munyakazi, wearing banana leaves [as part of a plan to distinguish Hutu from Tutsi] addressed the crowd at the soccer field on April 19 and helped to instigate the genocide. After the meeting, Munyakazi led a group of Hutus to find Felicien, an educated Tutsi who was eventually killed. Munyakazi also had a role in orchestrating night raids against Tutsi homes.198

In the Mushikiwabo case, the court explained (based on affidavits from the plaintiffs which were not subject to cross-examination) Barayagwiza’s role in the genocide and expressed “society’s outrage at the defendant’s actions.”199 The court paid special attention to one plaintiff’s description of how “[Coalition pour la Defense de la Republique] militia shot down the door of his parents’ home, hacked his parents to death with machetes and shot two of his brothers to death. Two other brothers were summarily executed, one along with his wife and three children ages four years, two years and two months.”200

In its order denying her motion to set aside the verdict, the Kantengwa court addressed several findings a jury could reasonably make based on the evidence presented: (1) she continued her membership in the MRND after 1991, attended MRND rallies after 1991, continued to wear an MRND party scarf and badge, and personally invested in Radio Télévision Libre des Milles Collines; (2) her husband remained a director throughout the genocide and evacuated with the Hutu led government.

194. Id.
195. Id.
197. Id. at 294–95.
198. Id.
200. Id.
from Kigali to provisional headquarters in Gitarama where he continued to coordinate government activities; (3) the Hotel Ihuririo in Butare was owned by MRND and that her brother-in-law (and son of the owners) led “one of the most vicious of the MRND youth militias”; and (4) it was impossible to live at Hotel Ihuririo and not be aware of the roadblock “immediately in front of the hotel’s entrance.”

3. Alternative Perspectives

As discussed above, federal courts are not limited by the temporal, political, or even geographic constraints limiting the ICTR, Rwandan national courts, and Gacaca. Thus, those who suffered as a result of retaliatory conduct, primarily by the RPF, were able to tell their stories.

Ndayisaba discussed how “many Hutus fled Rwanda fearing retaliation by Tutsis.” In particular, he recalled how, given his position as a Seventh Day Adventist pastor, he “began to fear for his and his family’s safety upon learning that a group of Catholic Church bishops were killed in May of 1994” and that “radio broadcasts called for Hutus to surrender or flee.”

Gahamanyi, whose testimony the immigration judge found to be both credible and corroborated by documentary evidence, discussed how his Hutu father and all of his siblings were killed by extremists because of his father’s marriage to a Tutsi and his membership in the Liberal Party, which was opposed to the Hutu government. He recounted how he was persecuted by both Hutu extremists and the Tutsi government, at one point being detained for a month by the RPF before prison officials “verified that neither he, nor his family, had participated in the Rwandan genocide.”

Uwase recounted how, after learning her family had been targeted for extermination based on her father’s role as a prominent Hutu businessman and his marriage to a Tutsi woman, her family fled Kigali. While her parents and six younger siblings returned, Uwase, then fourteen, and her older sister fled to refugee camps in the DRC. Two years later RPF soldiers captured Uwase, detained her in Kigali, subjected her to a series of abuses including “putting her feet in very cold water,

201. United States v. Kantengwa, No. 08-10385, 2012 WL 4591891, at *2 (D. Mass. Oct. 3, 2012), aff’d, 781 F.3d 545 (1st Cir. 2015) (these facts coupled with a finding that a jury could reasonably determine that her false statements were material justified the jury’s verdict).
203. Id.
205. Id.
206. Uwase v. Ashcroft, 349 F.3d 1039, 1040 (7th Cir. 2003).
207. Id.
tying her hands and legs, threatening her with violence, and withholding food,” and then released her due to her age.\textsuperscript{208} She found her way to her family’s home now occupied by RPF soldiers who invited her to stay in her old room, only to rape and beat her at gunpoint then confiscate her identification papers and leave her at a bus station bleeding.\textsuperscript{209} She lived with a friend for two years before making her way into the United States on a student visa.\textsuperscript{210}

Like Uwase, Mukamusoni was born to a Hutu father and Tutsi mother.\textsuperscript{211} Her father, who originally fought with the RPF but eventually deserted, and her brother joined Hutu rebel forces and were both apparently killed fighting the RPF.\textsuperscript{212} Her mother and remaining siblings, who had settled in a refugee camp, were murdered by Hutus.\textsuperscript{213} Alone, she began her studies at National University of Rwanda, only to be arrested and incarcerated on at least two occasions, first for four months and then for two months.\textsuperscript{214} Each time she was incarcerated, Tutsi soldiers tortured and raped her.\textsuperscript{215} A nun hid her on several occasions and eventually obtained a ticket for her to travel to the United States.\textsuperscript{216}

Not all unrest was related to a person’s ethnicity. For those previously living outside Rwanda who sought to return after the genocide ended, reintegration could be difficult. Ndayshimiye testified about a land dispute with a relative after returning to his homeland.\textsuperscript{217} While he ultimately prevailed on his claim, he fled Rwanda after receiving multiple threatening calls and being subject to police intimidation.\textsuperscript{218} “In one call, the speaker said that if Ndayshimiye’s family did not return to Burundi on their own, they would be thrown into the Akagera River to return there . . . a reference to the 1994 Rwandan genocide, during which massacred Tutsis were dumped into the Akagera.”\textsuperscript{219}

\textsuperscript{208.} Id.
\textsuperscript{209.} Id.
\textsuperscript{210.} Id. at 1041.
\textsuperscript{211.} Mukamusoni v. Ashcroft, 390 F.3d 110, 113 (1st Cir. 2004).
\textsuperscript{212.} Id. at 113–16.
\textsuperscript{213.} Id. at 114.
\textsuperscript{214.} Id. at 114–15.
\textsuperscript{216.} Mukamusoni, 390 F.3d at 116. Notably, Mukamusoni’s psychologist found her to be a “reliable historian” whose “account of her experience was consistent across interviews.” Id. at 116–17. The BIA also “implicitly accepted that Mukamusoni was credible.” Id. at 118.
\textsuperscript{218.} Id. at 126–27.
\textsuperscript{219.} Id.
Unfortunately—at least for those interested in a discussion of the historical record—one of the most fascinating accounts consists only of undeveloped controversial allegations as the *Habyarimana* case was dismissed in its initial stages. Nonetheless, it is worth noting the highly controversial perspective offered by the widows of Presidents Habyarimana and Ntaryamira, who claim:

The final order to shoot down the Presidents’ plane was given by Defendant Kagame, himself, during a meeting held in Mulindi, Rwanda on or about March 31, 1994, with the planning and the operational phase being entrusted to Col. James Kabarebe, who was specifically charged with the formation of a team specialized in the use of surface-to-air missiles furnished by Uganda in a conspiracy with members of the nongovernmental Rwanda Patriotic Army.

[U]pon direct command of Mr. Kagame, defendants Franck Nziza and Eric Hakizimana fired SAM-16-type surface-to-air missiles at the plane, destroying it in flight. The plaintiffs further allege that the assassination of the Rwandan and Burundian presidents was intended by the defendants to incite Rwanda’s Hutu ethnic majority to undertake “bloody reprisals against the Tutsi community” offering “a veneer of legitimacy for [Mr. Kagame’s] renewal of hostilities and his seizing of State power in Rwanda by criminally violent means.”

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C. An Endorsement of the ICTR and Mixed Review of the Rwandan National Courts and Gacaca

In addition to providing insight into the genocide itself, the various federal cases have provided background on the ICTR, explaining:

Tutsi rebels triumphed over the Hutus, and the Tutsi-dominated government then requested the U.N. to create an international war crimes tribunal. An investigation by the U.N. established that the mass exterminations of the Tutsis—motivated by ethnic hatred—had been planned for months. The Security Council adopted Resolution 955, which created the ICTR to prosecute and to punish the individuals responsible for the violations in Rwanda and its neighboring states between January 1 and December 31, 1994. The Resolution directed that “all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute [of the ICTR].”

The Fifth Circuit also discussed the United States government’s support and intent to cooperate with the ICTR.

In 1995, the President of the United States entered into an executive agreement with the ICTR . . . . The Agreement provided that the United States “agrees to surrender to the Tribunal . . . persons . . . found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal.”

Then, “[i]n 1996, Congress enacted Public Law 104-106 to implement the Agreement,” which provides that “federal extradition statutes . . . shall apply to the surrender of persons to the ICTR.” Thus, in a few short sentences—and its ultimate decision to allow for the extradition of Ntakirutimana to the ICTR—the court concluded that all three branches of the U.S. government supported the legitimacy of the tribunal. Subsequently, federal cases have repeatedly cited to the ICTR statute and case law, thus further acknowledging its legitimacy.

224. Id.
225. Id.
226. Id. at 429.
227. See Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 676 (7th Cir. 2012); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 136 (2d Cir. 2010); Abagninin v. AMVAC Chem. Corp., 545 F.3d 733 (9th Cir. 2008); Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 272, 280–81 (2d Cir. 2008). Interestingly, federal courts have also served as a forum for criticism of
The Rwandan national courts have received varying treatment. As one would expect, a court in 1996 concluded that the "Rwandan judicial system is virtually inoperative and will be unable to deal with civil claims in the near future." In addressing claims by an asylum seeker more than a decade later, a court noted that "the conditions in Rwanda have changed markedly since the early and mid-1990s. The new Rwandan government is Tutsi-controlled and, with the United Nations, has been actively seeking to prosecute those responsible for the 1994 genocide and related crimes." Similarly, in 2010, a court received testimony from Professor William Schabas, an authority on international criminal law, who opined that "the Rwandan Court in which Mudahinyuka would be tried has fair-trial and right-to-counsel guarantees, [and] that Mudahinyuka would not have trouble finding free legal representation."

At least two courts have also addressed, to a degree, "the Gacaca, a community-based court for the prosecution of crimes arising out of the 1994 Rwandan genocide." Mukeshimana, despite being summoned, did not appear at her Gacaca proceedings and was convicted in absentia of murder and sentenced to nineteen years. Based on the conviction of a "category two genocide crime," she was subject to mandatory denial of asylum because "she assisted or otherwise participated in the persecution of another based on ethnicity and because there were reasons to believe various aspects of the ICTR. In Ndayisaba, the court recounted how the ICTR prosecutor asserted, during Ndayisaba’s testimony, that he had "participated in genocide and was guilty of raping three women." Ndayisaba, 457 F. App’x at 555. Furthermore, "[t]he chief of the Witness and Victims Support Section for the ICTR treated the respondent and his family in a hostile manner, did not allow them to take their possession with them when they left the safe house, and threatened to send them back to Rwanda, calling them interahamwe, a military group known for participating in the genocide." Id. at 555–56.


229. Murangwa v. Mukasey, 310 F. App’x 965, 967 (9th Cir. 2009).

230. Mudahinyuka v. Holder, 444 F. App’x 901, 903 (7th Cir. 2010). The court ultimately concluded that "that prison conditions are adequate and improving, that torture abuse of prisoners is rare and not tolerated by the Rwandan government, and that Mudahinyuka is very unlikely to be tortured if removed." Id. However, other sources continue to challenge the impartiality of the Rwandan judiciary and the continued use of torture to obtain confessions, particularly in politicized cases. See European Parliament Resolution of 23 May 2013 on Rwanda: Case of Victoire Ingabire, 2013 O.J. (C 55) 127; Rwanda: Opposition Leader’s Right to a Fair Trial in Jeopardy, AMNESTY INT’L (Mar. 25, 2013), https://www.amnesty.org/en/documents/PRE01/147/2013/en/; see also Rwanda 2013 Human Rights Report, U.S. DEP’T OF STATE 12 (2013), https://2009-2017.state.gov/documents/organization/220359.pdf (noting that generally there was limited interference but that “government officials sometimes attempted to influence individual cases”).

231. Mukeshimana v. Holder, 507 F. App’x 524, 525 (6th Cir. 2012); see also Karangwa v. Lynch, 649 F. App’x 149, 150 n.1 (3d Cir. 2016) (“The Gacaca courts are community-based tribunals formed to adjudicate charges arising from the 1994 genocide.”).

that she committed a serious non-political crime outside the United States.”233 While Mukeshimana argued that the conviction in absentia lacked due process, the court noted that she had received notice of the Gacaca hearing and “provided varying reasons for her failure to appear,” while also offering conflicting testimony about her opportunity to appeal (which she failed to do).234 In Karangwa, the petitioner offered evidence that the Gacaca were “unfair and... sometimes misused for personal grudges.”235 He also contended that “the system did not allow defendants to have lawyers and often led to lengthy pre-trial detentions under harsh and abusive conditions.”236 However, his position was significantly undercut by the fact that both of his brothers were exonerated through the Gacaca and local prosecutors had not shown interest in Karangwa for several years.237

D. Contributions to International Criminal Justice and Human Rights Norms

Like ICTR jurisprudence, albeit on a smaller scale, U.S. cases have had a meaningful effect on human rights and international criminal law. The Ntakirutimana case, for example, affirmed the validity of arrest warrants issued by international tribunals and extradition to international tribunals under U.S. legislation pursuant to such arrest warrants.238 As noted by Harold Koh, U.S. Department of State Legal Advisor, the case is an example of “cooperation” in support of international criminal justice.239

The Karake case has been regularly cited in subsequent cases and scholarly articles on torture as a basis for suppressing confessions.240 Of

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233. Id. at 527 (citing 8 U.S.C. §§ 1158(b)(2)(A)(i), 1158(b)(2)(A)(iii), 1231(b)(3)(B)(i), 1231(b)(3)(B)(iii); 8 C.F.R. § 1208.13(c)(1)).
234. Id. at 528.
235. Karangwa, 649 F. App’x at 151.
236. Id.
237. Id. at 153.
particular import, the *Karake* opinion, after determining that torture had occurred at the hands of Rwandan interrogators, suppressed the subsequent confessions made to American interrogators. This marks a noticeable advancement in human rights law, as subsequent courts have quoted it for recognition of the “continuing effect of the prior coercive techniques on the voluntariness of any subsequent confession.”

E. A Starting Point for Appreciating Current Controversies in Rwanda

The U.S. federal court cases, as a whole, reveal a different perspective on the genocide and subsequent events. In addition to stories relating to events at the time of the genocide, these cases tell the story of an RPF government which has not always acted with clean hands. In particular, the *Karake* court found that Rwandan investigators had tortured the defendants. The defendants testified as to a wide range of brutal techniques applied by their captors at the Kami military prison camp, which included being tightly bound with fishing line that cut into the flesh, being beaten with sticks (to a point where shoes would not fit and stitches were required), being gouged with barbed wire, and being forced to dig what one believed was his own grave. This testimony was supported by the physical scars borne by the defendants—even the government’s expert agreed the defendants’ accounts were plausible and could offer no other explanation—and additional testimony and government reports regarding the conditions at the prison camp. The court ultimately found that “based on the totality of the circumstances . . . the conditions under which the defendants were held at Kami and the abuse and mistreatment they endured while being interrogated shock the conscience and therefore render the statements involuntary and inadmissible.”

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244. *Id.* at 43.
245. In a suppression case, the government is merely required to prove, upon a defendant’s claim that his confession was involuntary, that the confession was voluntary by a preponderance of the evidence. United States v. Karake, 443 F. Supp. 2d 8, 50–51 (D.D.C. 2006) (the government was unable to meet that standard, and thus the confessions were suppressed (citing Lego v. Twomey, 404 U.S. 477, 489 (1972))). *See also* Said, supra note 243, at 42–44 (providing additional discussion of the coercive nature of the torture and resulting confessions).
247. *Id.* at 63.
248. *Id.* at 67–70, 85–86.
The findings in *Karake* were highly pertinent in Niyibizi’s case. There, the court determined, in light of *Karake*: “[T]he Tutsi government which came to power in Rwanda after the 1994 genocide also tortures individuals . . . [t]he evidence . . . reveals disturbing new information about the Rwandan government’s abusive treatment of prisoners, and tends to indicate a more pervasive lack of respect for basic rights.”

Such a finding served as “material evidence of changed country conditions in Rwanda.”

The conclusion is hardly a novel one. The U.S. State Department has listed the “government’s targeting of political opponents and human rights advocates for harassment, arrest, and abuse; disregard for the rule of law among security forces and the judiciary; [and] restrictions on civil liberties,” as key human rights problems. The report also notes the existence of “arbitrary or unlawful killings both inside and outside the country, disappearances, torture, harsh conditions in prisons and detention centers, [and] arbitrary arrests.”

There were reports that torture continued in the Kami military intelligence camp, Mukamira camp, Ministry of Defense headquarters, and undeclared detention facilities as first reported by Amnesty International (AI). In 2012 AI documented 18 allegations of torture. . . . Former detainees alleged that they endured sleep deprivation, sensory deprivation, starvation, extraction of fingernails, electrocution, scalding, melting of plastic bags over the head, suffocation, burning or branding, beating, and

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250. *Id.* The Sixth Circuit appeared troubled that “the same Department of Justice that trusted Michel to work on a sensitive terrorism case . . . claims that Michel is not credible enough to remain in the United States.” *Id.* at 376.
251. *Rwanda 2013 Human Rights Report, supra* note 230, at 1. The Report also lists Rwanda’s support of warlords in the Democratic Republic of the Congo (particularly the M23 Movement) as a major human rights concern. *Id.* The United States has gone much further, as the current U.S. Ambassador on Global Criminal Justice expressly warned Kagame that continued support of such factions which committed atrocities could lead to charges similar to those brought against Charles Taylor, resulting in his conviction and fifty-year sentence at the Special Court for Sierra Leone. Chris McGreal, *Rwanda’s Paul Kagame Warned He May Be Charged with Aiding War Crimes*, GUARDIAN (July 25, 2012), http://www.theguardian.com/world/2012/jul/25/rwanda-paul-kagame-war-crimes [https://perma.cc/QJ8Y-X9QF]. However, since that time, one of the leaders of M23 sought by the ICC (and a former member of the RPF) surrendered himself to the U.S. Embassy in Rwanda. Kagame quickly promised to assist in Ntaganda’s transfer to the ICC. *Bosco Ntaganda: Kagame Promises to Help Transfer to ICC*, BBC News (Mar. 21, 2013), http://www.bbc.com/news/world-africa-21878010 [https://perma.cc/7CWG-VVLZ].
simulated drowning through confinement in cisterns filled with rainwater.253

Opposition leader Victoire Ingabire was convicted and, on appeal, her sentence increased from eight to fifteen years for threatening state security, minimizing the genocide, and spreading rumors to incite revolt.254 Yet there are allegations that the confessions of her co-accused resulted from torture at Camp Kami.255 A former director of external intelligence was also recently found strangled in a hotel in South Africa, the latest in a line of unsolved murders of Rwandan dissidents living abroad.256 President Kagame stated at a public prayer meeting some two weeks later: “You cannot betray Rwanda and get away with it. There are consequences for betraying your country.”257

On the other hand, not all U.S. courts have determined that prison conditions should dictate the return of Rwandans to their home country.

253. Id. at 4. The report noted that “[l]ocal and international human rights organizations reported that the [Rwandan military] took positive steps in 2012 to reform military interrogation methods and detention standards, resulting in fewer reports of torture. . . . They cautioned, however, that the increased use of undeclared detention facilities . . . made monitoring more difficult.” Id. at 4–5.

254. Victoire Ingabire: Rwanda Leader’s Jail Term Raised, BBC NEWS (Dec. 13, 2013), http://www.bbc.com/news/world-africa-25371874 [https://perma.cc/4VZM-UNPH]. The Rwandan government has often been criticized for incarcerating political opponents on convictions for denying or minimizing the genocide. See, e.g., Jennifer M. Allen & George H. Norris, Is Genocide Different?: Dealing with Hate Speech in a Post-Genocide Society, 7 J. INT’L L. & INT’L REL. 146, 157 (2011); Rwanda: Prison Term for Opposition Leader, HUM. RTS. WATCH (Feb. 11, 2011), http://www.hrw.org/news/2011/02/11/rwanda-prison-term-opposition-leader [https://perma.cc/W78S-Q2PS]. Without explanation, Ingabire was released in late 2018 along with more than two thousand other prisoners. Victoire Ingabire: Rwanda Frees 2,000 People Including Opposition Figure, BBC NEWS (Sept. 15, 2018), https://www.bbc.com/news/world-africa-45532922 [https://perma.cc/W9UV-V5EC]. Interestingly, the Kantengwa court warned the government that one aspect of its case bordered on prosecution for genocide denial. The court discussed the challenges of the government’s attempt to “flush out a definition of ‘genocide’ and then attempt to prove that its definition matches the one that Kantengwa had in mind at the time she testified.” United States v. Kantengwa, No. 08-10385, 2010 WL 3023871, at *6 (D. Mass. July 29, 2010). The court found that this would be difficult to prove since Kantengwa could not be prosecuted for her good faith beliefs even if they were wrong. However, this was distinct from genocide denial because she would have known that the genocide had occurred, and she had intentionally lied to immigration officials about her knowledge. Id.


In Munyakazi, the immigration judge found that Munyakazi’s “fear of future persecution based on a protected ground—his political opinion” was well founded. Munyakazi had, on more than one occasion, sought to describe the genocide as “fratricide,” clearly attempting to downplay the ethnic component of the atrocity. Still, the Court concluded, while Munyakazi may have been mistreated when originally detained by the Rwandan military, any confinement upon his return would be in a civilian facility, where, apparently unlike the military prisons, the conditions might well be poor but did not meet the definition of torture.

While U.S. court decisions by no means deliver the final word on Rwandan politics, they provide a very reliable source to corroborate other claims of torture and inhumane treatment by the current Rwandan regime.

V. LOOKING FORWARD

Much like the ICTR and the Gacaca, U.S. litigation involving the genocide appears to be winding down. Statutes of limitations resolve many concerns. While the standard statute of limitations for federal crimes is five years, many of the potential crimes for immigration violations are subject to a ten-year statute of limitations. Although the Alien Tort Statute has no explicit statute of limitations, courts have applied the limitation under the Torture Victims Protection Act, which is also ten years. As the ICTR is no longer investigating or prosecuting cases, there will not be another extradition case like that of Ntakirutimana. Naturally, fewer individuals will seek asylum based on conduct related to the genocide, although the Rwandan government’s tactics regarding political opponents and its reliance on the genocide for moral superiority may well surface again.

However, litigation in U.S. federal courts has provided unique insight into the genocide against the Tutsis and its aftermath, often serving as the only forum for a particular case or perspective. It is virtually impossible

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259. Id. at 293.
260. Id. at 297, 302.
to draw firm conclusions regarding an accused’s role in the genocide from the limited information available to the general public; the individual has strong personal motivation to minimize, while the Rwandan government may act in an effort to silence a critic. Although U.S. courts lack experience with the genocide, they do not have such inherent bias. Nonetheless, the judge must take great pains to ensure sufficient knowledge of the history and culture of Rwanda to ensure the truth surfaces given the parties’ personal agendas.

As a result of the U.S. litigation, some measure of justice has been provided to those affected by the genocide that would not have been otherwise obtainable. Victims have seen a perpetrator convicted or found liable for their unfathomable conduct. Others have been protected from coerced confessions or improper deportation. Judicial findings may be relied upon in future U.S. and international litigation. If similarly balanced results can be reached in genocide cases within Rwanda, the country will have taken significant strides in its continued emergence from the horrors of 1994. Rwanda has the potential for a very bright future—and progress has undoubtedly been made. However, a government dominated by a minority with a disenfranchised majority invites a scenario that has previously generated an outcome far too tragic. Justice must be equally accessible to all Rwandans to avoid the cycles of the past.