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TRANSNATIONAL TRIALS AS TRANSITIONAL JUSTICE: LESSONS FROM THE TRIAL OF TWO RWANDAN NUNS IN BELGIUM

MAX L. RETTIG*

I'm convinced that [Srs. Gertrude and Kizito] were convicted as cowards, more than as killers. They were scared like hell. They did not help people to avoid being killed themselves.

Gilles Vanderbeck, Co-Counsel for Sr. Kizito
(September 2009)

It's so complicated for us as Europeans to recognize when [a Rwandan] is not telling the truth.

Serge Wahis, Co-Counsel for Sr. Kizito
(September 2009)

The trial of Srs. Gertrude and Kizito should have taken place here in Rwanda. It is here that they committed these crimes.

Female farmer from Sovu
(May 2007)

ABSTRACT

More than a decade after the landmark trial of two Rwandan nuns for their role in the 1994 genocide, important lessons from the proceedings have yet to be fully explored. While scholars have vigorously debated the merits of international tribunals, hybrid courts, and local justice, comparatively little attention has focused on transnational trials—when national courts, typically in Europe and North America, exercise jurisdiction over foreign persons for crimes allegedly committed in foreign countries. Drawing on evidence collected in Belgium and Rwanda, including interviews, trial transcripts, and public opinion data, this Article uses the trial of the two Rwandan nuns to evaluate the strengths and

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weaknesses of transnational trials. The story of Srs. Gertrude and Kizito provides an example of how Belgium's exercise of jurisdiction prevented two accused génocidaires from escaping the law's reach. But their story also reveals the challenges associated with conducting a highly sensitive trial in a culturally and geographically distant land. Defense attorneys for the nuns argue that Belgian jurors were ill-equipped to sort truth from fiction because of their lack of familiarity with Rwandan culture. The Belgian government's reluctance to grant a key witness a visa to testify at trial deprived the jury of the opportunity to hear and assess his testimony. Furthermore, public opinion data reveals that the trial failed to capture the attention of the Rwandan people, perhaps detracting from the trial's capacity to promote norm penetration and reconciliation. The trial also implicitly privileged Belgian legal values, like due process and relatively light sentences, over Rwanda's preference for harsher punishments. Before fully embracing universal jurisdiction and transnational trials, policymakers must carefully consider the goals they aim to achieve by prosecuting foreign citizens for crimes committed abroad.

I. INTRODUCTION

The neatly manicured grounds of the monastic compound of Sovu, in southern Rwanda, belie the horror of what happened there. Just beyond the monastery's gates lies a mass grave, the final resting place for as many as 8000 men, women, and children who were murdered outside the monastery during the 1994 genocide. Today, as before, some thirty Benedictine nuns live in the monastery, and members of the community pray in the monastery's chapel on Sundays. In 1994, Sr. Gertrude, the mother superior, and Sr. Maria Kizito, a novice, were among the nuns living there. As the rebel army advanced, they first fled to Zaire with their flock, and then to a Benedictine convent one hour outside of Brussels. They lived quietly in Belgium with other Rwandan and European nuns until the Belgian media published a shocking accusation: these women of God collaborated with local genocide leaders, provided the gasoline used to burn hundreds of Tutsi alive, drove over the bodies of the dying, and cast out refugees who had been hiding in the monastery, knowing they would be slaughtered. In April 2001, seven years to the day after refugees

began to seek safety inside the monastery, the trial of Srs. Gertrude and Kizito commenced.¹

The circumstances of the nuns' trial were as extraordinary as the crimes of which they were accused. The trial did not take place in Sovu, where the crimes were committed. Nor did it take place in Tanzania, where the UN-sponsored international tribunal is headquartered. Rather, it was held four thousand miles away in Belgium, on the soil of Rwanda's former colonial master.² The trial was groundbreaking for reasons other than venue too. It was the first trial where a jury of laypersons was asked to hear evidence of international humanitarian law violations allegedly committed by a foreign national on the territory of a foreign state.³ It was the first trial under Belgium's pioneering, controversial, and now-defunct universal jurisdiction law.⁴ And it was among the first of a growing number of transnational trials to focus on the 1994 genocide.⁵

Now more than a decade after the trial of Srs. Gertrude and Kizito, important lessons from the proceedings have yet to be fully explored.⁶ These lessons remain relevant today because transnational trials have become a prominent feature of the international criminal justice landscape. Prosecutors in a number of countries, including Belgium, Canada, the Netherlands, Finland, Sweden, and Switzerland, have focused on individuals who allegedly committed atrocities abroad.⁷ As of 2001, 125 countries had universal jurisdiction laws on the books for one or more crimes.⁸ Even the United States, once an outspoken foe of universal

1. Srs. Gertrude and Kizito were tried with two men from Butare, the major city near Sovu. Although joined for the purposes of trial, their cases were not factually related.

2. See Assize Court of Brussels, verdict of 8 June 2001.

3. Linda Keller, *Belgian Jury to Decide Case Concerning Rwandan Genocide*, AMERICAN SOCIETY OF INTERNATIONAL LAW (May 2001), <http://www.asil.org/insigh72.cfm>.

4. *Id.*

5. *Id.*

6. The most in-depth treatments of the trial of Srs. Gertrude and Kizito are LAURE DE VULPIAN, *RWANDA, UN GENOCIDE OUBLIÉ? UN PROCÈS POUR MÉMOIRE* (Belgium: Éditions Complexe 2004) and Luc Reydams, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT'L CRIM. JUST. 428 (2003).

7. The European Court of Human Rights' recent decision in *Ahorugeze v. Sweden*, in which a Rwandan national attempted to block his extradition from Sweden to Rwanda—discusses a number of transnational trials for individuals suspected of having participated in the 1994 genocide. See *Ahorugeze v. Sweden* (No. 37075/09), HUDOC (Oct. 27, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107183>. Máximo Langer's study of universal jurisdiction found that eighty-seven complaints were filed against Rwandans under universal jurisdiction laws, while eleven Rwandans had been brought to trial. See Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 8, tbl. 1.

8. AMNESTY INT'L, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND ENFORCE LEGISLATION 4 (2001), http://www.amnesty.org/en/library/asset/IOR53/002/2001/en/be_2d6765-d8f0-

jurisdiction, has enacted universal jurisdiction laws for genocide,⁹ recruiting child soldiers,¹⁰ and terrorism.¹¹ These statutes give prosecutors broad power to indict persons suspected of committing atrocities abroad, irrespective of the accused's nationality.¹²

Although Srs. Gertrude and Kizito were living in Belgium at the time they faced trial, neither was a Belgian citizen, and the crimes they were accused of committing took place in Rwanda against Rwandan victims. To establish jurisdiction to prosecute the Sisters, Belgium relied in part on the 1993 Act Concerning Grave Breaches of International Humanitarian Law.¹³ The law, as amended in 1999, gave Belgian courts jurisdiction over cases involving genocide, war crimes, and crimes against humanity regardless of the nationality of the accused, the nationality of the victim, the place the criminal act was committed, and the presence of the accused on Belgian territory.¹⁴ Under Belgium's *constitution de partie-civile* system, victims were empowered to act as plaintiff-prosecutors by requesting that an investigative judge open an inquiry. Furthermore, though not relevant to the trial of Srs. Gertrude and Kizito, the law dispensed with international law immunity for heads of state.¹⁵ In sum, the

11dd-ad8c-f3d4445c118e/ior530022001en.pdf.

9. Genocide Accountability Act, 18 U.S.C. § 1091(d) (2010).

10. Child Soldiers Accountability Act, 18 U.S.C. § 2442(c) (2010).

11. Intelligence Reform and Terrorism Prevention Act of 2004, 18 U.S.C. § 2339(B)(d) (2004).

12. The UN-sponsored International Criminal Tribunal, Rwanda's domestic courts, and the quasi-traditional, quasi-local tribunals known as *gacaca* account for the vast majority prosecutions for the genocide. For an overview of the *gacaca* courts, see Lars Waldorf, *Mass Justice for Mass Atrocity? Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1 (2006), and PHILLIP CLARK, *THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS* (Cambridge 2010).

13. Loi du 16 juin 1993 relative à la répression des infractions grave aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions [Law Concerning Grave Breaches of International Humanitarian Law], June 8, 1993, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 5, 1993. For an overview of the "life and death" of Belgium's universal jurisdiction statute, see Steven Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 888-97 (2003). See also Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150, 150 (2001).

14. Loi du 16 juin 1993 relative à la répression des infractions grave aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions [Law Concerning Grave Breaches of International Humanitarian Law], June 8, 1993, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 5, 1993, *amended by* Loi relative à la répression des violations graves du droit international humanitaire [Law Concerning Grave Breaches International Humanitarian Law] Feb. 10, 1999, Art. 2, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 23, 1999, 9267. See also Stefaan Smis & Kim Van der Borgh, *Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives*, AM. SOC'Y OF INT'L L. (2003), available at http://www.asil.org/insigh112.cfm#_edn2.

15. Loi relative à la répression des violations graves du droit international humanitaire [Law Concerning Grave Breaches International Humanitarian Law], Feb. 10, 1999, art. 2, Moniteur Belge

law was among the broadest, most progressive jurisdictional laws ever enacted anywhere in the world. It was also highly controversial.

What is universal jurisdiction, and why is it controversial? There are several bases for jurisdiction, including the exercise of jurisdiction over a state's own nationals ("nationality"); over foreign nationals when the victim is a national of the state ("passive nationality"); over foreign nationals when the conduct took place on the state's territory ("subjective territoriality"); and over foreign nationals when the conduct "has or is intended to have substantial effect" within the state ("objective territoriality").¹⁶ Under international law, the exercise of jurisdiction, no matter the ground, must always be reasonable.¹⁷ Universal jurisdiction breaks with tradition by permitting states to exercise jurisdiction even when none of these traditional bases of jurisdiction is met.¹⁸ Hervé Ascensio defines universal jurisdiction as a ground of jurisdiction that "does not require any link or nexus with the elected forum."¹⁹ Luc Reydams defines it in the negative: "universal jurisdiction means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit."²⁰ Prominent scholars and policymakers argue that universal jurisdiction statutes leave excessive discretion in the hands of unaccountable foreign prosecutors and judges.²¹ By contrast, advocates contend that universal jurisdiction is necessary to combat impunity.²²

[Official Gazette of Belgium] [M.B.], Mar. 23, 1999, 9267.

16. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–03; see also IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 299–303 (6th ed. 2003).

17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403.

18. For an overview of universal jurisdiction, see generally Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 735–60 (2004).

19. Hervé Ascensio, *Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals*, 1 J. INT'L CRIM. JUST. 690, 699 (2003) (emphasis omitted).

20. LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 25 (2003).

21. See, e.g., Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 94 (2001); Eric Posner, *Garzon and the Trouble with International Law*, WALL ST. J. (Apr. 14, 2010), <http://online.wsj.com/article/SB10001424052702303828304575179891513981922.html>; John Bolton, *Democracy Under Arrest: 'Universal' Human-Rights Law Never Seems to Apply to the Likes of Kim Jong Il*, WALL ST. J. (Dec. 15, 2009), <http://online.wsj.com/article/SB10001424052748704398304574597913245752256.html>.

22. See, e.g., Roth, *supra* note 13, at 150. Roth, Executive Director of Human Rights Watch, argues:

With growing frequency, national courts operating under the doctrine of universal jurisdiction are prosecuting despots in their custody for atrocities committed abroad. Impunity may still be the norm in many domestic courts, but international justice is an increasingly viable

But the intense debate over whether universal jurisdiction is *legitimate* fails to address an equally fundamental question: whether transnational trials are an *effective* response to mass atrocity.²³ The story of Srs. Gertrude and Kizito offers several important insights that help answer this question. Belgium's exercise of universal jurisdiction prevented two accused *génocidaires* from escaping the law's reach, and the trial also afforded the Sisters the procedural protections prized by western criminal justice systems. But their story also reveals the challenges associated with conducting a highly sensitive trial in a culturally and geographically distant land. Defense attorneys for the nuns argue that Belgian jurors were ill-equipped to sort truth from fiction because of their unfamiliarity with Rwandan culture. Because of immigration restrictions, the Belgian government would not allow their chief accuser and alleged collaborator to enter the country to testify; as a result, the jury was deprived of the opportunity to hear and assess important testimony. Furthermore, public opinion data reveals that the trial failed to capture the attention of the Rwandan people, perhaps detracting from the capacity of the trial to promote norm penetration and reconciliation.²⁴ Finally, the trial implicitly privileged Belgium's legal values, such as due process and relatively light sentences, over Rwanda's preference for harsher punishments. In sum, the trial exposes both the merits and the demerits of prosecuting foreign nationals for crimes committed abroad through the exercise of universal jurisdiction.

This Article evaluates the strengths and weaknesses of transnational trials as a form of transitional justice, using the trial of Srs. Gertrude and Kizito as a case study. Part II describes the methodology underlying this study. Part III sets the historical backdrop for the trial of the Rwandan nuns, including a brief description of Rwanda's relationship with Belgium and the Catholic Church and an account of how the genocide was perpetrated in Sovu. Part IV examines the saga of Srs. Gertrude and Kizito, focusing on the dynamics of the trial and several evidentiary

option, promising a measure of solace to victims and their families and raising the possibility that would-be tyrants will begin to think twice before embarking on a barbarous path.

Id.

23. In the case of Belgium's universal jurisdiction statute, the critics won out. After the trial of Srs. Gertrude and Kizito, investigations were launched against such figures as Ariel Sharon and Yasser Arafat, as well as high-ranking American officials in connection with the 1991 Gulf War, including Norman Schwarzkopf, Colin Powell, Dick Cheney, and George H.W. Bush. In response, the United States threatened to relocate NATO headquarters from Brussels. Belgium quickly capitulated, dramatically curtailing the law's reach. Ratner, *supra* note 13, at 890–91.

24. See discussion *infra* Part V.B.3.

problems that arose. Finally, Part V assesses whether and how transnational trials promote the numerous and sometimes competing objectives of transitional justice. This Article demonstrates that, while transnational prosecutions aid in the fight against impunity and tend to provide robust due process protections, they are hampered by logistical challenges, they inherently privilege western legal values, and they have limited impact on the affected community.

II. FIELDWORK AND METHODOLOGY

To understand the dynamics of the trial and its impact among Sovu residents, this Article draws from both qualitative and quantitative evidence collected in Rwanda and Belgium. Lawyers and a judge involved in the trial contributed their insight on all phases of the case, from the investigation to the final verdict and beyond. In September 2009, three of the four defense attorneys for Srs. Gertrude and Kizito were interviewed for this Article. In September 2010, the *juge d'instruction* or investigative judge who conducts the investigative proceedings, Damien Vandermeersch, was interviewed. Despite several requests through their attorneys, Srs. Gertrude and Kizito declined interviews.²⁵

Evidence collected during ten months of fieldwork in Sovu in 2006 and 2007 and during a subsequent round of fieldwork in 2010 illuminates how Sovu residents view the trial. A team of trained and supervised Rwandan researchers administered three public opinion surveys in Sovu, the first in November and December of 2006, the second in May 2007, and the third in September 2010.²⁶ These surveys included both open and closed questions to provide context for the numbers.

25. Serge Wahis stated, "Understand that the Sisters must use discretion as their [immigration] status [in Belgium] has not yet been regularized." Email from Serge Wahis, Attorney for Sr. Kizito, to author, Sept. 7, 2010 (on file with author) (author's translation from French).

26. A team of trained Rwandan research assistants administered 250 survey questionnaires in November to December 2006, 255 in May 2007, and 177 in September 2010. According to census figures obtained by my research team from the Huye Sector office in September 2006, 2879 people in Sovu are at least eighteen years old. According to census figures provided by local officials in September 2010, 2312 people in Sovu are at least eighteen years old; officials were not able to provide the number of people who were at least twenty-one years old. All three surveys have a 95% confidence interval. The first two surveys have a sampling error of 5.9%, while the third survey has a sampling error of 7.21% (the rate was calculated based on the population of Sovu residents who were at least eighteen years old). The response distribution for all three surveys is set at 50%. The respondents were not selected at random because of the challenges that such a method would entail. For example, it would have been exceptionally difficult to locate an individual by name, and relying on the authorities to identify selected individuals could have distorted responses because of the perception that the Rwandan government requires adherence to its point of view. Instead, we administered a household survey, selecting one person in every other house in the community as the survey respondent. In the

To collect a representative sample, the research team interviewed residents of all geographic areas of the community. Geographic distribution was important to ensure that the data captured a cross-section of individuals.²⁷ These surveys probed local attitudes toward the International Criminal Tribunal for Rwanda (“ICTR”) in Arusha, Tanzania; Rwanda’s domestic military and civilian courts; the *gacaca* courts, which have heard the vast majority of genocide prosecutions; and the trial of Srs. Gertrude and Kizito. The surveys also measured public opinion on reconciliation, poverty, interethnic relations, and other social conditions in Sovu. The target population for all three surveys is defined as Sovu residents who were at least eighteen years old in 2006 and 2007. The target population was defined this way because the law governing *gacaca* permits persons eighteen and older to attend.²⁸ Thus, this group is more likely to have been engaged in the *gacaca* proceedings and is better equipped to make comparisons between *gacaca* and other types of trials

first survey, we selected the survey respondent based on the inhabitants’ date of birth (we chose the individual whose birth date fell closest to the date of the interview). This method proved cumbersome and time-consuming because Sovu residents were not always sure of their date of birth. For surveys two and three, we chose instead to select the survey respondent in the household whose Christian name came first in alphabetical order (Rwandans typically have a Christian name and a Kinyarwanda name, neither of which is a “family” name). In the first survey less than 1% of total interviewees refused to participate; just over 1% of total interviewees stopped the interview early because of emotional stress. In the second survey, 3% of total interviewees refused to participate or could not be located; less than 1% of total interviewees stopped the interview early, this time because they felt uncomfortable answering questions about ethnicity without express permission from local authorities. In the third survey, one person refused to participate and an interviewer skipped one section of the survey on one occasion out of concern for the participant’s emotional well-being. However, 107 completed questionnaires have been excluded from the survey data because of concerns about their authenticity. Thus, while 278 surveys were conducted, 171 are included in the data. The survey respondent’s name and place of residence were not recorded on the survey itself or anywhere else. Some survey questions were based on those administered by Longman, Pham, and Weinstein. For the results of that study, see Tim Longman, Phuong Pham & Harvey Weinstein, *Connecting Justice to Human Experience*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 206–25 (Eric Stover & Harvey Weinstein eds., 2004).

27. For example, observations in Sovu revealed that many genocide survivors and returnees live in a government-built cluster of houses known as an *umudugudu*; in other areas, there are very few survivors. In addition, wealthier families tend to live near the sole paved road that passes Sovu, whereas poorer families tend to live in more remote areas. Despite the fact that 107 questionnaires have been excluded from the data for the third survey, the 171 surveys that are included in the data still reflect a broad geographic distribution of survey respondents, including households within the *umudugudu* and in the rest of the community.

28. See Organic Law No. 16/2004 of 19/6/2004, art. 6, available at <http://www.inkiko-gacaca.gov.rw/pdf/newlaw1.pdf> (establishing the organization, competence and functioning of *gacaca* Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994).

than the younger population.²⁹ All interviews were anonymous. The interviewee's name and place of residence were not recorded to help ensure anonymity.

In-depth interviews and trial transcripts supplement the survey data. In 2007, I visited Karubanda Prison, a few kilometers from Sovu, where I interviewed Adjutant-Chef Emmanuel Rekeraho and Corporal Jean-Baptiste Kamanayo. Rekeraho and Kamanayo, as Part III details, were the principal orchestrators of the genocide in Sovu, and they allegedly worked closely with Srs. Gertrude and Kizito during the genocide. Rekeraho's out-of-court statements formed an important part of the case against the Sisters. Finally, transcripts from the trial of Srs. Gertrude and Kizito,³⁰ as well as other primary and secondary sources, provide detail about the local dynamics of the genocide and illuminate important facets of the trial.

Because not all transnational trials follow precisely the same model, not all of the lessons from the trial of Srs. Gertrude and Kizito are necessarily generalizable. Several of the attributes of this particular trial differ from those of other prosecutions in western jurisdictions for genocide-related crimes. For example, one of the defining characteristics of a trial is where it takes place. In this case, although the investigative judge traveled to Rwanda to interview potential witnesses, the court did not hold hearings in Rwanda. By contrast, in March 2010, the Finnish district court of East-Uusimaa moved to Dar es Salaam in neighboring Tanzania to hear testimony from nineteen Rwandan witnesses in the case against François Bazaramba.³¹ Around the same time, a Dutch court heard testimony in Kigali, Rwanda's capital, from some thirty witnesses in an

29. This study was not longitudinal. A longitudinal study would have required the research team to record the names of the survey participants, which would have detracted from the anonymity of the survey and undermined our efforts to elicit honest responses about sensitive subjects.

30. For many years, the Belgian NGO RCN Justice & Démocratie made a complete transcript of the trial of Srs. Gertrude and Kizito and their two co-accused publicly available. *Assises Rwanda 2001*, RCN JUSTICE & DÉMOCRACIE, <http://web.archive.org/web/20100619225608/http://www.assisesrwanda2001.be/plan.html> (last visited May 21, 2012). That website is no longer maintained but is available via web archive.

31. The Rwandan government had previously issued an international arrest warrant for Bazaramba on genocide charges. The Finnish government denied the Rwandan government's request to extradite Bazaramba out of concern that he would not receive a fair trial in Rwanda. See Susanna Mehtonen, *Finnish Genocide Trial Transfers to Tanzania*, HELSINKI TIMES (Mar. 4, 2010), <http://www2.helsinki.fi/htimes/finland-in-the-world-press/10117-finnish-genocide-trial-transfers-to-tanzania.html>. Bazaramba has been sentenced to life in prison. *Finland Sentences Rwandan Preacher to Life for Genocide*, BBC NEWS (June 11, 2010), <http://news.bbc.co.uk/2/hi/africa/10294529.stm>.

appeal lodged by Joseph Mpambara, who had been sentenced by a district court in The Hague to twenty years imprisonment for torture.³²

Nonetheless, there are a number of important commonalities between the trial of Srs. Gertrude and Kizito and other transnational trials. Like most transnational trials, the trial of Srs. Gertrude and Kizito took place far from the site where the crimes were committed, in a jurisdiction that prizes western-style procedural protections. Moreover, although witnesses were flown in from Rwanda to testify, the trial was not broadcast in Rwanda or otherwise publicized in the community where the crimes took place—another common feature of transnational trials. In these respects, it is a quintessential transnational trial. Thus, the trial of Srs. Gertrude and Kizito ably highlights some of the promises and pitfalls of transnational trials as a form of transitional justice.

III. HISTORICAL CONTEXT

Viewed in isolation, the trial of Srs. Gertrude and Kizito was a straightforward criminal matter focused on the guilt or innocence of the defendants. Historical context, however, is critical to understanding the way that Rwandans and Belgians perceive the trial, including their biases. This Part briefly explores the deep roots of Belgium and the Catholic Church in Rwanda, the dynamics of the genocide both at the national and local levels, and the events that led to the eventual indictment of Srs. Gertrude and Kizito.

A. *Belgium and the Catholic Church*

Originally a German colony, Rwanda changed hands after World War I, when the Treaty of Versailles gave the kingdoms of Ruanda and Urundi (later Rwanda and Burundi) to Belgium. Belgian rule in Rwanda was marked by a policy of social Darwinism and racial hierarchy that distinguished between Hutu (eighty-four percent of the national population today), Tutsi (nineteen percent of the national population today), and Twa (roughly one percent of the national population today).³³ Belgian census takers issued identity cards, and ethnicity was one of the predominant ways in which access to education and power was regulated, with

32. *Dutch Court Hears Witnesses in Rwanda*, INT'L JUST. TRIB. (Mar. 24, 2010), <http://www.rnw.nl/international-justice/article/dutch-court-hears-witnesses-rwanda>.

33. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2011, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html>

members of the Tutsi minority privileged in this regard.³⁴ Although historians largely agree that ethnic categories predated the colonial era, influential scholars including Mahmood Mamdani have argued that the colonial powers hardened those categories and infused them with the potency that made the genocide possible.³⁵ The *perception* that Belgian rule contributed to the genocide in this manner—wholly apart from whether that perception is rooted in reality—hung over the trial of Srs. Gertrude and Kizito.

For its part, the Catholic Church, a powerful social and political institution in Rwanda, has been accused of complicity in the genocide, both indirectly and directly: indirectly by providing political support to the government during the genocide, and directly through the active participation of some members of the clergy.³⁶ Missionaries, who arrived in Rwanda around the turn of the twentieth century, focused their conversion efforts not on the disadvantaged and underprivileged members of Rwandan society, but on the elite. If the Tutsi monarchy and local chiefs could be convinced to adopt Catholicism, it was argued, “their subjects would naturally follow.”³⁷ With that policy in mind, the missionaries turned their attention to the Tutsi, who formed the political and economic elite of Rwandan society. Beginning in 1927, when Belgium assumed trusteeship over Rwanda, the Tutsi began to embrace Christianity in larger numbers at least in part because of political and economic realities. In Belgian-controlled Rwanda, “[a] necessary prerequisite for membership of the élite . . . was to become a Christian” and to be a Tutsi.³⁸ Meanwhile, the Hutu and the Twa “constituted the mass of ‘roturiers’, relegated to a status of second class citizens.”³⁹ As Timothy Longman observes, “Christian churches were thus established during the colonial period not simply as allies of the government but as important players in contestation for state power.”⁴⁰

34. MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND GENOCIDE IN RWANDA* 76–102 (discussing racialization).

35. *See, e.g., id.* at 80. While the nature of ethnicity in Rwanda is the subject of considerable debate, historians largely believe that the ethnic categories of “Hutu” and “Tutsi” predate colonialism.

36. The seminal treatment of the history of the Catholic Church in Rwanda is TIMOTHY LONGMAN, *CHRISTIANITY AND GENOCIDE IN RWANDA* (2010).

37. Timothy Longman, *Christian Churches and Genocide in Rwanda*, in *IN GOD’S NAME: GENOCIDE AND RELIGION IN THE TWENTIETH CENTURY* 141 (Omer Bartov & Phyllis Mack eds., 2001).

38. GÉRARD PRUNIER, *THE RWANDAN CRISIS: HISTORY OF A GENOCIDE* 31 (1995).

39. Tharcisse Gatwa, *Mission and Belgian Colonial Anthropology in Rwanda*, 6 *STUD. IN WORLD CHRISTIANITY* 1, 5 (2000).

40. Longman, *supra* note 37, at 168.

The 1959 Social Revolution dissolved the Tutsi monarchy, upended Rwanda's social and political order, and coincided with Rwanda's push for independence. The exiting colonialists and the Church supported this revolution and maintained close ties with Rwanda's post-independence political elite. During Rwanda's first thirty-plus years of independence,⁴¹ ethnicity remained potent as two successive Hutu dictators supported policies favoring their co-ethnics. Ethnic-based violence accompanied moments of political turmoil, in particular in 1959 through 1962, 1973, and 1990, though on a much more limited scale than in the 1994 genocide.⁴² Like many former colonial powers, Belgium maintained a close, if not always friendly, relationship with post-independence Rwanda. Between 1959 and 1990, western nations including Belgium provided significant development aid to Rwanda,⁴³ and the Catholic Church retained substantial influence both with the government and the people.⁴⁴

Beginning in 1990, Rwanda's military clashed with rebels from the Rwandan Patriotic Front ("RPF"), a guerilla force composed mainly of Tutsis who had been exiled to Uganda and other countries in the region during the transition to independence.⁴⁵ Four years later, on the eve of President Juvenal Habyarimana's assassination, some 450 soldiers from the Belgian Army's Second Commando Battalion were stationed in Rwanda as part of the United Nations Assistance Mission ("UNAMIR").⁴⁶ The Security Council established UNAMIR in 1993 to oversee the implementation of the Arusha Accords, a peace agreement that was intended to end the civil war and usher in a power-sharing arrangement.⁴⁷

41. This period receives relatively scant treatment in the literature. A notable exception is PETER UVIN, *AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA* (Kumarian Press 1998).

42. For additional information on Rwandan history, see, for example, CATHERINE NEWBURY, *THE COHESION OF OPPRESSION: CLIENTSHIP AND ETHNICITY IN RWANDA, 1860-1960* (Columbia University Press 1988); ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (New York: Human Rights Watch 1999), available at <http://addisvoice.com/Ethiopia%20under%20Meles/Rwanda.pdf>.

43. See generally UVIN, *supra* note 41, at 40-81.

44. LONGMAN, *supra* note 36, at 162 ("The churches played an essential role in facilitating this descent into violence. As the primary voices of moral authority in Rwanda, the churches not only failed to speak out forcefully against the increasing exclusion of Tutsi and the growing violence against Hutu activists and Tutsis in the years leading up to the genocide but also lent strong support to the regime that was encouraging the exclusion and violence. . . . Because church officials at all levels of the institutions refused to condemn specific instances of ethnic and political violence . . . and because they encouraged continuing loyalty to the very state that was instigating this violence, many Rwandans concluded that ethnic and political violence was consistent with church teachings.")

45. FORGES, *supra* note 42, at 48.

46. LINDA MELVERN, *A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE I* (New York 2000).

47. See Catharine Newbury, *Background to Genocide: Rwanda*, 23 J. OPINION 12, 15 (1995).

But the Arusha Accords were not built to last. Habyarimana's assassination on April 6, 1994 shattered the fragile agreement, provided the spark that set off the genocide, and renewed the war between the Rwandan army and the RPF.

On the night of Habyarimana's assassination, killings began in Kigali as Hutu extremists eliminated moderate Hutu political leaders.⁴⁸ The next morning, on April 7, members of the Rwandan Army attacked the home of Prime Minister Agathe Uwilingiyimana, a political moderate who was in line to assume the presidency according to Rwanda's constitution.⁴⁹ Ten peacekeepers from the Belgian Army's Second Commando Battalion had been assigned to protect Uwilingiyimana, but UNAMIR's weak mandate undermined their ability to carry out their mission and Uwilingiyimana was killed.⁵⁰ After a firefight and protracted standoff with the Rwandan Army, help still had not arrived for the peacekeepers.⁵¹ Eventually, the Rwandan soldiers captured and massacred all ten Belgium peacekeepers.⁵² Less than two weeks later, on April 19, Belgium's remaining peacekeepers had been withdrawn from Rwanda.⁵³ Although the genocide would have likely continued even if the Belgian peacekeepers had stayed, Belgium's withdrawal reflected the lack of political will among western countries to stop the genocide and is a source of considerable anguish for many Belgians.⁵⁴

B. *The Genocide in Sovu*

The trial of Srs. Gertrude and Kizito failed to provide an uncontested narrative of what happened in Sovu during the genocide.⁵⁵ The account provided in this Part draws from statements made by nuns, survivors, and perpetrators in a variety of fora, including the trial of Srs. Gertrude and Kizito, local *gacaca* trials, interviews by the author, and interviews with

48. FORGES, *supra* note 42, at 181–201.

49. GÉRARD PRUNIER, *THE RWANDAN CRISIS: HISTORY OF A GENOCIDE* 230 (1995).

50. *Id.*

51. FORGES, *supra* note 42, at 187–92.

52. *Id.*

53. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 368 (2002).

54. A lawsuit has been filed in Belgian court alleging that the Government of Belgium and three Belgian soldiers violated Belgian law when they withdrew from a school, where they had been protecting some 2000 Rwandan Tutsis. See *Belgium Failed to Stop Tutsi Massacre in Rwanda: Lawyer*, ASSOCIATED FOREIGN PRESS (Sept. 8, 2010), <http://www.google.com/hostednews/afp/article/ALeqM5gKHFeFfkJYv3ZDJ01gdCBfT05HNg>.

55. That fact should come as little surprise, as trials are fundamentally a contest over the truth.

NGOs. Important facts set forth in this narrative were vigorously contested at trial, as Part IV details.

Sovu is a rural community near Butare-town, Rwanda's intellectual capital and second largest city. It lies in the country's southern region, not far from Burundi, in what was known as Butare Prefecture in 1994. Before the genocide, it was one of the most ethnically mixed areas of Rwanda and political moderates held considerable power there. In 1994, Butare Prefecture was governed by the only Tutsi prefect in the country. For nearly two weeks, he and other officials in Butare Prefecture successfully opposed the violence that erupted after President Habyarimana's assassination on April 6.

Even as the genocide raged elsewhere, the violence largely spared Sovu, but the new regime would not tolerate dissent from the policy of genocide. On April 17, 1994, the extremist government that seized power after President Habyarimana's assassination removed Butare's prefect from power, a move that signaled the impending violence.⁵⁶ Although violence had yet to besiege Sovu, in neighboring Maraba militias had burned Tutsi houses and had already begun their murderous campaign. Beginning on April 17, many of Sovu's Tutsi women and children began to gather at the Sovu monastery and the health clinic just outside the monastery's gates.⁵⁷ Meanwhile, Hutu and Tutsi men, together, fended off attacks launched by violent extremists from Maraba.⁵⁸ But as the violence grew worse in Maraba, Tutsi men began to seek refuge, too.⁵⁹ Knowing that churches had been sacrosanct during past episodes of violence, the refugees sought safety inside the monastery's church.

As the days passed, Sr. Gertrude grew increasingly disturbed by the presence of Tutsi refugees in the religious compound, calling them "dirt" and demanding that they leave the monastery.⁶⁰ If they refused to leave, Sr. Gertrude said, the militias would destroy the monastery.⁶¹ Although Sr. Gertrude did not know it at the time, the *génocidaires* would soon destroy the Benedictine abbey in Gihindamuyaga, not two kilometers from Sovu, with Tutsi refugees trapped inside.⁶² Most of the refugees reluctantly

56. FORGES, *supra* note 42, at 164–66.

57. *Id.* at 536–38.

58. *Id.*

59. AFRICAN RIGHTS, OBSTRUCTION OF JUSTICE: THE NUNS OF SOVU IN BELGIUM 3 (2000).

60. *Id.* at 12–13.

61. *Id.* at 7.

62. Omar McDoom, *Who Kills? Social Influence, Spatial Opportunity, and Participation in Inter-Group Violence*, Political Science and Political Economy Working Paper: London School of Economics, 20 (2011), http://www2.lse.ac.uk/government/research/resgroups/PSPE/pdf/PSPE_WP4_11.pdf.

obeyed Sr. Gertrude's instructions and went to the health center. But some refugees managed to climb over or sneak through the locked gates and into the monastic compound. Some huddled together in a small room, while others spent the night exposed to the elements on the monastery's outdoor volleyball court.⁶³ As tensions mounted in Sovu and as more and more refugees sought safety in the monastery, Sr. Gertrude refused to provide them with food, water, or shelter.⁶⁴

On April 19, the interim President and Prime Minister traveled to Butare to deliver a message: all men should be prepared to "work"—a euphemism for "kill."⁶⁵ Soon thereafter, moderates lost control of Sovu. Emmanuel Rekeraho, an adherent of the extremist "Pawa" political ideology, became Sovu's de facto leader.⁶⁶ A former army officer who had been working as a driver for the World Food Program, Rekeraho recruited, trained, and led the militia that was instrumental in perpetrating the genocide in Sovu.⁶⁷

In the days following the prefect's removal, refugees continued to seek safety at the health center, the church, and the monastery.⁶⁸ In response, Sr. Gertrude repeated her order that the refugees leave the religious compound and asked a group of soldiers to force the refugees out.⁶⁹ Meanwhile, militias assembled outside the monastery's gates, wielding machetes, clubs, guns, and grenades. On April 20, Sr. Gertrude lent Rekeraho the health center's ambulance, which he used to drive along the dirt paths of Sovu, exhorting Hutus to join the killing campaign.⁷⁰ According to Sr. Kizito's brother, Srs. Gertrude and Kizito were inseparable from Rekeraho during the genocide.⁷¹ Other nuns reported that Rekeraho made frequent visits to the monastery for secret meetings with Srs. Gertrude and Kizito, that they gave him milk to drink, and that Sr. Kizito spent a substantial amount of time outside the monastery with the militia.⁷²

63. AFRICAN RIGHTS, *supra* note 59, at 3–7.

64. *Id.* at 12–15.

65. *Id.* at 7; FORGES, *supra* note 42, at 351–52. "Slaughter was known as 'work' and machetes and firearms were described as 'tools.'" *Id.* at 11.

66. Rekeraho was president of the local *Mouvement démocratique républicain* ("MDR") political party and an adherent of MDR-Power.

67. Rekeraho served as a deputy to Aloys Simba, head of security for Butare and Gikongoro Prefectures, to maintain security in Butare. Simba was sentenced to twenty-five years in prison by the International Criminal Tribunal for Rwanda.

68. FORGES, *supra* note 42, at 536–39.

69. AFRICAN RIGHTS, *supra* note 59, at 7–9.

70. *Id.* at 10–11.

71. *Id.* at 37.

72. *Id.*

The first major massacre in Sovu began in the early morning hours of April 22 as soldiers, Rekeraho's militia, communal policemen, and civilians attacked refugees at the health center.⁷³ The killing continued for hours. Unable to hide in the religious compound, several hundred refugees sought safety in the health center's garage. But that afternoon, they were burned alive when the health center's garage was set ablaze, the doors barricaded shut and the flames ignited with gasoline allegedly supplied by Srs. Gertrude and Kizito.⁷⁴ (A key question during the trial was whether one or both of the nuns had in fact provided the gasoline.) As many as 5000 were dead after one day, among them refugees whom Sr. Gertrude, as the mother superior, had cast out of the religious compound. It took days to bury the dead in mass graves outside the health center.⁷⁵



The gates to the monastery⁷⁶

73. Sovu residents and lawyers for Sisters Gertrude and Kizito refer loosely to civilian killers as *interahamwe*, but Rekeraho told me that Sovu did not have any *interahamwe*—the youth militia from the *Mouvement républicain national pour la démocratie et le développement* (“MRND”) party. Rather, Rekeraho provided military-style training to members of the youth wing of the MDR party and others. Interview with Emmanuel Rekeraho, Karubanda Prison, Butare, Rwanda (May 24, 2007).

74. AFRICAN RIGHTS, *supra* note 59, at 19–24.

75. *Id.* at 26–27.

76. Photo courtesy of Jens Meierhenrich, *Through a Glass Darkly: Genocide Memorials in*

In the second wave of killings, which began in the days following the burning of the health center, militias searched for Tutsi who had escaped the initial massacres. A group of refugees—including employees of the monastery, Tutsis who had been in Sovu for a training course, and relatives of Tutsi nuns—were hiding in the convent.⁷⁷ But on April 25, Srs. Gertrude and Kizito worked with Rekeraho and other local leaders to force some thirty Tutsi refugees from their hiding places.⁷⁸ Cast out, the refugees had no place to hide. Militias killed the refugees outside the convent.⁷⁹ For the moment, the relatives of Tutsi nuns were spared except for one girl, the cousin of a Tutsi nun, who Sr. Gertrude allegedly forced to leave as the others were being slaughtered.⁸⁰



Mass graves in Sovu, steps from the monastery's gates.⁸¹

Rwanda 1994—Present (2010), <http://genocidememorials.cga.harvard.edu/sovu.html>.

77. AFRICAN RIGHTS, *supra* note 59, at 28.

78. *Id.* at 28–30.

79. *Id.*

80. *Id.* at 30.

81. Meierhenrich, *supra* note 76.

By the beginning of May, some twenty or thirty refugees—the relatives of Tutsi nuns—remained inside the monastery.⁸² On May 5, frustrated that the militias had not come to her aid in ridding the monastery of these remaining refugees, Sr. Gertrude wrote a chilling letter to the authorities in Butare.⁸³ She begged them to remove the remaining refugees from the monastery so that daily spiritual activities could “resume in peace.”⁸⁴ She wrote:

Mr. Mayor,

In recent weeks, there has been, in the monastery of Sovu, the usual arrival of visitors. Normally, their stay does not extend beyond a week. Some have come on mission and others on holiday or a prayer retreat.

Since the war has spread throughout the country, others have come unexpectedly and they insist on staying here. And we have no way of maintaining them illegally. A few days ago I asked the municipal authorities to come and give notice that they would have to return home or go elsewhere. Although they want to live here in the monastery, we no longer have any means of subsistence.

I am pleading with you, Mr. Mayor, that May 6, 1994 is the deadline. Everything must be finished by that date so that the daily activities of the monastery can resume in peace. We entrust you to God in our prayers.⁸⁵

On May 6, after the morning prayers, Sr. Gertrude told the nuns, “Before God Almighty, I am asking all the Sisters who have relatives here to expel them, otherwise we will use force.”⁸⁶ She turned the refugees over to the communal police and told them to go home.⁸⁷ Sr. Kizito searched the ceiling of the monastery to ensure that no refugees remained hidden.⁸⁸

82. AFRICAN RIGHTS, *supra* note 59, at 31.

83. FORGES, *supra* note 42, at 537.

84. *Id.*

85. Transcript of Record, Cour d’assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Lecture de l’acte d’accusation par l’avocat général*, <http://web.archive.org/web/20090508075102/http://www.assisesrwanda2001.be/040100.html> (last visited May 21, 2012) (translated from French by author).

86. AFRICAN RIGHTS, *supra* note 59, at 33.

87. *Id.* at 31–36.

88. *Id.* at 34.

Most of the refugees, if not all, were killed after their removal.⁸⁹ The monastery had been purged.

For two months, the monastery returned to its daily activities. Meanwhile, war ravaged the country and the rebel Rwandan Patriotic Front (“RPF”) was routing the Rwandan Armed Forces (“FAR”). On July 3, 1994, as the RPF advanced, Sovu’s Hutu population fled to Gikongoro Prefecture in large numbers.⁹⁰ There, France had established a zone of control known as *Opération Turquoise*, which allowed *génocidaires* and refugees alike to escape across the border to Zaire.⁹¹ It is via the French zone of control that nuns from the Sovu monastery, including Srs. Gertrude and Kizito, eventually reached Belgium, where they found a temporary home at the Benedictine convent at Maredret.⁹²

C. A Community Divided

In Belgium, Sovu’s Benedictine community was deeply divided. While some of the nuns supported Srs. Gertrude and Kizito, others accused them of complicity in the genocide.⁹³ Still the mother superior of the Sovu community, Sr. Gertrude used her position of authority to silence the Sovu nuns.⁹⁴ Sr. Gertrude scattered the Sovu nuns, assigning them to convents around Belgium, so that they would not be able to speak to one another freely.⁹⁵ The Benedictine order in Belgium stood behind Sr. Gertrude and tried to suppress any accusations against her.⁹⁶ According to Sr. Mélanie, one of the Sovu nuns, several sisters “wanted to denounce [Sr. Gertrude’s] bad behavior. But no one was interested in asking about it.”⁹⁷

Tensions within the community rose in November 1994 when Srs. Marie-Bernard and Scholastique, who had been critical of Sr. Gertrude, announced their intention to return to Rwanda.⁹⁸ Their decision sparked much consternation in the Benedictine community. Sr. Gertrude and the Benedictine hierarchy forbade Srs. Marie-Bernard and Scholastique from leaving Belgium.⁹⁹ But they left anyway and arrived in Butare on

89. *Id.* at 31–36.

90. Interviews with Sovu residents, 2006–07 and 2010.

91. FORGES, *supra* note 42, at 683–88; AFRICAN RIGHTS, *supra* note 59, at 42.

92. AFRICAN RIGHTS, *supra* note 59, at 42.

93. *Id.* at 42–47.

94. *Id.* at 43–44.

95. *Id.* at 43.

96. *Id.* at 44.

97. *Id.*

98. *Id.* at 45.

99. *Id.* at 44–46.

December 4, 1994.¹⁰⁰ Their departure pierced the silence as survivors in Rwanda and nuns in Belgium began to speak out against Srs. Gertrude and Kizito. Eventually, the Belgian media picked up the story, sparking alarm within the Benedictine order.¹⁰¹

The divide within the community then played out in public. Speaking to the press, Sr. Marie-Jeanne, also of the Sovu monastery, defended Sr. Gertrude.¹⁰² She attributed tensions in the community to the fact that many of the nuns had lost family members during the genocide.¹⁰³ Sr. Marie-Jeanne reported that Sr. Gertrude had cast the “guests” out of the monastery in order to save the community from destruction.¹⁰⁴ Like Sr. Marie-Jeanne and other Sovu nuns, the Benedictine hierarchy insisted that Sr. Gertrude had played something of a hero’s role, saving the religious order from being destroyed by the militias.¹⁰⁵ The accusations made by some nuns against Sr. Gertrude were motivated by external conflicts, said Sr. Marie-Jeanne: “You know how Rwanda is and especially now It seems that denunciations are made to settle scores.”¹⁰⁶

Not all of the Sovu nuns shared Sr. Marie-Jeanne’s account of Sr. Gertrude’s conduct during the genocide. Several nuns resisted a request by the Benedictine order to make written statements in support of Sr. Gertrude.¹⁰⁷ After the departure of Srs. Marie-Bernard and Scholastique, Sr. Gertrude convened a meeting to discuss their expulsion from the community.¹⁰⁸ But in a secret ballot, the nuns voted against expulsion.¹⁰⁹ The vote signaled the community’s growing opposition to Sr. Gertrude. As a consequence, Sr. Gertrude resigned as mother superior.¹¹⁰

The rift among the Sovu nuns would not heal as pressure on Srs. Gertrude and Kizito continued to mount. In May 1995, the Belgian newspaper *Solidaire* published an article about Srs. Gertrude and Kizito.¹¹¹ Subsequent media accounts, including the African Rights report *Rwanda:*

100. *Id.*

101. *Id.*

102. *Id.* at 46–47.

103. *Id.*

104. *Id.*

105. *Id.* at 46–47, 51.

106. *Id.* at 47.

107. *Id.* at 47–49.

108. *Id.* at 49.

109. *Id.*

110. *Id.* at 48–49.

111. See *Belgium’s Rwandan Genocide Trail*, REUTERS (June 8, 2001), <http://www.atour.com/~aahgn/news/20010611a.html> (“July 3 - Sister Gertrude files complaint against weekly *Solidaire* for accusing her of helping Hutus kill Tutsis at convent.”)

Not So Innocent, When Women Become Killers,¹¹² also focused on the role Srs. Gertrude and Kizito allegedly played in the genocide. The Sisters had been exposed.

IV. ON TRIAL: TWELVE BELGIANS JUDGE FOUR RWANDANS

Although Srs. Gertrude and Kizito remained in Belgium, their absence from Rwanda did not protect them from prosecution. In 2001, after the Sisters had been charged under Belgium's universal jurisdiction statute, the trial commenced. The jury of Belgians selected to decide the case heard testimony from eye-witnesses, but the attorneys defending Srs. Gertrude and Kizito raised doubt about the accuracy of this testimony, and Emmanuel Rekeraho—the convicted leader of the genocide in Sovu—recanted damning statements he had made against the Sisters. After hearing dozens of witnesses testify, and after hours of deliberation, the jury reached a verdict that would ring out to the world.

A. Charges under Belgium's Universal Jurisdiction Statute

In January 1996, Damien Vandermeersch, a Belgian investigative judge, formally charged Sr. Gertrude for her role in the genocide.¹¹³ As part of his investigation, Judge Vandermeersch traveled to Sovu in 1995 to interview genocide survivors and several of the Sovu nuns, who had returned to their monastery.¹¹⁴ Because he lacked sufficient evidence, it was not until 1999 that Judge Vandermeersch formally charged Sr. Kizito as well. It would be two more years before the trial finally began.

The Benedictine order, which had staunchly defended Srs. Gertrude and Kizito, hired four well-respected Belgian defense attorneys to represent the Sisters.¹¹⁵ Gilles Vanderbeck and Serge Wahis represented Sr. Kizito, while brothers Alain and Cédric Vergauwen represented Sr.

112. *Rwanda: Not So Innocent, When Women Become Killers*, AFRICAN RIGHTS (Aug. 1995), <http://www.scribd.com/doc/21263653/Rwanda-Not-so-Innocent-When-Womens-Became-Killers-Africa-Rights-August-1995>.

113. In the Belgian system, an investigative judge, a member of the judiciary with lifetime tenure, begins an investigation for serious offenses at the request of the prosecutor or a victim. Code d'instruction Criminelle [C.I.CR.] [Code of Criminal Procedure] Art. 55; see also Langer, *supra* note 7, at 27.

114. Interview with Damien Vandermeersch, former Investigative Judge, in Brussels, Belgium (Sept. 15, 2010).

115. Interview with Alain Vergauwen & Serge Wahis, Defense Attorneys for Srs. Gertrude and Kizito, in Brussels, Belg. (Sept. 8, 2009) (translated from French by author); Interview with Gilles Vanderbeck, Defense Attorney for Sr. Kizito, in Brussels, Belgium (Sept. 7, 2009).

Gertrude.¹¹⁶ The Sisters faced trial with two co-accused from Butare: Vincent Ntezimana, a professor at the National University of Rwanda, and Alphonse Higaniro, a prominent businessman and an associate of President Habyarimana.¹¹⁷ Although their cases were not factually related, the so-called “Butare Four” were tried together because they hailed from the same region of Rwanda and they all had fled to Belgium after the genocide.¹¹⁸

The trial of Srs. Gertrude and Kizito is typically referred to as a genocide trial, but the Sisters were charged with murder under the Belgian and Rwandan criminal codes and with war crimes.¹¹⁹ The war crimes charges were brought under the Act Concerning Grave Breaches of International Humanitarian Law, under common Article 3 of the 1949 Geneva Conventions, and under Article 4(2)(a) of Additional Protocol II to the Convention.¹²⁰

B. *The Women Beneath the Habit*

The trial of the so-called Butare Four commenced on April 17, 2001, exactly seven years after Tutsi women and children began to seek refuge at the monastery in Sovu.¹²¹ Dressed in the Benedictine habit of a brown veil, a beige robe, and a crucifix against their chests, Srs. Gertrude and Kizito appeared “inoffensive,” even “angelic.”¹²² The crimes of which they were

116. Interview with Alain Vergauwen & Serge Wahis, Defense Attorneys for Srs. Gertrude and Kizito, in Brussels, Belg. (Sept. 8, 2009) (translated from French by author); Interview with Gilles Vanderbeck, Defense Attorney for Sr. Kizito, in Brussels, Belgium (Sept. 7, 2009).

117. See generally Luc Reydam, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT'L CRIM. JUST. 428 (2003).

118. See generally *id.*

119. Transcript of Record, *Lecture de l'acte d'accusation par l'avocat général*, *supra* note 85.

120. *Id.* The indictment provides: “Accusés des crimes prévus par les articles communs 3-50-130 et 147 aux quatre Conventions de Genève du 12 août 1949 article 85, paragraphes 1 et 2 du Protocole additionnel 1 1.2, paragraphes 1 et 4, paragraphe 2 du Protocole additionnel 2. L'article 1, paragraphe 3 1° 2-4-5 et 6 de la loi du 16 juin 1993, modifiée par la loi du 10 février 1999. Les articles 51-52-53-66-67-392-393 et 394 du Code pénal belge et les articles 21-22-24-89-90-91-166-310 et 393 du Code pénal rwandais.” Transcript of Record, *Lecture de l'acte d'accusation par l'avocat général*, *supra* note 85.

121. Andrew Osborn, *Belgium puts nuns in dock for Rwanda genocide*, THE GUARDIAN (Apr. 16, 2001), <http://www.guardian.co.uk/world/2001/apr/17/warcrimes>.

122. LAURE DE VULPIAN, RWANDA, UN GENOCIDE OUBLIE? UN PROCES POUR MEMOIRE 49 (Belgium: Éditions Complexe 2004).

accused, of course, were anything but. The attorney general read the indictment against Srs. Gertrude and Kizito in open court:

In the prefecture of Butare in Rwanda, between April 17, 1994 and May 7, 1994, on several occasions, including April 22, 1994, April 25, 1994, and May 6, 1994.

A. Deliberately, with the intention of killing and in a premeditated fashion, murdered Déo GATETE and Placide SEPT.

B. Deliberately, with the intention of killing and in a premeditated fashion, murdered Chantal MUSABYEMARIYA and Arnaud Crispin BUTERA.

C. Deliberately, with the intention of killing and in a premeditated fashion, murdered a number of unspecified persons whose identities are not known as of this day.¹²³

Who are these women who pursued a life of the cloth, only to be accused of such heinous crimes? These are their biographies, as revealed at trial. Sr. Gertrude, née Consolata Mukangango, was born in Gitarama in central Rwanda on August 15, 1958.¹²⁴ She began her religious studies with the Benedictine nuns near her home and entered the Sovu convent at the age of nineteen.¹²⁵ She studied in France and in Belgium at the abbey of Maredret before rejoining the Sovu community in 1991.¹²⁶ As the mother superior, she led a group of thirty-one nuns, including seventeen Tutsi.¹²⁷ At trial, Sr. Gertrude expressed uncertainty about her own ethnicity: “I had a Hutu identity card,” she testified, “but since my youth and until the end of the genocide, I was always considered a Tutsi”¹²⁸ In 1994, her parents fled their home to escape militia attacks. Her father was shot and killed.¹²⁹ Her mother, brother, and two sisters managed to hide and they survived.¹³⁰

123. Transcript of Record, Cour d’assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Lecture de l’acte d’accusation par l’avocat général*, <http://web.archive.org/web/20090508075102/http://www.assisesrwanda2001.be/040100.html> (last visited Aug. 10, 2012); see also VULPIAN, *supra* note 122, at 49–52.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

Sr. Maria Kizito, née Julienne Mukabutera, is a native of Sovu born on June 22, 1964.¹³¹ After Sr. Kizito's father died, she took the holy vows and joined the Benedictine order at Sovu as a novice, or junior nun.¹³² Born to a Hutu family, some of Sr. Kizito's brothers are said to have been among the most zealous killers in Sovu.¹³³ Judging by the home where Sr. Kizito's mother lives today, her family is of average means for Sovu, where only a few homes have electricity and where floors are made of dirt or cement.¹³⁴

In the court psychiatrist's opinion, both Srs. Gertrude and Kizito suffered from psychological impairments.¹³⁵ The psychiatrist diagnosed Sr. Gertrude with post-traumatic stress disorder and "psychosis."¹³⁶ The psychiatrist also diagnosed Sr. Kizito with post-traumatic stress disorder, as well as a "fragile" and "neurotic" personality.¹³⁷ Despite these findings, the psychiatrist determined that both Srs. Gertrude and Kizito were capable of understanding the consequences of their actions and deemed them fit to stand trial.¹³⁸

C. *A Jury of One's Peers?*

In accordance with Belgian procedure,¹³⁹ a group of twelve Belgians was selected at random to sit as the jury for the four Rwandans accused of crimes allegedly committed more than 6000 kilometers away, in a small farming community where people live a lifestyle alien to most Europeans.

This arrangement warrants reflection. The potential difficulty in asking Belgians to judge Rwandans is not one of moral relativism or legal positivism. Murder was a crime under Rwandan law just as it was under Belgian law and both Rwanda and Belgium were parties to the Genocide Convention long before 1994.¹⁴⁰ Rather, the potential difficulty lies in Belgium's longstanding ties with Rwanda and the potential social and

131. *Id.*

132. *Id.* at 18.

133. AFRICAN RIGHTS, *supra* note 59, at 22.

134. This information is based on the author's personal observation during a visit Sr. Kizito's mother's home as part of the research and interviews conducted in 2007.

135. Transcript of Record, *Lecture de l'acte d'accusation par l'avocat général*, *supra* note 85.

136. *Id.*

137. *Id.*

138. *Id.*

139. JUDICIAL CODE [C.JUD/GER.W] art. 119 (Belg.).

140. *Chapter IV Human Rights I. Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants (last visited Aug. 10, 2012).

cultural gap between Belgians and Rwandans.¹⁴¹ Might a jury convict out of a sense of national guilt for Belgium's historical relationship with Rwanda? Would a Belgian jury possess the cultural understanding and sensitivity to sort truth from fiction?

During the summer of 2009, Gilles Vanderbeck, Sr. Kizito's attorney, was interviewed for this Article in his modern office in a prosperous Brussels neighborhood. Vanderbeck has made a career out of defending Rwandans accused of genocide. Like the other three lawyers hired to defend Srs. Gertrude and Kizito, he spent several months in Butare in the early 2000s with *Avocats Sans Frontières*, a Belgian NGO that arranged for international attorneys to represent victims and defendants before the Rwandan courts.¹⁴² He has defended four Rwandans, including Sr. Kizito, before the Belgian courts.¹⁴³ Vanderbeck implored:

Imagine how hard it is for a citizen of Belgium in 2001—somebody who knows nothing about Rwanda, or who does not know much about Rwanda except what he read in a newspaper, who has this feeling that we all had at the end of the genocide, that we could have done something to avoid it but that we did not do anything.¹⁴⁴

While Vanderbeck developed an understanding of Rwanda's history and culture through his work as a defense attorney for a decade, the jurors were not afforded the same opportunity. As Alain Vergauwen, co-counsel for Sr. Gertrude, told me, "Not only was there the consideration of distance, but also of attitude One of our regrets—it was only an eight week trial—is that we did not have enough time to permit the jurors to really understand Rwanda and its mentality"¹⁴⁵

Why is Rwanda's culture relevant to the factual question of Srs. Gertrude and Kizito's guilt? Serge Wahis, co-counsel for Sr. Kizito, related a story from when he represented a defendant before Rwanda's domestic courts: Accused of a crime carrying the death penalty, the defendant refused to confess, notwithstanding Wahis' advice. The defendant's father and brother testified that the defendant acted admirably

141. See, e.g., FORGES, *supra* note 42, at 34-40.

142. Interview with Gilles Vanderbeck, Defense Attorney for Sr. Kizito, in Brussels, Belgium (Sept. 7, 2009). Also note that *Avocats Sans Frontières* should not be confused with Lawyers Without Borders, an American NGO.

143. Interview with Gilles Vanderbeck, Defense Attorney for Sr. Kizito, in Brussels, Belgium (Sept. 7, 2009).

144. *Id.*

145. Interview with Alain Vergauwen & Serge Wahis, Defense Attorneys for Srs. Gertrude and Kizito, in Brussels, Belg. (Sept. 8, 2009) (translated from French by author).

during the genocide, tending his fields by day and caring for his wife at night. The three-judge panel, reportedly composed of one Tutsi and two Hutus, listened carefully to the testimony. After deliberating, the president of the panel told the witnesses that they would be subject to five years in prison for perjury. “The court will rehear you,” the president insisted, “and you will tell the truth.”¹⁴⁶ At this point, the witnesses dramatically altered their story, telling the court that the defendant “killed everything that moved and the next day took his club into a *cabaret* where he bragged about what he had done.”¹⁴⁷ While the judge may have simply intimidated the witnesses into telling a different version of the story, Wahis credited the judge for detecting false testimony.¹⁴⁸ Wahis noted: “A Belgian judge, or any foreign judge, could not have done that, and it is so complicated for us as Europeans to recognize when [a Rwandan] is not telling the truth.”¹⁴⁹

Of course, cultural differences are a common feature of typical domestic trials as well. Judge Vandermeersch pointed out that individuals who share common educational backgrounds may see the world similarly even though they come from two very different countries.¹⁵⁰ On the other hand, individuals who come from the same country may see the world very differently if, for example, one has gone to university in a city while the other had not completed primary education.¹⁵¹

D. Questions About the Accuracy of Witness Testimony

The jury’s ability to sort truth from fiction was particularly important because much of the most damning evidence against the nuns, in particular against Sr. Kizito, came in the form of witness testimony.¹⁵² As is the case in virtually all trials for the Rwandan genocide, no forensic or ballistic evidence was available. Rather, dozens of witnesses, including nuns and widows from Sovu, travelled from Rwanda to give testimony in Belgium.¹⁵³ The reliability of this testimony and the jury’s ability to accurately assess credibility would determine the fate of Srs. Gertrude and Kizito.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Interview with Damien Vandermeersch, *supra* note 114.

151. *Id.*

152. Transcript of Record, *Lecture de l’acte d’accusation par l’avocat général*, *supra* note 85. The letter Sr. Gertrude wrote pleading with the mayor to rid the monastery of the refugees provided strong evidence against her. *Id.*

153. Transcript of Record, *Lecture de l’acte d’accusation par l’avocat général*, *supra* note 85.

To this day, defense attorneys for the Sisters question the credibility of the testimony used to convict their clients. Vanderbeck lamented that some of the witnesses who had been slated to testify on behalf of the defense fell silent at trial:

[W]hen the time came for them [defense witnesses] to testify before the court, they did not change the content of their testimony, but they were almost silent. We had to ask them, “Please can you confirm?” But they did not want to be too involved because they knew they had to go back to Rwanda to live with these other sisters. . . . It’s unbelievable, to ask justice to be done in this situation.¹⁵⁴

Vanderbeck also raised doubt about the motives of the witnesses who testified against the Sisters. “Some of the sisters were against Sisters Gertrude and Kizito for several reasons,” he said, including because their families had been killed and because of in-fighting related to the election of the new mother superior.¹⁵⁵ In interviews, some Sovu residents expressed similar suspicions.¹⁵⁶

Indeed, witness testimony at trial often differed in important ways from statements the same witnesses provided to Belgian and Rwandan investigators years before. Gilles Vanderbeck and other defense lawyers pressed witnesses to explain the inconsistencies: “[W]hen you asked them [the witnesses] why, five years before when their memories were better, they said the opposite of what they were stating during the trial, they said maybe what they said was not recorded accurately or they were very—and they start crying—they were pushed by policemen.”¹⁵⁷

One of the most important subjects of witness testimony concerned who carried the gasoline used to burn the health center’s garage, where refugees had sought safety. After Witness 38, a female survivor, told the court that she saw both Srs. Gertrude and Kizito carrying gasoline to the health center, Vergauwen initiated the following colloquy:¹⁵⁸

Mr. Vergauwen: I will read the transcript . . . of an interview conducted [with Witness 38] by Mr. Delvaux and the Rwandan investigator. In that interview, the witness declared, “I saw Kizito giving Emmanuel Rekeraho a jerrycan of gasoline.” On October 8,

154. Interview with Gilles Vanderbeck, *supra* note 142.

155. *Id.*

156. Interview with Sovu resident, in Sovu, Rwanda (Sept. 2010).

157. Interview with Gilles Vanderbeck, *supra* note 142.

158. It is not apparent from the transcript whether it is Cédric or his brother Alain Vergauwen who is conducting the questioning.

1995, the witness, if I understand correctly, did not speak of Sr. Gertrude accompanying Sr. Kizito with the gasoline. And another question: why did she speak of a single jerrycan of gasoline? I would like to know, Mr. President, why there is a divergence today in her testimony.

President: According to the transcript . . . , Mrs. Witness 38, when she speaks of the episode of the gasoline, she speaks only of Sr. Kizito and only of a single jerrycan of gasoline

[Kinyarwanda translation and clarification]

Witness 38: It is possible that my statements were misunderstood or misinterpreted I was being interviewed by many people at the same time. Sometimes, it was difficult to tell them where the truth lay. What I am telling you now, it is what I saw, it is what I experienced.¹⁵⁹

Later, during questioning by Serge Wahis about another apparent discrepancy between her testimony at trial and her past statements, Witness 38 declared: “I told you that after the war in 1994–1995, we were questioned by many people. Finally, we thought that it was a game and, sometimes, we told them whatever we wanted.”¹⁶⁰ The president of the court interjected, telling the jurors:

I would like to tell the ladies and gentlemen of the jury that they should not be surprised to hear contradictory statements in witness testimony from time to time. It happens even in ordinary trials. So do not be surprised if [one witness says one thing] and another witness says the opposite. Do not be surprised.¹⁶¹

Similar colloquies were repeated with other witnesses, including Laurent Ntezimana (no relation to Vincent Ntezimana, a co-defendant), who visited the religious compound twice during the genocide to deliver rice:

PRESIDENT: Do you remember the nun who took delivery of the rice when you arrived?

159. Transcript of Record, Cour d’assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Audition des témoins: le témoin 38*, <http://assisesrwanda2001.be/080605.html> (last visited Aug. 10, 2012) (translation from French by author).

160. *Id.*

161. *Id.*

WITNESS 110 (NTEZIMANA): It was the mother superior [Sr. Gertrude].

PRESIDENT: In your declaration, you speak of Sr. Scholastique.

WITNESS 110: Also, yes. I think I saw them both.

PRESIDENT: You have explained that the rice was unloaded in front of the communion wafer workshop.

WITNESS 110: Yes.

PRESIDENT: You also have explained that Sr. Scholastique called refugees to help unload the sacks of rice.

WITNESS 110: I think so, yes.

PRESIDENT: But in your declaration, at the time, you said that you never saw the mother superior, Sr. Gertrude, that day. So, do you remember having seen, having seen only Sr. Scholastique?

WITNESS 110: I'm confused about this subject.¹⁶²

Several phenomena may help explain these and other inconsistencies in witness testimony. The problem of memory fallibility, which plagues all testimony, may be exacerbated when the events in question are highly traumatic.¹⁶³ Furthermore, travelling by airplane to Europe for the first time for questioning and testimony in a courtroom with the presence of translators, lawyers, the judge, and jurors may have been an overwhelming experience for the Rwandan witnesses. Finally, as Judge Vandermeersch has observed in his scholarly writing, “[l]ong lapses [in time between the events in question and the trial] serve to erode witnesses’ recollections, [and] create discrepancies in [witness testimony].”¹⁶⁴

Social dynamics also might have shaped the version of events that witnesses provided to investigators or at trial. According to Filip

162. Transcript of Record, Cour d’assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Audition des témoins: le témoin 110*, <http://assisesrwanda2001.be/080604.html> (last visited Aug. 10, 2012) (translation from French by author).

163. For an overview of the problem of memory fallibility in ordinary contexts, see generally Laura Engelhardt, *The Problem with Eyewitness Testimony: Commentary on a Talk by George Fisher & Barbara Tversky*, 1 STAN. J. LEGAL STUD. 25 (1999), available at <http://agora.stanford.edu/sjls/images/pdf/engelhardt.pdf>.

164. Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT’L CRIM. JUST. 400, 411 (2005).

Reyntjens, Rwandans tend to communicate “strategically.”¹⁶⁵ Before responding to a question, Rwandans may consider the personal consequences: Does the person posing the question have authority over me? Can this person help me or hurt me? Can they arrest me, have me fired, or even kill me?¹⁶⁶ In the course of research in Sovu for the Article, several interviewees expressed fear that they would be punished for expressing opinions contrary to government policies. One woman said, “Do not show my answers to the authorities. They would condemn me.”¹⁶⁷

Feelings of insecurity also could have affected witness testimony, whether the witness was testifying for the prosecution or the defense. But protections for witnesses can be in tension with the defendant’s confrontation rights. As Judge Vandermeersch has written:

While witnesses must receive protective measures, namely through anonymity, such protection cannot endanger defence rights and the principle of contradiction. Faced with unanimous opprobrium in cases of serious violations of humanitarian law, the defence has a particularly delicate task. Does it have sufficient resources to resist prejudice? How can it ensure contradictory debate?¹⁶⁸

Vanderbeck expressed the view that “most of the witnesses were really guided by their lawyers or local authorities to make sure that their testimony was going to the sense that the sisters are guilty.”¹⁶⁹ Witnesses flew together from Rwanda—with the expenses covered by Belgium—and witnesses who had planned to testify on behalf of the Sisters may have been pressured to change their testimony. “When you were a witness for [the defense],” Vanderbeck explained, “you were not well considered by other people and you may risk your life or the lives of your relatives [I]t’s hard when the time comes to testify to be honest.”¹⁷⁰ While these problems are not unique to the trial of Srs. Gertrude and Kizito, the Belgian jury would have struggled to comprehend the intense social pressures that a Rwandan might have felt in preparing to testify for or against the accused. Moreover, although it is difficult to assess the pressures facing witnesses, acts of intimidation and violence against

165. LAURE DE VULPIAN, RWANDA, UN GENOCIDE OUBLIÉ? UN PROCÈS POUR MÉMOIRE 82 (Belgium: Éditions Complexe 2004).

166. *Id.*

167. Interview with anonymous Sovu resident in Sovu, Rwanda (May 2007).

168. Vandermeersch, *supra* note 164, at 411.

169. Interview with Gilles Vanderbeck, *supra* note 142.

170. *Id.*

genocide survivors and *gacaca* witnesses took place in Sovu in 2006 to 2007.¹⁷¹

E. Emmanuel Rekeraho: The Key Witness Who Never Testified

While the testimony of survivors and nuns was vital, perhaps *the* key prosecution witness was Emmanuel Rekeraho, the man who is widely seen as the leader of the genocide in Sovu. But Rekeraho never appeared in court to testify.¹⁷² During the trial of Srs. Gertrude and Kizito, Rekeraho remained in Rwanda, where he had been under lock and key since 1996, when Rwandan authorities arrested him in Zaire.¹⁷³ Although Rekeraho did not travel to Belgium to testify, statements that Rekeraho had given to an investigator for the ICTR condemned the Sisters.¹⁷⁴ The ICTR investigator testified at trial and a written copy of Rekeraho's statement was admitted into evidence.¹⁷⁵ Yet during the trial, Rekeraho sent a letter to the investigative judge in which he called his statements to the ICTR investigator "pure lies" and declared that the Sisters are "truly innocent."¹⁷⁶ Rekeraho's story—how he came to provide a statement to the ICTR investigator, his subsequent change of heart about the role the Sisters played in the genocide, and the reasons that he did not testify in Belgium—is indispensable in evaluating the trial of Srs. Gertrude and Kizito.

In February 1999, Rekeraho found himself imprisoned in one of Rwanda's infamous jails, facing the death penalty.¹⁷⁷ An ICTR investigator, Réjean Tremblay, travelled to Rwanda to interview Rekeraho about the massacres perpetrated in Sovu.¹⁷⁸ At the time, the ICTR's focus

171. See Max Rettig, *Gacaca: Truth, Justice, and Reconciliation in Post-Conflict Rwanda?*, 51 AFR. STUD. REV. 25, 42–44 (2008).

172. Luc Reydam, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT'L CRIM. JUST. 428, 436 (2003).

173. Interview with Emmanuel Rekeraho, Karubanda Prison, Butare, Rwanda (May 24, 2007).

174. *Id.*

175. *Id.*

176. Letter from Emmanuel Rekeraho to Judge Damien Vandermeersch, May 5, 2001 (on file with author).

177. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 246–49 (1998). Gourevitch describes walking through a packed prison in Gitarama in 1995, where standing water had caused inmates' feet to rot and where "even during the dry season a scum of condensation, urine, and bits of dropped food covered the floor." *Id.* This prison was one of the worst in Rwanda at the time, and although prison conditions have improved throughout the country since 1995, they remain overcrowded.

178. Transcript of Record, Cour d'assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Audition des témoins: Réjean Tremblay*, <http://web.archive.org/web/20050224213736/http://www.assisesrwanda2001.be/080603>

was on Srs. Gertrude and Kizito. Initially, Rekeraho stonewalled Tremblay, and then he denied playing any role in the genocide and refused to provide any information to further the investigation.¹⁷⁹ Tremblay and his translator left empty-handed.¹⁸⁰

Months later, Tremblay received a copy of Sr. Gertrude's application for political asylum in Belgium. In the letter, Sr. Gertrude accused Rekeraho of having organized the massacres in Sovu.¹⁸¹ Tremblay returned to see Rekeraho and showed him the letter. Rekeraho's attitude changed abruptly and he agreed to provide a statement to the ICTR. In a fifty-six page sworn statement, dated June 7, 1999, Rekeraho acknowledged his role in the genocide, provided damning testimony against Srs. Gertrude and Kizito, and agreed to serve as a prosecution witness in Arusha.¹⁸² In exchange, Rekeraho's case would be transferred from the Rwandan courts, where he was still awaiting trial, to the ICTR.¹⁸³

It is not hard to see why Rekeraho would have found this deal enticing. The maximum penalty at the ICTR is life imprisonment, whereas Rekeraho faced the death penalty in Rwanda.¹⁸⁴ Moreover, in Arusha, Rekeraho would have lived in far more comfortable conditions, as compared to a Rwandan prison.¹⁸⁵ In his closing statement on behalf of Sr. Gertrude, Vergauwen drew an explicit link between Rekeraho's desire to be transferred to the ICTR and his statements condemning Srs. Gertrude and Kizito: "For Emmanuel Rekeraho, the International Criminal Tribunal

.html (last visited Aug. 10, 2012) (translation from French by author); *see also* *Le Soir*, 18 April 2001: 'Contre l'évidence. Rekeraho rétracte ses aveux'.

179. Transcript of Record, Cour d'assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Auditions des témoins: le témoin Réjean Tremblay, ICTR investigator*, <http://assisesrwanda2001.be/080603.html> (last visited Aug. 10, 2012) (translation from French by author).

180. *Id.*

181. *Id.*

182. Copy on file with author. *See also* Transcript of Record, *Auditions des témoins: le témoin Réjean Tremblay, ICTR investigator*, *supra* note 181.

183. Transcript of Record, Cour d'assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Auditions des témoins: le témoin Réjean Tremblay, ICTR investigator*, <http://assisesrwanda2001.be/080603.html> (translation from French by author).

184. Although Rekeraho was sentenced to death, Rwanda abolished the death penalty in 2007 and Rekeraho's sentence was commuted to life. *See* Statute of the International Criminal Tribunal for Rwanda, art. 23 (2010), *available at* <http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf> ("The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.").

185. *Id.*

is like an oasis in the desert. Arusha prison is the Rolls Royce of prisons.”¹⁸⁶

After Rekeraho signed his statement in June 1999, Tremblay officially recommended that the ICTR ask the Rwandan government to suspend its case against Rekeraho.¹⁸⁷ But the ICTR was uninterested in prosecuting Rekeraho, instead focusing on higher-ranking figures.¹⁸⁸ As a result, the ICTR had little use for Rekeraho’s statement, and it did not object when a Rwandan military tribunal proceeded to try Rekeraho.¹⁸⁹ The military tribunal sentenced Rekeraho to death; his co-accused, also from Sovu, received a life sentence.¹⁹⁰

The news that the ICTR had decided to allow Rekeraho’s case to proceed in the Rwandan courts came as a shock to Tremblay, and Rekeraho was incensed. When Tremblay went to visit him again in Rwanda, Rekeraho told him that if he was not transferred to Arusha, “he would tell everyone that he lied, that he did not tell the truth” in his declaration against the Sisters.¹⁹¹ In a letter Rekeraho sent during the trial to investigative judge Damien Vandermeersch, Rekeraho called the allegations against Srs. Gertrude and Kizito “pure lies.”¹⁹² The Sisters were not willful participants in the genocide, as he had said before.¹⁹³ No, they were “truly innocent.”¹⁹⁴ He implored Judge Vandermeersch to disregard the accusations against the Sisters, writing that the accusations “sully my dignity and the innocent souls” of the Sisters.¹⁹⁵

186. Transcript of Record, Cour d’assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Plaidoires de la défense: Défense de Consolata Mukangango* (Alain Vergauwen), <http://assisesrwanda2001.be/090404.html> (last visited Aug. 10, 2012) (translation from French by author).

187. Transcript of Record, Cour d’assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Auditions des témoins: le témoin Réjean Tremblay, ICTR investigator*, <http://assisesrwanda2001.be/080603.html> (last visited Aug. 10, 2012) (translation from French by author).

188. *Id.*

189. *Id.*

190. *Auditorat Militaire Général contre Adjudant Chef Rekeraho et Caporal Kamanayo* [Military Prosecutor v. Chief Officer Rekeraho and Corporal Kamanayo], RPA 0012/CM-CS/KGL/2000, November 15, 2000. See *supra* note 184; Ofeibea Quist-Arcton, *Rwanda Lawmakers Vote to Scrap Death Penalty*, NATIONAL PUBLIC RADIO (June 9, 2007), <http://www.npr.org/templates/story/story.php?storyId=10910112>.

191. Transcript of Record, *Auditions des témoins: le témoin Réjean Tremblay, ICTR investigator*, *supra* note 181.

192. Letter from Emmanuel Rekeraho to Judge Damien Vandermeersch, May 5, 2001, *supra* note 176 (on file with author).

193. *Id.*

194. *Id.*

195. *Id.*

After the trial, Rekeraho continued to proclaim the innocence of the Sisters. In a letter he wrote to Srs. Gertrude and Kizito after the trial, Rekeraho claims that he told Judge Vandermeersch the “unshakable truth”—that Srs. Gertrude and Kizito were in fact innocent.¹⁹⁶ When interviewed in 2007 in Karubanda Prison, Rekeraho remained adamant about the innocence of Sisters Gertrude and Kizito.¹⁹⁷ A charismatic figure, Rekeraho claimed that the Sisters played no role at all in the genocide.¹⁹⁸ “They are accused of giving me gasoline to burn the garage. But I was a driver and I was the leader of the killings,” he reasoned.¹⁹⁹ “I would have had all the materials I needed.”²⁰⁰ He added that he would not recognize Sr. Kizito if he saw her today. If he did not know Sr. Kizito, he reasoned, how could she have conspired with him to perpetrate the genocide?²⁰¹

Rekeraho has offered an array of explanations for his change of heart. In 2007, he explained, “I gave false testimony implicating the Sisters because I was seriously tortured. Actually, they are innocent.”²⁰² In a letter to Srs. Gertrude and Kizito, Rekeraho claimed that Tremblay and his interpreter tried to bribe him with cigarettes and money.²⁰³ He also claimed that Tremblay offered him a deal in which his sons would be released from prison, his home and land would be returned to him, his family’s security would be guaranteed, and he would be transferred to Arusha.²⁰⁴ Ultimately, Rekeraho explained, he gave in to the pressure. In the letter he wrote to the Sisters after their trial, he offered an apology: “I humbly ask for your forgiveness for lying about you and consequently [for lying] to myself.”²⁰⁵

While Rekeraho wanted to testify in defense of the Sisters, the Belgian government refused to permit him to travel to Brussels. According to Vanderbeck, the Belgian government feared that Rekeraho would claim

196. Letter from Emmanuel Rekeraho to Damien Vandermeersch, Juge d’Instruction, May 5, 2005 (on file with author).

197. Interview with Emmanuel Rekeraho, Karubanda Prison, Butare, Rwanda (May 24, 2007).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* While human rights observers have documented deplorable prison conditions and instances of prisoner abuse in Rwanda, the author can neither confirm nor discredit Rekeraho’s claim that he was tortured.

203. See Letter from Emmanuel Rekeraho to Srs. Gertrude and Kizito, at 4 (date unknown) (on file with author).

204. *Id.*

205. Letter from Emmanuel Rekeraho to Srs. Gertrude and Kizito, *supra* note 203.

political asylum if he were allowed into the country.²⁰⁶ Rekeraho implored the court to hear his testimony. “If I can’t be brought to Brussels to verbally testify, I ask that the court come here,” he wrote in a letter to the Sisters.²⁰⁷ He continued, “I will then be able to tell [the court] what took place at the Sovu Monastery.”²⁰⁸ Before the trial, Rekeraho had the opportunity to tell his new version of the story to Judge Vandermeersch when the judge travelled to Rwanda in March 2000.²⁰⁹ Rekeraho claims that he told Judge Vandermeersch the “unshakable truth”²¹⁰—that Srs. Gertrude and Kizito were innocent.

Instead of hearing Rekeraho’s testimony live in court, the court introduced the written statement that Rekeraho provided to the ICTR investigators and called Tremblay to testify.²¹¹ The statement and Tremblay’s testimony proved highly damaging to the Sisters. According to Rekeraho’s statement, Rekeraho coordinated closely with Srs. Gertrude and Kizito.²¹² Around April 7 or April 8, 1994, Sr. Gertrude provided Rekeraho the use of one of the health center’s vehicles, ostensibly so that he would be able to arrive quickly should anyone try to attack the monastery.²¹³ Srs. Gertrude and Kizito provided the gasoline used to incinerate the health center garage, but they did not carry it; rather, they followed a man by the name of Niondo, who carried two jerrycans.²¹⁴ After the first day of killings, soaked in blood, Rekeraho and two other local genocide leaders went into the monastery, where Sr. Kizito brought them soap and a towel to wash and served them milk and beer.²¹⁵ Two days later, Sr. Gertrude paid Rekeraho 100,000 Rwandan francs to pay for the burial of those who had been murdered.²¹⁶

In the days after the April 22 massacre, according to Rekeraho’s statement and Tremblay’s testimony, Sr. Gertrude implored Rekeraho to take swift action to rid the monastery of the remaining refugees, but Rekeraho refused.²¹⁷ Rekeraho saw himself as the protector of the

206. Interview with Gilles Vanderbeck, *supra* note 142, at 8.

207. See Letter from Emmanuel Rekeraho to Srs. Gertrude and Kizito, *supra* note 203, at 4.

208. See *id.*

209. See *id.*

210. *Id.* at 2.

211. Transcript of Record, *Auditions des témoins: le témoin Réjean Tremblay, ICTR investigator*, *supra* note 181; Statement of Emmanuel Rekeraho to the International Criminal Tribunal for Rwanda, June 9, 1999 (copy on file with author).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

monastery, and he wanted to save the families of the nuns.²¹⁸ The nuns and their families would never govern Rwanda, so he had no interest in killing them. Rekeraho also claims that he wanted to allow the Red Cross to set up tents in the monastery's courtyard, but Sr. Gertrude refused to allow it.²¹⁹ These disagreements, and others, cooled the previously warm relationship between Sovu's mother superior and its chief executioner.²²⁰

During Tremblay's testimony, the president of the court posed the question that must have been on everyone's mind: did the allure of a deal to bring Rekeraho to the ICTR "induce him to make statements that did not correspond to reality?"²²¹ Tremblay responded by insisting that Rekeraho had given his statement voluntarily.²²² But as discussed above, there are a number of reasons why Rekeraho may have been motivated to implicate the Sisters. The allure of being transferred to Arusha is one. Rekeraho also said in an interview for this Article that he was angry that Sr. Gertrude denied her role in the genocide and accused him of certain crimes that he claims he did not commit. Although Rekeraho is an enigmatic figure, his presence in court would have given the jury at least the opportunity to assess his credibility—a daunting but important task that is the crux of fact-finding.

F. Verdict and Sentence

In all, dozens of witnesses testified in court for and against the four co-defendants and the President read an additional three witness statements aloud. Finally, the Sisters spoke:

SR. GERTRUDE: Mr. President, ladies and gentlemen of the jury, I wanted to save my community. Perhaps that was not the right thing to do, but I never wanted the massacres to take place. Rwanda was in chaos and in the context of total chaos, I had to make decisions in dealing with the militias. I may have made unwise decisions, but I never wanted the massacres. I have confidence in justice. Thank you²²³

218. *Id.*

219. *Id.*

220. *Id.*

221. Transcript of Record, *Auditions des témoins: le témoin Réjean Tremblay, ICTR investigator*, *supra* note 181.

222. *Id.*

223. Transcript of Record, Cour d'assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Conclusions des prévenus: Consolata Mukanganga*, <http://web.archive.org/web/20050228103637/http://www.assisesrwanda2001>

SR. KIZITO: Mr. President, judges, ladies and gentlemen of the jury. As a Sovu native and a woman of Hutu origins, I do not know how to respond to Sovu's widows, who were waiting for me to help them. I must live with that every day. Nonetheless, I never gave anything to the militias for ill. What I know is that my fellow nuns and I remained united, and I helped them as best I could during the three-month ordeal. Mr. President, judges, ladies and gentlemen of the jury, I have confidence in justice and I thank you.²²⁴

Upon the conclusion of Sr. Kizito's statement, and before sending the jury to begin its deliberations, the president described the task awaiting the jury. "Gather strength tonight," he urged the jurors, "so that you can endure what lies ahead tomorrow."²²⁵

On June 8, 2001, after deliberating for eleven hours, the jury returned its verdict: guilty on all counts.²²⁶ Sr. Gertrude was sentenced to fifteen years in prison, while Sr. Kizito received a twelve year sentence.²²⁷ In response to the verdict, the Sisters reacted stoically. Sr. Gertrude declined to make a statement but courteously thanked the court for the opportunity to do so.²²⁸ Although she called the jury's verdict a "lie," Sr. Kizito reaffirmed her "confidence in justice" and added that she would not "lose her courage."²²⁹ To this day, Vanderbeck remains convinced that the Sisters "were convicted as cowards, more than as killers. They were scared like hell," he explains.²³⁰ "They preferred to avoid helping people so that they could assure that they would stay alive."²³¹ The late human rights activist and historian Alison Des Forges, who testified at the trial, responded to the verdict with a mix of approval and dissatisfaction: "It's sad," she said. "The tragedy is that it's easy to convict nuns—but when are we ever going to get the people who were the brains behind it?"²³² A

.be/090803.html (last visited Aug. 10, 2012) (translation from French by author).

224. *Id.*

225. *Id.*

226. Assize Court of Brussels, verdict of 8 June 2001; *see also Nuns jailed for genocide role*, BBC (June 8, 2001), available at <http://news.bbc.co.uk/2/hi/europe/1376692.stm>.

227. *Nuns Jailed for Genocide Role*, BBC NEWS (June 8, 2001, 17:20 GMT), <http://news.bbc.co.uk/2/hi/europe/1376692.stm>.

228. *See generally* Transcript of Record, Cour d'assises de Bruxelles, *Prosecutor v. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, Julienne Mukabutera, Conclusions des accusés: Consolata Mukangango*, <http://web.archive.org/web/20050228164002/http://www.assiseswanda2001.be/110403.html> (last visited Aug. 10, 2012) (translation from French by author).

229. *Id.*

230. Interview with Gilles Vanderbeck, *supra* note 142.

231. *Id.*

232. Keith B. Richburg, *Rwandan Nuns Jailed in Genocide*, WASH. POST (June 9, 2001), <http://www.washingtonpost.com/ac2/wp-dyn/A42755-2001Jun8>.

Rwandan living in Belgium offered similar sentiments: “It’s justice. But it’s just the beginning.”²³³

Consistent with standard Belgian procedure, whereby individuals serve only a fraction of their sentences, Srs. Gertrude and Kizito were released after serving half of their prison terms.²³⁴ Today, they are on conditional release at the monastery in Maredret, the same monastery where they lived after fleeing Rwanda.²³⁵ They are essentially under house arrest because they do not have permanent legal status in Belgium. As of September 2010, Belgian immigration authorities were still deciding how to handle their case.²³⁶ Despite living in legal limbo, the Sisters enjoy a remarkable degree of freedom. Although Sr. Kizito seldom strays far from the monastery, Sr. Gertrude leaves frequently to attend university, where she is studying for a degree in law.²³⁷

V. LESSONS FOR TRANSITIONAL JUSTICE

Whether a trial has been successful depends on the definition of “success.” Different countries and cultures adhere to different ideas about justice. Should transnational trials respect the values of the country where the atrocities occurred? Should setting the goals of transitional justice be the sole prerogative of the nation in which the atrocities occurred, or should the international community play a role in deciding what goals to pursue? Once the decision is made to conduct trials, should they take place in the country where the atrocities occurred, in an international forum, or in the territory of a foreign state? Should procedural fairness, like western-style due process protections for the accused, be elevated above other goals, such as punishing the guilty, promoting local reconciliation, or building domestic judicial capacity? Who should decide what goals are paramount and how to achieve them? This Part surveys the goals of transitional justice and explores the strengths and weakness of various types of trials. It goes on to evaluate the trial of Srs. Gertrude and Kizito based on a variety of metrics.

233. *Id.*

234. Interview with Gilles Vanderbeck, Defense Attorney for Sr. Kizito, in Brussels, Belgium (Sept. 7, 2009).

235. *Id.*

236. Interview with Serge Wahis, Attorney for Sr. Kizito, in Brussels, Belgium (Sept. 16, 2010).

237. Interview with Gilles Vanderbeck, Defense Attorney for Sr. Kizito, in Brussels, Belgium (Sept. 7, 2009).

A. *The Goals of Transitional Justice*

Transitional justice mechanisms aim to achieve an array of objectives, including sanctioning wrongdoing, making reliable determinations of guilt, individualizing guilt, ensuring fair trial standards are met, deterring future crimes, providing victim-centered justice, creating a historical record of past abuses, building national judicial capacity, strengthening respect for the rule of law, and contributing to long-term peace and reconciliation.²³⁸

While some of these objectives can be achieved simultaneously, others may be mutually exclusive. For example, scholars like Payam Akhavan cautiously argue that international prosecutions for mass atrocity may deter future atrocities.²³⁹ Thus, in theory, the objectives of sanctioning wrongdoing and deterring future crimes would not be mutually exclusive; rather, trials would be the vehicle through which deterrence is achieved. But it is difficult to discern a cause and effect relationship between prosecutions and deterrence. Deterrence comes in two forms: specific and general. Specific deterrence prevents the accused from committing crimes in the future.²⁴⁰ This goal is readily attainable through criminal prosecutions and imprisonment. On the other hand, general deterrence—where the threat of punishment discourages others from committing comparable crimes in the future—is more elusive for a variety of reasons.²⁴¹ Although prosecutions have increased through the establishment of the ad hoc criminal tribunals for Rwanda and Yugoslavia, and the International Criminal Court, there remains a low risk of prosecution for mass atrocity.²⁴² As a result, David Wippman argues that promoting general deterrence “would seem to require far more than the occasional punishment of a particular offender.”²⁴³

Another important debate is whether transitional justice mechanisms form an obstacle to peace and stability.²⁴⁴ Jack Snyder and Leslie

238. This list is derived in part from Allen Weiner, Co-Director, Stanford Center on International Conflict and Negotiation, Lecture at the Center on Democracy, Development, and the Rule of Law at Stanford University: *Transitional Justice: Dealing with Past Abuses* (Aug. 11, 2009).

239. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001). For an overview of the debate on the deterrent capacity of international trials, see generally David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999).

240. Weiner, *supra* note 238.

241. *Id.*

242. *Id.*

243. Wippman, *supra* note 239, at 486.

244. The so-called “peace versus justice” debate was thrust to the fore again over the fate of

Vinjamuri argue that “evidence from recent cases casts doubt on the claims that international trials deter future atrocities, contribute to consolidating the rule of law or democracy, or pave the way for peace.”²⁴⁵ Truth commissions, they argue, do little besides provide political cover for amnesties, which “pave the way for peace.”²⁴⁶ Indeed, conventional wisdom holds that a peaceful transition from apartheid to democratic governance in South Africa would have been impossible had the African National Congress insisted on criminal accountability.²⁴⁷ Writing about the aftermath of World War I, politics and international affairs professor Gary Bass argues that prosecution of lower-level accused at Leipzig “made the Allies look vindictive and weak” and “galvanized the German right and thus helped to undermine democracy in the Weimar Republic.”²⁴⁸ But not all scholars agree that retributive justice, in the form of trials, are an obstacle to peace. After reviewing historical evidence, Kathryn Sikkink and Carrie Booth Walling concluded in an influential article that “it remains hard to sustain in the face of this data that human rights trials actually lead to more atrocities.”²⁴⁹

In addition, international and transnational trials typically afford robust due process protections to the accused; however, because they purposefully sidestep national courts, they may not contribute to the development of domestic judicial capacity or promote norm penetration. Furthermore, international and transnational trials largely have failed to resonate with domestic audiences that do not understand the nature or

former Libyan leader Muammar el-Qaddafi. *See, e.g.*, Kathryn Sikkink, *Making Tyrants Do Time*, N.Y. TIMES, Sept. 15, 2011, at A29, available at <http://www.nytimes.com/2011/09/16/opinion/making-tyrants-do-time.html>; David Kaye, *What to Do With Qaddafi*, N.Y. TIMES, Sept. 1, 2011, at A29, available at <http://www.nytimes.com/2011/09/01/opinion/what-to-do-with-qaddafi.html>; Mark S. Ellis, *Peace for All or Justice for One?*, N.Y. TIMES (Aug. 11, 2011), <http://www.nytimes.com/2011/08/12/opinion/12iht-edellis12.html?pagewanted=all>.

245. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SEC. 5, 20 (2003/2004).

246. *Id.*

247. Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, 52 J. OF INT’L AFFAIRS 647, 650 (1999) (“The former government and its security forces never would have allowed the transition to a democratic order had its members, supporters or operatives been exposed to arrest, prosecution and imprisonment.”).

248. GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES* 104–05 (2000).

249. KATHRYN SIKKINK & CARRIE BOOTH WALLING, *ERRORS ABOUT TRIALS: THE POLITICAL REALITY OF THE JUSTICE CASCADE AND ITS IMPACT* 25 (2005) (paper presented at the annual meeting of the American Political Science Association, Washington D.C., Aug. 31–Sept. 3, 2005), available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/4/0/8/0/pages40806/p40806-1.php.

purpose of due process rights and that do not have ready access to news about the trials.²⁵⁰

Thus, not all trials are created equally. International and transnational tribunals can make a number of contributions to post-genocide justice. Compared to the legal systems of countries in transition, international tribunals are more likely to have highly trained lawyers and judges who can resolve complex legal questions.²⁵¹ International tribunals are also more likely to have the physical infrastructure and resources to carry out investigations and trials.²⁵² In some cases, international tribunals may benefit from the perception, if not the reality, of impartiality because the court is not staffed by parties to the conflict.²⁵³ Finally, international tribunals may be more effective than domestic tribunals at obtaining physical custody over wanted persons.²⁵⁴ Yet international and transnational tribunals typically are physically and culturally distant from the country where the crimes took place, and they have suffered from a crisis of legitimacy.²⁵⁵ Rwandans might well wonder: What business does Belgium have adjudicating crimes committed in Rwanda when it has such a dubious record from the colonial period? What business does the UN have adjudicating crimes committed in Rwanda when it failed to act more decisively to prevent or halt the atrocities?

By contrast, national trials are presumed to be accessible to the affected population for reasons of venue and language. Trying those responsible for atrocities in the country where the atrocities occurred can also build the capacity of the national justice system: judges, prosecutors, and defense attorneys will have to be trained; courthouses will have to be built; case management systems will have to be designed and implemented. But after large-scale violence, national justice systems are unlikely to be equipped to adjudicate large volumes of cases. It is also, perhaps, naïve to expect to build judicial capacity by trying some of the most complex, highly

250. See, e.g., Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 49, 56 (Eric Stover & Harvey M. Weinstein eds., 2004) (“The [ICTR] devotes only a very small portion of its budget to publicizing its work, leaving the task instead to organizations such as Internews In 2002 the ICTR opened a center in the capital, Kigali, to disseminate information about the tribunal. Attractive to a tiny part of the urban elite, the center offers little to the majority of Rwandans, who are illiterate and live in rural areas.”).

251. Neil Kritz, *War Crimes Trials: Who Should Conduct Them—and How*, in *WAR CRIMES: THE LEGACY OF NUREMBERG* 170 (Belinda Cooper ed., 1999).

252. *Id.*

253. Kritz, *supra* note 251, at 170.

254. *Id.*

255. Akhavan, *supra* note 239, at 25.

sensitive criminal cases. In some instances, including post-1994 Rwanda, it would have taken decades or more to build judicial capacity to the point where the courts could credibly process tens of thousands of cases.²⁵⁶ Furthermore, national trials may suffer from a credibility gap if key populations do not regard the domestic justice system as impartial.

At one point, local, traditional dispute resolution mechanisms were *en vogue* among some scholars of transitional justice. As Lars Waldorf observes, proponents of local justice have argued that “after mass atrocities, restorative justice processes can promote accountability, deterrence, collective memory, truth, reconciliation, and the rule of law more successfully than international and national criminal trials.”²⁵⁷ Despite their promise, local legal mechanisms also suffer from a number of frailties: local trials tend to deny due process protections to the accused; they may inflame local tensions precisely because they are so proximate to the people who have been most directly affected by past violence; and if too tightly controlled by the state, they lose their character as decentralized, traditional forms of dispute resolution—the very source of their credibility.²⁵⁸

Professor Laura Dickinson argues that hybrid courts, which blend elements of international and national justice, may promote capacity building and norm penetration more effectively than either international or national trials and may enjoy greater legitimacy in the eyes of the affected population.²⁵⁹ To date, however, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia have been met with decidedly mixed reviews.²⁶⁰ Hybrid courts have struggled to secure sufficient resources and ensure proper coordination between the national and international components.²⁶¹ Hybrid tribunals also face the difficult task of establishing a body of procedural and substantive law.²⁶²

256. Peter Uvin, *Difficult Choices in the New Post-Conflict Agenda: The International Community in Rwanda After the Genocide*, 22 *THIRD WORLD Q.* 177, 183 (2001).

257. Lars Waldorf, *Mass Justice for Mass Atrocity? Rethinking Local Justice as Transitional Justice*, 79 *TEMP. L. REV.* 1, 16 (2006).

258. *See, e.g., id.* at 85–86; Rettig, *supra* note 171, at 25.

259. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 *AM. J. INT’L L.* 295–96 (2003).

260. *See, e.g.,* THIERRY CRUVELLIER, *FROM THE TAYLOR TRIAL TO A LASTING LEGACY: PUTTING THE SPECIAL COURT MODEL TO THE TEST*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE AND SIERRA LEONE COURT MONITORING PROGRAMME (2009).

261. Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 *INT’L L. & POL.* 1013, 1044–52 (2009).

262. *Id.* at 1044.

B. *Evaluating the Trial of Srs. Gertrude and Kizito*

In the wake of mass atrocity, there is no panacea. To devise the most effective legal response as part of a country's transition to peace and stability, policymakers must carefully consider their objectives and, from the array of possibilities, identify the response that is best suited to achieving those objectives. This Section examines the choices that were made in prosecuting Srs. Gertrude and Kizito in Belgium and evaluates how well the trial achieved various objectives.

1. *Sanctioning Wrongdoing*

In the wake of mass atrocity, a threshold determination is whether to prosecute, establish a truth commission, grant amnesty, pursue an alternative form of transitional justice, or do nothing. As discussed in the previous Section, each of these modes of transitional justice has certain strengths and weaknesses. Many countries have chosen to eschew prosecution, at least in the short term, to preserve stability. Rwanda, however, has chosen a different path. Since 1994, the Rwandan government has aggressively prosecuted alleged perpetrators from the political and military leadership to low-level perpetrators accused of pillaging.²⁶³ The *gacaca* courts alone have heard more than one million cases.²⁶⁴ In this respect, Belgium's decision to prosecute the Sisters was consistent with Rwanda's own emphasis on prosecution. Assuming that the jury accurately adjudged the guilt of Srs. Gertrude and Kizito, the trial succeeded in sanctioning wrongdoing.

2. *Due Process*

Closely related to the decision to prosecute is the question of which authority should prosecute. European and North American nations have come to loggerheads with Rwanda over this question. Rwanda has pushed aggressively for European and North American countries to arrest and extradite suspected *génocidaires* found in their territory.²⁶⁵ In the case of

263. Lars Waldorf, *Mass Justice for Mass Atrocity? Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 40–41 (2006).

264. *1994 Genocide: Gacaca Trials Discharge One Million Cases So Far*, HIRONDELLE NEWS AGENCY (Mar. 4, 2009), <http://www.hirondellenews.com/content/view/12200/1192/>. The number of cases should be distinguished from the number of individuals tried by the *gacaca* courts. A single individual could be tried in multiple cases. Thus, the actual number of individuals tried by the *gacaca* courts is likely to be less than the number of cases.

265. In the most high profile such case, Rwanda pushed the French government to arrest the

Srs. Gertrude and Kizito, prosecution by the Rwandan authorities was never seriously considered because Rwanda and Belgium have never had an extradition treaty.²⁶⁶ In any event, until recently, Rwanda's extradition requests had generally been refused because of questions about the impartiality of Rwanda's justice system.²⁶⁷ A 2008 Human Rights Watch report on Rwanda's legal system notes the "susceptibility of judges to pressure from members of the executive branch and other powerful persons, and the failure to assure basic fair trial standards—including the presumption of innocence, the right to present witnesses in one's own defense, and the right to protection from double jeopardy."²⁶⁸ In light of

widow of President Habyarimana, who is widely suspected of leading the cabal of extremists who orchestrated the genocide. The arrest came on the heels of President Sarkozy's visit to Rwanda, a trip that signaled the healing of diplomatic relations between the two countries. See Marlise Simons, *France: Widow of a Rwandan Leader is Arrested*, N.Y. TIMES, Mar. 3, 2010, at A6, available at <http://www.nytimes.com/2010/03/03/world/europe/03briefs-France.html?scp=1&sq=agathe%20habyarimana&st=cse>. In late September 2011, a French appeals court rejected the extradition request. See Marlise Simons, *Rwanda: France Refuses to Extradite President's Widow*, N.Y. TIMES (Sept. 28, 2011), available at <http://www.nytimes.com/2011/09/29/world/africa/rwanda-france-refuses-to-extradite-presidents-widow.html?scp=1&sq=habyarimana&st=cse>. Just last year, the European Court of Human Rights determined that Sweden could extradite a Rwandan national to Rwanda for trial, notwithstanding the Rwandan national's assertions that he would not receive a fair trial in Rwanda. See *Ahorugeze v. Sweden* (No. 37075/09), HUDOC (Oct. 27, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107183>.

266. However, by becoming a party to the Convention Against Torture, Rwanda could have triggered Article 8(2), which provides: "If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offenses." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 8, June 26, 1987, 1465 U.N.T.S. 113 [hereinafter Convention Against Torture]. But Rwanda did not ratify the Convention Against Torture, making this potential basis for extradition unavailable. Interview with Damien Vandermeersch, *supra* note 114.

267. See, e.g., Thijs Bouwknecht, *Rwanda Ex-Pastor Faces Genocide Charges in Finland*, RADIO NETHERLANDS WORLDWIDE (Aug. 31, 2009), <http://www.rnw.nl/international-justice/article/rwanda-ex-pastor-faces-genocide-charges-finland> (discussing a Finnish court's refusal to extradite Francois Bazaramba, a pastor accused of orchestrating the massacre of as many as 5000 Tutsi); *France Refuses to Extradite Rwanda Genocide Suspect*, AGENCE FRANCE PRESSE (Sept. 15, 2010), http://www.google.com/hostednews/afp/article/ALeqM5gM8WYIVq9j5WrljTfQo_464kg4Fg (noting a French court's refusal to extradite a Rwandan doctor wanted for genocide crimes); *Sweden Stops Extradition of Rwanda Genocide Suspect*, AGENCE FRANCE PRESSE (July 16, 2009), http://www.google.com/hostednews/afp/article/ALeqM5i-2X4PpngZoIZJiLHB2xoh_bDemQ (reporting the Swedish government's decision to delay the extradition of a Rwandan genocide suspect, Sylvère Ahorugeze, upon a request by the European Court of Human Rights). After a lengthy analysis of Rwanda's judicial system, in October 2011 the European Court of Human Rights issued a decision holding that extraditing Ahorugeze to Rwanda for trial would not violate the European Convention on Human Rights. See *Ahorugeze v. Sweden* (No. 37075/09), HUDOC (Oct. 27, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107183>.

268. *Rwanda: Progress in Judicial Reforms Fall Short: Technical Advances, but Insufficient Fair Trial Guarantees*, HUMAN RIGHTS WATCH (July 25, 2008), <http://www.hrw.org/en/news/2008/07/23/rwanda-progress-judicial-reforms-falls-short>. The full report is available at *Law and Reality: Progress in Judicial Reform in Rwanda*, HUMAN RIGHTS WATCH (July 24, 2008), <http://www.hrw.org/en/node/>

these observations, due process rights may have been compromised had the Sisters been tried in Rwanda.

Of course, while due process rights form the bedrock of European and North American legal systems, robustly protecting due process rights may come at the expense of other goals. For example, when Rwanda launched the *gacaca* courts, it consciously decided not to prioritize western-style procedural protections, such as the right to defense counsel.²⁶⁹ While this decision has been the subject of considerable debate, it was made, at least in part, out of necessity. Rwanda's legal system was decimated after the genocide. If it had submitted all genocide cases to prosecution in the ordinary court system, with the complete set of due process protections, the trials would have continued for decades.

3. *Local Engagement*

Another consequence of prosecuting Srs. Gertrude and Kizito in Belgium is a remarkable lack of engagement with the people of Sovu. Although the saga of Srs. Gertrude and Kizito generated significant media attention both in Belgium and abroad, and although witnesses traveled from Sovu to testify in Belgium, Sovu residents do not appear to have followed the trial closely.

This lack of engagement is evidenced in the responses that Sovu residents gave to questions about the trial. In public opinion polls, over 85% of Sovu residents said they were “not well-informed” or “not informed” about the landmark trial.²⁷⁰ Only 20% of residents said that they had heard radio reports about the trial, while 33% said that they received news about the trial from neighbors; fewer than 10% of respondents could correctly state the verdict.²⁷¹

Perhaps as a result, the majority of Sovu residents expressed uncertainty in response to a series of questions about the impact of the trial on the community. Nearly half of respondents (46%) were uncertain as to whether the trial had functioned well. “Uncertain” also was the most

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269. HUMAN RIGHTS WATCH, JUSTICE COMPROMISED: THE LEGACY OF RWANDA'S COMMUNITY-BASED COURTS 27–31 (2011), available at http://www.hrw.org/sites/default/files/reports/rwanda_0511webwcover_0.pdf.

270. The public opinion polls were conducted by the author. See discussion *supra* Part II. The 2007 survey indicated that 88% of the Sovu residents said they were “not well-informed” or “not informed.” Data of the anonymous surveys is on file with the author.

271. The public opinion polls were conducted by the author. Data of anonymous survey is on file with the author.

common response to questions about the trial's impact on local reconciliation (49%), whether the trial was fair to all groups (62%), and whether the punishments handed down were fair compared to the sentences at *gacaca* (62%).²⁷² When asked whether the trial in Belgium has contributed to reconciliation in Sovu, nearly 50% of Sovu residents replied that they were "uncertain" while 39% replied affirmatively.²⁷³

With a concerted effort to reach out to the people of Sovu, the trial might have had a more significant impact on the community.²⁷⁴ After all, Sovu residents overwhelmingly expressed the desire to know more about the trial (more than 80%).²⁷⁵ For example, allowing the Rwandan authorities to prosecute the case—or play a role in the prosecution, perhaps in partnership with the Belgian authorities, in a kind of hybrid tribunal—may have strengthened Rwanda's own legal system and contributed to an understanding of the importance of due process.²⁷⁶ Belgian authorities could have arranged for the trial to be publicized or even broadcast in Sovu. Court representatives could have been sent to Sovu to explain the proceedings to the public. While these are not typical functions of domestic criminal justice systems, transnational trials are not typical trials.

272. The public opinion polls were conducted by the author. Data of anonymous survey is on file with the author. For an in-depth discussion of *gacaca* and its impact in Sovu, see Rettig, *supra* note 171, at 25.

273. The public opinion polls were conducted by the author. Data of anonymous survey is on file with the author.

274. Jessica Feinstein argues that the Special Court for Sierra Leone "succeeded in its relations with local media where past international criminal courts have failed, largely through the early creation of proactive outreach and public affairs sections." Jessica Feinstein, *The Hybrid's Handmaiden: Media Coverage of the Special Court for Sierra Leone*, 7 LOY. UNIV. CHI. INT'L L. REV. 131, 133 (2009).

275. The public opinion polls were conducted by the author. Data of anonymous survey is on file with the author. Of course, whether enhanced engagement would have had any affect at all on the community, and whether any impact would have been positive or negative, is unclear.

276. Along these lines, David Kaye recently suggested that the International Criminal Court should be allowed to prosecute Muammar el-Qaddafi in Libya. He argues that the trial "would be closer to the communities that most need to see justice done. It could involve more Libyans in the proceedings, a step that would afford the ICC greater access to victims and give young Libyan lawyers and other professionals experience with a modern system of justice. It would give the ICC's staff members an opportunity to engage directly with the society for which they are doing their work, while serving as a platform for the international community to help Libya rebuild the rule of law. Trial in Tripoli, with significant Libyan participation, could also signal a new direction for Libya, one that favors the rule of law and integration with the institutions of international life. It could foster criminal prosecutions of lower-level perpetrators and truth-and-reconciliation processes at the national level, as well as investigations of any serious crimes committed by rebel forces, a signal that the new government believes in fairness within a unified society." *What to Do With Qaddafi*, N.Y. TIMES (Aug. 31, 2011), <http://www.nytimes.com/2011/09/01/opinion/what-to-do-with-qaddafi.html>.

4. *Rehabilitation and Reconciliation*

Where a trial takes place is closely linked to the severity of the sentence an accused is eligible to receive. For example, handing down the death penalty or a life sentence sends a strong message about the individual's culpability and the gravity of the crime. On the other hand, a shorter sentence, or a sentence that combines a prison sentence with community service, as is sometimes the case with *gacaca*, may be more conducive to reintegration and reconciliation.²⁷⁷

The fact that the Sisters have been released after serving only a handful of years in prison raises an important question about whether the trial comported with Rwanda's priorities for transitional justice. Compared to the sentences handed down by Rwanda's military and domestic courts, *gacaca*, and even the ICTR, the nuns received extraordinarily light sentences. Under Belgian law, prisoners generally serve only one-third of their sentence.²⁷⁸ The nuns served closer to half of their sentences because Belgium struggled to decide what to do with the nuns upon their release. For legal and political reasons, they could not be allowed to walk free in Belgium.²⁷⁹ In contrast to Belgian law, Rwanda's domestic courts initially sentenced the worst offenders to death; since Rwanda abolished the death penalty, death sentences have been commuted to life. Rekeraho and Kamanayo, tried before a military tribunal, will spend the rest of their lives in prison. Even the *gacaca* courts have the power to hand down life sentences for leaders of the genocide and individuals accused of committing rape or sexual torture.²⁸⁰ Although *gacaca* rewards those who confess with reduced prison terms, judges routinely deem confessions

277. John Braithwaite argues that, in certain societies, "sanctions imposed by relatives, friends or a personally relevant collectively have more effect on criminal behavior than sanctions imposed by a remote legal authority." JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 69 (1989). Mark Drumbl has argued that "restorative justice initiatives may be more effective in promoting accountability for mass violence that was not perceived as deviant at the time and may still not be universally perceived as deviant after the fact." Mark Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1232 (2000).

278. Interview with Gilles Vanderbeck, Defense Attorney for Sr. Kizito, in Brussels, Belgium (Sept. 7, 2009).

279. They were ineligible to seek political asylum in Belgium because they had been convicted of breaching the Geneva Conventions, and the Belgian government also refused to allow them to remain under a law intended for persons with strong links to the country. But they also could not be returned to Rwanda. Belgium was concerned about how they would be treated there. Interview with Serge Wahis, September 2010. Serge Wahis, co-counsel for Sr. Kizito, predicted that if the Sisters returned to Rwanda, they would disappear and would never be heard from again. Interview with Alain Vergauwen and Serge Wahis, Defense Attorneys for Srs. Gertrude and Kizito, in Brussels, Belg. (Sept. 8, 2009) (translated from French by author).

280. See Rettig, *supra* note 171, at 31.

incomplete and impose prison terms of twenty-five years for individuals who killed two or three people;²⁸¹ these are “ordinary” killers in a place where thousands of people were massacred in the span of days in Sovu alone. The ICTR has earned a reputation for handing down light sentences. Yet even regional leaders like Aloys Simba, Rekeraho’s immediate superior, received a twenty-five year sentence.²⁸²

The differential in sentences may have been justified if the crimes Srs. Gertrude and Kizito committed were not as grave as those committed by the likes of Rekeraho, Kamanayo, and Simba. But if Srs. Gertrude and Kizito did in fact cooperate with local genocide leaders and provide the gasoline used to burn the health center, they share responsibility for the deaths of as many as 500 people. A Rwandan court almost certainly would have sentenced the Sisters to death or life imprisonment.

5. Summary

Judged against concrete metrics, the trial succeeded in certain respects and failed in others. Srs. Gertrude and Kitizo were subjected to a trial in accordance with the rule of law and, notwithstanding questions about whether Rekeraho should have testified in court, they enjoyed robust due process protections. A jury of laypersons found them guilty, and they were punished not because of their ethnicity, but because of their acts. However, the trial failed to capture the attention of the people of Sovu, which may have diminished its contributions to such goals as reconciliation and norm penetration. The transcripts and exhibits left behind contribute to the historical record of the Rwandan genocide and how it was perpetrated in Sovu, but this record is more easily accessible to western researchers with speedy internet connections and the ability to travel to Brussels than it is to Sovu residents, who often lack electricity, let alone computers. Moreover, it is difficult to assess the trial’s performance in other fundamentally important areas. Establishing the rule of law, deterring future crimes, and reconstructing social trust are vital to a community’s long-term security and stability, but they are infamously difficult to measure.

281. Based on statistics collected during fieldwork in Sovu between August 2006 and July 2007.

282. See ICTR Detainees—Status on 28 June 2011, INTERNATIONAL [sic] CRIMINAL TRIBUNAL FOR RWANDA (June, 28, 2011), <http://www.unictr.org/Cases/StatusofDetainees/tabid/202/Default.aspx>.

VI. CONCLUSION

The trial and conviction of Srs. Gertrude and Kizito, the first under Belgium's universal jurisdiction law, broke new ground in international criminal justice. It also raised awareness around the world of the power of universal jurisdiction. In their post-mortem on the law after its repeal in 2003, following the indictment of several senior American political and military figures, several NGOs heralded the law for "help[ing] destroy the wall of impunity behind which the world's tyrants had always hidden to shield themselves from justice."²⁸³ They lamented that "Belgium has now forgotten the victims to whom it gave a hope of justice."²⁸⁴

But what does "justice" mean? If Srs. Gertrude and Kizito had been extradited to and tried in Rwanda, they would have received a much stiffer sentence than they did before the Belgian courts. Furthermore, if the trial had taken place in Sovu or even in Butare, Sovu residents would have had the opportunity to attend the trial; they would have heard widows tell their story of loss and survival; they would have seen Rekeraho, dressed in prison pink, testify about his relationship with the nuns. Perhaps that outcome would have been more just in the eyes of survivors.

Asked to reflect on the role of transnational trials in transitional justice, defense attorney Vanderbeck responded: "I'm not convinced [transnational trials are] a good way to do justice."²⁸⁵ He continued, "It's hard to export justice and to ask some other people to be the judge of what happened in Rwanda. And on the other hand, it's hard for Rwandans to [deliver] justice because they were involved in the conflict."²⁸⁶

Vanderbeck's ambivalence reflects the tradeoffs that were implicit in the trial of Srs. Gertrude and Kizito. Transnational trials promote accountability, contribute to the fight against impunity, and uphold liberal judicial norms. Perhaps over time, they may even have a deterrent effect on future crimes. But transnational trials are distant—physically and culturally—from the people in whose name justice is done. Foreign judges and juries may not be ideally placed to judge crimes committed in far off lands. Key witnesses may not be available to testify, and transnational trials do little to build domestic judicial capacity and connect with the affected population. It is only by accounting for the numerous and

283. *Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS WATCH (Aug. 1, 2003), available at <http://www.hrw.org/fr/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>.

284. *Id.*

285. Interview with Gilles Vanderbeck, *supra* note 142.

286. *Id.*

sometimes competing goals of transitional justice that the impact of transnational trials can truly be measured.