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Beyond Genocide: Transitional Justice and *Gacaca* Courts in Rwanda

The Search for Truth, Justice and Reconciliation

Pietro Sullo

Springer

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A mio padre

Foreword

During a few months in the spring of 1994, some 800,000 Rwandan citizens, primarily Tutsis, were killed by Hutu militias and ordinary people. Despite the fact that the UN Special Rapporteur on Summary and Extrajudicial Executions, Bacre N'Diaye, had in 1993 warned the United Nations about the rapidly spreading hatred and violence and the danger of an imminent genocide, the world organization neither prevented nor stopped the genocide. On the contrary, rather than enforcing the mandate and strength of the UN peacekeeping troops stationed at that time in Rwanda, the United Nations decided to withdraw this Assistance Mission (UNAMIR) as soon as the first Belgian peacekeepers had been deliberately killed by radical Hutu militias. The Tutsis were tragically abandoned by the international community, and the genocide was finally stopped with military force by the Rwandan Patriotic Front, led by the current President Paul Kagame and supported by Uganda.

His newly established Government was faced with the enormous task of dealing with the past and healing the wounds by introducing some form of transitional justice and fostering a process of reconciliation between the two groups of people, who had been constructed as two different "ethnic" and social groups by the Belgian colonial administration. It was the new Rwandan Government which requested the UN Security Council in 1994 to establish an International Criminal Tribunal for Rwanda, similar to the one that had in 1993 been set up for the former Yugoslavia. However, the ICTR, which was soon thereafter established in Arusha, could only bring to justice some of the key perpetrators. The infrastructure of the ordinary criminal justice system in Rwanda was broken down, and many judges were killed and the prisons in a most deplorable state. Nevertheless, more than 100,000 suspected *génocidaires* were arrested and kept under inhuman conditions in pre-trial detention. These were the circumstances when the Government decided to entrust a mechanism of traditional African justice, the *gacaca* courts, with the task of providing justice according to local culture and finally achieving reconciliation and peace in the country.

The purpose of the present book by Pietro Sullo is to assess whether the *gacaca* courts have achieved this highly ambitious goal. He describes in detail the mandate and functioning of these community-based courts with lay judges and arrives at the conclusion that the original aims were certainly overambitious. On the other hand, he finds that "the attempt to abide by the principle of duty to prosecute (all) the perpetrators of genocide-related crimes as well as its participatory, community-based approach, made *gacaca* the most courageous effort ever in the search for post-genocide justice" and the "most ambitious prosecution experiment ever", under the slogan of "mass justice for mass atrocities". He makes this positive assessment by comparing the achievements in Rwanda with the few Nazi criminals who were prosecuted in post-World War II Europe, the limited results of the current efforts by the Extraordinary Chambers in the Courts of Cambodia and similar situations in Guatemala or Darfur. On the other hand, he also points at the obvious shortcomings and problematic features of the *gacaca* courts, if assessed against the principles of the international rule of law and fair trial. He also strongly criticizes the intrusion of the state, which deprived the people of Rwanda to some extent of their ownership of this important mechanism to redress the painful consequences of the genocide. Overall, Pietro Sullo provides an excellent and balanced analysis of the *gacaca* courts, which should be taken into account by other countries and peoples when faced with a similar challenge.

Vienna, Austria Manfred Nowak
March 2018

Manfred Nowak is Professor of International Human Rights at Vienna University and Secretary General of the European Inter-University Centre for Human Rights and Democratisation in Venice. He served as UN Special Rapporteur on Torture and currently leads the UN Global Study on Children Deprived of Liberty.

Acknowledgements

This book is both the result of my interest for the issues surrounding human rights and genocide, and the happy end of a journey through transitional justice in Rwanda begun several years ago when I started an internship at the ICTR in Arusha under the supervision of Silvana Arbia. In these years, the intricacies connected with Rwandan *gacaca* courts have constantly occupied my mind. Fortunately, I was not alone in my journey and several persons have accompanied me in different capacities, giving me advice and helping me to overcome obstacles and to keep my motivation. It would be impossible to mention all of these fortunate encounters. I am indebted to Prof. Giorgina Alessi who invited me to join her chair of legal history at the University Federico II at the beginning of my career and illuminated the years spent in Naples with her knowledge, acumen and irony. I am very thankful to the Scuola Superiore Sant'Anna di Studi Universitari e Perfezionamento in Pisa and in particular to Prof. Andreas de Guttry, which offered me a generous Ph.D. scholarship to spend a considerable amount of time in Rwanda and other post-conflict settings. I also benefitted from a research stay at the International Centre for Transitional Justice in New York under the supervision of Priscilla Hayner in 2007 which has expanded my knowledge in the field of transitional justice. In New York, I also met Valeria Izzi, my dear "grillo parlante", whose maturity and wisdom remain an example for me. My research work in Rwanda has been facilitated by Avocats Sans Frontières mission to Rwanda, which helped me to orient myself in the complexities of the *gacaca* world. To the Rwandans I have met and interviewed during my research work goes my deepest gratitude. My stays in Kigali were also the occasion to meet Enrico Rampazzo and Elisa Radisone, whom I thank for their friendship.

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Brussels, Belgium Pietro Sullo
March 2018

Contents

Abbreviations

AI	Amnesty International
ASF	Avocats Sans Frontières
AU	African Union
AVEGA	Association des Veuves du Génocide
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
DPKO	Department of Peacekeeping Operations (United Nations)
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West Africa
FAR	Forces Armées Rwandaises
FARG	Fonds d'Assistance aux Rescapés du Génocide
HRW	Human Rights Watch
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDPs	Internally Displaced Persons
IER	Instance Equité et Réconciliation
IPEP	International Panel of Eminent Personalities
LDGL	Ligue des Droits de la personne dans la région des Grands Lacs
LIPRODHOR	Ligue Rwandaise pour la promotion et la defense des Droits de l'Homme
MRND	Mouvement Républicain National pour la Démocratie et le Développement
NURC	National Unity and Reconciliation Commission
OAU	Organization of African Unity
PRI	Penal Reform International
R2P	Responsibility to Protect
RDR	Rassemblement Républicain pour la Démocratie au Rwanda

RPA	Rwandan Patriotic Army
RPF	Rwandan Patriotic Front
RTML	Radio Télévision Libre des Milles Collines
SNJG	Service National des Juridictions *Gacaca*
SRSG	Special Representative of the Secretary General (United Nations)
TIG	Travaux d'intérêt general
TRC	Truth and Reconciliation Commission
UN	United Nations
UNAMIR	United Nations Mission in Rwanda
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNOMUR	United Nations Observer Missions Uganda–Rwanda
UNSC	United Nations Security Council

Chapter 1
Introduction

Contents

Abstract The crime of genocide triggers a multiplicity of questions regarding victims, perpetrators and bystanders. Transitional justice has tried to address the issues emerging from contexts marked by genocidal violence: possible forms of accountability for perpetrators, repair and healing for the victims and reconciliation for the society involved. However, systematic analysis in the field of transitional justice is embryonic and there is little evidence concerning its achievements in terms of reconciliation, peace-building and healing. This book concentrates on the most ambitious programme of prosecution for genocide-related crimes ever: Rwandan *gacaca* courts. *Gacaca* courts aimed at punishing the genocide perpetrators, searching for the truth, encouraging dialogue between former enemies, reconstructing the social fabric, repairing the harm to victims and achieving reconciliation. *Gacaca* courts have also drawn attention to the use of traditional customary patterns of justice as a transitional justice instrument, emerging as a possible model for prospective transitional justice strategies. Due to their key features, grass-roots nature, flexible procedures, presence of lay judges directly elected by the population that witnessed the genocide and lack of defence lawyers, *gacaca* courts have triggered a heated debate. This chapter explains why Rwanda has emerged as a key test for transitional justice and how the analysis of *gacaca* as an accountability, reparation and reconciliation mechanism is articulated.

Keywords Transitional justice · traditional justice systems · reconciliation · criminology · victimology · legal pluralism · ICTR

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1.1 Introduction

'I am not responsible', says the Kapo,

'I am not responsible', says the officer,

'I am not responsible'.

Who is responsible then?

As I speak to you now, the icy water of the ponds and ruins lies in the hollows of the charnel-house. A water as sluggish as our own bad memories. War nods, but has one eye open. Faithful as ever, the grass flourishes on the muster-ground round the blocks. An abandoned village, still heavy with the threats. The furnace is no longer in use, the skill of the Nazis is child's play today. Nine million dead haunt this landscape. Who is on the lookout from this strange watchtower to warn us of our new executioners' arrival? Are their faces really different from ours? Somewhere in our midst lucky Kapos survive. Reinstated officers and anonymous informers. There are those reluctant to believe, or believing from time to time. There are those who look at these ruins today as though the monster were dead and buried beneath them. Those who take hope again as the image fades as though there were a cure for the scourge of these camps. Those who pretend all this happened only once, at a certain time and in a certain place. Those who refuse to look around them, deaf to the endless cry.[1]

The questions spelled out by Alain Resnais at the end of his seminal movie on the Holocaust, 'Night and Fog', echo unanswered through the history of mankind, loudly resounding on Rwanda's hills. How was another genocide possible? Why? Who is responsible? Can it happen again? Are we really different from the perpetrators of these crimes? Is there a cure for this scourge?

Genocide is a complex human experience that has marked the history of mankind at several stages, as stressed in the preamble of the 1948 Genocide Convention.[2] Current patterns of violence in Darfur, the Croatia versus Serbia 2015 Judgement by the International Court of Justice, trials before the United Nations *ad hoc* Tribunals, and genocide denial cases before the European Court of Human Rights, have widely demonstrated that genocide is also a problem of our age, the relevance of which is not limited to the past. This was also suggested by the debate surrounding the anniversary of the Armenian and Rwandan Genocide in April 2015 and 2014 respectively. The debate has also re-attracted the attention of the 'seventh art', which has repeatedly put genocide in its spotlight. 'The Act of Killing', a 2012 tribute to an unexplored and relatively lesser-known instance of genocide in Indonesia in the sixties, anticipated the imminent release of a long expected

[1] Alain Resnais, Night and Fog, 1955.

[2] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by resolution 260 (III) of the United Nations General Assembly on 9 December 1948.

documentary by Alfred Hitchcock on the Holocaust that was ultimately held back for political reasons.[3]

Unpacking the genocidal experience has proved to be particularly difficult. It is however necessary in order to try to understand its multiple causes and its implications for post-genocidal societies. The latter, in fact, face (and pose) multiple daunting challenges as to how, if at all, to repair the injustice of the past, healing victims (and perpetrators), while embarking on a journey toward reconciliation. Despite the remarkable amount of studies devoted to genocide, several aspects of this phenomenon remain partially unexplored. Among the questions raised by contexts marked by radical and often intimate violence, one in particular signals an under-researched area. It is the issue whether and under what conditions, if at all, coexistence is possible in the aftermath of genocidal violence. As Halpern and Weinstein have clarified:

> Little attention has been paid to the fact that people who once saw each other as the enemy must learn to live together again on a daily basis – in shops, the market, in schools, playgrounds, concerts and coffeehouses. (…) We know surprisingly little about how neighbors who have tortured neighbors, looted their homes or fired them from jobs can learn to live together again. (…) It is the interpersonal ruins, rather than the ruined buildings and institutions that pose the greatest challenge for rebuilding society.[4]

In other words, there is a need to amplify the knowledge we have of genocidal and post-genocidal dynamics in order to address the issues stemming from this form of radical violence. In this regard the experience of victims, who have for a long time played a minor role in the judicial and non-judicial response to mass atrocities, can be of crucial importance.[5]

The studies of Nicole Laraux on internal violence in Athens in the fifth century BC have demonstrated that the challenges posed by reconstruction of the social fabric after neighbourly violence are old.[6] Furthermore, a recent contribution by Giorgio Agamben has highlighted that despite the studies devoted to polemology and irenology (respectively the theory of war and the theory of peace) and despite the recurrent instances of internal conflicts, a theory of civil war and fratricidal violence is missing in contemporary political theory.[7] This remark is of particular interest considering that the Rwandan genocide has been perpetrated in a context marked by an ongoing civil war that started in 1990. The need to address the aforementioned lacunae, and to make a further contribution to the understanding of genocidal violence, is hence acutely perceived.

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[3] See the Guardian, Unseen Alfred Hitchcock Holocaust documentary to be released, at http://www.theguardian.com/film/2014/jan/10/unseen-alfred-hitchcock-holocaust-documentary-screening. Last accessed 9 June 2015.

[4] See Halpern and Weinstein 2004, pp. 303–304.

[5] Letschert et al. 2011.

[6] Laraux 1997.

[7] Agamben 2015.

The German philosopher Adorno has claimed that after Auschwitz it is not more possible to write poetry.[8] Hannah Arendt has stressed the impossibility for humanity to reconcile with the radical evil experienced during WWII in the concentration camps and with its load of 'banality'.[9]

The crime of genocide is both a fracture in the life of its victims and a historical watershed for the societies that face it. But genocide is much more than this. It puts humanity in front of a paradox: the non-reducibility of history to a purely *evenementielle* dimension.[10] Genocide seems to be not fully understandable if exclusively unpacked through the lenses of the concatenation of factual circumstances that culminate in the destruction of the targeted group. Its meaning and its consequences transcend, and are more comprehensive and ambiguous, than the events that constitute it.

Both victims and scholars have tried to clarify the meaning of this experience that marks the border between human and inhuman.

The survivors who have witnessed the life in the camps where the 'final solution' took place such as Primo Levi, 'superstes' and 'agrimensore implacabile della Muselmannland' to use the words of Giorgio Agamben, have tried to unearth and convey the deep meaning of their experience.[11] They have stressed several times

[8] Adorno 1951.

[9] Arendt 1964.

[10] See Agamben 1999, preface, p. 11: 'We can enumerate and describe each of these events, but they remain singularly opaque when we truly seek to understand them. This discrepancy and unease has perhaps never been described more directly than by Zelman Lewental, a member of the Sonderkommando who entrusted his testimony to a few sheets of paper buried under crematorium, which came to light seventeen years after the liberation of Auschwitz. "Just as the events that took place there cannot be imagined by any human being," Lewental writes in Yiddish, "so is it unimaginable that anyone could exactly recount how our experiences took place. We, the small group of obscure people who will not give historians much work to do." What is at issue here is not, of course, the difficulty we face whenever we try to communicate our most intimate experiences to others. The discrepancy in question concerns the very structure of testimony. On the one hand, what happened in the camps appears to the survivors as the only true thing and, as such, absolutely unforgettable; on the other hand, this truth is to the same degree unimaginable, that is, irreducible to the real elements that constitute it. Facts so real that, by comparison, nothing is truer; a reality that necessarily exceeds its factual elements—such is the aporia of Auschwitz. As Lewental writes, "the complete truth is far more tragic, far more frightening." More tragic, more frightening than what? Lewental had it wrong on at least one point. There is no doubt that "the small group of obscure people" ("obscure" here is to be understood in the literal sense as invisible, that which cannot be perceived) will continue to give historians work to do. *The aporia of Auschwitz is, indeed, the very aporia of historical knowledge: a non-coincidence between facts and truth, between verification and comprehension*' (emphasis added).

[11] Agamben defines Primo Levi 'Implacable land surveyor of the Muselmannland' (translation by the author) referring to the zone were the victims of the Holocaust dwelt before death. 'Muselmann' was the term used in Auschwitz and other concentration camps to identify those prisoners whose will was completely annihilated by the Nazi and were destined for death. In the words of Amery 'The so-called Muselmann, as the camp language termed the prisoner who was giving up and was given up by his comrades, no longer had room in his consciousness for the contrasts good or bad, noble or base, intellectual or unintellectual. He was a staggering corpse, a bundle of physical functions in its last convulsions'. See ibid., p. 41 (quoting: Améry 1977, p. 39).

the importance of testimony for the survivors of the Holocaust.[12] Survivors also concluded that the final lesson to be drawn from the concentration camps is brotherhood in abjection of perpetrator and victim.[13] Some researchers, on the other hand, have interpreted the chain of deaths organised '*fabrikmäßig*' as a successful attempt to diminish the meaning and the value of the death, the ultimate results of the concentration camps.[14]

A second set of questions posed by genocide regards the possibility of a legal redress that punishes perpetrators and repairs the victim. In this regard, Hannah Arendt asserted that radical evil 'exploded the limits of the law'.[15] In a similar regard, Giorgio Agamben stressed that 'it has taken almost half a century to understand that the law did not exhaust the problem [of Auschwitz], but rather that very problem was so enormous as to call into question the law itself, dragging it to its own ruin'.[16]

In contrast, international lawyers considered extreme evil to be within the reach of legal precepts. One of the main assumptions underpinning the development of international criminal law is that international crimes (genocide, crimes against humanity and war crimes) have a peculiar nature and differ from ordinary crimes. A distinguishing characteristic is the fact that while common crime is usually the result of a deviant behaviour, international crimes are mostly the consequence of conducts driven by conformity.[17] Paradoxically however, the mechanisms set up to adjudicate ordinary and international crimes share several features: they rely, for instance, on the same penalties, mainly incarceration, pursuant to a model deeply rooted in the western legal tradition. The efficacy of incarceration as an instrument of deterrence, retribution, rehabilitation and social control is however radically questioned by scholars and practitioners as, among others, David Garland has stressed.[18] Moreover, the adjudication of both ordinary and international crimes is grounded on the concept of individual criminal responsibility, regardless of the collective nature of the conduct leading to the commission of international crimes.[19]

[12] Levi 1997 quoted in ibid., pp. 14–15.

[13] Ibid., p. 17, where the author affirms that 'Victim and executioner are equally ignoble; the lesson in the camps is brotherhood in abjection'.

[14] Rousset, in Levi 1997, quoted in Agamben 1999, p. 17.

[15] Arendt et al. 1992, p. 54.

[16] Ibid., p. 20.

[17] Drumbl 2007.

[18] Garland 2012. Helena Cobban interestingly noticed that 'The Rwandan genocide throws into profound relief many of the cosmological and ethical assumptions—about the nature of individual responsibility, the purpose of punishment, and the normal conditions of human life—upon which our contemporary criminal-court system is based. We in the West seldom examine these assumptions. But the Rwandan case challenges them deeply and calls on us to tread lightly and carefully before we spread the mantle (or strait-jacket) of our criminal justice system over populations or situations to which it may be fundamentally unsuited', Cobban 2002.

[19] Drumbl 2007.

What is, and what should be the purpose of punishing international crimes? How can the criminal sanction pursue these goals? How should mass atrocities be punished? Should they be addressed differently from ordinary crimes and from context to context? (How) should the genocidal context influence the way its consequences are legally addressed? Interestingly, Mark Drumbl has stressed that, 'Each genocide is unique. This uniqueness manifests itself in the differences of experiences of genocide survivors, the levels of social mobilisation of aggressors, the public or secretive nature of the aggression, and the historical context from which the violence emerged'.[20] Consequently, he argues the way to pursue accountability and to foster healing in the wake of genocide 'should vary in each individual case'.[21]

Rwanda's experience with post-genocide *gacaca* courts has emerged as an opportunity to test Drumbl's theory, offering an unprecedented contextual and home-grown response to the violence experienced in 1994 and beyond. Furthermore, *gacaca* courts have provided a new context where the aforementioned questions surrounding genocide have been explored and debated.

By combining empirical and legal research this manuscript explores the legal aspects and the practice of transitional justice in Rwanda since 1994 to date. It focuses on *inkiko gacaca* (*gacaca* tribunals), a 'neo-traditional' and community-based approach to the dispute settlements conceived and applied in the aftermath of the 1994 massacres in Rwanda. My research work examines Rwanda's effort to deal with the legacy of the 1994 genocide through *gacaca* popular courts under a human rights perspective. It discusses the main assumptions surrounding the necessity and legitimacy of such an experiment and its consequences on the reconciliation process in Rwanda.

It is largely through post-genocide justice in Kigali and in Arusha, where the International Criminal Tribunal for Rwanda (ICTR) was located, that our knowledge as to the Rwandan genocide has been generated. Transitional justice strategies for Rwanda have been shaped pursuant to the paradigm of the fight against impunity by creating three potentially overlapping jurisdictional levels: the ICTR, the national ordinary courts and the community-based *gacaca* courts. The latter contributed to the pursuit of the *génocidaires*, an effort depicted by Mahmood Mamdani as 'the *raison d'être* of the post-genocide state, the one permanent part of its agenda'.[22] While rejecting the proposal of setting up a truth and reconciliation commission pursuant to the South African example, the Rwandan government formally requested the United Nations to establish an international tribunal to try the alleged responsible for the 1994 genocide. On 8 November 1994, the United Nations Security Council (UNSC) through Resolution 955 created the ICTR, whose jurisdiction *ratione materiae* encompassed genocide, serious violations of international humanitarian law and war crimes committed in Rwanda or by Rwandans in

[20] See Drumbl 2000, pp. 1224–1225.

[21] Ibid.

[22] See Mamdani 2002, p. 271.

the neighbouring countries between January 1st and December 31st of 1994. The ICTR was also charged with furthering 'the process of national reconciliation and the restoration and maintenance of peace',[23] (which triggered crucial questions concerning the features, rationale and objectives of criminology and penology of international crimes).[24] After initial support, Rwanda voted against the institution of the ICTR within the UN Security Council. The Rwandan hostility toward the Arusha-based international tribunal was due to several factors, including its temporal jurisdiction, limited to 1994, which would have not allowed the coverage of the crimes under the Habyarimana regime, limiting the possibility to prove the orchestration and long planning of the genocide.[25] Other reasons for the Rwandan hostility were the allegedly insufficient number of staff of the ICTR and the exclusion of the death penalty, which at the time was not yet abolished in Rwanda.[26]

In 1996 the Rwandan Transitional National Assembly passed the Organic Law 8/1996, assigning jurisdiction to national ordinary courts on genocide-related crimes and crimes against humanity committed in Rwanda between 1 October 1990 and 31 December 1994. This implicitly suggested a different chronological framework for the genocide compared to the ICTR, including the patterns of violence occurring in Rwanda since 1990. However, the abuses committed during and after the four years of conflict, which started in October 1990 when the Tutsi-led Rwandan Patriotic Army[27] (RPA) entered Rwanda to overthrow the government, remained excluded from the jurisdiction of the national ordinary courts (and later the *gacaca* tribunals). Efforts achieved by the ICTR to prosecute these crimes also failed.[28] Scholarly literature has broadly argued that selective justice, being perceived as victors' justice, might be an obstacle to the national reconciliation process. Given the multifaceted social polarisation inherited from the colonial past, articulated in political, cultural, racial and ethnic aspects, Mamdani warned that one-sided post-genocide justice might reproduce the colonial discourse and its logic.[29]

Faced by both a tremendous files backlog, which it was estimated would require more than one hundred years to tackle, and a growing number of detainees held in pre-trial detention, the Rwandan government decided to revert to a socio-juridical

[23] On this point see UN Security Council 1994, as well as Hassan Bubacar Jallow, *The contribution of the United Nations International Criminal Tribunal for Rwanda to the development of international criminal law,* in Clark and Kaufman 2009, p. 262.

[24] On this point please see Drumbl 2007. See also Sullo 2015.

[25] See Palmer 2015, p. 45.

[26] Ibid.

[27] The RPA was the armed wing of the Rwandan Patriotic Front, a political movement formed in 1987 by the Tutsi refugee diaspora in Uganda. Led by the current Rwandan President Paul Kagame, the Rwandan Patriotic Front has ruled Rwanda since 1994, when it took the power immediately after the end of the genocide.

[28] For a comprehensive study of the ICTR case law see Human Rights Watch 2010.

[29] See Mamdani 2001, pp. 20–35.

experiment rooted in domestic disputes-settlement tradition known as *inkiko gacaca*. The term '*gacaca*' means 'little lawn'. It intentionally evokes the space where the local communities before, during and even after the Belgian colonisation, (and as we will see later, spontaneously even after the genocide), used to administer a harmony-oriented kind of justice. In the end the *gacaca* courts faced the bulk of genocide cases and, according to the Rwandan Government, tried more than one million of individuals: a result absolutely unprecedented in post-genocide settings.[30]

As Nicola Palmer has demonstrated, the three bodies established to adjudicate crimes perpetrated during the Rwandan genocide, the ICTR, national and *gacaca* courts have interacted and reciprocally influenced each other.[31] The relationship between the ICTR and Rwandan courts was governed by the principle of primacy, allowing the tribunal in Arusha to impose its jurisdiction over the other fora. Transfers of cases from one tribunal to others were possible, but subject to conditions.[32] The jurisprudence elaborated by one system of courts has been applied also in the other, and evidence introduced in hearings before Rwandan courts has also been considered by the ICTR and vice-versa.[33] 70% of the ICTR Trial Chamber decisions referred to proceedings before the *gacaca* courts.[34] The effort to cope with the legacy of the Rwandan genocide at international, national and the local level has hence emerged as one of the most challenging and fascinating journeys in the realm of transitional justice.

1.1.1 Central Research Problems and the Delimitation of the Research Domain

The research question this work is aimed at answering is the following: to what extent, if at all, *gacaca* courts contributed to provide justice, truth and reconciliation in post-genocide Rwanda?

Rwanda has offered a setting for protracted violence from October 1990 until the end of the 1990s, which reached its apex during the 1994 genocide. This is the complex historical-political context where the judicial and non-judicial answers to the genocide have been elaborated. This setting is obviously not neutral under the justice perspective, as the re-adaptation of traditional dispute settlement mechanisms known as *gacaca* had to be applied to a damaged social tissue. The usual circumstances in which *gacaca* worked in the past did not exist anymore after the

[30] Chakravarty 2015, p. 7.

[31] See Palmer 2015, pp. 2–3; on the relationships between ICTR, Rwandan ordinary courts and *gacaca* see also Wibabara 2014, pp. 216–249.

[32] Ibid., p. 2.

[33] Ibid.

[34] Ibid.

genocide. This has cast doubts on the possibility to fruitfully re-adapt them to such a new context. The question whether the conditions under which they have operated were suitable for such an experiment has been met with conflicting answers by scholarly literature and practitioners.

In post-genocide Rwanda, in fact, justice did not need to be served for merely a few cases, but rather for crimes of an unprecedented and unique magnitude, for which no justice system had to date been conceived and put into effect. The active and repressive role played by the public authorities during the genocide in particular made it necessary to rebuild trust among Rwandan citizens and between Rwandans and the state, which is the primary institution in charge of protecting human rights. This has implied that post-genocide justice in Rwanda has been charged with a plurality of goals beyond retribution and deterrence; such as restoration, reaching truth through dialogue, and reconciliation.

This research work focuses on *gacaca* courts as a post-genocide transitional justice mechanism in Rwanda for several reasons. First, as Lars Waldorf has stressed, Rwanda is a key test for transitional justice because of the rarely paralleled peaks of violence and brutality reached during the 1994 genocide, the high degree of popular involvement and the massive recourse to gender and sexual violence as a genocide weapon.[35] Moreover, due to geographical reasons and economic interdependence often perpetrators, bystanders, survivors and rescuers had no choice but to live side by side after the genocide. This made the issues surrounding rehabilitation and reintegration of those involved in the genocide particularly pressing.[36]

Second, Rwanda's violent past, while unique, shares important features with other settings of recent mass atrocities: intrastate conflict, international indifference, manipulated identities, neighbourly violence, high levels of participation and complicity and uncertain lines of responsibility.[37]

Third, despite scarcity of resources, Rwanda is the first country in the history of humankind uncompromisingly willing to prosecute all actors involved in genocidal activities. Beyond criminal proceedings before the ICTR, foreign courts adopting universal jurisdiction (first of all Belgian, but also Swiss, German and Canadian), Rwandan national courts, and *gacaca* courts offer, as indicated above, 'a fascinating example of legal pluralism and an opportunity to compare different justice mechanisms'.[38] Finally, Rwanda's experiment in adopting a local justice approach within a transitional justice framework turned out to be the most ambitious ever: in June 2012, when *gacaca* courts have concluded their work, 1,958,634 genocide cases had been dealt with.[39]

The scope of action and the goals pursued by *gacaca* courts are hence unprecedented. They have not only been conceived to punish the genocide

[35] See Waldorf 2006a, p. 7. On gender and sexual violence in Rwanda, see Kaitesi 2014.

[36] See Waldorf 2006a, p. 7.

[37] Ibid., pp. 7–8.

[38] Ibid., p. 8.

[39] Chakravarty 2015, p. 7.

perpetrators, but also to work as a truth telling mechanism encouraging dialogue between former enemies, to reconstruct the social fabric, redress the victims and achieve reconciliation through a blend of retributive and (to a lesser extent) restorative justice. It is, undoubtedly, an ambitious objective. In addition, *gacaca* has attracted attention on the use of traditional customary patterns of justice as a transitional justice instrument, emerging as a possible model for prospective transitional justice strategies.[40] Due to their key features, the grass-roots nature, the flexible procedures, the presence of lay judges directly elected by the population that witnessed the genocide and the lack of defence lawyers, *inkiko gacaca* have triggered a heated debate.

Some scholars and NGOs have merciless stressed their flaws and the non-compliance to internationally recognised fair trial standards.[41] Others have praised this approach to local justice, stressing that *gacaca*, a home-grown invention, are better suited to face the contextual challenges that the genocide has posed and to meet the expectations of the Rwandan population.[42] *Gacaca*, it has been argued by certain scholars, were able to provide substantive justice even though they were not designed to respect fair trial standards imposed by human rights law treaties ratified by Rwanda.[43] Haveman and Muleefu, in discussing the fairness of *gacaca*, have also explicitly challenged the idea that in a context such as post-genocide Rwanda common justice standards conceived for ordinary situations should be applied.[44]

The Rwanda case is hence a key test to understand the role of justice in post-violence contexts. New research works are constantly flourishing in the field of transitional justice, many of which affirming that prosecution of gross human rights violations during political transitions is a crucial element to establish a full-fledged democracy.[45] However, systematic analysis in the field of transitional justice is

[40] See Clark 2010. See also Waldorf 2006a, p. 8.

[41] Waldorf 2006a; Haile 2008; Amnesty International 2002; Human Rights Watch 2008 and 2011; Avocats Sans Frontières 2005 and 2006.

[42] Drumbl 2000 and 2007; Clark 2010; Haveman and Muleefu 2011.

[43] See, for instance, Clark 2010. Roberto Unger has provided a clear distinction between formal and substantive justice. He argued that 'One way is to establish rules to govern general categories of acts and persons, and then to decide particular disputes among persons on the basis of the established rules. This is legal justice. The other way is to determine goals and then, quite independently of rules, to decide particular cases by a judgement of what decision is mostly likely to contribute to the predetermined goals, a judgement of instrumental rationality. This is substantive justice', Unger 1976, p. 89.

[44] Haveman and Muleefu 2011, pp. 219–244.

[45] See Sikkink 2011. See also Sikkink, *Making Tyrants Do Time*, The New York Times, 16 September 2011: 'Historical and statistical evidence gives us reason to question criticisms of human rights trials. My research shows that transitional countries—those moving from authoritarian governments to democracy or from civil war to peace—where human rights prosecutions have taken place subsequently become less repressive than transitional countries without prosecutions, holding other factors constant (…) Although civil war heightens repression, prosecutions in the context of civil war do not make the situation worse, as critics claim'. http://www.nytimes.com/2011/09/16/opinion/making-tyrants-do-time.html. Last accessed 27 February 2018.

embryonic and there is little evidence concerning its achievements in terms of reconciliation, peace building and healing.[46]

This book, combining legal and empirical research is one of the few monographs taking into account the entire *gacaca* process from its very beginning to the end in 2012, when the law terminating *gacaca* jurisdictions was passed.[47] Through field-work including direct observation of *gacaca* trials, interviews and informal discussions with ordinary Rwandans, academics, and NGO staff deployed in Rwanda, it overcomes a purely legalistic perspective, *per se* insufficient to assess complex phenomena such as *gacaca* and meta-legal concepts such as justice, fairness, truth and reconciliation. The specific aims of my study are to clarify through a detailed investigation of *inkiko gacaca* the role of these community-based courts in granting access to post-genocide justice and their achievements and deficits as both transitional justice and reconciliation mechanisms. Both *gacaca's* flaws and strengths provide a relevant lesson to be drawn from Rwanda, an important precept for scholars, human rights activists, international organisations and common citizens.

1.1.2 Originality of the Research

Scholarly works targeting *gacaca* initially consisted of short pieces of research necessarily lacking a comprehensive analysis of this sophisticated socio-legal phenomenon.[48] In most of the cases they offered a study of the *gacaca* legal framework without deep analysis of its actual implementation. This was due to the fact that while the first *gacaca* law was enacted in early 2001, the phase of national implementation started only in 2005 and ended in June 2012. The majority of these works were legalistic or theoretical in the approach and descriptive in nature and refrained from a systematic analysis concerning the way the *gacaca* normative framework has actually been implemented.[49] Step by step, more comprehensive analyses and also monographic works offering deeper insights of particular aspects of *gacaca* have been published. Most of them, however, including the sound legal work of Bornkamm 'Rwanda's *Gacaca* Courts: Between Retribution and Reparation' published in 2012, have not taken into account the entire range of the *gacaca* experiment, an element necessary to produce a comprehensive assessment of its performance. The same can be affirmed for the ethnographic work of Phil Clark published in 2010 'The *Gacaca* Courts, Post-genocide Justice and Reconciliation in

[46] See on this point Thoms et al. 2008; and Brounéus 2010, pp. 410–413.

[47] See Organic Law No 04/2012/OL of 15/06/2012 Terminating *Gacaca* Courts and Determining Mechanisms for Solving Issues Which Were Under Their Jurisdiction.

[48] See, among others, Vandeginst 1999; Sarkin 2000 and 2001; Schabas 2005; Fierens 2005.

[49] See Ingelaere 2016, p. 8.

Rwanda, Justice without Lawyers' based on a remarkable number of interviews. Gerald Gahima's 2013 'Transitional Justice in Rwanda' takes into account *gacaca* as only one justice mechanism among others, devoting just one chapter to the home-grown courts.

In the literature written in English, so far only two books cover the entire *gacaca* experience from the beginning until closure, namely Chakravarty's 'Investing in Authoritarian Rule' (2016) and Ingelaere's 'Inside Rwanda's *Gacaca* Courts' (2016). Both approach *gacaca* from the point of view of social sciences. Chakravarty's aim is to disguise the consolidation of an authoritarian rule by RPF through *gacaca* dynamics in the aftermath of the genocide. It focuses on the dialectic between confessions and accusations, filtered through the work of the *gacaca* judges highlighting the trade-off between governing RPF elite and ordinary Rwandans. Chakravarty's conclusion is that the RPF, concerned with its grip on power in a post-genocide country that was deeply polarised, has gained the (conditional) allegiance of the Hutu main ethnic group through a blend of authoritarian rule and provision of selective benefits. The Hutu majority allegedly, which 'mistrusted and did not believe that the new ruling elite had the moral authority to govern', cooperated with the RPF government of the basis of a calculated self-interest.

As the author suggests, Ingelaere's work 'emphasises anthropological rather than legal frameworks of interpretation'.[50] Ingelaere's study is based on the most systematic direct observation of the *gacaca* hearings conducted so far, inspired by a 'primarily ethnographic and data-driven approach'.[51] It challenges Clark's main finding, arguing that although they are presented as ethnographic, they are crypto-normative. Like Chakravarty, also Ingelaere strongly emphasises the relevance of accusatory practices in the *gacaca* liturgy.

This book adopts a radically different approach. Although overtly ambitious, it does not maintain to fully unpack the formidable intricacy of the *gacaca* phenomenon, but rather to expand the knowledge available about it under specific perspectives. The latter include the contribution made by *gacaca* courts to both post-genocide justice in formal and substantive terms, as well their achievements as a truth telling and a reconciliation mechanism. Although criticising the analysis conducted by Clark, which fails in grasping the predominantly retributive features of *gacaca*, this work does not challenge, but rather complements the approach and conclusion reached by Chakravarthy and Ingelaere. I am strongly convinced that *gacaca* is too complex a phenomenon to be investigated within a single study and that it requires the contribution of different disciplines and investigators.

This study examines both the legal foundation and the actual implementation of transitional justice in Rwanda. It poses transitional justice in its historical, political and social background taking into account the Rwandan historical colonial record, a decisive factor influencing the subsequent Hutu-Tutsi polarisation. The research is

[50] Ibid., p. 10.

[51] Ibid.

based on a strong awareness of both, the potentially dangerous reduction of transitional justice to a purely legal discipline, and the existing gap in post-violence contexts between law and its practice. Such a gap renders an analysis of the modalities of implementation of the law absolutely imperative. As to the first point, I rely on the writings of Kieran McEvoy and on his struggle for a 'thicker'[52] conception of transitional justice, which, transcending a purely normative/prescriptive approach argues in favour of a local and grass-roots ownership over the transition processes. Transitional justice studies in fact, are often institution-oriented, focusing on the mechanisms implemented to deal with the legacy of large-scale human rights abuses disregarding the perceptions of the actors involved (victims, perpetrators, bystanders, rescuers and all those who have found shelter in the intermediate 'grey areas'). I also share McEvoy's and McGrecor's concerns regarding a teleological conceptualisation of transitional justice serving western liberal values, with no option for a 'Transitional Justice from below'.[53]

As to the second point, my research work is influenced by the awareness that African legal systems are characterised by a condition of legal pluralism, where the written, general and abstract norm is perceived as one of the many, concurrent sources of the law, together with customs, traditions and the role played by local leaders. This makes an exclusively legalistic approach insufficient to assess the impact of institutions such as *gacaca*. Consequently I have fine-tuned my research approach with this reality by complementing the legal research with interviews aimed at verifying the perception of *gacaca* among Rwandans, who remain the final legitimate judges of this experiment.[54]

Finally, this monograph is deeply influenced by considerations regarding the leading role that victims, vulnerable and marginalised groups should play in shaping the transitional justice agenda, an idea influenced by the 'subaltern studies' rooted in the work of the Italian Marxist intellectual Antonio Gramsci.[55]

This manuscript offers an unprecedented analysis of the legal instruments adopted domestically to deal with the legacy of the Rwandan genocide. These include the different laws adopted between 2000 and 2012 to establish *gacaca* courts and the pieces of legislation connected with the latter (organic laws setting up domestic courts, memory-laws prohibiting the denial of the genocide which have

[52] See McEvoy 2007, p. 414, where the author argues that legal scholars are often 'largely disconnected from the real lives of those affected by the legal system', as 'it is broadly less likely to reflect critically on the actions, motivations, consequences, philosophical, assumptions or power relations which inform legal actors and shape legal institutions. A thicker understanding of transitional justice is therefore intended to counteract at least some of these tendencies'.

[53] See McEvoy and McGregor 2008.

[54] See Pozen et al. 2014.

[55] The term 'subaltern studies' is linked to the use by scholars of an approach defined as 'history from below', focused more on the factors that impact the life of the masses than on what occurs to the upper layers of the society, the elite. The term 'subaltern' refers to the work of the Italian Marxist and antifascist opponent Antonio Gramsci (1881–1937). Literally, 'subaltern' designs any individual of inferior rank and status because of a plurality of reasons including race, sex, class, religion, ethnicity, sexual orientation, education and incomes.

influenced testimonies before *gacaca*). Due attention is also paid to the legislation closing the *gacaca* experiment, which remained unaddressed in previous monographic works on *gacaca*. The transitional justice experiment Rwanda has undergone is firstly assessed against the background provided by international human rights law. Complementing the legal analysis with a study of the practice of *gacaca* courts and interviewing Rwandans participating in the *gacaca* experiment, this book also tries to assess whether *gacaca* courts were able to deliver a fair trial in substantive terms despite the disregard of formal guarantees.

The relevance of *gacaca* courts is also discussed from the point of view of the Rwandan constitutional system, which was created while the transitional justice processes unfolded. One of the main assumptions on which this manuscript is based is in fact that transitional justice processes can play an important constitution-building role, a dimension to which not enough attention has yet been paid.[56] Transitional justice mechanisms adopted and implemented in contexts marked by political and constitutional transitions may represent a decisive constitutional factor.[57] The implications of this assumption are crucial. In fact, the transitional justice approach opted for has an impact on the constitutional order emerging from the ashes of the past regime. In other words, the transitional justice strategies are not at all neutral under the constitution-building perspective. In the last decades, constitutional charters have increasingly tried to address the legacy of violent conflicts from the ashes of which new legal and social orders have emerged. The key features of the 'new wars', to use a fortunate term by Mary Kaldor,[58] which have replaced to a large extent international conflicts, have further complicated peace building processes and imposed new challenges to constitutional charters. The scope of contemporary constitutions has expanded, including not only a social contract, instruments for power sharing and institutional design, but also mechanisms aimed at preserving peace, accountability, reparation and reconciliation. Constitution-building processes have become the *locus* where national identities are defined and acknowledged, and the past is elaborated, remembered and, if possible, repaired. Transitional justice has become a recurrent element of contemporary post-conflict constitutions, a sort of complementary constitutional factor.[59] This is confirmed by recurrent cases where transitional justice mechanisms were directly entrenched in the constitutional charters, including South Africa, Rwanda and Libya.[60] The link between post-violence justice and constitutional processes is not confined to a formal level. The mechanisms chosen to deal with the past exercise a deep influence on the 'memory pact', or the 'social contract' in which the new political system is grounded.

[56] This idea is borrowed from Lollini 2005.

[57] Ibid.

[58] See Kaldor 1999.

[59] On this point see Lollini 2005.

[60] On the relevance of transitional justice in the Libyan constitution drafting process, see International Commission of Jurists 2015.

While remaining the main method of inquiry law-based, the legal approach of the manuscript has been enriched and completed through a series of semi-structured interviews aimed at evaluating the contribution of *gacaca* system to the national reconciliation process, one of the stated goals of these jurisdictions. Finally, this work offers an account of the result of *gacaca* judgements in terms of sentencing, acquittals, terms of penalties, which is missing in previous monographic works published before the end of the *gacaca* process.

1.1.3 Methodology

Given the premise on which this analysis is based—the wide existing gap between formal law and its practice such as in the Rwandan context—it proved to be fundamental to complement the legal perspective with socio-legal research methods borrowed from social sciences.

My investigation relied on a multitude of research instruments. Since 2004 I spent six months based at the ICTR in Arusha and visited Rwanda multiple times. During my research stays I observed *gacaca* hearings mainly in the areas of Gitarama and Kigali and carried out in total 79 interviews. Both interviews and monitoring were conducted thanks to the cooperation of interpreters. For the monitoring of the *gacaca* activities I have availed myself of the use of two interpreters simultaneously. While one translated the content of the *gacaca* hearing for me, the other fully recorded the debate held before the *gacaca* judges in writing. Later the results of the two accounts by the interpreters were compared and possible misunderstandings were eliminated. I received from the National Service of *Gacaca* Jurisdictions a permit to attend *gacaca* hearings but not to film or take pictures. Interviews were not recorded, and the answers received were entirely transcribed. When interviewees asked for anonymity, I used an alias instead of the real name. From July until October 2009 I concentrated my attention on *gacaca* hearings in the area of Nyabisindu (*gacaca* jurisdiction of the sector of Gahogo), which I monitored on a daily basis. I carried out a series of semi-structured interviews asking a wide segment of the population participating in *gacaca* sessions, including 56 survivors, bystanders, returnees and perpetrators, to express their opinion on the contribution of *gacaca* jurisdiction to justice, truth, healing, reparation and reconciliation. This was in particular necessary to validate my theoretical framework and fine-tune the approach to the meaning of reconciliation I adopted with the culture, ideas and customs of the Rwandan population. By doing so, I tried to address a gap in the scholarly literature concerning *gacaca* courts and their contribution to the Rwandan reconciliation process. *Gacaca* investigators in fact have refrained from systematically unpacking the concept of reconciliation, often imposing a definition stemming from the scholarly debate which might have no roots in Rwanda's post-genocide societies. The approach to reconciliation I adopt, in contrast, is bottom-up and based on the meanings that Rwandans attribute to the term reconciliation. Often the opinions expressed on *gacaca* are based more on unexplained

assumptions; for instance, considering retributive or local justice *per se* good or bad, rather than on a sound analysis of their performance and of the assessment by Rwandans.[61] This is why I have directly asked Rwandans what the meaning of the term reconciliation is, a term overburden with ambiguity in the transitional justice debate. This has allowed me to fine-tune my theoretical framework, clearly articulating the parameters against which I assess the reconciliation process ongoing in Rwanda and the contribution of *gacaca* courts to such a process. When I conducted my field research, *gacaca* jurisdictions were in an advanced working phase close to accomplishing their task. This means that Rwandans had gained long experience and familiarity with the *gacaca* process and its meaning. My data are compared with those emerging from other fieldwork, taking into account the most recent developments and triangulated with the results of the monitoring activities conducted by NGOs with sound experience in Rwanda.

I concentrated my fieldwork on a limited area, where my daily activity provided me with some degree of trust by the local community. Of course, the data gathered are relevant with respect to the concerned area and cannot be arbitrarily extended to the whole country. However, interesting similarities and parallels with wider survey-based analysis have emerged and are discussed in this monograph.[62]

Moreover, I conducted interviews with healing experts, representatives of NGOs, the EU and National Service of *Gacaca* Jurisdictions, as well as ordinary Rwandans. I have extensively analysed *gacaca* trials' transcripts and case law, in order to verify if their sentencing was consistent with the respective legislation. I finally examined the dynamics of the genocide at the local level through personal accounts, trials reports and secondary sources. I have enriched my data through interviews to representatives of the Rwandan diaspora throughout Europe who have provided me with interesting narratives of the genocide dynamics. Finally, some words are necessary on the limitations of my research. Certain limitations are due to the challenging environment where the work has been carried out. Scholars depict Rwanda as a country marked by deeply rooted culture of secrecy.[63] Others have

[61] See Rettig 2008, pp. 26–27: 'not nearly enough is known about how Rwandans view *gacaca*. Empirical evidence about Rwandan attitudes toward *gacaca* and post-conflict reconciliation is scant, out-of-date, and suspiciously positive given the range of problems documented by observers. For example, a public opinion survey conducted in early 2002, after the election of *gacaca* judges but before the courts had begun to function, found that 83% of Rwandans had confidence in *gacaca* (Longman et al. 2004). In an earlier survey, 53% of respondents said they were "highly confident" that *gacaca* would promote a lasting peace (Ballabola 2001). A third survey, conducted in 2003 by Rwanda's National Unity and Reconciliation Commission (NURC), revealed some sceptical attitudes toward *gacaca* but still was generally positive (NURC 2008). These results seemingly contradict most qualitative evidence and raises several questions: if Rwandans support *gacaca* in high numbers, why do officials resort to threats and fines to achieve a quorum at *gacaca* sessions? Why do interviews with Rwandans reveal deep concern about *gacaca*'s ability to promote truth, justice, and reconciliation?'.

[62] Ibid.

[63] See Ingelaere 2007, pp. 24–35. See also Ingelaere 2016.

warned that interviewees tend to answer questions according to the expectations of the interviewer. Because categorisation according to ethnicity is today officially prohibited in Rwanda, it is a challenging task to obtain data on the effect of *gacaca* on ethnic polarisation, a crucial element to assess their contribution to the national reconciliation process. A set of specific laws regarding 'divisionism' and the so-called 'genocide ideology' have made it easy for prosecutors to indict Rwandans when they refer to ethnicity. Penal Reform International, an international NGO that has monitored *gacaca* courts extensively, has stressed that ethnicised antagonistic categories are still a strong identity factor for Rwandans.[64]

Furthermore, official government data on *gacaca* trials have been scant for a long time. The Rwandan National Service of *Gacaca* Jurisdictions issued a report containing comprehensive and updated information on the trials completed, the percentage of acquitted and convicted individuals, the minors involved and gender aspects only at the end of the *gacaca* process in June 2012.[65]

1.1.4 *Key Terms:* Gacaca*, Traditional and Informal Justice Systems*

The Rwandan post-genocide experiment with *inkiko gacaca* proposed the revitalisation of a customary, originally traditional and informal autochthonous dispute settlement mechanism. This makes a brief contextualisation of traditional and informal justice systems in the transitional justice realm necessary.

Despite the fact that redress can be obtained through formal or informal justice systems, also labelled in some cases as 'state' and 'non-state' systems, the term 'access to justice' is often used to refer exclusively to access to the formal state justice system.[66] This occurs despite the fact that in rural areas, where in developing countries most of the population tends to concentrate, as well as in some urban communities, 'Western-style justice' is distrusted and avoided by most.[67] Only in some countries informal justice systems have been formally recognised in other sources of legislation. This occurred for instance in the case of customary courts in South Sudan.[68] Informal systems include a variety of traditional, customary and

[64] Penal Reform International (PRI) 2002a, p. 7: 'Although the study did not originally include ethnicity, this experience forced the research team to take also the concept and role of ethnicity into account to understand the views, needs, fears and interests of various groups concerning the *gacaca* programme and its consequences. Research experience over several months has reinforced the clear impression that the importance of ethnicity remains crucial for many Rwandans in describing their own identities and relationship to others'.

[65] Government of Rwanda 2012.

[66] See on this point Wojkowska 2006.

[67] Ibid.

[68] See Diehl et al. 2015, p. 57.

religious mechanisms that handle and settle disputes. Traditional and informal mechanisms have to be distinguished.[69] Traditional justice systems were originally non-state justice systems which have existed (with some changes), since pre-colonial times and are generally still common in rural areas.[70] For the purpose of this research they can fall within the formal or the informal categorisation. The term 'informal justice systems' refers to any non-state justice system.[71] There is no universal comprehensive formula to describe non-traditional informal justice systems.[72] Such systems encompass, for instance, popular justice forums run by non-governmental organisations. While original *gacaca* fell within the category of traditional and informal justice systems, *inkiko gacaca*, modernised and governed by state law, were neither informal nor fully corresponding to the traditional model.

Even though informal justice systems are prevalent throughout the world, especially in developing countries, where they usually resolve between 80 and 90% of disputes, they remain to some extent neglected by researchers and scholars. Ewa Wojkowska has argued that 'this is somewhat surprising as the poor and disadvantaged are infrequent users of the formal justice system'.[73]

When in 2004 the UN Secretary-General[74] stressed the relevance of transitional justice mechanisms in establishing the rule of law in post-conflict contexts, scholars and practitioners of transitional justice mainly focused on the role of truth commissions and of international, national and hybrid tribunals. The role of traditional and informal conflict resolution tools was often neglected or at least underestimated. Shedding light on these forgotten mechanisms Kofi Annan in his report argued that

> due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition. Where these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice. Particularly in post-conflict settings, vulnerable, excluded, victimized and marginalized groups must also be engaged in the development of the sector and benefit from its emerging institutions.

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[69] Wojkowska 2006.

[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] Ibid., pp. 11–12: 'in Malawi between 80 and 90% of all disputes are processed through customary justice forums; In Bangladesh an estimated 60–70% of local disputes are solved through the Salish; In Sierra Leone, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as 'the rules of law, which, by custom, are applicable to particular communities in Sierra Leone; Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana; There are estimates claiming that up to 80% of Burundians take their cases to the Bashingantahe institution as a first or sometimes only instance'.

[74] See UN Security Council 2004, para 8, p. 12.

Consistent with Annan's stance, the UN General Assembly in its Declaration of the High Level Meeting on the Rule of Law at the National and International Levels has stressed that 'informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution', and that 'everyone (…) should enjoy full and equal access to these justice mechanisms'.[75] Moreover, since 2012 the World Justice Project's Rule of Law Index has included informal justice within the nine key indicators to measure the rule of law.[76] Recent research has confirmed the crucial role that is often played in the shadows by traditional and informal justice systems in complementing state-run jurisdictions.[77]

Attracted by the Rwandan experiment with *gacaca*, international attention to the potential role of traditional mechanisms within human rights' protection, reconciliation and transitional justice strategies has increased. Article 3.1 of a Preliminary Pact on Accountability and Reconciliation, signed in late June 2007 by the government of Uganda and the Lord's Resistance Army (LRA), states that 'Traditional justice mechanisms, such as Culo Kwor, Mato Oput, Kayo Cuk, Ailuc and Tonuci Koka and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation'. According to Luc Huyse, 'The explicit reference to traditional justice instruments in the context of peace-making and justice is innovative. It is one of the strongest signs of the rapidly increasing interest in the role such mechanisms can play in times of transition'.[78]

The coexistence and the potential tension between centralised jurisdictions and customary dispute resolution mechanisms is an ancient phenomenon.[79] In the context of transitional justice, it adds to the complications explained above about the coexistence between international and national jurisdictions.

The debate surrounding the *gacaca* courts in Rwanda, the discussion triggered in Uganda over the respective roles of the International Criminal Court, and the traditional reconciliation practices of the Acholi people, as well as the recognised role of informal justice worldwide, indicate that traditional and informal mechanisms are increasingly in the transitional justice spotlight. Some scholars have stressed the important role the aforementioned mechanisms can play in granting access to justice for vulnerable groups as refugees and internally displaced persons (IDPs).[80]

Despite this growing interest, traditional and informal justice systems remain a partially neglected area. Some studies held that in some circumstances they can

[75] See Kötter et al. 2015, preface, ix.

[76] Ibid.

[77] See PRI 2000. See also Wojkowska 2006.

[78] On this point, see Huyse and Salter 2008, p. 1.

[79] See Alessi 2002.

[80] On this point, see Griek 2006, pp. 1–5.

effectively complement conventional judicial instruments and represent a real potential for promoting justice, reconciliation and a culture of democracy.[81]

However, the possibility of a clash between traditional and informal justice systems and international human rights standards exists. The concerns surrounding the use of traditional and informal justice systems to deal with large-scale abuses are interestingly summarised by Lars Waldorf, who commented on the UN Secretary General's position on traditional justice in the following way:

> While a positive step, Annan's pronouncement offered no guidance on three pressing issues. First, how should post-conflict states use local justice? Second, how should the inevitable tension between local practices and international human rights norms be resolved in the extraordinarily complicated setting of post-conflict transitions? Finally, how should local justice relate to international criminal justice? This latter question raises a key concern about the International Criminal Court's so-called complementarity regime: should meaningful, local justice be counted as part of a state's good faith efforts to provide post-conflict accountability, such as would preclude the ICC from asserting jurisdiction?[82]

Inspired by the questions raised by Waldorf this book tries to expand the existing knowledge regarding *inkiko gacaca*.

1.1.5 Outline

This monograph consists of nine chapters.

Chapter 1 provides an introduction to the book clarifying its structure, the key issues faced and the methodology adopted.

Chapter 2 provides an overview of the concept of genocide and its evolution in international law. This introduction is necessary to properly understand the key features of the debate surrounding the Rwandan Genocide. The challenges posed by the necessity to protect ethnic minorities within sovereign states are highlighted, as well as the contribution of Raphael Lemkin to the emerging of the concept of genocide in international law. The 1948 Convention on the Repression and Punishment of the Crime of Genocide, to which Rwanda acceded in 1975, is analysed with particular attention to the objective and subjective element of the crime. Attention is also paid to the contribution of the jurisprudence of the international tribunals, and in particular the ICTR, to the interpretation of the concept of genocide.

The key features of the Rwandan genocide are discussed, with particular emphasis on the role of the Belgian colonisation, a determining factor for the 'ethnicisation' of the categories of Hutu and Tutsi, which played a major role in the violent dynamics triggered in 1994. The impact of the decolonisation and of the 1959 Hutu social revolution on the relationships between Hutu and Tutsi is also

[81] On this point, see Huyse and Salter 2008, pp. 181–198.

[82] See Waldorf 2006a, p. 4.

described and assessed. Finally, the constitutional transition and the challenges that post-genocide Rwanda had to face in terms of reconstruction of the rule of law and of the social fabric are highlighted, with particular emphasis in the issue of post-genocide justice.

Chapter 3 sketches a legal framework for countries in transition after experiencing mass atrocities and widespread human rights violations. It depicts the obligations of the Rwandan state in the aftermath of the genocide relevant under the point of view of transitional justice. I firstly stress the constitutional implications of transitional justice processes. Then the scope of the individual right to reparation of victims of international crimes, the principle of duty to prosecute gross human rights violations and the emerging right to the truth under international law are analysed. The legal framework provided will be also used to highlight what are the rights of the victims of the Rwandan genocide and to what extent Rwandan prosecution policies were in harmony with international standards.

Chapter 4 highlights the challenges that Rwanda faced in the immediate aftermath of the genocide focusing on the role of ordinary justice. The first Organic Law on domestic prosecution of the *génocidaires* (Organic Law 8/1996) is scrutinised, paying due attention to its categorisation mechanism. This is of particular relevance because the first *gacaca* law relied on the same criteria for the categorisation of genocide-related crimes. The penalties and procedural measures provided for by the law are also described. The reform of the Code of Criminal Procedure and Law 9/1996 are also analysed with particular regard to the issue of abuse of pre-trial detention, a dramatic issue in the aftermath of the genocide. Finally, the sentencing practice of ordinary courts is considered and conclusions regarding their penological rationale are drawn.

Chapter 5 provides an insight into *gacaca* legislation and the unfolding of the *gacaca* experiment. The key features of the pre-colonial *gacaca* are first outlined, which allows us to compare traditional *gacaca* to *inkiko gacaca*. This comparison offers a necessary perspective to discuss some of the main assumptions surrounding the use of these jurisdictions to deal with the legacy of the Rwandan genocide. The different *gacaca* laws that have been passed between 2000 and 2008 are then scrutinised in-depth. This is necessary to understand the legal framework regulating the courts.

Chapter 6 assesses *gacaca* courts against the background provided by domestic and international norms governing fair trials standards. The concerns expressed by scholarships and NGOs regarding the respect by *gacaca* of key principles such the non-retroactivity of criminal law, the right to defence, double jeopardy and the presumption of innocence are reviewed.

Chapter 7 provides an overview of the way *gacaca* courts have worked in practice. This aspect is crucial in order to verify to what extent the daily practice of the courts corresponded to and respected their legal framework. Attention is paid to the phases of preparation of the *gacaca* courts, their launch and the training of the *inyangamugaio*, as well as the extent to which the non-compliance to human rights norms granting a fair trial has jeopardised the *gacaca* experiment. The way in which the *gacaca* procedure has unfolded is consequently analysed in order to

detect whether the participation of local communities and the *gacaca* judges have granted a fair trial in substantive terms. An overview regarding the judgements delivered by *gacaca* courts covering sentencing rationale and modalities is provided. Particular attention is devoted to child victims and perpetrators of genocide-related crimes and gender issues. Finally, relying on direct observation of *gacaca* practice, scholarly sources and accounts by NGOs, concerns triggered by administrative intrusion by the Rwandan Government and its impact on truth telling and fair trial rights are exposed.

Chapter 8 faces the issue of reconciliation in Rwanda focusing on the contribution made by *gacaca* courts. Efforts to build unity and reconciliation made by Rwandan post-genocide state are initially sketched and several *ad hoc* mechanisms are discussed, including the National Unity and Reconciliation Commission, *ingando* and *abunzi*. Due to the initial lack of definition of the concept of reconciliation by the Rwandan Government, the progressive conceptualisation of the term is also reflected upon. Genocide denial laws and 'memory wars' occurring in Rwanda are in the focus of the chapter, as this allows us to have an in-depth insight in the governmental policy of memorialisation of the genocide. This policy, culminating in the adoption of the contested Law 13/2008 on genocide ideology, is a clear instance of the 'public use of history' and has imposed severe limitations on freedom of expression in post-genocide Rwanda.

The results of the fieldwork conducted regarding the role of *gacaca* in Rwanda's reconciliation process are presented. Particular attention is paid to the conceptualisation of the term 'reconciliation' by Rwandans and its key components, namely truth, justice, healing and reparation.

Chapter 9 includes a conclusion based on the previous chapters and a final assessment of the *gacaca* journey, highlighting the key lessons that should be drawn.

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Chapter 2
The Crime of Genocide and Its Contextual Features in Rwanda

Contents

Abstract In order to understand the key features of the Rwandan Genocide and the debate surrounding it, this chapter provides an overview on both the concept of genocide and its evolution in international law. The challenges posed by the protection of ethnic minorities within sovereign states are highlighted, as well as the contribution of Raphael Lemkin to the emergence of the concept of genocide in international law. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide is analysed, with particular attention to the objective and subjective element of the crime. The contribution of the jurisprudence of the international tribunals and in particular the ICTR to the interpretation of the meaning of the concept of genocide is also in the spotlight. The key features of the Rwandan genocide are discussed. Particular emphasis is placed on the role of Belgian colonization, which significantly contributed to the 'ethnicisation' of the categories of Hutu and Tutsi, a factor that played a major role in the violent dynamics triggered in

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1994. In addition, the careful preparation of the genocide by the regime of Juvenal Habyarimana and the indifference of the international community are emphasised. Finally, the constitutional transition and the challenges that post-genocide Rwanda faced in terms of reconstruction of the rule of law and of the social fabric are highlighted, with particular emphasis on the issue of post-genocide justice.

Keywords Convention on the Prevention and Punishment of the Crime of Genocide · ICTR · ICTY · Raphael Lemkin · Treaty of Versailles · Leipzig trials · Martens Clause · UNAMIR · Hutu · Tutsi · Hamitic theory · Arusha Peace Agreement

2.1 Historical Development of the Crime of Genocide

Quite optimistically, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, (hereafter referred to as the 'Genocide Convention') was seen for decades after its adoption as an archaeological element of international law, a historical necessity and a tribute to the memory of Armenians, Jews, Gypsies and other victimised groups. As William Schabas has put it, the Convention 'was soon relegated to obscurity as the human rights movement focussed on more 'modern' atrocities: apartheid, torture, disappearances'.[1] This overly optimistic perspective has been abandoned after the allegations of genocide in Cambodia, Guatemala, the Balkans and Rwanda, followed later by Darfur, shocked the conscience of the international community.

Genocidal massacres have marked human relations and have been widely reported since time immemorial.[2] This is acknowledged in the Preamble of the Genocide Convention, which states that 'at all periods of history genocide has inflicted great losses to humanity'. Despite the deep rootedness of genocide in human history, the law prohibiting it is quite recent. This attests once more to the complex relationship between human rights law and state sovereignty.[3] The overdose of prudence by the states in waiving the shield of sovereignty was due to the fact that genocide is usually committed or tolerated by states that consequently show unwillingness in prosecuting state actors. The efforts to prosecute and punish other crimes against the law of the nations committed by individuals, such as piracy or trafficking in human beings in fact were more successful.[4]

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, entered into force in January 1951, protects four groups (national, racial, ethnic and religious, but not political groups due to the opposition of the USSR

[1] See William Schabas, *The Greatest Crime*, Washington Times, Dec. 7, 1998.

[2] See Ternon 1997.

[3] See Schabas 2000, p. 1.

[4] Ibid., p. 2.

during the negotiations) against the 'crime of crimes' providing a narrow definition of genocide.[5] It simultaneously poses duties on states in terms of prosecution, prevention and, despite the inertia showed before and during the 1994 Rwandan crisis by the international community, prevention. Due to the great expectations lying heavily on states' shoulders, the Genocide Convention has met a relatively low number of adherents if compared to other important human rights instruments.[6]

In 2006 the ICJ affirmed that the prohibition of genocide is a norm of *jus cogens*, a peremptory norm of international law.[7] Consistently with this position, the ICJ confirmed in 2007 that the genocide prohibition possesses 'the existing requirements of customary international law'.[8]

2.1.1 The Origins

International legal norms binding states to protect the basic rights of their citizens represent a rather recent novelty in the system of international relations, which for a long time has been shaped according to the Westphalian paradigm.[9] Attempts to grant religious minorities some safeguards date back to the 1648 Peace of Westphalia and other treaties providing Christians living within the Ottoman Empire or British North America with some degree of protection.[10] Later the

[5] According to Article 2 of the Genocide Convention 'Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group'.

[6] There are currently 137 parties to the Convention. Among the recent signatory states are Sudan, Comoros and Bolivia. For an interesting comparison, see Schabas 2000, p. 3. The 1989 Convention for the Rights of the Child, counts 192 parties, the 1969 International Convention for the Elimination of All Forms of Racial Discrimination has 173 adherents, the 1981 Convention for the Elimination of Discrimination Against Women, 185 parties.

[7] On this point, see ICJ, *Case Concerning Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application,* 3 February 2006 (New Application: 2002), para 64.

[8] On this point, see ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, 26 February 2007, Reports 2007, p. 43, para 161.

[9] See Schabas 2000, p. 18: 'In human history, the concept of international legal norms from which no State may derogate has emerged only relatively recently. This is, of course, the story of the international protection of human rights. The prohibition of prosecution of ethnic groups runs like a golden thread through the defining moments of the history of human rights'.

[10] Ibid., p. 18. See, for instance, the Treaty of Peace between Turkey and Russia signed in Adrianople on 14 September 1829, BFSP XVI, p. 647, Articles V and VII; or the Treaty of Peace and Friendship between France and Great Britain signed at Utrecht on 11 April 1713, Dumont VIII, Part 1, p. 339, Article 14.

'Martens Clause' embodied in The Hague Convention (II) of 1899 placed civilians under the protective shield of principles of international law also in cases not directly contemplated by the same convention.[11] Moreover The Hague Regulations, focusing in addition on the treatment of civilians in occupied territories, ruled that occupant powers have to respect 'family honour and rights, the lives of persons, and private property, as well as religious convictions and practice'.[12]

The peace treaties which put an end to the First World War's atrocities recognised the necessity to develop mechanisms of protection for minorities' rights. The Armenian genocide raised the question of accountability for high-ranking public officials and Heads of States responsible for massacres of civilians within their jurisdiction. The first attempt to set up international prosecution mechanisms for the Armenian genocide was anticipated by the joint declarations of France, Great Britain and Russia on 24 May 1915, affirming that 'in the presence of these new crimes of Turkey against humanity and civilisation, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres'.[13]

2.1.2 Versailles Treaty and Leipzig Trials

In the aftermath of World War I, a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was set up with the mandate to investigate and report on breaches of international law committed by Germany. The Commission denounced the 'violations of the Laws and Customs of War and the Laws of Humanity' committed by the Germans and their allies.[14] The practices

[11] See the 1899 Hague Convention (II) with respects to the Laws and Customs of War on Land, Preamble. The Martens Clause established that 'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience'.

[12] See the Convention (IV) Respecting the Laws and Customs of War by Land (1910), UKTS 9, annex, Article 46.

[13] Schabas 2000, p. 20, notes that this is the first time that the term 'crimes against humanity' is adopted 'at least within an international law context'. According to Schabas 'the expression "crimes against humanity" appears to have been in use for many years. During debates in the National Assembly, French Revolutionary Robespierre described the King, Louis XVI, as a "criminal against humanity". In 1890, an American observer, George Washington Williams, wrote to the United States Secretary of State that King Leopold's regime in Congo was responsible for "crimes against humanity"'.

[14] See *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919,* Oxford, Clarendon Press, 1919, p. 23.

reported by the Commission corresponded to acts which today would fall within the umbrella of the crime of genocide as defined in the 1948 Convention. Efforts 'to denationalize the inhabitants of occupied territory' carried out in Serbia by Bulgarians, Germans and Austrians, who tried to prohibit the use of Serbian language,[15] as well as abduction of children, starvation and internment in inhuman conditions were reported.[16] The Commission encouraged the creation of an international 'High Tribunal' and required the prosecution of 'all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity'.

The Greek representative in the Commission proposed a new category of crimes aimed at covering the massacres of the Armenians: the 'Crimes against the law of humanity'. The latter were immediately labelled by Woodrow Wilson as an instance of *ex post facto* law.[17] The Treaty of Versailles provided for the first international trial of a Head of State, Kaiser Wilhelm II, who, according to Article 227 of the agreement was to be tried by a special tribunal. However, because of the refusal by Netherlands opposed to the Kaiser's extradition, the trial was never put in place. Articles 228[18] and 230[19] of the Treaty of Versailles established respectively the right of the war victors to prosecute before their own military courts those Germans 'accused of having committed acts in violation of the laws and customs of war' as well as the duty of Germans to share all the necessary documents facilitating prosecution efforts. The German Government accepted the treaty on condition, arguing that the criminal code in force at that time did not admit the handing over of German nationals to foreign powers for arraignment and punishment. A solution was agreed upon, by allowing the prosecution before the Supreme Court of the Empire of those suspects of war atrocities charged by the Allies. The trials however turned out to be a farce. Germany opposed the prosecution of most of the suspected chosen by the Allies, arguing that putting on trial its defence forces would have weakened the government. As a result, in the end, only a few

[15] Ibid., p. 39, the Commission, in fact, reported 'people beaten for saying "good morning" in Serbian, destruction of archives of churches and law courts, and the closing of schools'.

[16] See Lippman 1999, pp. 589–613.

[17] See Schabas 2000, p. 23.

[18] On this point, see Article 228 of the Versailles Treaty: 'The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities'.

[19] On this point, see Article 230 of the Versailles Treaty: 'The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility'.

low-ranking German military personnel were brought to trial for atrocities committed against prisoners in war camps and for the targeting of hospital ships. In total, only nine trials took place.[20] Most of the defendants were acquitted and those convicted were quickly released from prison.

As to the massacres of Armenians perpetrated by the Ottoman Empire domestic prosecution efforts encouraged by Turkish lawyers were partially successful. Ministers of the war cabinet as well as members of the Ittihad party were prosecuted on the basis of the penal code in force at that time and consequently convicted *in absentia* to heavy sentences including capital punishment. They were found guilty of 'organization and execution of crime of massacre' committed against the Armenians. Pursuant to Article 226 of the Treaty of Sèvres Turks were subject to trial by the Allies 'notwithstanding any proceedings or prosecution before a tribunal in Turkey'. Turkey had to hand over 'all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under Turkish authorities'. The greatest novelty embodied in the Treaty of Sèvres was however included in Article 230, anticipating prosecution of what today would correspond to crimes against humanity.[21]

Unfortunately those prosecutions were never carried out, as the Treaty of Sèvres was never ratified. It was replaced by the Treaty of Lausanne[22] of 24 July 1923, which entrenched an amnesty for all crimes committed between 1 August 1914 and 20 November 1922. This had severe consequences for those Armenians who escaped the 1915 slaughters as they were targeted again by the former persecutors.[23] Between the two world wars, a system of protection for minorities was established in Europe, 'almost as if international law-makers sensed the coming Holocaust'.[24] According to the Advisory Opinion of the Permanent Court of International Justice (PCIJ) *Minority Schools in Albania*,[25] the aim of the treaties protecting minorities was to 'secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs'. To some extent these treaties slowed the implementation of Nazi policies: in Silesia, for instance, the

[20] See Schabas 2000, p. 24.

[21] See Schabas 2000, p. 26.

[22] Treaty of Lausanne between Principal Allied and Associated Powers and Turkey, 1923.

[23] See Holloway 1967, pp. 60–61, where the author holds that the failed attempt to enforce the Treaty of Sèvres 'Resulted in the abandonment of thousands of defenceless people—Armenians and Greeks—to the fury of their persecutors, by engendering subsequent holocausts in which the few survivors of the 1915 Armenian massacres perished'.

[24] See Schabas 2000, p. 28.

[25] Advisory Opinion, 6 April 1935, PCIJ, Series A/B, No. 64, p. 17.

Jews were protected against the Nuremberg Laws by a deal between Poland and Germany.[26]

2.1.3 *Lemkin's Contribution to the Emerging of Genocide in International Law: 'An Old Practice in Its Modern Development'*

Consistently with his assumption that 'new conceptions require new terms', Raphael Lemkin translated 'an old practise in its modern development' by merging the ancient Greek root *genos*, meaning race, folk or tribe with the Latin verb *caedere*, which means to kill. The result was the rapidly universally adopted word 'genocide'. Lemkin defined the new concept as:

> (A) co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions of culture, language, nation feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[27]

If compared with the definition provided in the Genocide Convention, Lemkin's definition is at the same time narrower and yet broader. In fact, on the one hand it includes only national groups (and not ethnic, religious and racial); whilst on the other hand it encompasses 'acts aimed at destroying the culture and livelihood of the group' which are not mentioned in the Genocide Convention.[28]

In his writings Lemkin proposed a categorisation of different practices of genocide based on Nazis' acts perpetrated in occupied Europe.[29] Genocide is, according to Lemkin, a two-phased process, consisting of the destruction of the national features of the oppressed group, followed by the imposition of the national features of the oppressor. By highlighting that, according to Germany's plans, some populations had to be 'Germanized', while others had to be exterminated, Lemkin shed light on different genocidal strategies encompassing 'political, social, cultural, economic, biological, physical, religious and moral genocide'.[30] The 'recommendations for the future' formulated by Lemkin concluded the chapter on genocide in his seminal work 'Axis Rule in Occupied Europe'. Lemkin expressed his concerns as to the instruments of international law aimed at preventing and punishing

[26] See Schabas 2000, ibid.
[27] See Lemkin 1944, p. 79.
[28] See Schabas 2000, p. 25.
[29] Lemkin 1944, pp. XI–XII.
[30] Schabas 2000, p. 28.

genocide in force at that time, calling prophetically for the 'prohibition of genocide in war and peace'.[31] The Polish lawyer referred to the restricted applicability of The Hague Conventions as their main shortcoming. Moreover, he noted that the Hague Conventions were 'silent regarding the preservation of the integrity of the people' when dealing with rules governing occupation.[32] Lemkin also suggested that 'an international controlling agency vested with specific powers, such as visiting the occupied countries and making inquiries as to the manner in which the occupant treats natives in prison' should be integrated into the Conventions.[33] The Polish lawyer further criticised the system of minorities' protection enforced in the wake of World War II, noting that it 'proved to be inadequate because not every European country had the sufficient judicial machinery for the enforcement of its constitution'.[34] Lemkin was also a supporter of the adoption of the principle of universal jurisdiction in order to punish the crime of genocide.[35] The pioneering work of Lemkin shed light on genocide-related issues that remain central even today. Serious consideration of his recommendations regarding genocide prevention and repression would have probably saved many lives fifty years later in Rwanda, and indeed elsewhere.

2.1.4 Developments Leading to the London Conference

The genocidal practices carried out by Nazis in Europe triggered a wide debate on the mechanisms to be used to address them. A milestone regarding the prosecution policies of Nazi criminals was the Moscow Declaration of 1 November 1943, which underscored the 'evidence of the atrocities massacres and cold-blooded mass executions'.[36] It however failed in addressing the racist aspect of the Germans' crimes because it did not refer to any individual targeted as a part of a group, nor to the Jews. The United Nations Commission for the Investigation of War Crimes, set up shortly before the Moscow Declaration, at first decided to base prosecution on the list of offences formulated in 1919 by the Responsibilities Commission of the Paris Peace Conference. The 1919 list encompassed crimes such as 'denationalization', murder and ill-treatment of civilians but failed to address the issue of the extermination of the Jews. Similarly, the issue remained unaddressed in the

[31] See Lemkin 1944, p. 90.

[32] Ibid., p. 90.

[33] Ibid., p. 95. On this point, W. Schabas comments: 'Here Lemkin may be able to claim credit for conceiving of the fact-finding commission eventually provided for under Article 90 of Protocol Additional I to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, that was created in 1991'. See Schabas 2000.

[34] Ibid., p. 93.

[35] Ibid., pp. 93–94.

[36] On this point, see "Declaration on German Atrocities", Department of State Publication 2298, Washington: Government Printing Office, 1945, pp. 7–8.

Commission's 'Draft Convention for the Establishment of a United Nations War Crimes Court'.[37]

Despite the cautiousness of the *Realpolitik*, efforts to establish a sound basis for bringing to trial all those responsible for the atrocities committed against the Jews were not lacking. An example were the efforts by the US representative on the legal committee of the Commission, who proposed the term 'crimes against humanity' for indicating felonies 'committed against stateless persons or against any persons because of their race or religion'.[38] At the very end, the Statute of London included human rights violations within the jurisdiction of the Nuremberg Tribunal as far as their commission was marked by a clear link with an armed conflict.[39] One of the main merits of the Nuremberg trial was its contribution to the fact-finding process concerning the genocidal polices carried out by Hitler's Germany and creating a necessary database for further research. Shedding light on the Nazis' practices during WWII, such a database would provide an important debate platform for the further drafting of the Genocide Convention in 1948. As a reminder of the crucial relevance of the principle stated through the Nuremberg Trial Otto Kircheimer stated that:

> In spite of the Nuremberg trial's infirmities, the feeble beginning of transnational control of the crime against human condition raises the Nuremberg judgement a notch above the level of political justice by fiat of a successor regime.[40]

2.1.5 *UN General Assembly Resolution 96(I) 1946*

The Nuremberg Trial, despite its exemplary value, failed to label genocide as an international crime. Cuba's representative at the UN General Assembly (hereinafter GA) hosted in London shortly afterwards displayed the political will to redress this pitfall by proposing the GA a resolution on Genocide. The resolution was unanimously endorsed by the GA. It solemnly affirms that:

> Genocide is a denial of the existence of entire human groups, as homicide is the denial of the rights to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to the moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed,

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[37] See UN War Crimes Commission 1944.

[38] See United Nations War Commission, *History*, p. 75.

[39] As the American prosecutor Telford Taylor stated, 'none of the Nuremberg judgements squarely passed on the question whether mass atrocities committed by or with the approval of a government against a racial or religious group of its own inhabitants in peacetime constitute crimes under international law'. See Taylor 1971, pp. 224 and 226.

[40] Kirchheimer 1962, p. 336.

> entirely or in part. The punishment of the crime of genocide is a matter of international concern.[41]

Although not a binding source of law,[42] the resolution paved the way to the adoption of the Genocide Convention two years later, unambiguously affirming that the international community considered genocide an international crime and mandating the UN Economic and Social Council (ECOSOC) to draft the Genocide Convention. Resolution 96(1) has several merits. Firstly it makes both individuals in their private capacity as well as public officials accountable for genocide. Secondly, 'the unfortunate legacy of the Nuremberg jurisprudence',[43] the necessity of a link between genocide and armed conflict, was abolished by the resolution. However the latter is not explicit as to the jurisdiction competent for the prosecution of genocide, ambiguously referring to 'international cooperation'. While Raphael Lemkin in 1947 stated that the Resolution admitted the principle of universal jurisdiction, William Schabas expresses an opposite view, as the explicit reference to universal jurisdiction included in an earlier draft was subsequently excluded.[44] It is worth noting that the groups protected include those relating to race, religion and political affiliation; the latter would later be excluded from the 1948 Genocide Convention. Finally, Resolution 96(1) imposes on States the duty to enact domestic legislation aimed at preventing and punishing genocide. The international community was ready for a binding international law instrument against genocide.

2.2 The Genocide Convention

The adoption of the Genocide Convention on 9 December 1948 triggered an interesting debate within the United Nations bodies concerned. The procedure was somewhat tortuous, and two drafts of the covenant were elaborated before the final version was endorsed. The first version of the convention was drafted by the Secretariat's Human Rights Division supported by Raphael Lemkin, Vespasian Pella and Henri Donnedieu de Vebres, former judge of the Nuremberg Tribunal. In the words of Donnedieu de Vabres, the Secretariat's draft represented a 'maximum

[41] United Nations General Assembly Resolution 96 (I): The Crime of Genocide, United Nations, 11 December 1946.

[42] On this point, see International Court of Justice, Advisory Opinion *Legality of the Threat of Use of Nuclear Weapons*, ICJ Reports 226, para 70: 'General Assembly resolutions, even if they are not binding, may sometimes have a normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or emergence of an *opinio juris*. To establish whether this is true of a given Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule'.

[43] Schabas 2000, p. 57.

[44] Ibid.

programme'.[45] It consisted of an ambitious 24 articles proposal accompanied by a commentary and two draft statutes for an international criminal tribunal (which were not required by Resolution 96(1)). One of the draft convention's objectives was to make a clear distinction between genocide and other notions such as crimes against humanity, previously defined in the Nuremberg Charter, while avoiding overlap with the simultaneous work of the Commission on Human Rights, tasked with drafting the Universal Declaration of Human Rights. Genocide was defined as 'the intentional destruction of a group of human beings'. The groups protected encompassed only the racial, national, linguistic, religious, and political,[46] excluding the 'other groups' mentioned in Resolution 96(1). The draft followed the articulation of Lemkin's book *Axis Rule in Occupied Europe*, depicting three possible acts of genocide, physical, biological and cultural. Finally, according to article XIII of the Secretariat's draft, states were bound to provide reparations to victims of genocide. This is an important detail, considering that victims' attempts to receive reparations in the aftermath of genocide have mostly failed, as the Rwandan case confirmed.

A second draft convention was prepared by the *ad hoc drafting Committee* whose members were China, France, Lebanon, Poland, the Soviet Union, the United States and Venezuela. The ad hoc committee prepared a draft convention accompanied by a commentary.[47] The debate was centred on the most crucial issues surrounding the intentional element, the definition of the groups protected and the inclusion of cultural genocide. Ultimately, the reference to the political group as an object of protection and the cultural genocide as a prohibited act were not included in the consolidated text of the Genocide Convention.

The consolidated version of the Genocide Convention was adopted on 9 December 1948. It opens with a preamble referring to Resolution 96(1) which declares genocide a crime under international law. In article I, the Contracting Parties, by confirming that genocide can be committed in time of war or peace, emancipated the 'crime of crimes' from the Nuremberg legacy, and committed themselves to prevent and punish it. Article II is at the very heart of the Convention as it provided an authoritative definition of the crime by enumerating the acts of genocide (objective element) and by highlighting the *mens rea* (or subjective element) of genocide. Moreover, the list established in Article II of genocidal acts is meant to be exhaustive. It states that:

> genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (1) Killing members of the group;
> (2) Causing serious bodily or mental harm to members of the group;

[45] See UN Committee on the Progressive Development of International Law and its Codification 1947, p. 13.

[46] According to Lemkin the political group, lacking the feature of permanency, should have been excluded. See Schabas 2000, p. 61.

[47] See UN Ad Hoc Committee on Genocide 1948a, b.

(3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(4) Imposing measures intended to prevent births within the group;
(5) Forcibly transferring children of the group to another group.

Article III enumerates the scope of the punishable conduct,[48] including: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide. Article IV provides that individuals responsible for genocide are to be punished independently from any official capacity. Article V establishes that states must adopt the necessary domestic legislation 'to give effect to the provisions of the Convention and, in particular, to provide effective penalties for persons guilty of genocide'. Article VI deals with the jurisdiction competent for the crime of genocide. It rejects the principle of universal jurisdiction, accepting the territorial jurisdiction of the state where the crime is committed. As an alternative to the territorial jurisdiction, Article VI proposes an international penal tribunal whose judgements are binding for those states which have accepted its jurisdiction. Some states considered the setting up of an international criminal court a fundamental complement to the adoption of the Genocide Convention. According to France, this was 'the essential purpose of the convention on genocide'.[49] Pursuant to Article VII, adherents to the Convention committed themselves to extradite genocide suspects. Article VIII allows states party to the Convention to 'call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide'. Article IX gives jurisdiction to the International Court of Justice in case of disputes among States Party regarding the interpretation, application or fulfilment of the Convention.

The Convention was approved together with two General Assembly resolutions. The first concerned the establishment of an international criminal court, while the second regarded the extension of the Convention to be dependent on self-governing territories.

2.2.1 The Objective Element of the Crime of Genocide

The conduct that may constitute genocide is defined in Article II of the Genocide Convention. The fact that genocide is distinct from crimes against humanity is confirmed by Article II not requiring a widespread or systematic practice.[50] Needless to say, 'genocidal acts are hardly conceivable as isolated or sporadic

[48] Article III of the Convention affirms: The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

[49] See United Nations 1948.

[50] Cassese 2003, p. 100.

events',[51] but the widespread or systematic structure of the genocidal practice is relevant only 'from an evidentiary point of view, not as a legal ingredient of the crime'.[52]

The definition of the term 'group' was one of the most difficult questions in the context of the interpretation of the Convention. What is a group for the purpose of the Convention? And what is the meaning of the terms 'national', 'racial', 'ethnic' and 'religious'? This question is particularly relevant in the Rwandan context, where in order to identify Tutsi as victims of the genocide it is necessary to establish why they form a group. The case law of the *ad hoc* tribunals ICTR and ICTY has provided interesting answers to these questions, helping lawyers and researchers in interpreting the Genocide Convention. Particularly relevant in this regard is the *Akayesu* judgement issued by the ICTR in 1998. According to the Trial Chamber, it is necessary for a group to be stable in order to fall within the scope of protection of the Convention. The group must be

> constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.[53]

Interestingly, Trial Chamber I, disregarding Article II of the Genocide Convention, (which expressly refers only to the aforementioned four groups) and directly referring to the intention of its drafters as expressed in the *travaux préparatoires*, stated in para 516 of *the Akayesu* judgement that protection under the covenant should be granted to 'any stable group'.[54]

As to the definition of national group, referring to the Nottebohm Case[55] Trial Chamber I stated that 'a national group is defined as a collection of people who are

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[51] Ibid.

[52] Ibid.

[53] On this point, see ICTR, *Akayesu*, Trial Court, 2 September 1998, Case No. ICTR-96-4-T (*Akayesu 1998*) §511.

[54] Ibid., §516: 'Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group'.

[55] On this point, see ICJ, *Liechtenstein v. Guatemala (Nottebohm Case), 6 April 1955*, [1955] ICJ 1.

perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'.[56]

The ethnic group is defined by Trial Chamber I as 'a group whose members share a common language or culture'.[57]

Trial Chamber I defined a racial group as a group 'based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.[58]

Finally, a religious group is identified as 'one whose members share the same religion, denomination or mode of worship'.[59]

The question of identifying the targeted group when dealing with the crime of genocide in Rwanda has assumed a crucial importance because Hutu and Tutsi are two groups very difficult to tell apart. They in fact share the same culture, religion, language, citizenship and physical features. The Trial Chamber in *Akayesu* set out the criteria to distinguish the targeted group in Rwanda through a mix of objective and subjective factors:

> In Rwanda in 1994, the Tutsi constituted a group referred to as "ethnic" in official classifications. Thus, the identity cards at the time included a reference to "ubwoko" in Kinyarwanda or "ethnie" (ethnic group) in French which, depending on the case, referred to the designation Hutu or Tutsi, for example. The Chamber further noted that all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity. Accordingly, the Chamber finds that, in any case, at the time of the alleged events, the Tutsi did indeed constitute a stable and permanent group and were identified as such by all.[60]

This position was later confirmed and further developed in the case *Kahyishema and Ruzindana*:

> An ethnic group is one whose members share a common language and culture: or a group which distinguishes itself, as such (self-identification); or a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs.[61]

Only by introducing this double criterion based on self-identification or identification by others it is possible to consider Hutu and Tutsi as two different groups in Rwanda. Simply relying on the phrasing of the Genocide Convention and the

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[56] See *Akayesu* 1998, §512.

[57] Ibid., §513.

[58] Ibid., §514.

[59] Ibid., §515.

[60] Ibid., §702. Cassese observes: 'It would thus seem that for the Trial Chamber the question of whether or not a multitude of persons made up a group protected by the rules against genocide was primarily a question of fact: the court had to establish whether (i) those persons were *in fact treated* as belonging to one of those protected groups, and in addition (ii) they *considered themselves* as belonging to one of such groups', (italics in the original version). See Cassese 2003, p. 101.

[61] On this point, see ICTR, The Prosecutor V. Clément Kayishema And Obed Ruzindana, *Case No. ICTR-95-1-A*, §98.

definition of the four protected groups provided in *Akayesu*, it would be impossible to distinguish Hutu and Tutsi. According to Cassese, 'in *Rutaganda* the ICTR pushed the subjective standard even further' stressing that:[62]

> The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.[63]

The *Akayesu* judgement also defined the conduct corresponding to the *actus reus* of genocide. Trial Chamber I stressed the intentional nature of the act of 'killing' included in the Genocide Convention.[64] With regard to 'causing serious bodily or mental harm to members of the group' the Trial Chamber I concluded that it 'does not necessarily mean that the harm is permanent and irremediable'.[65] Moreover, Trial Chamber I held that the expression 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' has to be 'construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.[66]

The ICTR Trial Chamber I has also contributed to the interpretation of the meaning of 'Imposing measures intended to prevent births within the group means' affirming that they include 'sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. Trial Chamber I was of the opinion that 'In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group'.[67]

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[62] Cassese 2003, p. 102.

[63] See ICTR, Rutaganda, Judgement and Sentence, 6 December 1999, ICTR-96-3-T, §56. The ICTY has shared this point of view in two cases, respectively TY, Prosecutor v. Goran Jelisić, Trial Judgement, 14 December 1999, IT-95-10-T (§§70–71) and ICTY, Prosecutor v. Radislav Krstić Appeal Judgement, 19 April 2004, IT-98-33-A (§§556–7 and 559–60).

[64] On this point, see *Akayesu* 1998, §500, where Trial Chamber I held that 'the term "killing" used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term "meurtre", used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for, incidentally, in the Penal Code of Rwanda which stipulates in Article 311 that "Homicide committed with intent to cause death shall be treated as murder".

[65] *Akayesu* 1998, §502.

[66] Ibid., §505.

[67] Ibid., §507, Trial Chamber I also clarified that 'measures intended to prevent births within the group may be physical but can also be mental. For instance, rape can be a measure intended to

Trial Chamber I, interpreting the very meaning of 'forcibly transferring children of the group to another group', affirmed that 'the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another'.[68]

Finally, Article II of the Convention has triggered an interesting debate on the relationship between genocide and 'ethnic cleansing'. The latter amounts to 'the forcible expulsion of civilians belonging to a particular group from an area, a village, or a town.[69] During the preparatory works for the Convention, Syria proposed to introduce one more class of acts of genocide: 'Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment', which would provide a link between ethnic cleansing and genocide.[70] The attitude of domestic courts is ambivalent, some of them including ethnic cleansing within the genocide paradigm, others excluding it. According to Cassese, the German Constitutional Court has assumed a balanced position in the *Jorgić* case, holding that: 'systematic expulsion can be a method of destruction and therefore an indication, though not the sole substantiation, of an intention to destroy'.[71]

2.2.2 *The Subjective Element of the Crime of Genocide*

Article II of the Genocide Convention at para I also clarifies the subjective element of the crime, the so called *mens rea*, 'the intent to destroy, in whole or in part, a national, ethnic, racial or religious group'. The targeted individual is not considered as such, in its individual capacity, but because of his/her membership in a group. Genocide is a crime committed with *dolus specialis*, an aggravated criminal intention that distinguishes it from other offences characterised by the same criminal conduct. This mental element by definition rules out other subjective elements as recklessness or *dolus eventualis* and gross negligence. In Akayesu the ICTR Trial Chamber has confirmed that to qualify a certain conduct as genocide a special intent is needed. According to the *Akayesu* judgement, the latter is 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'.[72] As the intent is 'a mental

prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate' (§508).

[68] *Akayesu* 1998, §509.

[69] See Cassese 2003, p. 98.

[70] For the Syrian proposal see UN Doc. A/C6/234, incorporated in A/C6/SR.81.

[71] The *Jorgić* case was decided the Higher State Court (*Oberlandsgericht*) of Düsseldorf in 1997, see Cassese 2003, p. 118.

[72] See *Akayesu* 1998, §498.

factor which is difficult, even impossible to determine (…) in the absence of a confession from the accused the intent can be inferred from a certain number of presumptions of fact'.[73] Another seminal contribution to the definition of *mens rea* of genocide was provided by the Trial Chamber I of the ICTY in Krstić. The case dealt with the massacre of Srebrenica, where between 7,000 and 8,000 Muslims were murdered. The Trial Chamber stated that:

> The intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not to seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.[74]

2.3 The Rwandan Genocide

'The history of Rwanda has been the subject of polemical interpretations, approximations and simplifications of which there are few examples as caricatural as this in the history of ex-colonies, the ethnic vulgate has mostly been used without any critical distance'.[75]

The Rwandan genocide was perpetrated in the context of a civil war and was the result of complex historical, political and economic dynamics.[76] Its relevance is confirmed by the impressive body of studies devoted to it, by its long lasting effects on the victims, as well as by the unprecedented efforts carried out worldwide to bring its perpetrators to justice.[77]

In the three months between the beginning of April and mid-July 1994, the genocidal violence triggered by the Hutu-led Rwandan government claimed the lives of hundreds of thousands of Tutsi citizens, moderate Hutu and political opponents. The current government asserts that the total number of people killed reached one million. As Bruce D. Jones has concluded in his study on the 1994 genocide, 'the intensity in the rate of killing was shocking even by the bloody standards of the twentieth century'.[78] This escalation of violence was preceded by sporadic outbursts of violence since the end of the 1950s, when Hutu-dominated

[73] Ibid., §523.

[74] *Krstic,* Trial Chamber, August 2, 2001, para 590.

[75] Ntaganda 2002, p. 6.

[76] Ingelaere 2016, pp. 14–18.

[77] On the Rwanda genocide see des Forges 1999; Gourevitch 1998; Straus 2006.

[78] See Jones 2001, pp. 15–16.

political movements overthrew the ancient pro-Tutsi monarchy. Possibly, this was also due to the change of attitude of the Belgian colonisers, who withdrew their support of the Tutsi minority fearing that Tutsi elites might give raise to pro-independence movements. The clashes and explosions of violence since the 1950s however were such that they did not risk the annihilation of any of the three groups living in Rwanda.[79]

Before outlining the main events surrounding this watershed in the history of human violence, it is worth highlighting some features unanimously stressed by scholars who have investigated the facts of 1994. First of all, the 1994 Rwandan genocide was not a spontaneous expression of ethnic hate but was 'premeditated, meticulously planned and systematically perpetrated'.[80] It was prepared and perpetrated based on a conspiracy plan involving the Rwandan military, militia groups and the propagandists who helped to spread the genocidal ideology throughout the population.

Secondly, the Rwandan genocide could be committed thanks to an unwilling international community that did not wish to get involved and did not act pursuant to its duty to intervene established by the Genocide Convention. In fact, after the Rwandan genocide the adequacy of the prevention mechanisms established by the Genocide Convention has been repeatedly questioned.[81]

The failure to protect Rwandan civilians during the genocide has triggered a debate within the international community, which has led to the progressive development of the doctrine of the 'responsibility to protect'.[82]

Thirdly, the polarisation between Hutu and Tutsi, identified as one of the causes of the slaughters, is the consequence of manipulated and socially constructed identities, an issue that needs to be addressed to encourage a sustainable process of national reconciliation.[83]

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[79] Beside the numerically dominating Hutus (about 85% of the total population), Tutsis (14% of the population) and Twa (1% of the population) used to live together for centuries in Rwanda.

[80] On this point, see Melvern 2008, pp. 21–31, stating that the genocide 'was developed and perpetrated according to a conspiracy involving the Rwandan military, the *Interhamwe* as well as other militia groups and the propagandists who helped to spread the genocidal ideology throughout the population. Far from being a spontaneous atrocity, the 1994 Rwandan genocide was 'premeditated, meticulously planned and systematically perpetrated'.

[81] On this point, see Organization of African Unity (OAU) 2000, p. 8: 'What the Genocide Convention badly lacks, as the secretary-general of the International Commission of Jurists explained to the Panel, is a trigger mechanism which results in firm, appropriate action that prevents such atrocities ever being perpetrated by mankind again. At present the convention is almost purely reactive, in effect only providing for action after the crime has been committed, by which time it is too late for the victims and, indeed, for humanity in general'.

[82] On the role that the Rwandan genocide played in the development of the theory of the responsibility to protect, see Welsh 2008, pp. 333–350.

[83] OAU 2000, p. 12.

2.3.1 The Ancient Kingdom and the Origin of Hutu and Tutsi

Rwanda's recent history is marked by scarcity of sources, the majority of which are accounts dominated by the colonial ideology. The lacuna is even more serious if we try to dig into the pre-colonial past of the African country.

The report of the International Panel of Eminent personalities (IPEP) established by the Organization of African Unity to investigate the Rwandan genocide opens with three interesting premises: (1) the interpretations of Rwandan history are highly controversial and oversimplifications are almost unavoidable; (2) Rwanda's history is exploited as a political instrument; (3) the figures related to human rights violations which occurred in the 20th century are very much debated and controversial.[84]

The first available sources regarding Rwanda date back to the 17th Century, when according to Jan Vansina 'les traditions fiables émergent de la brume et du bricolage des legendes antérieures'.[85] Rwandan ancient history was handed down through oral tradition, exposed in the myth telling and later collected and elaborated in the colonial era by scholars influenced by the 'hamitic' theory.[86] The latter considered the Tutsi a foreign population that originally arrived from abroad, superior by definition to Hutu and Twa. According to the colonial narrative and because of their origin, Tutsi were more intelligent, more loyal and better workers than Hutu and Twa.

The divide between the two main groups Rwanda was composed of, Hutu and Tutsi, which originally resembled two different social classes, was 'ethnicised' under the colonial rule. These ethnicised identities played a divisive role during the genocide.[87] However, the two groups shared for centuries the same language, *kinyarwanda*, the same religion, customs, culture and the same physical traits. This means that the definition of ethnic group endorsed by the Genocide Convention cannot be easily applied to Hutu and Tutsi. However, despite their similarities, Hutu and Tutsi continue to perceive themselves as different groups. The origin of this divide has triggered a wide, unfinished debate. The cleavage between Hutu and Tutsi has been surrounded by uncertainty since its outset. The current government puts emphasis on the fact that the distinctions between Rwandans are an artificial product of the Belgian colonisation.

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[84] Ibid., paras 2.1, 2.2 and 2.3, p. 11.

[85] 'The reliable traditions come to light from the mist and from the bricolage of the earlier legends', translation by the author. See Vansina 2001.

[86] See Digneffe and Fierens 2002, p. 9.

[87] Fujii 2009, p. 180.

The division between the two groups was enforced during the kingdom of Mwami (king) Rwabugiri at the end of the 19th century, when in Rwanda the main features of a centralised state were outlined.[88] Nevertheless, intermarriages between the two groups were common and are also practised today.[89]

A turning point in Rwanda's modern history was the Berlin Congress of 1884 when Rwanda became a part of the German sphere of influence. Rwanda was a German colony from 1895 until the Reich was deprived of its colonies as a consequence of the defeat in World War I. The country of thousand hills was placed under a League of Nations mandate and for the following 45 years subjected to the Belgian policy of indirect rule. The king and the Tutsi aristocracy were placed under the control of the colonial rulers, but they shared with the colonisers the intent to centralise the country's administration. The Belgian colonisation was also the premise for the spreading of the first racist theories deepening the cleavage between Hutu and Tutsi, whose long-lasting consequences would set up a favourable setting for the genocide ideology.[90]

For the first time in Rwandan history, Hutu and Tutsi became fixed categories whose membership was decided arbitrarily through the introduction of ethnic identity cards. According to a well-known account, the Belgians considered all those who had less than ten cows as Hutu and all those possessing more than ten as Tutsi.[91] In parallel, a system of quotas to access education and public charges was introduced, widely privileging Tutsis over Hutus.[92] This policy was carried out with

[88] Ibid., p. 12: 'From that point, a powerful head of a centralized state provided firm direction to a series of subordinate structures that were ethnically differentiated under Tutsi domination. And while there was no known violence between the Tutsi and the Hutu during those pre-colonial years, the explicit domination of one group and the subordination of the other could hardly have failed to create antagonism between the two'.

[89] Ibid., p. 11: 'Even today, after all the carnage, one historian estimates that at least 25% of Rwandans have both Hutu and Tutsi among their eight great-grandparents. Looking back even further, the percentage with mixed ancestry would most likely exceed 50%. These conclusions are inconsistent with the preferred Hutu version of history, which asserts that the Tutsi were treacherous foreign conquerors who had rejected and oppressed the Hutus since time immemorial'.

[90] Ibid., para 2.10, p. 13: 'The theory was based both on the appearance of many Tutsi—generally taller and thinner than were most Hutu—and European incredulity over the fact that Africans could, by themselves, create the sophisticated kingdom that the first white men to arrive in Rwanda found there. (…) They [the Tutsi] were considered more intelligent, more reliable, harder working, and more like whites than the "Bantu" Hutu majority. The Belgians appreciated this natural order of things so greatly that, in a series of administrative measures between 1926 and 1932, they institutionalized the cleavage between the two races (race being the explicit concept used at the time before the milder notion of ethnicity was introduced later on), culminating in identity cards that were issued to every Rwandan, declaring each to be either Hutu or Tutsi. This card system was maintained for over 60 years and, in a tragic irony, eventually became key to enabling Hutu killers to identify during the genocide the Tutsi who were its original beneficiaries'.

[91] Ibid., para 2.12.

[92] Ibid., para 2.13: 'The ramifications of the Belgian system could hardly have been clearer. Between 1932 and 1957, for example, more than three-quarters of the students in the only secondary school in the small city of Butare were Tutsi. Ninety-five per cent of the country's civil service came to be Tutsi. Forty-three out of 45 chiefs and all but 10 of 559 sub-chiefs were Tutsi'.

the fundamental support of the Catholic Church that aimed at converting the indigenous population. Later, the Catholic Church was involved in the genocide, as the case of Atanase Seromba demonstrated.[93] According to the Panel of Eminent Personalities:

> Much of the elaborate Hamitic ideology was simply invented by the Catholic White Fathers, missionaries who wrote what later became the established version of Rwandan history to conform to their essentially racist views. Because they controlled all schooling in the colony, the White Fathers were able, with the full endorsement of the Belgians, to indoctrinate generations of school children, both Hutu and Tutsi, with the pernicious Hamitic notions. Whatever else they learned, no student could have failed to absorb the lessons of ethnic cleavage and racial ranking. Together, the Belgians and the Catholic Church were guilty of what some call "ethnogenesis" – the institutionalization of rigid ethnic identities for political purposes. The proposition that it was legitimate to politicize and polarize society through ethnic cleavages – to play the "ethnic card" for political advantage, as a later generation would describe the tactic – became integral to Rwandan public life. Ethnogenesis was by no means unknown in other African colonies and, destructive as it has been everywhere, no other genocide has occurred. But it was everywhere a force of great potential consequence and, in Rwanda, it combined with other factors with ultimately devastating consequences.[94]

At that moment, Rwandan society was consolidated along a pyramid of several stages: at the top layer sat the white colonisers, the Belgian authorities and the Catholic Church, followed by a small elite of privileged Tutsi who had a good relationship with the Europeans. At the bottom of the hierarchy were Hutu and Tutsi afflicted by poverty, representing the mass of those subject to a twofold yoke by the two ruling groups.[95]

2.3.2 The Hutu Social Revolution

A second watershed in Rwandan recent history was the social revolution of the years 1959–1962, which inspired nationalist feelings in the Hutu majority. Hutu started fighting to overturn the privileges of the smaller Tutsi group. This time they

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[93] On the trial of Atanase Seromba before the ICTR trial Chamber see Human Rights Watch 2010, p. 10: 'Athanase Seromba was a priest in Nyange parish, Kivumu commune in Kibuye prefecture. The Trial Chamber convicted him of aiding and abetting genocide and extermination as a crime against humanity for his role in the bulldozing and destruction on April 16, 1994, of the Nyange parish church holding over 1,500 Tutsi who had sought refuge there. The Trial Chamber sentenced him to 15 years' imprisonment. The Appeals Chamber reversed the convictions of aiding and abetting regarding destruction of the church and instead convicted him of genocide and extermination as a crime against humanity; as to two other killings, it affirmed the conviction of aiding and abetting genocide. The Appeals Chamber sentenced Seromba to life in prison'.

[94] OAU 2000, paras 2.16–2.17.

[95] Ibid., para 2.19: 'The fact that just two Tutsi clans among many were privileged by colonial rule points to a central truth of Rwanda: It has never been valid to imply that a homogeneous Tutsi or Hutu community existed at any time'.

were supported by the Belgians, who tried to resist the call for independence by the well-educated Tutsi elite. In this setting the 1957 Bahutu Manifesto was drafted, an expression of a new Hutu leadership eager to gain access to education and adequate job opportunities. It was co-authored by Grégoire Kaybanda, the first president of the Rwandan Republic. According to the Manifesto, the main Rwandan problem was 'that of the monopoly of one race, the Tutsi (…) which condemns the desperate Hutu to be forever subaltern workers'.[96] Hutu-Tutsi tension escalated quickly and what seemed to be a peaceful confrontation became a civil war in 1959. As a result, hundreds of Tutsi were killed throughout the country and 10.000 Tutsi seeking asylum fled Rwanda. The issue of the return of 1959 Tutsi refugees remained unresolved until the genocide, representing for decades a source of conflict and political tension throughout the Great Lakes region. Some exiled Tutsi also joined armed groups. Between 1961 and 1967, Tutsi guerrilla based outside the country launched several raids on Rwanda, while the anti-Tutsi government led reprisals claiming the lives of thousands innocent people.[97] These guerrillas contributed significantly to form the backbone of the Rwandan Patriotic Front (*Inkotanyi* RPF) and its armed wing, the Rwandan Patriotic Army, the political movement that in 1990 entered the country to stop the anti-Tutsi policy carried out under Habyarimana's rule.[98]

In 1962, the Rwandan monarchy was overthrown and Kaybanda was appointed president of the Republic. Kaybanda's Parmehutu party, relying on the ethnic divide, ruled in Rwanda until 1973, associating the concept of democracy with that of '*rubanda nyamwinshi*' (the majority people). Consistent with this discriminatory policy, a strictly controlled quota system was introduced. Tutsi, surprisingly amounting to only 10% of the population according the new manipulated census, were largely excluded from the educational system and from the civil service, as well as from the highest ranks of the government and army. In this climate of hate, in July 1973, General Juvenal Habyarimana, a senior military officer, seized power, paving the way to the genocide. Both the first and the second republic have been interpreted as a 'reversal and continuation of long-standing psychocultural images',[99] namely of the superiority of the Tutsi and of the inferiority of the Hutu. These images had been carved out by colonial rule but were also reinforced during

[96] See Prunier 1997, p. 45.

[97] See OAU 2000, para 3.14: 'Before these incursions ceased, 20,000 Tutsi had been killed, and another 300,000 had fled to the Congo, Burundi, Uganda, and what was then called Tanganyika. The nature of the reprisal attacks changed. Hutu government officials (senior officials were all Hutu) began accusing all Tutsi of being accomplices of the raiders. All Tutsi, in any event, were considered foreign invaders and, accordingly, all became fair game for the slaughters of these years; significantly, this included women and children. In that sense, as an aggressive and exclusivist Hutu solidarity was consciously being forged in opposition to these despised outsiders, we can see another building block in the long road to genocide. Indeed, the massacres briefly caught the attention of the outside world and were condemned as genocidal by such prominent western dissidents as philosophers Bertrand Russell in England and Jean-Paul Sartre in France'.

[98] See Bornkamm 2012, pp. 13–14.

[99] See Uvin 1998, p. 33.

Kaybanda's and Habyarimana's regime. The latter was centred on a single party rule, the *Mouvement républicain national pour la démocratie et le développement*, (National Republican Movement for Democracy and Development, MRND) led by Habyarimana. The parliament, named *Conseil National du développement* (National Council of Development) played a formal role but the real power was concentrated in the hands of the president and the clan of his wife Agathe nicknamed *Akazu* (little house).[100] The rule of Habyarimana, despite his domestic policy discriminating Tutsi, was widely supported by international donors, especially France and Belgium. Under the rule of Habyarimana, the fall in the prices of tea and coffee, important sectors for Rwanda's export, caused an economic crisis triggering social and ethnic tensions. The overpopulation in particular generated a fight for basic resources, which was exploited by the government to promote anti-Tutsi bias and enforce a clampdown policy against the minority. The conflict over land, the property of which was an important factor determining social ranking and an essential requirement for marriage, was particularly tense.

At the same time, the RPF augmented the pressure it exerted on Rwanda's borders from the neighbouring Uganda, which culminated in the 1990 invasion of the country. There is consensus on the importance that this RPF action had on escalating the internal tension in Rwanda.[101] The conflict triggered by the RPF invasion produced thousands of internally displaced persons, facilitating at the same time the recruitment by the Rwandan Government of young males to fight against the Tutsi minority. The genocide was hence perpetrated within the framework of an internal conflict. Habyarimana decided to play the ethnic card and instilled a feeling of insecurity in Rwanda's population by exploiting Hutu peasants' fears about purported Tutsi plots to regain control over the republic and over the land they abandoned. All Rwandan Tutsi were equated to supporters of external intruders and the RPF by the pro-government propaganda. Pogroms against Tutsi and retaliations after every RPF attack regularly followed, culminating in the massacre of 300 civilians in the south of the country in 1992. Human rights violations perpetrated by the RPF were also reported during the long eve of the genocide and its aftermath.[102]

Habyarimana, under international donors' pressure, was forced to introduce liberalisation measures, including the adoption of a new constitution and a multi-party system in 1990. This constitution remained in force during the genocide and its aftermath, until it was replaced in 2003 by a new constitutional charter.

[100] In spite of the fact that she is considered one of the masterminds of the genocide, Agathe Habyarimana was long hosted and protected in France before being put on trial in 2010.

[101] On this point, see OAU 2000, p. 34: 'Even those sympathetic to the invaders' cause acknowledge that the attack triggered a series of pivotal consequences that ultimately led, step by step, to the genocide. In the words of one human rights group, "…it is beyond dispute that the invasion …was the single most important factor in escalating the political polarization of Rwanda'.

[102] See des Forges 1999, pp. 692–735.

Negotiation with the RPF gave birth to the Arusha Peace Agreement in 1993, a never implemented deal envisaging a power-sharing government and the repatriation of Tutsi refugees.[103]

2.3.3 The Unfolding of the Genocide

The reformed political arena was increasingly violent, and the new political parties often relied on youth wings that received military training. These squads played a key role in the most heinous crimes which contributed to the genocide. Among these are to recall the *Impuzamugambi* ('those with a single purpose') affiliated with the *Coalition pour la Défense de la République* (Coalition for the Defence of the Republic, CDR), the *Inkuba* ('thunder'), the youth of the *Mouvement Démocratique Républicain* (Democratic Republican Movement, MDR), the *Abakombozi* ('the liberators'), affiliated with the *Parti Social-Démocrate* (Social Democratic Party, PSD) and finally, the *Interahamwe*, ('those who work together') who represented the youth wing of the MRND. Death squads, whose notoriety reached as far as the Belgian Parliament, were also created and directly supervised by President Habyarimana.[104] The Rwandan Government was supported by French troops that were sent during the first stage of the RPF invasion in 1990. In this climate, Tutsi were constantly depicted by pro-governmental propaganda as allies of the RPF invaders and labelled as *ibiytso* (foreign) or *inyenzi* (cockroaches). The media played a crucial role in the hate campaign, in particular the newspaper *Kangura*, which published the 'Hutu Ten Commandments',[105] and the Radio Télévision Libre

[103] See OAU 2000, p. 49: 'In the end, the process could not resolve the greatest problem of all. That was the tragic irony of Arusha: the massacres against the Tutsi civilians were not directly addressed during the long months of negotiations in Tanzania, yet at the very same time in Rwanda, Hutu Power's massacres continued, prompted by the fear that the Arusha process might succeed and deliver genuine power sharing'.

[104] On this point, see OAU 2000, para 7.18.

[105] In detail the Hutu Commandments stated that: '1. Every Hutu should know that a Tutsi woman, whoever she is, works for the interest of her Tutsi ethnic group. As a result, we shall consider a traitor any Hutu who—marries a Tutsi woman—befriends a Tutsi woman—employs a Tutsi woman as a secretary or a concubine. 2. Every Hutu should know that our Hutu daughters are more suitable and conscientious in their role as woman, wife and mother of the family. Are they not beautiful, good secretaries and more honest? 3. Hutu women, be vigilant and try to bring your husbands, brothers and sons back to reason. 4. Every Hutu should know that every Tutsi is dishonest in business. His only aim is the supremacy of his ethnic group. As a result, any Hutu who does the following is a traitor: (1) makes a partnership with Tutsi in business; (2) invests his money or the government's money in a Tutsi enterprise (3) lends or borrows money from a Tutsi; (4) gives favours to Tutsi in business (obtaining import licenses, bank loans, construction sites, public markets, etc.). 5. All strategic positions, political, administrative, economic, military and security should be entrusted only to Hutu. 6. The education sector (school pupils, students, teachers) must be majority Hutu. 7. The Rwandan Armed Forces should be exclusively Hutu. The experience of the October 1990 war has taught us a lesson. No member of the military shall marry

des Mille Collines (RTLM), the 'sole source of news as well as the sole authority for interpreting its meaning' during the genocide, according to Allison des Forges.[106] The responsibility of the media in the genocide has been determined in the ICTR jurisprudence in the notable case of *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*.[107]

When, on the evening of 6 April 1994, the plane carrying Habyarimana was shot down by unknown attackers, the country was already prepared for the massacres. The exact moment in which the genocide was planned and decided is unknown, but authoritative sources put this moment between 1990 and 1993. According to the Panel of Eminent Personalities' report, 'the idea of genocide emerged only gradually, possibly in late 1993 and accelerating in determination and urgency into 1994'.[108] Whenever the decision to organise the genocide was taken, it is well established that human rights organisations[109] and the UN Special Rapporteur on Summary, Arbitrary, and Extrajudicial Executions in 1993 were aware that a genocide was about to be committed. The UN Special Rapporteur issued a report confirming that 'The victims of the attacks, Tutsi in the overwhelming majority of cases, have been targeted solely because of their membership in a certain ethnic group and for no other objective reason'.[110]

On the same day of Habyarimana's plane crash, large-scale killings starting in Kigali spread progressively throughout the country. The militia groups, the military, the police and the state personnel soon assumed a driving role in the slaughters,

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a Tutsi. 8. The Hutu should stop having mercy on the Tutsi. 9. The Hutu, wherever they are, must have unity and solidarity and be concerned with the fate of their Hutu brothers. The Hutu inside and outside Rwanda must constantly look for friends and allies for the Hutu cause, starting with their Hutu brothers. They must constantly counteract Tutsi propaganda. The Hutu must be firm and vigilant against their common Tutsi enemy. 10. The Social Revolution of 1959, the Referendum of 1961, and the Hutu Ideology, must be taught to every Hutu at every level. Every Hutu must spread this ideology widely. Any Hutu who persecutes his brother Hutu for having read, spread, and taught this ideology is a traitor.'

[106] See des Forges 1999, p. 71.

[107] On this point, see ICTR, *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Judgment of the International Criminal Court for Rwanda*, 3 December 2003, Case No. ICTR-99-52T; ICTR, *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Judgment of the Appeals Chamber*, 28 November 2007, Case No. ICTR-99-52-A, Judgment of the Appeals Chamber of 28 November 2007. An important precedent stressing the role of the media in the violation of international law was established in 1946 when Julius Streicher, editor-in-chief of the anti-semitic newspaper *Der Stürmer* was convicted by the International Military Tribunal at Nuremberg. See International Military Tribunal, *Judgment of the International Military Tribunal for the Trial of the German Major War Criminals*, 30th September and 1st October, Cmd 6964. See also Della Morte 2005.

[108] OUA 2000, para 7.4. At para 7.5, the report stresses that 'Many hoped that these crucial issues would be illuminated at the International Criminal Tribunal for Rwanda, set up after the genocide to try senior figures accused of genocide. And indeed, the tribunal has concluded that genocide had been planned and organized in advance, but with no more precision than that'.

[109] See the Report of the International Commission of Inquiry into Human Rights Abuse in Rwanda, March 1993.

[110] See UN Commission on Human Rights 1994.

while the common population reacted in different ways. Sometimes Rwandans joined the killers spontaneously, sometimes they had to be threatened and forced, in other occasions they sheltered and protected the targeted Tutsi victims at their own risk.

Hutu who did not approve the genocidal strategies of the government also became victims of the massacres. The high degree of involvement in the slaughters of common citizens who had previously never killed remains a key feature of the Rwandan setting, which triggers the question as to why so many peoples without a previous criminal record joined the massacres.[111] Among the factors encouraging mass violence, researchers have included the climate of insecurity and fear triggered by the war, the long-standing anti-tutsi propaganda, economic constraints caused by scarcity of land and drop of coffee price in the global market and the hierarchical structure of the state which was instrumentalised to perpetrate the genocide.[112]

Key factors for the success in massacring such a high number of harmless civilians were the passive attitude and the unwillingness to act of the international community and the UN Security Council (UNSC). Reports and academic research works published since the 1994 agree on the fact that the genocide might have been prevented by a timely intervention of foreign actors. The lack of political will of the UN and Western countries to intervene in areas of limited strategic interest such as Rwanda was echoed by the careful attempt to avoid the term 'genocide', which would have obliged them to act as a consequence.[113] The language of American diplomacy recurred to the ambiguous terms 'acts of genocide' without explaining their meaning nor their relation to a 'full genocide', in the extreme effort to reject the 'g-word'. This attitude was confirmed by the reduction of the number of peacekeepers of the United Nations Assistance Mission in Rwanda (UNAMIR) during the genocide, the mission tasked with monitoring the respect of the 1993 Arusha Peace Accord. It is also well known that reports aired by the head of the UNAMIR, the Canadian General Roméo Dallaire, including evidence of ethnic massacres, were not fully communicated to the UNSC.[114] The IPEP summarises this aspect of the genocide with the following words:

> There can be not an iota of doubt that the international community knew the following: that something terrible was underway in Rwanda, that serious plans were afoot for even more appalling deeds, that these went far beyond routine thuggery, and that the world nevertheless stood by and did nothing.[115]

The book of Alison des Forges *Leave none to tell the Story*, lists thirty pages of early warning signals, starting five months before 6 April 1994. Military studies accomplished after the genocide have confirmed that a relatively small but well-equipped army could have easily stopped the genocide, significantly reducing

[111] Bornkamm 2012, p. 17.

[112] Ingelaere 2016, p. 17.

[113] See Gourevitch 1998.

[114] Ibid.

[115] OAU 2000, para 9.1, p. 53.

the total number of victims.[116] Moreover, Dallaire was clearly ordered by the UN Secretariat to use a double standard in interpreting the rules of engagement depending on the nationality of the individuals to be rescued. As the IPEP reported, Dallaire was told by the UN Headquarters in New York: 'You should make every effort not to compromise your impartiality or to act beyond your mandate' (the April 9 cable from Kofi Annan and Iqbal Riza stated), 'but [you] may exercise your discretion to do [so] should this be essential for the evacuation of foreign nationals. This should not, repeat not, extend to participating in possible combat except in self-defence'. On 17 May, the UNSC decided to increment the number of peacekeepers through the mission UMAMIR II, consisting of 5,500 personnel. Due to 'bureaucratic' issues however, namely the lack of troops to be sent to Rwanda, not a single UNAMIR II blue helmet reached Kigali. This sounds even more ironic when considering that in June France launched a peacekeeping operation, the famous Chapter VII *Opération Turquoise*, which was endorsed by the UNSC. The French troops *de facto* granted the *génocidaires* evacuation from Rwanda, allowing them to flee the country and reach the territory of the Democratic Republic of Congo (DRC), then called Zaire. Ultimately, only the march of the RPF stopped the genocide and saved the lives of those Tutsi who were still alive.

The genocidal government, after moving its headquarters from Kigali to Nyanza, was finally defeated in July 1994 by the RPF. The *génocidaires* fled the country, looking for a shelter in Zaire and Tanzania, followed by two million refugees, triggering one of the worst humanitarian crises of the 20th century and significantly contributing to destabilise the Great Lakes region. The price of this tragedy was not only the slaughter of between 500,000 and one million Tutsi, but also the killing of thousands of moderate or non-collaborative Hutu, as well as the 'revenge killings' committed by the RPF of thousands of victims.

2.3.4 Challenges for Post-Genocide Justice

The challenges faced in Rwanda when trying to deal with the legacy of the genocide are beyond imagination. They include the rebuilding of the state machinery in all its parts, as well as the reconstruction of the deeply torn social fabric. In a nutshell, the genocide had afflicted everybody in Rwanda, victims, perpetrators and bystanders. The economy was in tatters, public services were not working, hospitals and schools were closed. All the pillars of the rule of law were demolished and needed to be established again on sound grounds. Public administrators were not able to guarantee safety. The judiciary lacked resources and trained personnel as most of the lawyers had been killed or had fled the country. The judicial sector charged with prosecuting and punishing an impressive number of perpetrators and satisfying the cry for justice of the victims was called to

[116] See Feil 1998.

accomplish a never-ending task. A few words on the consequences of the genocide on vulnerable groups, particularly women and children, are at this point necessary. The reason is twofold: first, the merciless way the slaughters affected these categories of victims is a benchmark of Rwanda's genocide; second, the victims' needs were important inspiration sources for the approach to the drafting of the post-genocide transitional justice.

Article 14 of the 2003 Rwandan Constitution deals with the legacy of the genocide establishing that 'The State shall, within the limits of its capacity, take special measures for the welfare of the survivors of genocide who were rendered destitute by the genocide committed in Rwanda from October 1st, 1990 to December 31st, 1994, the disabled, the indigent and the elderly as well as other vulnerable groups'.

This provision serves as a benchmark to evaluate the post-genocide policies enacted in Rwanda.

The level of violence and the trauma experienced by women and children during the genocide was unparalleled in many respects. Their long-term consequences are astonishing. Women and children were specifically targeted during the genocide because of the social role they played, respectively mothers and future adults, namely potential instruments in the hands of RPF combatants. The first three points of the Hutu ten commandments were devoted to Tutsi women:

1. Each Hutu man must know that the Tutsi woman, no matter whom, works in solidarity with her Tutsi ethnicity. In consequence, every Hutu man is a traitor: - who marries a Tutsi woman; - who makes a Tutsi woman his concubine; - who makes a Tutsi woman his secretary or protégée.
2. Every Hutu man must know that our Hutu girls are more dignified and more conscientious in their roles as woman, wife, and mother. Aren't they pretty, good secretaries, and more honest!
3. Hutu women, be vigilant and bring your husbands, and sons to reason!

Women were consequently depicted by Hutu propaganda as a weapon in the hands of the enemy that had to be exterminated.[117] This plot was carried out with zeal and was marked by a frequent use of sexual torture. Since Rwanda is a patrilinear society, children inherited their father's ethnicity. Children with a Tutsi father were consequently the target of genocidal violence too. In some cases Hutu

[117] OAU 2000, para 16.3, p. 141: 'The extremist newspaper *Kangura*, which frequently ran pornographic cartoons featuring Tutsi women, explained: "The inkotanyi [members of the RPF] will not hesitate to transform their sisters, wives, and mothers into pistols to conquer Rwanda". The conclusion was irresistible: Only when no Tutsi women were left could Hutu men be safe from their wicked wiles'.

women married to Tutsi men were forced to kill their children to demonstrate their commitment to genocidal ideology.[118] The consequences of such violence on women were devastating. The total number of women who were raped is unknown and the appraisals vary widely from a minimum of thousands up to a maximum of hundreds of thousands.[119] Rape was used as a war strategy to humiliate women and destroy family and community ties. The violence was often exerted by neighbours or individuals whom the victims knew, which made the return to their communities difficult and painful for women. Sometimes women were abducted and held as sexual slaves for weeks before being killed or mutilated. Many of them were intentionally infected with HIV. Rape was usually considered shameful for the victims, who thus kept it secret. This makes statistics on sexual violence perpetrated during the genocide hard to compile. According to testimonies of the survivors, almost the totality of Tutsi women above twelve years who survived were raped.[120] In addition, as abortion was illegal in Rwanda since the time of European colonisation, women were forced to recur to clandestine treatments.[121] The punishment of sexual violence was hence one of the main challenges for *gacaca* jurisdictions.

Most of the Rwandan population is aged under 15, which means that a large portion of inhabitants targeted by the 1994 massacres were children. Children were also actively involved in the slaughters, and Rwanda was the first country ever to prosecute minors for genocide. It is hence not surprising that the Committee on the Rights of the Child in its concluding observations on Rwanda has categorised the genocide among the 'factors and difficulties impeding the implementation of the Convention on the Rights of the Child'.[122] Transitional justice strategies developed in the country had to take into account this legacy, as the reconstruction process of Rwanda strongly depends on the way the African country dealt with the generation of children affected by the 1994 genocide. In such a setting, international standards for children recognised by the Convention on the Rights of the Child (CRC) should work as a benchmark for framing transitional justice policies by drawing on best practices and focusing on the children's need for reintegration and rehabilitation.

[118] Ibid., para 16.4, p. 145.

[119] Ibid., para 16.17, p. 148.

[120] Ibid., para 16.20, p. 149.

[121] In 1994, rape was a crime under Article 360 of the 1977 Rwandan Criminal Code, punishable by five to 10 years of imprisonment.

[122] On this point, see Committee on the Rights of the Child, Consideration of Reports submitted by the States Parties under Article 44 on the Convention, CRC/C/15/Add.234, 1 July 2004: 'The Committee notes that the genocide which occurred in 1994 has long-term negative consequences on the implementation of the Convention and that the lives of all children have been seriously affected during that event and its aftermath. The Committee also notes that, since the Convention was ratified there has been a serious deterioration in the socio-economic conditions in the Stare party, aggravated by the genocide'.

2.4 Political Transition in the Aftermath of the Genocide

Scholarship has devoted a remarkable amount of research to the categorization of political transitions after pervasive human rights violations, stressing that the features of the transition have a strong impact on transitional justice.[123] Post-violence transitions have been classified as ruptures, negotiated transitions and transformations.[124] In the first case, the previous regimes are defeated, and a new legal and political order is established. In the second case, the leadership of the former regime negotiates the layout of the new political order. In the third case, the former regime has enough power to reform itself and set in motion a change in a more liberal direction. It has been argued that, in the second and third case, the new political constellation limits the possible transitional justice initiatives that can be adopted, in particular criminal trials, while the first scenario would allow wider margins of manoeuvre. Post-genocide Rwanda falls within the first typology. Almost *legibus solutus*, the new regime led by the RPF was free to decide how to draft the post-genocide political agenda.[125]

Despite some improvements, in the immediate aftermath of the genocide, security concerns remained acutely felt in Rwanda. The situation deteriorated along 1995 and 1996, as soon as attacks from neighbouring Zaire, where Interhamwe had gathered and found shelter, rapidly increased. The RPF's invasion of Zaire to close the refugees' camps and defeat the Interhamwe, together with Kabila's Rwanda-backed rebellion against Mobutu, gave to the conflict a regional dimension the reverberations of which are acutely felt also nowadays in Rwanda and the DRC.[126]

In the wake of the genocide, Rwanda was ruled by a body of provisions including the 1991 Constitution, the RPF's Declaration of 17 July 1994, the Protocol of Agreement between Different Political Parties of 24 November 1994, the Fundamental Law of Rwanda of 5 May 1995 (entered into force on 17 July 1995) and the Arusha Peace Accord,[127] signed on 4 August 1994. The latter had

[123] See Halmai 2017, p. 7: 'Huntington gives the following guidelines for democratizers dealing with authoritarian crimes: (a) If replacement (revolution) occurred and it is morally and politically desirable, prosecute the leaders of the authoritarian regime promptly … while making clear that you will not prosecute middle- and lower-ranking officials. (b) If transformation or transplacement occurred, do not attempt to prosecute authoritarian officials for human rights violations, because the political costs of such an effort will outweigh any moral gains. (c) Recognize that on the issue of "prosecute and punish versus forgive and forget", each alternative presents grave problems, and that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and above all, do not forget'.

[124] Ibid.

[125] Ingelaere 2016, p. 17.

[126] See Vandeginste 1999.

[127] The Arusha Accord consists of 7 different agreements and protocols negotiated in different moments.

crucial implications on the fair trial standards binding Rwanda.[128] Article 2 of the Fundamental Law affirmed that the RPF's Declaration of 17 July 1994 prevailed over the other constitutional provisions in case of conflict.[129]

Charged with the daunting challenge of rebuilding a war-torn country whose society was deeply polarised along the division of Hutu-Tutsi, the Rwandan Government had to translate its military victory into political legitimisation.[130] Inevitably, this context deeply influenced the choice of how to approach the painful legacy of the genocide. When seizing power in July 1994, legitimised by its successful effort in stopping the genocide, the RPF declared its will to establish an inclusive transitional government bound by the aforementioned pre-existing rules. The Arusha Peace Accord in particular called upon the establishment of a government of national unity (GNU) tasked with preparing the country for multi-party election within 22 months. However, two important provisions of the Arusha agreement were not taken further into account and were disregarded. The first was the rule providing for a role in the GNU for the MRND, Habyarimana's party in the Government of National Unity. The second was the rule providing for an international commission of inquiry aimed at shedding light on human rights abuses perpetrated by both sides of the conflict.[131] While the reason underlying the exclusion of *génocidaires* from the new government is obvious, the failure to respect the second provision had severe consequences on the perception of the post-genocide justice in Rwanda as 'victors' justice'. Instead of creating the inquiry commission mentioned in the Arusha Accord, the GNU focused on a broad-based prosecution programme asking the international community to set up an *ad hoc* tribunal. Furthermore, the transition period was extended by the GNU to five years, and in 1999 on a second occasion for a further four years; leaving Rwanda without a democratically adopted constitution until 2003, the year of the first parliamentary election.

The RPF transition strategies were influenced by a multitude of factors. The genocide had ruined the country's economy and state infrastructure. Institutions suffered from a lack of trained experts and civil servants. A considerable part of the male population of working age had been slaughtered or forced to flee the country, with the further consequence of causing a humanitarian crisis internally and in the

[128] The *Protocole relative àl'État de droit*, signed in Arusha on August 18, 1992 by the Rwandan Government and by the Rwandan Patriotic Front, was part of the Arusha Peace Agreement signed in 1994. The former established under Article 1 that national unity had to be based on the respect of human rights as defined in both the 1948 Universal Declaration of Human Rights as well as in the African Charter on Human and Peoples' Rights, which embody several guarantees in terms of fair trial standards (for more details see the chapter on *gacaca* courts and fair trial standards). The 5th Chapter of the Protocol, entitled "Droits de l'Homme", further recognized the universal nature of the human rights and allows the international community to monitor violations taking place on Rwandan soil.

[129] On this point, see Haile 2008: 'Up until then the Rwandan Constitutional Law was a curious amalgam of various instruments permitting the selective application of favourable provisions'.

[130] Vandeginste 1999.

[131] See the *Protocole relative àl'État de droit*, Article 16.

neighbouring countries. Moreover, the policy of full accountability pursued by the government had filled the national prisons to the rafters, which also further affected the troubled Rwandan economy. However, some scholars also point the finger to RPF's political culture and priorities, which are said to be incompatible with the setting up of a multi-party democracy in Rwanda.[132] The RPF programme of social and constitutional engineering was characterised, according to Waldorf and Straus, by 'transformative authoritarianism' of which the *gacaca* courts were a key instrument.[133] Acting as a fully legitimised government, the GNU readily started the state-rebuilding process, by enacting comprehensive reforms aimed at law enforcement (with a particular focus on the judiciary), and transforming its military wing into a national army, the Rwandan Defence Forces. Moreover, an administrative reform with the purpose of decentralisation took place in 2005 through a constitutional amendment.[134] Rwanda was divided in five provinces, thirty districts, sectors, cells and villages. The latter, so-called *imidugudu*, were the fulcrum of a government-led policy of redistribution of the population, heavily criticised because of its alleged authoritarian nature.[135]

As a UN report stressed, purges within the GNU progressively increased, with some appointees, including the President, resigning, being fired or even imprisoned.[136] Local elections in 1999 and 2001 were censured as lacking minimum fairness standards by the UN Special Representative Michel Moussali in his report on the *Situation of Human Rights in Rwanda.*[137] Reportedly, this problem worsened during the 2003 Presidential elections, when the EU observation mission confirmed similar concerns expressed by the International Crisis Group.[138] The RPF's understandable concern not to become the victim of social polarisation, and to lose the power seized after years of forced exile and through personal hard commitment and sacrifice, resulted in its determination to resort to force and to exploit the legacy of the genocide as a source of political legitimation.

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[132] On this point, see Haile 2008: 'The RPF had to make a difficult decision, upon assuming political power. It had to either risk losing political power by respecting its pledge to form a genuinely power-sharing government and organize free and fair elections, or renegade on its pledge in order to assure its dominance for the foreseeable future. Having fought and won a bitter war to seize the state power and pursue their founding objective on their own terms, the RPF leaders had little internal or external incentives for pursuing a political process that would force them to share power with the attendant risk of relinquishing it altogether'.

[133] Straus and Waldorf 2011b, p. 5. See also Ingelaere 2016, p. 18.

[134] See Article 3(1) of the Rwandan Constitution amended by Article 1 of the Amendment N. 2 of 8 December 2005.

[135] See Bornkamm 2012, p. 21.

[136] See UN High Commissioner for Refugees 1998.

[137] See UN General Assembly 2000, para 14.

[138] On this point see Mission d'Observation Electorale de l'EU Rwanda, 2003, *Rapport Final sur l'élection présidentielle et les élections législatives*.

2.5 Constitutional Transition and the Role of Post-Genocide Justice

During the transitional period, a new constitutional order was set up based on the following texts: the 1991 Constitution (based on a parliamentary regime with a unicameral parliament), the Arusha Peace Agreement (based on four pillars: establishment of the rule of law including respect for human rights, power-sharing, repatriation and resettlement of refugees and internally displaced people, and integration of the armed forces), the Declaration of the Rwandan Patriotic Front of 17 July 1994 (which called for the implementation of national institutions, approval of and respect for the Arusha Peace Agreement, creation of a vice presidency, exclusion from the political arena of the parties involved in the genocide, continuation of the transitional period and strengthening of presidential powers) and the Agreement Protocol between political forces of 24 November 1994 (calling for implementation of national institutions). Within the framework of the new constitutional order, these legal texts were organised in the following hierarchy: in the case of conflict between the Arusha Peace Agreement and the 1991 Constitution, the former prevailed; in the case of conflict between the Arusha Peace Agreement and the Declaration of the FPR, the latter prevailed; in the case of conflict between the Declaration of the FPR and the Agreement Protocol between political forces, the latter prevailed. A new constitution, the first after the genocide era, was adopted in 2003. The 2003 constitution in many of its provisions aims at eradicating Hutu-Tutsi ethnic polarisation. From 1961, shortly before the country's independence, to 2003, Rwanda experimented with four different constitutions.[139] These documents embodied numerous norms discriminating the Tutsi minority through a pro-Hutu preferential system of quotas applied in crucial sectors of public life and education. The first constitution, dated 28 January 1961 (under Belgian rule), was elaborated by the *Parmehutu Party* and included provisions aimed at reverting the privileges formerly granted to the Tutsi minority by the Belgian colonisers. Immediately after independence, a new constitution was adopted (24 November 1962). This constitution was amended twice, in 1963 and 1973. When in 1973 General Juvenal Habyarimana took power through a *coup d'état*, his anti-Tutsi ideology spread throughout the country. This ideology was instrumental in shaping the following constitution in 1978, introducing a single-party system (the sole political party allowed in Rwanda was the National Revolutionary Movement for Development (NRMD) led by Habyarimana). The 1991 constitution, the last of the pre-genocide era, was more liberal, allowing for a moderate opposition activity to Habyarimana's ruling party.

The 2003 Rwandan Constitution tried to address the legacy of genocide by overcoming ethnic division and discrimination. Crucial for this purpose are the

[139] See Du Bois de Gaudusson et al. 1997.

provisions stated in the preamble,[140] as well as those in Articles 9[141] (fundamental principles), 11[142] (equality principle and discrimination prohibition), 13[143] (revisionism prohibition), 33[144] (freedom of opinion). The Preamble of the Rwandan 2003 Constitution shares many principles and goals of the *gacaca* legislation, putting a strong emphasis on the necessity of overcoming the legacy of the genocide and rebuilding national unity. It solemnly affirms that the Rwandan State is based on the principle of the rule of law, on the respect for fundamental human rights, pluralistic democracy, equitable power sharing and tolerance. It expressly highlights the adherence of the African country to the principles of human rights enshrined in the United Nations Charter of 26 June 1945, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, the Universal Declaration of Human Rights of 10 December 1948 and several other human rights instruments.[145] The Preamble aims at eradicating ethnic, regional and any other form of divisions; promoting national unity and reconciliation; building a

[140] See Preamble of the 2003 Rwandan Constitution: 'We, the People of Rwanda, In the wake of the genocide that was organized and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda; Resolved to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other form of divisions; Determined to fight dictatorship by putting in place democratic institutions and leaders freely elected by ourselves; Emphasizing the necessity to strengthen and promote national unity and reconciliation which were seriously shaken by the genocide and its consequences; Conscious that peace and unity of Rwandans constitute the essential basis for national economic development and social progress; (…) Now hereby adopt, by referendum, this Constitution as the supreme law of the Republic of Rwanda'.

[141] Article 9 of Rwanda's Constitution affirms: 'The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof: fighting the ideology of genocide and all its manifestations; eradication of ethnic, regional and other divisions and promotion of national unity; equitable sharing of power; building a state governed by the rule of law, a pluralistic democratic government, equality of all Rwandans and between women and men reflected by ensuring that women are granted at least 30% of posts in decision making organs; building a State committed to promoting social welfare and establishing appropriate mechanisms for ensuring social justice; the constant quest for solutions through dialogue and consensus'.

[142] Article 11 of Rwanda's Constitution states: 'All Rwandans are born and remain free and equal in rights and duties. Discrimination of whatever kind based on, inter alia, ethnic origin, tribe, clan, colour, sex, region, social origin, religion or faith, opinion, economic status, culture, language, social status, physical or mental disability or any other form of discrimination is prohibited and punishable by law'.

[143] Article 13 of Rwanda's Constitution affirms: 'The crime of genocide, crimes against humanity and war crimes do not have a period of limitation. Revisionism, negationism and trivialisation of genocide are punishable by the law'.

[144] Article 33 of Rwanda's Constitution affirms: 'Freedom of thought, opinion, conscience, religion, worship and the public manifestation thereof is guaranteed by the State in accordance with conditions determined by law. Propagation of ethnic, regional, racial or discrimination or any other form of division is punishable by law'.

[145] These include the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; the International Convention on Civil and Political Rights of 19 December 1966; the International Covenant on Economic, Social and Cultural Rights of 19 December 1966; the Convention on the Elimination of all Forms of Discrimination against Women

state governed by the rule of law based on respect for fundamental human rights, pluralistic democracy, equitable power sharing, tolerance and resolution of conflicts through dialogue. It stresses the Rwandan privilege of having one country, a common language, a common culture and a long-shared history. Moreover, it holds necessary 'to draw from Rwandan centuries-old history the positive values which characterized the ancestors that must be the basis for the existence and flourishing of the nation'. The Preamble also commits the state to ensuring equal rights between Rwandans and between women and men.[146] Article 9 calls upon every Rwandan citizen to fight against genocide ideology and ethnic division, while Article 54[147] bans the creation of ethnicity-based parties. In addition, the constitution sets up two important commissions to deal with the legacy of the genocide and overcome social divisions. The first is the National Unity and Reconciliation Commission (Article 178[148] of Rwandan Constitution), charged with reporting annually about the reconciliation policies in the country. The second commission, the National Commission for the Fight against Genocide, set up pursuant to Article 179[149] of the Constitution, is tasked with organising a permanent debate on the genocide, its consequences as well as prevention strategies.

The 2003 Constitution tries to redress the recent history of the country in many ways, guaranteeing for instance the right to the Rwandan nationality.[150] Article 8 establishes the principle of direct, universal suffrage. Article 14 deals with the legacy of the genocide too, stressing the state commitment towards victimised vulnerable groups.

The principle of separation and independence of powers is widely recognised by the Rwandan Constitution. The legislative, executive and judiciary power are separate but complementary (Article 60). The state must ensure that the exercise of legislative, executive and judicial power is vested in people who possess the competence and integrity required to fulfil the respective responsibilities accorded to the three branches.

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of 1 May 1980; the African Charter on Human and Peoples' Rights of 27 June 1981; and the Convention on the Rights of the Child of 20 November 1989.

[146] It is worth noting that in September 2008 Rwanda's parliamentary election saw women win 45 of the 80 seats.

[147] Article 54 of Rwanda's Constitution states: 'Political organizations are prohibited from basing themselves on race, ethnic group, tribe, clan, region, sex, religion or any other division which may give rise to discrimination. Political organizations must constantly reflect the unity of the people of Rwanda and gender equality and complementarity, whether in the recruitment of members, putting in place organs of leadership and in their operations and activities'.

[148] Article 178 of Rwanda's Constitution.

[149] Article 179 of Rwanda's Constitution.

[150] Article 7 of the Rwandan Constitution affirms that 'Rwandans or their descendants who were deprived of their nationality between 1st November 1959 and 31 December 1994 by reason of acquisition of foreign nationalities automatically reacquire Rwandan nationality if they return to settle in Rwanda. All persons originating from Rwanda and their descendants shall, upon their request, be entitled to Rwandan nationality'.

The constitutional provisions regarding judiciary and fair trail standards are crucial to assessing *gacaca* courts. Under the 2003 Constitution, the judiciary is independent and separate from the legislative and executive branch of government. It enjoys financial and administrative autonomy. Judicial decisions are binding on all parties concerned, be they public authorities or individuals. They cannot be challenged except through ways and procedures determined by law (Article 140). As a general rule, court proceedings are to be conducted in public. Proceedings *in camera* are possible on the ground of public order or for reasons of public morals. Court decisions must be recorded in writing and well-reasoned.

Individual freedoms are guaranteed by the state. Article 18 enshrines the principle of non-retroactivity of criminal law. The right to be informed of the nature and cause of the charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision-making organs.

Article 19 strengthens the guarantees of fair trial by affirming the principle of presumption of innocence. According to Article 21, no one can be subject to security measures except as provided for by law, for reasons of public order and state security.

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Chapter 3
A Framework for Post-Genocide Rwanda: Legal Imperatives Concerning Transitional Justice

Contents

Abstract This chapter provides a legal framework for countries in transition after mass atrocities and widespread human rights violations. It depicts the obligations under international law of the Rwandan state in the aftermath of the genocide relevant under the point of view of transitional justice. I firstly stress the constitutional implications of transitional justice processes. Then the scope of the individual right to reparation for victims of international crimes, the principle of duty to prosecute gross human rights violations and the emerging right to the truth under international law are analysed. The legal framework provided is used to highlight what are the rights of the victims of the Rwandan genocide and to what extent Rwandan prosecution policies were in harmony with international standards.

Keywords International law · constitutional transitions · duty to prosecute · reparation · right to the truth · victim · International Covenant on Civil and Political Rights · Universal Declaration of Human Rights · Convention on the Rights of the Child · UN Human Rights Committee

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3.1 Introduction

Transitional justice is a field marked by a certain degree of tension between different objectives, conceptual ambiguity and possible overlaps between legal imperatives and policy-stated goals. This makes the establishment of a conceptual framework governing transitional justice a challenging task. As Phil Clark tellingly summarised, "'Transitional Justice' is an often ill-defined realm that encompasses a multitude of discrete, though overlapping, and often conflicting themes. (…) Given the complexity of issues surrounding rebuilding societies after mass violence, the immense confusion about what 'transitional justice' entails is perhaps inevitable'.[1] Different societies and states in transition have chosen different transitional justice strategies, opting for and prioritising different goals. Each case, if singularly considered, provides a different lesson learnt that can be used to prove conflicting theories. Each transitional justice process and each political transition need to be considered individually because every post-violence setting has its particular challenges to be addressed. From a review of the relevant scholarship it emerges that transitional justice is closely related to four areas that compose its main pillars. These pillars are traditionally considered as *truth seeking, prosecution*, *reparations and vetting/lustration processes*. Pursuing these goals might however trigger a conflict between objectives that cannot be reached simultaneously. Transitional justice is in fact characterised by a paradox inherent in the potentially conflictive nature of its legal and political goals. Although subject to national and international human rights norms, transitional justice processes may *de facto* take place outside the umbrella of these legal frameworks. This is for instance what happened in the case of South Africa's transition from apartheid to the rule of law when, for the sake of political stability, a blend of blanket and conditional amnesties were issued with the purpose of covering grave human rights violations.[2] Similarly, in post-genocide Rwanda war crimes committed by the Rwandan Patriotic Army have been deliberately ignored by national and international prosecutors, whilst trials of the suspected *génocidaires* have often taken place without guarantees of a fair trial.

Due regard must be given to those principles of international law which constitute the legal framework within which transitional justice processes are expected to take place. Legal and political goals of transitional justice processes can ideally overlap but may also collide. The first scene is however quite exceptional, as transitional justice processes are deeply conditioned by political and resources

[1] On this point, see Clark 2008, pp. 191–205.

[2] Even if not as much debated as the *ad personam* conditional amnesties granted by the Amnesty Committee of the Truth and Reconciliation Commission, two amnesties were passed before the TRC was created, respectively through the Indemnity Act 35/1990 and the Further Indemnity Act 151/1992. While the first, which fell within the 'removal of obstacles phase' and was aimed at allowing the repatriation of many exiled political anti-apartheid leaders, was granted under strict conditions (public investigations, full confession by the applicant, publication of the applicants' names and description of the offences committed), the second was granted secretly and without any investigation and consequently amounted to a blanket amnesty. Lollini 2005, pp. 82–83.

constraints. Consequently, societies in transition have to strike a balance between different objectives and priorities. This was also the context where transitional justice process had to be implemented in Rwanda, a post-genocide setting obviously very far from an 'ideal' transitional justice scene. The following is a legal framework for post-genocide Rwanda and more generally for countries in transition after experiencing mass atrocities and widespread human rights violations. I firstly stress the constitutional implications of transitional justice, and then I analyse the scope of the individual right to reparation of victims of international crimes, as well as the principle of duty to prosecute gross human rights violations and the emerging right to the truth under international law.

3.2 Transitional Justice and Constitution-Building Processes

The issues arising from constitutional transitions are multiple and multifaceted. Authoritative scholars have distinguished constitution-making processes in two categories.[3] The first category includes those processes that take place according to the existing rules within the constitutional framework in force (so called 'juridical' constitution-making processes). The second includes those processes set in motion through a breach of the previous constitutional order (so called '*de facto*' constitution making processes).[4] The latter can be subdivided in non-juridical[5] and anti-juridical.[6] Non-juridical processes take place in a sort of legal vacuum (e.g. a military defeat of the previously ruling regime), while those that are anti-juridical take place expressly violating the constitutional order in force at that moment. Similarly, even though both contribute to the constitution-making process, it is important to tell apart constitutional 'acts' and constitutional 'facts'.[7] While the former have a juridical nature, the latter don't. Despite this feature however, constitutional facts have a constitutional character and impact on the constitution-building process. This distinction is crucial in order to underscore that constitution-making processes may fall outside the previous juridical order, despite the fact that they contribute to the shaping of a new constitutional frame. The study of the constitutional power, enhanced at the beginning of 20th Century by the Italian lawyer Santi Romano, has received further momentum thanks to the debate on South African post-Apartheid constitutional transition.[8]

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[3] See Biscaretti di Ruffia 1988, p. 638.

[4] On this point see Romano 1990, pp. 133–201.

[5] I translate the Italian term 'agiuridici' with the English word 'non-juridical' due to the lack in English of a corresponding term.

[6] I translate the Italian term 'antigiuridico' into English by way of 'anti-juridical'.

[7] See De Vergottini 2007.

[8] See Lollini 2005, pp. 1–66.

Over the last three decades, different regions of the world have been swiped by dramatic political changes, often reflected in new constitutions.[9] In these highly polarised scenarios, transitional justice mechanisms are called to address the need for stability, and, at the same time, to respond to the victims' aspiration for justice. Mechanisms to deal with the past, both judiciary and extra-judiciary, can be articulated in new constitutions (e.g. Rwanda's 2003 Constitution, Articles 143 and 152 referring to *gacaca* courts, South Africa 1993 ad Interim Constitution, Post-amble, Libya 2017 draft constitution, Chapter 11), establishing a clear link between transitional justice and constitutional provisions. However, the links between post-conflict justice and constitutional processes are not confined to this formal level. The mechanisms chosen to deal with the past exert a deep influence on the 'memory pact', or the 'social contract' in which the new political system is grounded.

The distinction between a 'formal' and 'material' constitution was originally elaborated by the Italian scholar Constantino Mortati, and is today very popular among scholars, especially in civil law countries.[10] According to Mortati, the *formal constitution* is the body of (usually written) constitutional provisions that represents the supreme source of the law, while the *material constitution* is a living, dynamic constitution in constant evolution not frozen by written rules, shaped by changing political and social forces. In this sense, the latter can be regarded not as a 'source', but rather as the 'child' of different effective powers, as exercised through new legislation, courts' jurisprudence and political parties. Hence, in this perspective the constitution in a material sense can also be seen as the body of external conditions of validity of the formal constitution.[11] Which of the two is the 'real' constitution and how they mutually influence each other is a tricky juridical-philosophical question, as the material and formal constitution may or may not overlap. By way of an example, we can refer to the South African Truth and Reconciliation Commission to clarify the linkage between justice, politics and constitution making during political transitions.

[9] For a detailed account of the constitutional transitions in the aftermath of the decolonization, see De Vergottini 1998.

[10] Mortati 1940.

[11] The South African constitution-making process in fact was marked by a fragmentation and co-sharing of the constitutional power among a plurality of subjects at several stages. In this regard scholars have underscored the crucial role that constitutional facts formally occurring outside of the strictly juridical sphere play in the constitution-making process. On this point Lollini 2005, introduction by Roberto Toniatti, who defines the material constitution as 'extra-juridical factor of substantial validity of the primary legal source', translation by the author from Italian 'fattore extragiuridico di validitá sostanziale della fonte normativa suprema'.

From the 'formal' point of view, the Post-amble of the 1994 South Africa Interim Constitution,[12] while not explicitly referring to a truth commission, pointed to the need for an amnesty to pursue national reconciliation. The Interim Constitution established a kind of 'constitutional suspension of the judiciary approach'[13] for crimes committed during the apartheid era. The amnesties, which were granted under strict conditions by the TRC's Amnesty Committee,[14] aimed at an inclusive approach between former enemies for granting a peaceful future for the rainbow nation. Looking back, it seems clear that the same result would not have been reached through criminal prosecution of the political adversary. The criminalisation of the adversary would have meant their exclusion from the new constitutional framework and would have shaped a different 'material constitution' as well. In other words, in the case of South Africa, the state decided to exercise its sovereignty not through the power to punish, but through the power to pardon.[15] This way of exercising sovereignty deeply affected the material constitution of post-apartheid South Africa.

Embodied in its constitution, we find the collective memory shared by a nation, which represents the most important 'social glue' to grant and preserve national unity. This emerges clearly in many post-WWII constitutions. By way of example, we can recall Article 20 of German 1949 *Grundgesetz*,[16] which embodies John Locke's principle of the right to resistance against the oppressor, or the provision

[12] The Postamble of the 1993 South African Interim Constitution states: 'The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 Oct 1990 and before 6 Dec 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed. With this Constitution and these commitments, we, the people of South Africa, open a new chapter in the history of our country'.

[13] See Lollini 2005.

[14] These conditions were: (1) Political nature of the crime committed; (2) Applicant's full disclosure of all relevant facts.

[15] Lollini 2005.

[16] Article 20 of the German constitution in fact states that: (1) Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat. (2) Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt. (3) Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden. (4) Gegen jeden, der es unternimmt, diese Ordnung zu beseitigen, haben alle Deutschen das Recht zum Widerstand, wenn andere Abhilfe nicht möglich ist.

included in the Italian 1948 constitution that bans the political reorganisation of the fascist party (disposizione transitioria N. 12).[17]

Ruti Teitl has stressed that it is possible to read the content of contemporary constitutionalism as an answer to the injustice of the past.[18] Similar remarks are formulated by András Sajó[19] and Gábor Halmai.[20] The link between transitional justice and constitution-making is further demonstrated by recent constitutional transitions.

The link between memory and constitutional process is indeed remarkable. During transitions, history is often re-written, and the contribution of transitional justice can be crucial in this regard. Once framed in a constitution, transitional justice mechanisms become a sort of 'complementary constitutional instrument' which builds and shapes the political body of the nation.[21] This was also the case of post-genocide Rwanda, whose 2003 constitution was imbued with the express goal to overcome the legacy of the genocide and to redress the Hutu-Tutsi polarisation.

3.3 The Right to Reparation in International Law

In order to assess transitional justice strategies implemented in Rwanda in the aftermath of the genocide, it is useful to provide an overview of the duties regarding the right to reparation that international law imposes on states. The goals of the *gacaca* tribunals included reparation for the victims of the genocide. Reparative aspects of *gacaca* justice work as a litmus test to assess them as a restorative justice mechanism. Reparation is a key element of a restorative approach to post-violence justice.[22] Meeting victims' need for rehabilitation, healing and restoration is strongly dependent on reparative measures.[23]

Several international treaties embody provisions granting victims of human rights violation a right to reparation. Relevant for Rwanda in this regard are Article 8 of the Universal Declaration of Human Rights (hereinafter also UDHR),[24] Article 2(3) of the International Covenant on Civil and Political Rights (hereinafter also

[17] It affirms that the re-establishment of the Italian fascist party is forbidden ('E' vietata la ricostituzione, sotto qualsiasi forma, del disciolto partito fascista)'.

[18] Teitel 2011, p. 57.

[19] Sajó 1999, p. 3.

[20] Halmai 2017, p. 7.

[21] See Lollini 2005.

[22] See Sullo 2016.

[23] Cody et al. 2015.

[24] Universal Declaration of Human Rights, proclaimed by United Nations General Assembly in Paris, on 10 December 1948.

ICCPR),[25] Article 39 of the Convention on the Rights of the Child (hereinafter also CRC)[26] and Article 7 of the African Charter on Human and Peoples' Rights (hereinafter also Banjul Charter).[27] Relevant provisions are also included in Article 14 of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (acceded by Rwanda after the genocide on December 15 2008, hereinafter also Convention against Torture or CAT).[28] In the light of the widespread use of sexual violence as weapon of genocide, crucial to Rwanda is also the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.[29] The latter provides guidance as to how to approach and address sexual and gender-based violence against women and girls.[30]

Recent developments in international criminal justice show a trend towards the recognition of the right to reparation for victims of international crimes. The International Criminal Court Pre-Trial Chamber I in *Prosecutor v. Thomas Lubanga Dyilo*, has in fact affirmed that:

> The reparation scheme provided for in the Statute is not only one of its unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system.[31]

Even if not yet fully corroborated by practice, the ICC reparation mechanism has triggered enthusiasm among scholars and human rights activists. The dual objective pursued by the ICC, namely the punishment of perpetrators and the repair, to the extent possible, of the harm inflicted on victims of the crimes falling within its jurisdiction, mirrors a slow evolution of international justice towards a more reparative and victim-centred model.[32]

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[25] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A of 16 December 1966.

[26] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 44/25 of 20 November 1989.

[27] African Charter on Human and Peoples' Rights, adopted 27 June 1981.

[28] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984.

[29] Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, adopted at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007.

[30] On this point, see RIGHT TO REPARATION FOR SURVIVORS RECOMMENDATIONS FOR REPARATION FOR SURVIVORS OF THE 1994 GENOCIDE AGAINST TUTSI DISCUSSION PAPER submitted to the Rwandan Government by the organisations IBUKA, AVEGA, AERG, GAERG, AOCM, Duhozanye, Duharanire Kubaho, Barakabaho, the Survivors Fund (SURF) and REDRESS, October 2012.

[31] See Sullo 2014.

[32] See Sullo 2017.

Despite this enthusiasm the existence and the scope of an individual right to reparation for human rights violations under international law remains unsettled.[33] This contrasts with the clearly established duty to repair wrongful acts in inter-states relations. In international law wrongful acts and the ensuing reparative duty were traditionally framed as a matter of inter-state responsibility, as the famous judgement of the Permanent Court of International Justice on the *Chorzow Factory* case clarified.[34] This judgement according to Dinah Shelton 'remains the cornerstone of international claims for reparations' also today.[35] In this case the Permanent Court of International Justice established that:

> 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'[36] and that 'the essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral institutions – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law'.[37]

In other words, before the emergence of internationally protected human rights, the dominant view in international law was that wrongs committed by a state against its own nationals were an essentially domestic matter. The principle that states must provide reparations to other states to redress wrongful acts they have committed is quite undisputed. It is confirmed by other instruments of international law and in particular by the 2001 International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts (Articles 31 and 34–37).[38] Also the 1907 Hague Convention concerning the Laws and Customs of War

[33] See Bornkamm 2012, pp. 119–125.

[34] See Judgment of 13 September 1928, Chorzow Factory Case (Merits), P.C.I.J. Reports, Series A, N 17, p. 47.

[35] See Shelton 2002, pp. 833 and ff., at p. 836.

[36] Judgment of 13 September 1928, Chorzow Factory Case (Merits), P.C.I.J. Reports, Series A, N 17, p. 29.

[37] Judgment of 13 September 1928, Chorzow Factory Case (Merits), P.C.I.J. Reports, Series A, N 17, p. 47.

[38] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001).

on Land (Article 3)[39] and Protocol I Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Article 91),[40] which established an inter-state duty to pay compensation when a belligerent party violates the provisions of these treaties.

The International Commission of Inquiry on Darfur, chaired by the prominent Italian lawyer Antonio Cassese, in its final report stressed the reluctance of states towards the acknowledgement of an individual right to reparation under international humanitarian law affirming that:

> even in 1949, when the Geneva Conventions were drafted and approved, the obligation (to provide reparations) was clearly conceived of as an obligation of each contracting State towards any other contracting State concerned. In other words, it was seen as an obligation between States, with the consequence that (i) each relevant State was entitled to request reparation or compensation from the other State concerned, and (ii) its nationals could concretely be granted compensation for any damage suffered only by lodging claims with national courts or other organs of the State. National case law in some countries has held that the obligation at issue was not intended directly to grant rights to individual victims of war crimes or grave breaches. In addition, the international obligation was to be considered as fulfilled any time, following the conclusion of a peace treaty, the responsible State had agreed to pay to the other State or States war reparations or compensation for damages caused to the nationals of the adversary, regardless of whether actual payment was ever made.[41]

After WWII, thanks to the pressure of the human rights movement and the Universal Declaration of Human Rights a new principle was elaborated: fundamental rights were no longer a matter of exclusively domestic jurisdiction. Progressively international human rights law valued the right of victims of human rights violations to pursue their claims to a remedy and reparations before national and international courts. The outcome of this normative process is the current embodiment of the right to a remedy, compensation and reparation within a sophisticated corpus of legal instruments. Among them are the Universal Declaration of Human Rights (Article 8),[42] the International Covenant on Civil and

[39] See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, adopted in The Hague, 18 October 1907, Article 3: 'A belligerent Party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.

[40] See Additional Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Article 91. Responsibility: 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.

[41] See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, para 594.

[42] See Article 8 UDHR: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.

Political Rights (Article 2.3),[43] the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6),[44] the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14)[45] and the Convention on the Rights of the Child (Article 39).[46] International humanitarian law is also relevant in this regard. Article 68 of the Third Geneva Convention relative to the Treatment of Prisoners of War includes a norm providing for an individual right to compensation by establishing that 'Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends, through the Protecting Power'.[47] The International Committee of the Red Cross (hereinafter ICRC) has pointed out that 'There is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State'.[48] On this basis the ICRC considers as an emerging customary norm the

[43] See para 3, Article 2 ICCPR: 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted'.

[44] International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by United Nations General Assembly resolution 2106 of 21 December 1965, Article 6: 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination'.

[45] Article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment affirms: 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law'.

[46] Article 39 CRC states that 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'.

[47] Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 68.

[48] ICRC, Customary IHL Database, Chapter 42, rule 50, at www.icrc.org. On this point Redress, *Justice for Victims: the ICC's Reparations Mandate*, London, 2011, p. 8: 'An array of State practice is indicative of the emerging norm status. For instance, the Conference on Jewish Material Claims Against Germany led to the compensation by Germany for injuries inflicted upon Jewish victims of the Holocaust, including serious violations of international humanitarian law. These

obligation of states to allow individual claims for reparation. The ICRC also refers to Article 33(2) of the International Law Commission Draft Articles on State Responsibility, which affirms that:

> When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.

Furthermore, the case law of several human rights bodies interprets the right to an effective remedy as implying a right of the victims to reparation and not only a duty on states in this regard. As authoritatively stated by the United Nations Human Rights Committee (HRC), the duty of states to make reparations to individuals whose rights under ICCPR have been violated is a component of effective domestic remedies: 'without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy […] is not discharged'.[49] However, this comprehensive interpretation of the right to a remedy, including the right to reparation is not universally accepted. Christian Tomuschat considers the approach of the HRC 'rather doubtful' as the right to a remedy is to be seen as a procedural and not a substantive right.[50] Moreover, international treaty law lacks a universal norm recognising a general and comprehensive right to reparation.[51] The human rights treaties mentioned above recognise limited forms of reparations, mainly compensation, for specific human rights violations.

The European Court of Human Rights and the Inter-American Court of Human Rights have significantly contributed to expand and define the scope, features and

include the establishment of a number of Funds such as the Hardship Fund and the German Foundation "Remembrance, Responsibility and Future". Practice identified by the ICRC includes UN General Assembly resolutions on the former Yugoslavia, wherein the Assembly affirmed "the right of victims of 'ethnic cleansing' to receive just reparation for their losses" urging parties to the conflict "to fulfil their agreements to this end".

[49] Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting), para 16.

[50] Bornkamm 2012, p. 121. See also Tomuschat 2002, p. 168: 'The appropriateness of this approach is rather doubtful. In English, the word "remedy" has a twofold meaning. On the one hand it connotes a legal action which can be brought before a judicial or other body entitled to settle the dispute concerned; or it could mean a measure designed to make good for damages caused. Since in the French version of the Covenant the word *recours* is used, and in the Spanish version the word *recurso*, one is inclined to conclude that the former is the correct meaning'.

[51] See Bornkamm 2012, p. 120: 'In fact, a provision that expressly lays down a comprehensive right to reparation for the violation of individual rights is nowhere to be found in international human rights law'.

the objective of reparation for human rights violations.[52] The latter in particular has developed a sophisticated and progressive jurisprudence on reparations, which are deemed to embody a 'transformative effect'.[53] The African Charter does not include any reference to reparation but the African Commission on Human and Peoples' Rights is already developing an interesting body of case law in this regard.[54] Significant steps towards the acknowledgement of the right to reparation are also registered thanks to the 'just satisfaction' doctrine developed under the case law of the European Court of Human Rights.[55]

Even though the status of customary norm of the individual right to reparation for violations of international humanitarian law (IHL) and international human right law (IHRL) is debated, a steady trend confirming the slow emergence of such an entitlement can be observed.[56] Article 33(2) of ILC Draft articles on State Responsibility for instance affirms that the obligations entrenched therein are 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State', clarifying that the individual is the beneficiary of the right to reparation. Authoritative scholars however are reluctant to acknowledge an individual right to reparation corresponding to a general rule of customary international law. Christian Tomuschat for instance has stressed that the *Bundesgerichthof*, the German highest court in civil matters, affirmed in the *Distomo* case that the nature of the right to reparation has not changed since 1949, when the Geneva Conventions were adopted.[57] Furthermore, according to Tomuschat the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter also Basic Principles) are of an

[52] See Article 41 ECHR ('If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party') and Article 63(1)of the Inter-American Convention (If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied, and that fair compensation be paid to the injured party).

[53] See Rubio-Marín and Sandoval 2011.

[54] See Union interafricaine des droits de l'Homme et. A. v. Angola, Decision of 11 November 1997 (no 159/96) and Malawi Africa Association et al. v. Mauritania, Decision of 111 May 200 (nos. 54/91-61/91-96/93-98/93-164/97_196/97-210/98). On this point, see also Conor McCarthy, op. cit., p. 257.

[55] See Altwicker-Hàmori et al. 2015.

[56] See Dwertmann 2010, p 19. and ff.

[57] See Tomuschat 2005, at p. 582 referring to BGH, Decision of 26 June 2003, **I1** ZR 245/98, printed in 42 *International Legal Materials* (2003) 1030–1055, at 1037.

'aspirational nature only'.[58] However, the adoption of the Basic Principle by consensus without a vote can be interpreted as a signal that the growing trend towards the recognition of an individual right to reparation under international human rights law has led to the crystallisation of a norm of customary international law. Despite the evidence of contrary practices, examples corroborating this customary rule exist. Reparation programmes in the aftermath of the Apartheid era in South Africa, and the military juntas in Latin America, and for the benefit or the Victims of the Nazi regime, coupled with acknowledgement of reparation claims for violations of international human rights law in domestic jurisprudence, confirm this assumption.[59] The ground-breaking reparation regime of the ICC can be also interpreted as an indication that international customary law finally recognises an individual right to reparation. Such a rule would be binding also the Rwandan state, the liability of which has emerged during genocide trials before national ordinary courts.[60]

3.3.1 Forms of Reparation

The 2005 Basic Principles are the most comprehensive document detailing what forms reparative measures can take. Unlike the 1985 UNGA Victims' Declaration,[61] the Basic Principles and Guidelines address the issues surrounding victimisation resulting from international crimes. They constitute soft law and are not *per se* legally binding but recognise rules of international law already in place. They offer a broad categorisation of reparative measures including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Principle 11 defines the concept of remedy for gross violations of international human rights law and serious violations of international humanitarian law. The remedy includes equal and effective access to justice; adequate, effective and prompt reparation for harm suffered and access to relevant information concerning violations and reparation mechanisms. Principle 18 in particular affirms that:

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[58] Ibid., p. 585. Interestingly, Tomuschat finds in the drafting history of the Basic Principles evidence that 'states are reluctant to acknowledge a fully-fledged right of individual victims to obtain compensation for the harmed suffered: 'although in that Part the Bassiouni text reads "a State *shall* provide reparation to victims for its acts or omissions constituting violations of international human rights and humanitarian law norms", the current text contains the following formulation: 'In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law *should* as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation' (emphasis added).

[59] See Bornkamm 2012, pp. 124–125.

[60] See Bornkamm 2012, p. 124, footnote 33.

[61] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by United nations general Assembly resolution 40/34 of 29 November 1985.

> in accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation.

As to restitution Principle 8 establishes that:

> Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

Restitution, where possible, requires the restoration of the *status quo ante* as if the offence had never occurred.[62] This assumption is however replete with problems. The re-establishment of the situation existing before the violation occurred seems problematic considering that such a condition was already marked by human rights violations against the victim. In some cases, the *status quo ante* might constitute the premise for the violation of fundamental rights. Moreover, where large-scale violence imperils basic rights such as the right to life or to physical integrity, restitution is by definition impossible. Taking this into account, other reparative measures have also been conceived.

Compensation should be provided in case of economically evaluable loss, following a criterion of proportionality to the gravity of harm and of the violation.[63] The Inter-American Court of Human Rights in its case law has established that compensative measures must be financially assessed against a parameter related to the so-called *proyecto de vida* (life project) of the victim.[64]

Rehabilitation includes 'medical and psychological care as well as legal and social services'. The Convention on the Rights of the Child refers to the need for 'physical and psychological recovery and social reintegration of a child victim',[65]

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[62] In the words of the drafters of the Basic Principles '*Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property'.

[63] According to the Bassiouni-Van Boven Principles 'Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (***a***) Physical or mental harm; (***b***) Lost opportunities, including employment, education and social benefits; (***c***) Material damages and loss of earnings, including loss of earning potential; (***d***) Moral damage; (***e***) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services'.

[64] See for instance Inter-American Court of Human Rights, Case of Tibi v. Ecuador, Judgment of September 07, 2004; Case of Maritza Urrutia v. Guatemala, Judgement of 27 November 2003; Case of Mirna Mack Chang v. Guatemala, Judgement of 25 November 2003.

[65] See Article 39 of the CRC: 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of

while the Convention against Torture refers to 'the means for as full rehabilitation as possible'.[66] The content of the rehabilitation measures is extremely textured. For instance, in the famous Plan de Sanchez Massacre Judgement the Inter-American Court of Human Rights has established a comprehensive rehabilitation plan for the affected communities, including:

> a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization; b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal; c) sewage system and potable water supply; d) supply of teaching personnel trained in inter-cultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities, and e) the establishment of a health centre in the village of Plan de Sánchez with adequate personnel and conditions, as well as training for the personnel of the Rabinal Municipal Health Center so that they can provide medical and psychological care to those who have been affected and who require this kind of treatment.[67]

Satisfaction includes measures aimed at stopping the on-going violations, disclosing the truth concerning the violations, restoring the dignity of the victims and obtaining a public apology.[68] Both satisfaction and guarantees of non-repetition are forms of reparation usually granted by states. However, in the Civil Parties' Co-Lawyers' Joint Submission on Reparations before the Extraordinary Chambers in the Courts of Cambodia, the victims demanded the record of the apologies rendered by the defendants during the hearings to be published as a form of satisfaction.[69]

According to Principle 23 of the UN Basic Principles *Guarantees of non-repetition*[70] should include, where applicable, any or all of the following measures:

(1) Ensuring effective civilian control of military and security forces;
(2) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
(3) Strengthening the independence of the judiciary;
(4) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

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neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'.

[66] See Article 14 CAT.

[67] Inter-American Court of Human Rights, Case of the Plan de Sánchez Massacre v. Guatemala, Judgement of 9 November 2004, (Reparations) para 110.

[68] See Basic Principles, Principle 22.

[69] See Redress, Justice for Victims: the ICC's Reparations Mandate, London, 2011, p. 13.

[70] As to these measures, the issue arises whether a tribunal imposing guarantees of non-repetition on a state is respecting the principles of separation of powers or is *de facto* holder of legislative power.

(5) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
(6) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
(7) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(8) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

3.3.2 Recent Developments in International Criminal Law

An important step towards the acknowledgement of reparations for victims of international crimes is marked by the redress regime developed by the Rome Statute of the International Criminal Court. The ICC reparation scheme is unique in the legal sphere. The ICC has jurisdiction to award reparations to identified victims pursuant to Article 75, para 2 of the Rome Statute, addressing in this way a lacuna in the ICTR and ICTY statute, where victims were allowed to play only the role of witnesses.[71] The opportunities for victims to participate as such in proceedings before the ICTY and ICTR were extremely limited.[72] Articles 24(3) of the ICTY Statute and 23(3) of the ICTR Statute only allow the tribunals to provide property restitution to the victims of the offences falling within their jurisdiction.[73] However, a restitution order has never been delivered by the trial chambers of the two *ad hoc* tribunals. Common Rule 34 of ICTY and ICTR Rules of Procedure and Evidence

[71] It is worth nothing that the older international criminal tribunals, Nuremberg and Tokyo, did not provide for any procedural rights for victims either. On this point, see van Boven 1999, pp. 77–89.

[72] Even though victims are not allowed to participate in the proceedings before the two UN ad hoc Tribunals Anne-Marie de Brouwer and Marc Groenhuijsen identifiy, 'three situations of 'victim participation' before the Tribunals deserve to be mentioned: (1) victims 'participating' in the trial proceedings through victim impact statements submitted by the Prosecutor to the Chamber; victims 'participating' in the trial proceedings through *amicus curiae* intervention; and (3) victim 'participation' by addressing the Prosecutor directly through, for instance, letter writing. These forms of 'victim participation' are, however, very much dependent on the goodwill of others; the victims themselves have no enforceable right to victim participation'. See de Brouwer and Groenhuijsen 2011. See further de Brouwer 2005, pp. 284–301.

[73] See Article 24(3) of the ICTY Statute and Article 23(3) ICTR statute: 'In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners'.

envisages the possibility to provide the victims with counselling and support, 'in particular in cases of rape and sexual assault'.

The broad concept of 'victim' adopted under the legal instruments of the ICC is crucial in order to clarify who is entitled to claim for reparation awards. The ICC's definition of victim encompasses both natural and legal persons but, contrary to the 2005 UN Basic Principles, it does not expressly acknowledge collective victimisation. The reparation regime of the ICC is laid down in Articles 75 and 79 of the Rome Statute and is further elaborated in rules 94–99 of the Rules of Procedure and Evidence (RPE). The Court can pass an order awarding reparation on the basis of the conviction of the accused. Moreover, the creation of a Trust Fund for Victims, established on 9 September 2002 under a Resolution of the Assembly of States Parties (ASP), allowed a broader system of reparation which, and this is a remarkable innovation, can be claimed at any stage in the trial, including the investigation, pre-trial and trial stages.

In the Lubanga case the ICC Trial Chamber I in its August 2012 decision seized the opportunity to shed light on crucial reparation-related issues.[74] Addressing a gap in the Rome Statute, which does not clarify which organ of the ICC is tasked with monitoring the reparation process, Trial Chamber I affirmed that this responsibility falls within the functions of the judiciary (Reparation decision, § 85). Trial Chamber I has clearly stressed that the validity of the principles it established was limited to the case at stake. It has highlighted both general and case-relevant purposes of reparations. General purposes include obliging 'those responsible for serious crimes to repair the harm they caused to the victims and enable the Chamber to ensure that offenders account for their acts' (Reparation decision, § 64–65). Case-relevant purposes include 'relieve the suffering caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers'. Moreover, in the opinion of Trial Chamber I 'Reparations can assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities (without making Mr. Lubanga's participation in this process mandatory)'. This emphasis on the relevance of victim-centred reparative measures in reconciliation processes is a factor to be considered in the assessment of Rwanda reparative policies in the aftermath of the genocide.

Trial Chamber I decided not to limit reparations to the victims who either participated in the Lubanga case or applied for reparations. It has also stressed that the ICC had to ensure that reparations were awarded on non-discriminatory and gender-sensitive basis, prioritising the needs of the most vulnerable victims. It emphasised that the principle of the best interest of the child entrenched in the Convention on the Rights of the Child had to guide the reparation decisions of the ICC.[75]

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[74] On the Lubanga Case, see Sullo 2014.

[75] The ICC Trial Chamber in Lubanga has established that 'Reparations proceedings, and reparations orders and programmes in favour of child soldiers, should guarantee the development of the

As to the modalities of reparations, the ICC has clarified that the list included in Article 75 RS was not exhaustive and that the conviction of the defendant and the sentence of the ICC were also to be considered forms of reparation for the victims (§ 80). Finally, the Trial Chamber I stressed that reparations should mirror local customary practices (§ 82). Trial Chamber I has also ruled that the implementation of the reparation programme was delegated to the Trust Fund for Victims, which had to determine the most suitable forms of reparations and identify the victimised communities and beneficiaries with the help of a group of experts in the field of child soldiers, violence against minors and gender issues.

Reparation measures however are not only a legal issue: the challenges in implementing programmes aimed at redressing past abuses are manifold. Indeed, the contexts in which reparation programmes are set up are often marked by weak institutions, scarcity of financial resources and lack of political will. Furthermore, the abuses that reparation programmes are aimed at redressing are often 'irreparable' and in most of the cases it is not possible to re-establish the *status quo ante*, as post-genocide Rwanda has demonstrated.

3.4 The Duty to Prosecute in International Law

This paragraph elaborates on the duty to prosecute genocide and other severe violations of human rights stemming from international treaty law and international customary law. It concentrates on the scope and features of obligations on states with a particular focus on transitional societies and post-genocide Rwanda. It is in fact crucial to establish to what extent societies in transition are bound under international law to prosecute human rights violations committed by previous regimes. If mandatory prosecution on the one hand would provide countries in transition with universal instruments to enforce the rule of law, on the other it might expose them to political backlash. This is why part of the scholarship argues that the duty to prosecute needs to be balanced with the necessity to protect the new regime from instability.

While post-genocide settings are usually characterised by impossibility and/or unwillingness to prosecute, Rwanda has embarked in a serious attempt to prosecute as many genocide suspects as possible. Consequently, the question at stake here is not whether Rwanda has respected the duty to prosecute stemming from international law but, on the contrary, whether it has overstretched it by prioritising trials to the detriment of other imperatives under international and domestic human rights law.

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victims' personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. For each child, the measures should aim at developing respect for their parents, cultural identity and language. Former child soldiers should be helped to live responsibly in a free society, recognising the need for a spirit of understanding, peace and tolerance, showing respect for equality between the sexes and valuing friendship between all peoples and groups' (Reparation decision, § 213).

Rwanda accessed the Convention on the Prevention and Punishment of the Crime of Genocide and the International Covenant on Civil and Political Rights on 16 April 1975 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment on 15 December 2008. The Genocide Convention and the CAT include crucial norms regarding the duty to prosecute genocide and torture. On the basis of Article 28 of the 1969 Vienna Convention on the Law of Treaties[76] however, affirming the principle of non-retroactivity of treaties, it is to be concluded that the provisions entrenched in the CAT do not cover crimes committed in Rwanda during the genocide, unless they already corresponded in 1994 to customary international law. The duty to prosecute crimes against humanity other than genocide and torture is not explicitly embodied in international treaties and is very much the outcome of the interpretation of international jurisprudence and human rights bodies, particularly the United Nations Human Rights Committee. Post-violence transitions, either from violent conflicts or from authoritarian rules, trigger dilemmas regarding the best way to deal with the past abuses as interests of different groups may be competing. Doubts in particular surround the existence of an obligation of the succeeding state to criminally repress all international crimes perpetrated under the previous regime.[77] To what extent is criminal prosecution a 'must' in such a scenario is a question that challenges both legally and politically regimes in transition. Whether international law leaves room for a solution based on a case-by-case rationale is also a question that triggers an interesting and heated debate. If international law imposes on states an uncompromising duty to prosecute and punish every violation, the possibility of adopting amnesties also for low-ranking perpetrators should be ruled out. If the duty to punish is to a lesser extent rooted in a criminal rationale and does not imply an uncompromising state obligation to adopt retributive justice, other measures of accountability such as vetting and lustration mechanisms, hearings before truth commissions and civil suits might have a more prominent role to play.[78] Moreover, if international rule of law requires unfettered prosecution, this duty in post-conflict settings marked by poor judicial infrastructure might be difficult to operationalise. Finally, while human rights activists and scholars mostly argue that prosecution is the best guarantee of non-recurrence of past abuses, parts of the scholarly literature consider trials an

[76] Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties.

[77] See Kritz 1995, p. 346, quoting Tina Rosenberg, in Boraine et al. 1994, p. 66: 'Many governments and some individuals have made the call that to leave the past alone is the best way to avoid upsetting a delicate process of transition or to avoid the return to past dictatorship and reopening the victims' old wounds. The attitude is that there is a dragon living on the patio and we had better not provoke it'. On the current scope and implications of the duty to prosecute in international law see Olson 2006, pp. 275–294; Orentlicher 1991; Orentlicher D., '*Settling Accounts' Revisited: Reconciling Global Norms with Local Agency*, The International Journal of Transitional Justice, Vol. 1, 2007, pp. 10–22; A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, UK, 2003, pp. 312–316.

[78] See Olson 2006, pp. 275–294.

obstacle to the reconciliation processes.[79] This position was held for instance by the South African Constitutional Court in 1996 in response to the attempt by the Azanian People's Organization (AZAPO) to challenge the legitimacy of the amnesty power the Truth and Reconciliation Commission was endowed with. In this case the Court affirmed that 'If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming'.[80]

At the domestic level a main distinction can be drawn between states regarding the duty to prosecute internal crimes: states 'active' can be distinguished from states 'reactive'.[81] The former are bound to prosecute every crime committed inside their territory, while the latter concede national prosecutors a certain degree of discretion in this regard. As an example of the first model it is possible to refer to Italy, the constitution of which demands that every crime envisaged by the national penal code is prosecuted.[82] As to the second approach, the United Kingdom is the paradigmatic example. British prosecutors, even though not entitled to an unbridled discretion, are free to assess the relevance of a crime in terms of gravity for social peace, deciding whether or not to prosecute it. Transferred at the international level, these options are mirrored by the provisions entrenched in the Rome Statute of the International Criminal Court, in particular in the Preamble[83] and in Article 53.[84] In fact, while the former solemnly affirms that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', Article 53 of the Rome Statute, incorporates the principle of the 'interest of justice' as a parameter against which to evaluate if prosecution falling within the ICC reach should be limited to give the floor to other priorities. Transitional justice debate is

[79] On this point, see Ignatieff 1997, p. 184: 'If trials assist the process of uncovering the truth, it is doubtful if they assist the process of reconciliation. The purgative function of justice tends to operate on the victims' side only. While the victims may feel justice has been done, the community from which the perpetrators come may feel that they have been made scapegoats'.

[80] On this point, see Azanian People's Organization (AZAPO) and Others v. President of the Republic of South Africa, 1996 (4) SA 671, pp. 684–686.

[81] See Alessi 2002, introduction.

[82] On this point, see Article 112 of the Italian Constitution: 'Il pubblico ministero ha l'obbligo di esercitare l'azione penale'.

[83] According to the Preamble of the Rome Statute the states parties 'affirm that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation', and consequently are 'determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.

[84] Article 53 of the Rome Statute affirms: 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under Article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

very sensitive to these dilemmas, as an internationally sanctioned duty to prosecute deeply affects and conditions justice to be delivered during and after political transitions. An unfettered duty to prosecute imposed through international law would narrow down the governmental degree of discretional power, limiting state sovereignty.

The position of international law towards states' duty to prosecute and amnesty laws covering offences against human rights is nuanced. As affirmed in Article 38 of the Statute of the International Court of Justice, international law stems from several sources, including treaties between states or international organisations and customary norms. Some treaties provide for the duty to prosecute particular violations, such as genocide, torture and breaches of the 1949 Geneva Convention, while no treaty provides a definition of the constitutive elements of an amnesty.[85] Recently however, the UN Office of the High Commissioner for Human Rights (OHCHR) has defined amnesties as 'Legal measures that have the effect of: (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specific criminal conduct committed before the amnesty's adoption; or (b) Retroactively nullifying legal liability previously established. Amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law'.[86] Given the inconsistent practice of states, that in the last decades have issued amnesties covering also gross human rights violations, the question whether international customary law imposes a general obligation to prosecute human rights violations is debated. Currently, there is no agreement among scholars regarding the crystallisation of such a norm.[87]

As stressed by Diane Orentlicher, the duty to punish human rights violations under international law is by and large the outcome of interpretation by researchers and human rights bodies, as most of the covenants protecting human rights lack a

[85] On amnesties in international law see Della Morte 2011.

[86] On this point, see OHCHR, *Rule-of-Law Tools for Post-Conflict States, Amnesties*, HR/PUB/09/1 (2009), p. 41.

[87] In a broad study on amnesties Louise Mallinder concluded that 'Perhaps the most significant period in the relationship between international crimes and amnesties is after the UN changed its approach to amnesty laws with the signing of the Lomé Accord on 7 July 1999. Between this date and December 2007, 34 amnesty laws have excluded some form of international crimes, which has inspired human rights activists to point to a growing trend to prohibit impunity for these crimes. This research has found, however, that during the same period, 28 amnesty laws have granted immunity to perpetrators of international crimes, and that consequently, it is too early to suggest that an international custom is developing'. On this point, see Louise Mallinder, *Amnesty, Human Rights and Political Transitions*: *Bridging the Peace and Justice Divide*, Hart Publishing, Oxford, UK, 2008. For a contrary opinion affirming that a customary norm establishing the duty to prosecute human rights violation has emerged before 1990 see Bornkamm, op cit., p. 96.

'black-letter' obligation in this sense.[88] At the same time, however, she highlighted that 'a State party fails in its duty to ensure the cluster of rights protecting physical integrity if it does not investigate violations and seek to punish those who are responsible'.[89] Furthermore 'a state's failure to punish repeated or notorious violations breaches the customary obligation to respect the same set of preeminent rights'.[90]

Moreover human rights law, while imposing duties on states, leaves governments unchained with regard to the means to be used to accomplish their tasks.[91] In other words, usually states are bound by an 'obligation of result' and by no way by an obligation of means. Step by step, however, a trend has emerged imposing on states parallel 'obligations of means' more detailed in specifying their duties.[92] Within the debate surrounding states obligations during and in the aftermath of political transitions a general consensus on two points has consolidated. First, when prosecuting human rights violations of a former regime the successor government must integrally respect fair trial standards. Secondly, some crimes are to be punished under international law. Beyond these certainties however, doubts exist on the scope of state substantial and procedural duties.

Under international treaty law the most rigorous obligations of punishing human rights violations are set out in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[93] Despite the

[88] On this point, see Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, Yale Journal of International Law, 1991, in particular p. 2541, footnote N. 8: 'Key sources of a duty to prosecute human rights crimes include conventions that do not explicitly require States Parties to punish violations, but which have authoritatively been interpreted to do so. Looking only at the text of the conventions, many have assumed that the treaties have no bearing on the question of punishment'.

[89] Ibid., pp. 2551–2552.

[90] Ibid., 2552.

[91] Ibid., 2551.

[92] Ibid.: 'International human rights law traditionally has allowed governments substantial discretion to determine the means they will use to ensure protected rights, while international penal law has often focused on the power—not duty—of governments to punish violations committed outside their territorial jurisdiction. When the law has required states to punish offenses committed in their territory, the duty traditionally has applied principally to crimes committed against foreign nationals'.

[93] The adherents' duty to punish individuals for crimes committed on their territory is also included in the 1930 Convention concerning Forced Labour, while the 1999 International Convention for the Suppression of the Financing of Terrorism demands states parties to punish or extradite individuals for crimes committed on their territory or by their nationals. The 1979 International Convention against the Taking of Hostages and the 1994 Inter-American Convention on the Forced Disappearance of Persons impose on states a *duty aut dedere aut judicare* without regard for the *locus commissi delicti.* The 1956 Slavery Convention and the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid require the prosecution of the offenders for crimes committed anywhere excluding the possibility to extradite. On this point see Olson 2006, p. 281, footnote N. 33.

common feature of demanding the prosecution of the acts they proscribe, the two treaties express 'profoundly different visions of international human rights law'.[94] While the Genocide Convention was written in the aftermath of the Nuremberg Trials and mirrored the hope in the imminent creation an international criminal tribunal, the CAT was drafted when such a hope had faded away. To discourage international crimes the Genocide Convention, besides domestic prosecution, also provides for an international tribunal, while the CAT relies on domestic prosecution by the concerned state or, should this not be possible, on universal jurisdiction. Article I of the Genocide Convention confirms that 'genocide is a crime under international law which (the contracting parties) undertake to prevent and to punish'. Article IV establishes that individuals committing genocide 'shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals', while Article V imposes on the Contracting Parties the obligation to adopt the necessary legislation to give effect to the Convention 'and, in particular, to provide effective penalties for persons guilty of genocide'. For our purpose, the most relevant Convention provision is Article VI:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

As the international penal tribunal referred to in the Convention was not created, the jurisdiction on genocide should be automatically transferred to those states on the territory of which the crime is perpetrated. This is considered one of the main limitations of the covenant: states which are foremost responsible for the crime of genocide are at the same time charged with prosecuting its perpetrators, an obligation that during and after a political transition is hard to meet. Beyond the national jurisdiction, there is support for the assumption that international customary law establishes universal jurisdiction over genocide.[95] US legislation has confirmed this view.[96]

The Convention against Torture,[97] in the same way as the Genocide Convention, obliges states party to prosecute individuals suspected of criminalised conduct. The

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[94] Orentlicher 1991, pp. 2562–2563.

[95] See International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951.

[96] See Restatement (Third) of Foreign Relations Law of the United States: 'A state violates customary law if it practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide. Parties to the Genocide Convention are bound also by the provisions requiring states to punish persons guilty of conspiracy, direct and public incitement, or attempt to commit genocide, or complicity in genocide, and to extradite persons accused of genocide'.

[97] According to Article 1 of the CAT, torture is defined as: 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or

states party accordingly declared 'that all acts of torture are offences under [their] criminal law'. Article 7 of the CAT imposes on states the duty of *aut dedere aut judicare*, to extradite or to prosecute. Even though focused on the domestic prosecution of torture cases, the CAT also provides a form of universal jurisdiction for those instances in which states are unable or unwilling to prosecute suspected individuals. The adherents to the CAT are not allowed to pass or apply amnesty laws that would hinder the prosecution of alleged torturers. The Convention is however compatible with provisions establishing a statute of limitation covering prosecution for torturers, unless the statute of limitation would not allow a reasonable lapse of time to set in motion criminal proceedings. The UN Committee Against Torture has clearly affirmed that the duties stemming from the CAT only exist when the torture has been committed after the CAT entered in force with respect to the states parties.[98]

The duty to prosecute violations of the rights ensured is also established by the 2006 International Convention on Enforced Disappearances, which entered into force in 2010. The treaty in fact requires states to adopt the necessary measures to hold criminally responsible those who commit, order, attempt to commit, are accomplice to or participate in an enforced disappearance, as well as the superiors who carry responsibility over their subordinates involved in these crimes.[99] Apart from these treaties, the majority of human rights covenants are vague as to an explicit duty to prosecute and punish.

Despite these gaps in the international legal framework, human rights monitoring bodies hold that states parties are required to investigate grave human rights violations and to bring to justice those responsible. This is especially true for torture, extra-judicial executions and forced disappearances. The duty is based on the obligation on states to grant the enjoyment of the rights entrenched in the treaties. In fact, any state party to the ICCPR is obliged 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized' and 'to provide an effective remedy' (Articles 2.1 and 3 ICCPR). The European Convention on Human Rights and American Convention on Human Rights adopt a similar language. They demand state parties to ensure that victims whose protected rights are violated are entitled to an effective remedy before a competent body.[100] Parties to the American Convention on Human Rights

a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.

[98] See Orentlicher 1991, p. 2567.

[99] On this point, see Article 6 of the International Convention on Enforced Disappearances.

[100] According to Buergenthal the duty to ensure rights included in the International Covenant 'implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights'. See Buergenthal 1981.

'undertake to respect the rights and freedoms recognized and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms' (Article 1.1).[101] Parties to the European Convention on Human Rights pledge to 'secure to everyone within their jurisdiction the rights and freedoms' set out the Convention (Article 1).[102] In *Aksoy v. Turkey,* the European Court of Human Rights sustained that 'the notion of an ''effective remedy'' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complaint to investigatory procedure'. The ICCPR and the American Convention require state parties to pass legislation aimed at giving effect to the rights and freedoms established in these treaties. The Banjul Charter provides for affirmative obligations of states too. It establishes that states parties 'shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'.[103] Moreover, it also affirms that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter' and shall have 'the right to an appeal to competent national organs against acts violating his fundamental rights'.[104] The ICCPR's drafters, in spite of a proposal formulated by the Philippines' representative, asking that 'violators shall swiftly be brought to the law, especially when they are public officials', did not explicitly require states to prosecute individuals responsible for such violations.[105] According to Diane Orentlicher, however, 'nothing in the drafting history is inconsistent with such a duty'.[106] This opinion is shared by the UN Human Rights Committee with regard to crimes such as torture, forced disappearances and summary executions: in these cases the HRC urges state parties to bring perpetrators to the book and to provide victims with suitable reparations. As to the crime of torture, for instance, the HRC has affirmed that:

> It is not sufficient for the implementation of [article 7] to prohibit [torture or other cruel, inhuman or degrading] treatment or punishment or to make it a crime. Most States have

[101] See Article 25 of the American Convention on Human Rights.

[102] See Article 13 of the European Convention for the protection of Human Rights and Fundamental Freedoms.

[103] See Article 1 of the Banjul Charter.

[104] See Articles 2 and 7(1)(a) of the Banjul Charter.

[105] The Delegates' concerns are explained by Orentlicher 1991, p. 2570: 'First, the Commission sought to ensure the broadest possible range of remedies for violations of human rights, and eschewed language implying that judicial remedies were the exclusive form contemplated by the Covenant. Second, delegates sought to avoid language that would give rise to the same consequences regardless of the seriousness of a state's infraction. More generally, Article 2(3) was designed principally to ensure that states provided non-criminal remedies, such as restitution or an order to desist wrongful conduct, and delegates may have viewed the Philippine proposal to be out of place in such an article'.

[106] Ibid., p. 2571. The author adds also that 'The text could, moreover, reasonably be interpreted to require States Parties to ensure at least some rights through use of criminal sanctions'.

> penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.[107]

As to the interpretation of the term 'held responsible', which does not expressly refer to criminal punishment, Diane Orentlicher suggests that a penal sanction in case of torture would be consistent with the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[108] A similar reasoning is followed by the HRC with respect to extra-legal executions and forced disappearances. The HRC however has not recognised an individual right 'to see another person criminally prosecuted'.[109] Despite the silence of the *travaux préparatoires* for the American Convention, the Inter-American Court of Human Rights has interpreted Article 1 of the Covenant as affirming the states' 'legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'.[110] In the Velasquez Rodriguez Case, which built on a rich and consistent jurisprudence of the Inter-American Commission, the Court moreover stated that:

> This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[111]

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[107] See UN Human Rights Committee General Comment No. 20, Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (Article 7) adopted by the Human Rights Committee at the Forty-fourth Session, A/44/40, 10 March 1992 available at: http://www.refworld.org/docid/453883fb0.html. Last accessed 23 October 2016.

[108] Ibid., p. 10. Article 10 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishes that criminal proceedings should be set up against individuals suspected of committing torture, and that, 'if an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings'.

[109] Ibid., p. 10.

[110] On this point, see Velasquez Rodriguez Case, Inter-American Court of Human Rights (ser. C) No. 4, para 174 (1988) (judgment).

[111] See Velasquez Rodriguez v. Honduras, Judgment of July 29, 1988, Inter American Court of Human Rights (Ser. C) No. 4 (1988) (judgement), para 166.

This trend was confirmed in 1989, when the Commission's Chairman spoke against amnesties covering human rights violations.[112]

International Humanitarian Law (IHL) recognises a duty to prosecute too. If grave breaches of IHL listed in the four 1949 Geneva Conventions and in the Additional Protocol I of 1977[113] occur, the Treaties demand that states prosecute or extradite.[114] These violations, when committed during international armed conflicts against individuals and property protected by the treaties, amount to war crimes. Similarly, customary international law also imposes on states a duty to sanction war crimes, including those committed during internal armed conflicts, and violations of Article 3 common to the four Geneva Conventions.[115] Other international humanitarian law treaties impose on states specific obligations to prosecute or to extradite individuals suspected of committing the proscribed actions.[116] According to the four 1949 Geneva Conventions, states are also obliged to curb and suppress all non-grave breaches of IHL, but this duty does not necessarily entail the obligation to set up criminal trials.[117] The states' obligations in this case can be satisfied also through disciplinary, administrative or other measures.[118]

There is a general agreement among scholars that customary international law prohibits torture, genocide, extra-legal killings and forced disappearances. The scope of this prohibition and its corollaries, on the contrary, remain unclear. There is a growing trend, however, to recognise the states' duty to investigate and punish violations against the right to life and freedom from torture and involuntary disappearances as a norm of international customary law. This is echoed by several UN documents and reports, arbitral tribunals' decisions and by the Restatement (Third) of the Foreign Relations Law of the United States.[119] The UN Commission on Human Rights has stated that 'the obligation to promote and protect human rights and fundamental freedoms calls not only for measures to guarantee the protection of human rights and fundamental freedoms but also for measures

[112] See speech by Ambassador Oliver H. Jackman before the First Committee of the XIX Regular Meeting of the General Assembly to Present the Annual Report of the IACHR, Nov. 1989.

[113] On this point, see Protocol I, Articles 11(4), 85(3), and 85(4).

[114] See Articles 50, 51, of the Geneva Convention I and II and 130 and 147 respectively of the four Geneva Conventions.

[115] On this point, see Olson 2006, p. 280.

[116] These include: The 1954 Hague Convention for the Protection of Cultural Property; the 1972 Biological Weapons Convention; the 1976 Environmental Modification Techniques Convention; the Amended Protocol II to the 1980 Conventional Weapons Convention; the 1993 Chemical Weapons Convention; the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. See Olson 2006, p. 280, in particular footnote N. 26.

[117] On this point, see Articles 49(3), 50(3), 129(3) and 146(3) of the four Geneva Conventions stating that 'Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article'.

[118] See Orentlicher 1991, p. 2576.

[119] See Orentlicher 1991, pp. 2582–2583

intended effectively to prevent any violation of those rights'.[120] Several UN reports endorsed this position: even though they are not binding, as they consist of 'soft law', the view they express is shared in several UN General Assembly Resolutions.[121] All this considered it can be affirmed that 'While not conclusive, the frequent reiteration of a duty to punish grave violations of physical integrity in international instruments is evidence that the duty is—or is emerging as—a customary norm'.[122] It is hence clear that international law imposes obligations on states by demanding them to prosecute and punish serious violations of physical integrity.

A crucial issue surrounding transitional justice arises at this point, namely whether the duty to prosecute stemming from international treaty and customary law should be mitigated during political transitions. In other words, is a successor government charged with prosecuting every violation committed during the rule of its predecessor? First, it is necessary to clarify that the failure by an outgoing government in addressing such violations does not discharge the new government from the duty to prosecute, which cannot be made susceptible to considerations of political opportunity. Second, international law does not impose on states duties which may cause serious threats to their existence.[123]

The answer provided by international customary law on this point seems to be compatible with the needs to balance the duty to fight against impunity with the claim for political stability, made by states and societies in transition. Following Orentlicher's conclusion on this point, it is possible to affirm that 'customary law would be violated by complete impunity for repeated or notorious instances of torture, extra-legal executions, and disappearances, but would not require

[120] On this point, see Commission on Human Rights. Res. 1988/51 and Commission on Human Rights. Res. 1988/50.

[121] See Orentlicher 1991, p. 2584. See also for instance Report prepared by the Special Rapporteur on the situation of human rights in Chile in accordance with para 11 of the Commission on Human Rights resolution 1983/38 of 8 March 1983, U.N. Doc. A/38/385, para 341 (1983) (impunity enjoyed by Chilean security organs 'is the cause, and an undoubted encouragement in the commission, of multiple violations of fundamental rights'); Final report on the situation of human rights in El Salvador submitted to the Commission on Human Rights by Mr. Jose Antonio Pastor Ridruejo in fulfilment of the mandate conferred under Commission resolution 1986/39, 43 U.N. ESCOR Comm'n on Hum. Rts. at 13, para 60, U.N. Doc. E/CN.4/1987/21 (failure of Salvadoran courts to render convictions that bear reasonable relationship to number of violations of right to life creates 'climate of impunity'); Report of the Working Group on Enforced or Involuntary Disappearances, 45 U.N. ESCOR Comm'n on Hum. Rts. at 85, para 312, U.N. Doc. E/CN.4/1989/18 (impunity in the face of repeated disappearances 'creates conditions conducive to the persistence of such practices'); Report of the Working Group on Enforced or Involuntary Disappearances, 47 U.N. ESCOR Comm'n on Hum. Rts. at 86, para 406 ('impunity is perhaps the single most important factor contributing to the phenomenon of disappearance. Perpetrators of human rights violations … become all the more irresponsible if they are not held to account before a court of law').

[122] Ibid., p. 2585.

[123] Ibid., p. 2600.

prosecution of every person who committed such an offense'.[124] As to the duties stemming from international treaty law, views that states parties to the ICCPR, European and American Convention on Human Rights, the Genocide Convention and CAT are formally bound to prosecute every violation of the right to physical integrity are to be taken into account and properly evaluated. For instance, in the *Velasquez Rodriguez Case*, the Inter-American Court unambiguously stated that a State Party to the American Convention must investigate and punish 'any' and 'every' violation of the rights protected by the Convention.[125] At the same time however, the Court clearly stated that the unsuccessful attempt to prosecute authors of a violation does not represent a violation of the Covenant.[126] Similarly, the International Law Commission is in favour of an interpretation that limits the scope of treaty duties and avoids situations of impossibility.[127] Moreover, according to the International Law Commission 'international duties must not be taken so far as to result in self-destruction'.[128] Taking all this into consideration, in specific cases where a policy of full accountability is neither possible nor tenable, the deterrent effect, which is one of the main objectives of the duty to prosecute, would be reachable also through a principled programme of selected prosecution.[129] The criteria to select the defendants must, needless to say, abide by the principle of equality before the law.[130] Domestic laws generally allow identifying different degrees of culpability based on which it is possible to develop a limited programme of prosecution.[131] This programme could be based on identified good practices, avoiding amongst other concerns, exonerating from prosecution those responsible for gross human rights violations.

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[124] Ibid., p. 2599.

[125] See the *Velasquez Rodriguez vs. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, para 177, (1988) (judgment).

[126] Ibid.: 'In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective'.

[127] See 1978 2 Y.B. INT'L L. COMM'N (pt. 1), at 75, para 33, U.N. Doc. A/CN.4/315 (1977): in the words of the Commission treaty duties 'are likely to be interpreted in a manner which circumscribes them so as to exclude situations of both absolute and relative impossibility from the very scope of such duties'.

[128] Ibid., p. 133.

[129] On this point, see Orentlicher 1991, pp. 2601–2602.

[130] Ibid.

[131] On this point, see Orentlicher 1991, p. 2601: 'While limitations on prosecutions may be compatible with states' international obligations, a policy that exonerates large numbers of persons who committed atrocious crimes offends common standards of justice and diminishes respect for the law. The best means of accommodating competing values might be to combine a finite program of prosecutions with legislation establishing a statute of limitations governing further prosecutions. Such legislation would minimize the destabilizing effects of trials while affirming the rule of law'.

Some scholars have seen in the instrument of the pardon, which in contrast to an amnesty does not foreclose prosecution nor affects the guilt sentence, a useful tool in order to strike a balance between the fight against impunity and the need for political stability.[132] In evaluating the suitableness of a measure of pardon, it must be borne in mind that both treaties, CAT and the Genocide Convention, demand prosecution or punishment. In other words, their standards are satisfied by a conviction, which would leave room for a subsequent pardon. International law however is not completely indifferent to the use of pardon, since the aforementioned conventions, as well as an articulated international jurisprudence and soft law instruments, demand human rights violations to be punished through appropriate penalties, albeit some discretion is allowed to the state as to the determination of the punishment. Article V of the Genocide Convention obliges States Parties to pass legislation establishing 'effective penalties for persons guilty of genocide', while Article 4 of the Convention against Torture requires them to make acts of torture 'punishable by appropriate penalties which take into account their grave nature'. The failure to apply to grave violations of human rights a well-proportioned penalty would in other words represent a breach of a state party's duty under the said covenants. In fact, scholarship has remarked that 'abuse of the pardon power can undermine states' duty to protect citizens from harm'.[133]

For those cases where a state is unable to comply with the minimum prosecution standards, it remains difficult to find an answer in international law whether the duty to prosecute is violated or not. Further analysis aimed at addressing this issue is required to fill this lacuna.

The right to life and the right to freedom from torture and forced disappearance have the status of *jus cogens* in international law. Clauses relating to derogation in the main international treaties, as well as the doctrine of the state of necessity and *force majeure*, stating that *jus cogens* principles cannot be derogated, do not provide a clear answer to the question, as they do not recognise if and to what extent prosecution complementing the protection of such rights has the status of a peremptory norm.[134] It would be less difficult to find and consequently evaluate the meaning and the scope of the applicable norms on a case-by-case basis.[135] To conclude on this point, it is worth quoting again Diane Orentlicher, who has

[132] On this point, see Della Morte 2014, pp. 427–440.

[133] On this point, see Orentlicher 1991, p. 2606. The Italian jurist Cesare Beccaria has underscored the danger underlying an abuse of pardon power in this way: 'To show mankind, that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity'. Jeremy Bentham highlights the link between pardon and lawfulness: 'From pardon power unrestricted, comes impunity to delinquency in all shapes: from impunity to delinquency in all shapes, impunity to maleficence in all shapes: from impunity to maleficence in all shapes, dissolution of government: from dissolution of government, dissolution of political society. The harmful effects of pardons are compounded when they are granted in response to military demands, thereby undermining the authority of civilian institutions re-established by prosecutions'.

[134] Ibid., p. 2607.

[135] Ibid., p. 2611.

contributed to investigate the intricate issues surrounding the duty to prosecute imposed on transitional institutions and societies:

> Although these issues merit further study, the difficulty of satisfactorily addressing prosecution-related risks through doctrines of exception underscores the importance of interpreting general legal standards requiring prosecution in a manner that accommodates constraints commonly faced by transitional governments. As argued earlier, governments should be able to discharge their legal duties without provoking the type of crisis that might, under various rules of exception, justify noncompliance.[136]

All this considered, it is possible to draw some conclusions regarding post-genocide Rwanda, which, as Schabas has stressed, crystallised 'vexing dilemmas of post-conflict justice.[137] Obligations under international law first of all committed Rwanda to grant fair trail standards as spelled out in the ICCPR when prosecuting those accused of genocide. Moreover, international law, while requiring the prosecution of the genocide suspects, granted some latitude as to the number and timeline of the trials. Rwanda, in other words, was not obliged to try all the suspects immediately in the wake of the genocide if such a step would have implied a threat to the state survival or lack of fair trials. To start with a programme of 'principled prosecution', to use the words of Diane Orentlicher, would have been

[136] Orentlicher 1991, p. 2612.

[137] Schabas, *The Rwanda Case: Sometimes It's Impossible*, in M. Scherif Bassiouni (ed.) Post-Conflict Justice, Ardsley, NY, 2002, p. 518: 'The Rwandan situation seems to crystallize one of the vexing dilemmas of post-conflict justice. Faced with international criminality on a massive scale, Rwanda appeared to be the sincerest in its commitment to the international law principles concerning punishment and impunity. Given the devastation of its justice systems following the conflict, however, as well as the underlying problems of poverty and underdevelopment, it was doomed to failure. This was like Yossarian's famous "Catch 22", transposed to the context of post-conflict justice (…) The major difference between the situation of Rwanda and that in other countries facing post-conflict justice issues, such as Sierra Leone, Cambodia, East Timor, and Kosovo, is in Rwanda's professed determination to process *all* cases by judicial means. These are all countries that probably fit the mould of Article 17 of the Statute of the International Criminal Court, in that they are "unable genuinely" to bring all perpetrators to justice. In theory, at least, they are candidates for the attention of the Prosecutor of the International Criminal Court. The Rome Statute makes this conditional on "a total or substantial collapse or unavailability of its national judicial system" (an early draft used the word "partial" in place of "substantial", as less demanding standard). Some may contend that the Rwanda's noble but incomplete and imperfect efforts at criminal prosecution, coupled with the detention of tens of thousands under conditions incompatible with human rights norms, would not shelter Rwanda from the Rome Statute's "unable genuinely" criterion. Nor would a promising alternative, the *gacaca*, which emerged half a dozen years after the events, and born of frustration with criminal prosecutions, satisfy them. Others will take the view that a future Prosecutor of the International Criminal Court would consider these measures in deciding that it would not be "in the interest of justice, taking into account all the circumstances" to proceed with prosecution, although the text of Article 53 of the Rome Statute suggests this provision is to be applied on a case by case basis, rather than with respect to a situation. Where the Prosecutor insists on proceeding, of course, the judges may still declare a case inadmissible where, despite genuine ability, it is not "of sufficient gravity to justify further action by the Court". But as with the case of prosecutorial discretion under Article 53, it is anyone's guess as to how the judges might rule on a case like Rwanda's'.

sufficient to satisfy obligations under international law. In order to respect the duty to prosecute under international law however, prosecution initiatives should also have involved crimes against humanity and war crimes committed by the RPF, and not only the crime of genocide.

3.5 The Right to the Truth in International Law

The determination of the scope of an individual and collective right to the truth under international law is crucial to assess transitional justice strategies opted for in Rwanda. Post-genocide Rwanda embarked on an ambitious, unparalleled experiment of truth-telling which involved the entire adult population. The cornerstone of such an experiment was the judicial program centred on the *gacaca* system. The room devoted to non-judicial truth telling instruments was more limited. Interestingly, the debate addressing the genocide was deeply affected by the massive adoption of a criminal law punishing revisionism. The recourse to *lois mémorielles* imposing a state-driven interpretation of the past is also a key feature of Rwanda's post-genocide setting.[138]

The truth emerging from criminal trials is of a legal nature, and it may or may not overlap with truth in its factual aspects. When the criminal trials concern international crimes however, the concept of truth acquires a more comprehensive meaning, including relevant factual aspects.[139]

It goes without saying that the search for truth is linked to legal imperatives under international law such as the duty to prosecute and the duty to provide reparations to victims of human rights violations. Under international law, the right to the truth is explicitly acknowledged by Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949. These articles recognised 'the right of families to know the fate of their relatives' (Article 32) and a duty of states to search for missing persons (Article 33). The International Committee of the Red Cross has confirmed that the rule encompassed in Article 32 has acquired the status of customary international law and is applicable in both international and non-international armed conflicts.[140] Consequently, it is binding for post-genocide Rwanda. Moreover, Article 24 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance states that 'Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard'.

[138] See Sullo 2014 and 2018; see also Waldorf 2011.

[139] See Naqvi 2006, p. 246. See also Donat-Cattin 1999, p. 873. The author has stressed that from a systematic analysis of the parts of the Rome Statute devoted to procedural matters it emerges that the search for the truth is the most important objective of the proceedings before the ICC.

[140] See Naqvi 2006, p. 256.

Bodies such as the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the UN Working Group on Enforced or Involuntary Disappearances and the UN Human Rights Committee, have also progressively recognised the right to the truth.[141] The right is, however, not formally included in a universal treaty and whether it has reached the status of a customary norm remains a matter of debate.[142] The right has been deduced by the UN Human Rights Committee as stemming from the existence of other rights. In the case of *Lyashkevich v. Belarus* for instance, the HRC concluded that the 'complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of Article 7 of the Covenant'.[143] A similar reasoning was followed by the European Court of Human Rights, which considered the right to truth in its connection to the right to freedom from torture, effective remedy and effective investigation.[144] The African Commission on Human and Peoples' Rights Principles and guidelines on the right to a fair trial and legal assistance in Africa state that the right to an effective remedy includes 'access to the factual information concerning the violations'.[145]

[141] See Naqvi 2006, p. 249: 'These bodies progressively drew upon this right in order to uphold and vindicate other fundamental human rights, such as the right of access to justice and to an effective remedy and reparation. They also expanded the right to the truth beyond information about events related to missing or disappeared persons to include details of other serious violations of human rights and the context in which they occurred. Broadly speaking, the right to the truth, therefore, is closely linked at its inception to the notion of a victim of a serious human rights violation. Like procedural rights, it arises after the violation of another human right has taken place and would appear to be violated when particular information relating to the initial violation is not provided by the authorities, be it by the official disclosure of information, the emergence of such information from a trial or by other truth-seeking mechanisms'.

[142] See Naqvi 2006, p. 255.

[143] See Lyashkevich v. Belarus Communication No. 887/1999 * 3 April 2003 CCPR/C/77/D/887/1999, para 9.2. See also Naqvi 2006, pp. 256–7: 'The HRC also found that in order to fulfil its obligation to provide an effective remedy, states party to the ICCPR should provide information about the violation or, in cases of death of a missing person, the location of the burial site. The right to know the truth has also been invoked in relation to protection of the family guaranteed in Article 23 of the ICCPR, as well as the right of the child to preserve his or her identity, including nationality, name and family relations, as contained in Article 8 of the Convention on the Rights of the Child of 1989 (CRC), the right of the child not to be separated from its parents as laid down in Article 9 thereof, and other provisions of that convention'.

[144] See Naqvi 2006, p. 257; see also Judgement of 25 May 1998, Kurt v. Turkey, Application No. 24276/94; Judgment of 14 November 2000, Tas v. Turkey, Application No. 24396/94; and Judgment of 10 May 2001, Cyprus v. Turkey, Application No. 25781/94.

[145] See Naqvi 2006, p. 257.

The 'right to know' of victims of human rights violations, in both its individual and collective nature, was acknowledged and formulated by the Special Rapporteur for the UN Commission on Human Rights Louis Joinet in the Joinet Principles in 1997.[146] The Joinet Principles were later updated by Professor Diane Orentlicher in 2005.[147] In the words of Joinet, the right to know 'draws upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism…; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved'.[148] In 2006, scholarly literature concluded that 'the scope of the progressively emerging right to the truth in international law has not yet clearly consolidated and the right 'stands somewhere on the threshold of a legal norm and a narrative device'.[149]

Recent trends in international law indicate a progressive acknowledgement of the right to the truth for victims of gross human rights violations. The 2010 General Comment on the Right to the Truth in Relation to Enforced Disappearances issued by the Working Group on Enforced or Involuntary Disappearances concluded that 'The right to the truth—sometimes called the right to know the truth—in relation to human rights violations is now widely recognized in international law. This is witnessed by the numerous acknowledgements of its existence as an autonomous right at the international level, and through State practice at the national level. The right to the truth is applicable not only to enforced disappearances'.[150] The Working Group on Enforced or Involuntary Disappearances further affirmed that the right to the truth in international law 'is accepted by State practice consisting in both jurisprudential precedent and by the establishment of various truth-seeking mechanisms in the period following serious human rights crises, dictatorships or armed conflicts. Those mechanisms include the launching of criminal investigations and the creation of "truth commissions" designed to shed light on past violations and, generally, to facilitate reconciliation between different groups. The right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society as a "vital safeguard against the recurrence of violations", as stated in Principle 2 of the Set of Principles for The Protection And Promotion Of

[146] On this point, see 'Question of the impunity of perpetrators of human rights violations (civil and political)', revised final report prepared by Mr. Joinet pursuant to subcommission decision 1996/119, See UN Sub-Commission on the Promotion and Protection of Human Rights 1997.

[147] On this point, see the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (UN Commission on Human Rights 2005).

[148] See the Joinet report, para 17.

[149] On this point, see Naqvi 2006, p. 273.

[150] General Comment on the Right to the Truth in Relation to Enforced Disappearances issued by the Working Group on Enforced or Involuntary Disappearances, 2010, p. 1, available at http://www.ohchr.org/EN/Issues/Disappearances/Pages/GeneralComments.aspx. Last accessed 2 February 2018.

Human Rights Through Action To Combat Impunity (E/CN.4/2005/102/Add.1)'.[151]

In the light of the above considerations it is possible to conclude that states' best practices are clearly oriented towards granting victims of human rights violations the right to know the truth about the circumstances of their victimisation. The acknowledgement of an individual and collective right to the truth implies a positive action by the state, which is expected to set up mechanisms aimed at genuinely investigating human rights violations. How this duty stemming from international law has been interpreted in post-genocide Rwanda will be discussed in the subsequent chapters.

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[151] Ibid., p. 2.

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Chapter 4
Post-Genocide Justice in Rwanda: Ordinary Courts

Contents

Abstract This chapter deals with the challenges that Rwanda faced in the immediate aftermath of the genocide focusing on the role of ordinary justice. The first Organic Law on domestic prosecution of the *génocidaires* (Organic Law 8/1996) is scrutinized paying due attention to its categorization mechanism. This is of particular relevance because the first *gacaca* law relied on the same criteria for the categorization of genocide-related crimes. The penalties and procedural measures provided for by Organic Law 8/1996 are also described and assessed. The reform of the code of criminal procedure and Law 9/1996 are also analysed with particular regard to the issue of abuse of pre-trial detention, a dramatic issue in the aftermath of the genocide. Finally, the sentencing rationale and practice of ordinary courts is considered and conclusions regarding their penological aim and logic are drawn.

Keywords Pre-trial detention · Organic Law 9/1996 · *cachots* · categorization of offences · Rwandan Criminal Procedure Code · ICCPR · length of detention · sentencing

4.1 Domestic Responses to the Rwandan Genocide

At first, the task to deal with the legacy of the genocide was monopolised by the ICTR due to the absence of a working judiciary in Rwanda.[1] In August 1996, the jurisdiction on crimes against humanity and genocide committed from 1 October

[1] Wibabara 2014, p. 108.

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1990 was given to Rwandan national courts through the *Loi Organique* 08/1996, turning Rwanda into one of the first countries to pass domestic criminal legislation on genocide.[2] In fact, crimes against humanity and genocide were not included in the Rwandan domestic criminal system before the adoption of Organic Law 8/1996.

Even though the *Loi Organique* 8/1996 did not deal with *gacaca*, it divided the genocide perpetrators in four categories, which were also used later by the first *gacaca* Organic Law. Organic Law 8/1996 established specialised chambers within the national courts to hear genocide-related cases (these were later abolished by the *gacaca* legislation) and introduced the common law practice of plea-bargaining. Plea-bargaining allowed terms of sentence to be reduced if the defendant had timely plead guilty and named accomplices.

The institution of *gacaca* courts largely deprived ordinary courts of jurisdiction over genocide-related crimes, as only suspects categorised in the first group were tried before domestic criminal jurisdictions. The jurisdiction over genocide-related crimes of Rwandan ordinary courts and *gacaca* tribunals stretched from 1 October 1990 to 31 December 1994. This suggests a different interpretation of the Rwandan genocide, which according to the Rwandan authorities started already in 1990. This change of perspective can be read as an attempt by the Rwandan government to take charge in a broad fashion of the consequences of the genocide.

Article 143[3] of the Rwandan constitution introduced the *gacaca* as 'specialised' courts, clearly stressing that special courts cannot be created. Article 152 explains that their jurisdiction is the same as for the national courts. It includes genocide and crimes against humanity, while crimes falling within the jurisdiction of other tribunals were excluded from *gacaca* jurisdiction.[4] In the immediate aftermath of the genocide, there was extensive debate on the post-conflict justice device to be used. Given the peculiarities of the Rwandan case, i.e. a vast number of victims and perpetrators, a very high level of social involvement in the genocide and strong

[2] See on this point the Organic Law 08/1996 of the Republic of Rwanda.

[3] Article 143 of Rwanda's Constitution states: Ordinary and specialised courts are hereby established. Ordinary Courts are the Supreme Court, the High Court of the Republic, the Provincial Courts and the Court of the City of Kigali, the District Courts and the Municipality and Town courts. Specialised courts, are the *gacaca* courts and Military courts. An organic law may establish other specialised courts.

[4] Article 152 Rwanda Constitution: There is hereby established *gacaca* Courts responsible for the trial and judgment of cases against persons accused of the crime of genocide and crimes against humanity which were committed between 1 October 1990 and 31 December 1994 with the exception of cases in respect of which jurisdiction is vested in other courts. An organic law shall determine the organisation, jurisdiction and functioning of *gacaca* Courts. A law shall establish a National Service charged with the follow-up, supervision and coordination of activities of the *gacaca* Courts. This body shall enjoy administrative and financial autonomy. This law shall also determine its duties, organisation and functioning.

social polarisation, many thought that the criminal path could not be followed to restore justice and secure national reconciliation. One of the models that were proposed was that of the South African Truth and Reconciliation Commission.[5] The underpinning argument for this option was that both international and national justice mechanisms were not capable to cope with the consequences of the genocide. In fact, the ICTR was a slow and expensive machine able to try only a few *génocidaires*, while the Rwandan national courts, even though tried perpetrators at a quicker pace, often set up unfair trials and made indiscriminate use of imprisonment.[6] However, a South African type of solution was refused by the government as it contemplated the possibility of issuing an amnesty. Therefore in 1996, given the appalling backlog before national courts, the Rwandan government expressed its will to re-establish the traditional *gacaca* courts.[7]

4.1.1 Organic Law 8/1996

The prosecution of the *génocidaires* was one of the main declared objectives of the Rwandan Government of National Unity in power since July 1994. The domestic genocide trials began in Rwanda in 1996 after the Transitional National Assembly passed Organic Law 8/1996 on the organisation of the prosecution for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990. The purpose of the Organic Law 8/1996 was the prosecution of persons who were accused of having committed acts sanctioned under the Rwandan Penal Code, which constituted:[8]

(a) either the crime of genocide or crimes against humanity as defined in international covenants;

[5] In fact, an International Commission of Enquiry into Human rights abuses in Rwanda had already been set up in 1993 by the Arusha Accords. It produced a report stressing the governmental responsibility for Tutsi massacres, but there was no follow-up mechanism, and a few months later genocide started. On this point, see Hayner 1994, pp. 597–655.

[6] Wibabara 2014, pp. 142–150.

[7] The idea to set up *gacaca* courts tasking them with the charge of dealing with genocide legacy dates 1995 and was discussed within an international forum in Kigali. It was definitely adopted within the *Urugwiro* meetings at the presidential seat between 1998 and 1999.

[8] See Journal Officiel No. 17 du 1er sept. 1996, Organic Law 8/1996, Article 1. In her analysis of the Rwandan case law on genocide Wibabara concluded that one of the key features of Law 8/1996 was the introduction of the principle of dual incrimination, implying that: 'Judges had to first check whether a specific offence in the Penal Code was committed by the defendant and also verify whether the offence amounted all together to a crime of genocide or a crime against humanity', op. cit., p. 136.

(b) or offences 'committed in connection with the events surrounding the genocide and crimes against humanity'.

As most of the Rwandan post-genocide leaders grew up and lived in Uganda or other Anglophone countries, this law was deeply influenced by principles of common law 'which neither the population nor the handful of remaining professional judges and lawyers were accustomed to'.[9] Due to the legacy of the German and Belgian colonisation, written law in Rwanda was before largely based on the Romano-Germanic tradition. As Jacques Fierens argued, 'The civil law-common law divide therefore grafted itself onto the existing dualism between custom and written law'.[10]

The working pace of the criminal trials resulted to be initially slow. By 1997 only 346 accused were tried.[11] Progressively the number of trials increased, with 928 individuals tried in 1998, 1,318 in 1999, 2,458 in 2000, 1,416 in 2001 and 727 in 2002, for a total of 7,181 by 2002.[12] By 2005 nearly 10,000 individuals had been prosecuted,[13] an impressive result considering the local context, and better than the achievements of several European countries in the wake of WWII.[14]

One of the most interesting provisions embodied in Law 8/1996 is Article 2, which established a mechanism for the categorisation of perpetrators, divided in four groups according to the offences committed. The division was also followed later in the *gacaca* legislation set up through the 2000 Organic Law. The 2000 Organic Law was amended by the *gacaca* Organic Law passed in 2004, reducing the number of criminal categories to three.

According to the Organic Law 8/1996 alleged perpetrators were classified in the following categories:

Category 1

(1) planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity;
(2) persons who acted in positions of authority at the national, prefectoral, communal, sector or cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes;
(3) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
(4) persons who committed acts of sexual torture;

[9] On this point, see Fierens 2005.
[10] Ibid.
[11] Ibid.
[12] Ibid, p. 899.
[13] On this point, see Drumbl 2007, p. 72.
[14] See on this point Schabas 2005, p. 888.

Category 2
perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death;
Category 3
persons guilty of other serious assaults against the person;
Category 4
persons who committed offences against property.

Through the 1996 Organic Law Specialized Chambers with exclusive jurisdiction over genocide-related cases within both tribunals of first instance and military courts were also established.[15] Some of these benches were composed of magistrates for minors, with exclusive jurisdiction over the offences committed by them.

Penalties were commensurate with the gravity of the crimes committed. Both the harshness and the form of the penalty depended on the gravity of the offence, assessed pursuant to the ordinary scale of culpability.[16] Pursuant to Article 14 of Law 8/1996 a perpetrator who was sentenced for multiple crimes had to serve the most severe sentence (the sentences were consequently not cumulative).[17] Some criminal conducts were linked to a fixed term sentence, while others were linked to a range of sentencing options.[18] The degree of discretion enjoyed by the Rwandan judges was limited compared for instance to the ICTR.[19] Organic Law 8/1996 stipulated the applicability of the punishments provided for in the Rwandan Criminal Code.[20] The acts committed by persons placed in category 4 only gave rise to civil damages determined by amicable agreement between the parties with the assistance of the community. If the amicable procedure failed, the rules pertaining to criminal proceedings and civil actions had to be applied. If the accused was sentenced to a term of imprisonment, the sentence was suspended.[21] The case law of the Rwanda's ordinary courts offers examples of property offenders convicted to imprisonment, sometimes without suspension of the sentence, like in *Ministère Public v. Ndererehe and Rwakibibi*.[22]

Pursuant to the Organic Law 8/1996, perpetrators falling within category 3 were liable for sentences envisaged in the Rwandan Penal Code for serious assault, for

[15] Article 19 Organic Law 8/1996.

[16] See Drumbl 2007, p. 73.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid. However, some exceptions were foreseen: Category 1 offences were punished by death; for Category 2 offences death penalty was replaced with life imprisonment; from category 4 offences stemmed only civil damages.

[21] Ibid.

[22] Ibid, p. 244, footnote No. 20, *Ministère Public v. Ndererehe and Rwakibibi*, October 21, 1999, ch. Sp. 1 ière instance Nyamata, RP 066/97/C.S./Nmata/GDe, RPM 101825/S1?BAZ/Nmta/K.A. See also *Ministère Public v. Buregeya and Uwitonza* (March 22, 1998, 1 ière instance, Kibuye), RMP 56.886/S4/BA/KRE/KBY/2000, where the accused was convicted for property offence placed in category 4, namely eating pillaged meat, to five years' imprisonment, suspended for four years.

which national judges had a reasonable margin of sentencing discretion.[23] The penalties provided by the law included death penalty for perpetrators within category 1 and life sentence for those placed within category 2.[24]

A guilty-plea procedure was also introduced through Organic Law 8/1996.[25] The aim of this provision was, *inter alia*, to overcome one of the main potential prosecutorial obstacles, namely the lack of evidence in many genocide-related cases. In fact, while evidence of the involvement of planners and masterminds was available due to written documents, lists of arms distributions, training of militia, newspaper articles and radio broadcasts, evidence of the involvement of lower ranking perpetrators was often poor. Interviews with genocide survivors and monitoring of *gacaca* hearings confirmed that the majority of Tutsi population was forced into hiding and could not directly witness the atrocities relating to the genocide.[26] This implied that often direct evidence of the crimes perpetrated in 1994 was lacking. The confession procedure, unfamiliar to the Rwandan judicial system, was inspired by 'plea bargaining', a cornerstone of the common law criminal justice systems. It was also aimed at seeking and recognising the truth concerning the genocide, which had been very often challenged by radical Hutu revisionism. The plea bargaining system was also supposed to work as a mechanism of reconciliation for victims and perpetrators. For those who confessed and pleaded guilty, the law provided a considerable penalty reduction. Individuals categorised in the first group however were not entitled to any penalty reduction.[27] A confession was admissible under the 1996 Organic Law if it included:[28]

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[23] Ibid., pp. 73–74. Drumbl lists examples of punishments issued by the Rwandan Penal Code for crimes that could be included in Category 3 according the Organic Law 8/1996: Penal Code Article 318, violent attacks, (one month to one year imprisonment); Penal Code Article 319, violent attacks causing an illness or inability to work, (two months to two years; six months to three years if committed with premeditation); Penal Code Article 320, violent attacks causing serious mutilation or incurable illness, (two to five years; five to ten years in case of premeditation).

[24] See Article 14 of Organic Law 8/1996.

[25] See Article 5(1) and (2) Organic Law 8/1996: 'All persons who have committed offences set out in Article I have the right to participate in the Confession and Guilty Plea Procedure. The right to participate, which cannot be denied, may be exercised at any time before the criminal file is brought to the attention of the President of the competent tribunal. This right can only be exercised once, and the confession can be withdrawn at any time before it is pronounced again by the interested person before the court. reductions in penalties set out in Articles 15 and 16'.

[26] *Gacaca* jurisdiction of sector of Gahogo, Muhanga District, South Province, 01/09/2009, trial of Umpfuyisoni Goretti, on file with the author.

[27] See Article 5(3) of the law: '"Notwithstanding the provisions of para (1), persons who fall within Category 1, as defined in Article 2, shall not be eligible to the reductions in penalties set out in Articles 15 and 16'". It is worth however to consider the provision embodied in Article 9 establishing that "Notwithstanding the provisions of Article 5, para 3, a person who confesses and pleads guilty, and whose name was not published on the list of Category 1, shall not be placed in Category 1 if the confession is complete and accurate. If his confession should place him in Category 1, he shall be placed in Category 2".

[28] See Article 6 of Organic Law 8/1996.

- a detailed description of all the offences that the applicant committed, including the date, time and the scene of each act, as well as the names of victims and witnesses, if known;
- information with respect to accomplices, conspirators and all other information useful to the exercise of public prosecution;
- an apology for the offences committed by the applicant;
- an offer to plead guilty to the offences described by the applicant.

The Rwandan Public Prosecution Department had a duty to inform the applicant in order to allow him/her to waive or confirm the choice to proceed with the confession and guilty plea procedure. If the applicant renounced the intention to proceed with the confession and guilty plea procedure, (s)he was allowed to withdraw the confession which consequently became inadmissible under the evidentiary point of view in any subsequent proceedings. By 30 June 1999, 15,000 persons had already confessed.[29]

According to Article 7 of Organic Law 8/1996 the Public Prosecution Department was charged with verifying the accuracy and completeness of the confession and its compliance with the conditions stipulated by law within a maximum period of three months. A record giving the reasons for the acceptance or rejection of the confession and offer to plead guilty was to be prepared following verification. If a confession and offer to plead guilty was rejected, the Public Prosecution Department had to proceed with the investigation of the case in accordance with ordinary procedures. A subsequent confession could not be accepted. According to Article 15 of the law where genuine confession and guilty plea took place prior to prosecution, the penalty was reduced as follows:

(1) individuals placed in category 2 were liable to a term of imprisonment of between 7 and 11 years;
(2) individuals placed in category 3 were liable to a penalty equivalent to one-third of the penalty the tribunal would normally impose;

If truthful confession and guilty plea were offered after prosecution, the penalty reduction was smaller:

(1) persons placed in category 2 were subject to a term of incarceration of between 12 and 15 years;
(2) persons placed in category 3 were subject to a penalty equivalent to one-half of the penalty normally imposed.[30]

Persons convicted under Organic Law 8/1996 were subject to the withdrawal of their civic rights.[31]

[29] See Avocats Sans Frontières 1999.

[30] See Article 16 of Organic Law 8/16.

[31] Article 17 of the Organic Law 8/1996 states that: Persons found guilty under this organic law shall be liable to the withdrawal of their civic rights in the following manner: (a) for persons whose acts place them within Category 1, the withdrawal for life of all civic rights; (b) for persons whose acts place them within Category 2, the withdrawal for life of civic rights as provided in Article 66

Decisions of the Specialized Chambers were subject to opposition and appeal (Article 24). Where the appellate court condemned a person to death following an acquittal at first instance, the condemned person had the possibility to apply for review in cassation within fifteen days of conviction. The Court of Cassation was entitled to decide the case on the merits. A review in cassation had to be based solely on questions of law or flagrant errors of fact (Article 25).

Interestingly, unlike under the statute of the ICTR, per Organic Law 8/1996, victims were entitled to participate in the proceedings as civil claimants (*partie civile*). In approximately two thirds of the cases before Specialized Chambers in ordinary courts victims participated as *partie civile*.[32] About 50% of survivors who filed complaints for redress measures were awarded compensation for material prejudice and/or moral grief against individual perpetrators.[33] The compensation awarded was initially generous. Organic Law 40/2000 however definitely precluded compensation awards for the victims of the genocide.[34] Victims associations have voiced their malcontent and proposed the establishment of a task force charged with solving the outstanding issues concerning reparation which dragged until 2012, when *gacaca* courts stopped working.[35]

Rwandan domestic courts were entitled to award civil damages to both identified and not yet identified victims. In the case of non-identified victims, damages had to be deposited in a compensation fund (Article 32), which however was never established.

Individuals prosecuted under Organic Law 8/1996 enjoyed the right to a defence counsel of their choice, but not at government expense (Article 36). Finally, Article 37 of the law established that prosecution and penalties for offences constituting the crime of genocide or crimes against humanity were not subject to a statute of limitation.

Under Organic Law 8/1996, imprisonment could be complemented through temporary or permanent *dégradation civique*, which allowed the punishment to be calibrated according to the level of individual culpability.[36] *Dégradation civique,* however, seems to be in conflict with the reintegrating and rehabilitative purposes of the law, as it hinders the inclusion of the convicted individual back in his/her

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of the Penal Code, sub-paragraphs 2, 3 and 5. Persons whose acts place them within Category 3 shall incur the civic consequences provided by law.

[32] Ibuka et al. 2012, p. 6.

[33] Ibid.

[34] See Article 91 Organic Law 40/2000: 'Any civil action lodged against the State before the ordinary jurisdictions or before "*gacaca* jurisdictions" shall be declared inadmissible on account of its having acknowledged its role in the genocide and that in compensation it pays each year a percentage of its annual budget to the Compensation Fund. This percentage is set by the financial law'.

[35] Ibuka et al. 2012, p. 2.

[36] See Drumbl 2007, pp. 71–83.

community.[37] Organic Law 8/1996 has been expressly repealed by the *gacaca* 2000 Organic Law, which abolished the Specialized Chambers. It remained applicable to all cases transmitted to the Specialized Chambers by national prosecutors.[38]

4.1.2 The Reform of the Code of Criminal Procedure and Law 9/1996

In the immediate aftermath of the mass killings, the number of arrests of genocide suspects, often carried out illegally, picked up dramatically. As a consequence of the policy of full accountability carried out by the Rwandan Government, the prison population in Rwanda rose from around 10,000 in 1994, up to nearly 130,000 in 1998. The massive number of arrests implied that thousands of detainees languished for years in prisons and *cachots* (lock-up cells) with little hope of getting a speedy trial. As a consequence of the appalling pre-trial detention conditions, about 11,000 detainees died in jail between 1994 and 2001.[39] According to Peter Uvin a few years after the genocide, 'More people accused of participation in the genocide die in Rwanda's prisons each year than are judged'.[40] By 1999, after five years of detention, 40,000 detainees had no case file. To bring perpetrators to justice within a reasonable time frame in a situation characterised by several simultaneous constraints proved to be a difficult challenge for the Rwandan Government. Moreover, sometimes judges and prosecutors were involved in the genocide not only as victims, but also as perpetrators, and in some cases, they decided to flee the country.[41]

William A. Schabas has highlighted that 'the Rwandan legal system has never been more than a corrupt caricature of justice', in which 'even well-meaning lawyers and judges within the system were powerless to prosecute the numerous atrocities during the few years that foreshadowed the 1994 genocide'.[42] Even without considering the genocide-related caseload, the Rwandan judicial system was caught between constraints regarding expertise, independence and budget.[43]

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[37] Ibid.

[38] Article 96 Organic Law 40/2000 of 26/01/2001 setting up *gacaca* jurisdictions and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994.

[39] On this point, see Amnesty International 2002.

[40] See Uvin 2003, p. 116.

[41] On this point, see Human Rights Watch 1994.

[42] On this point, see Schabas 1996, p. 532.

[43] See Tully 2003, p. 390: 'This suggests that even if the judicial system had not been decimated during the genocide it would not have been capable of administering impartial justice, especially in the wake of the violence and conflict that had subsumed the country. Mired in a history of impunity, and with few resources, the new government of Rwanda found itself largely unable to carry out this type of large-scale judicial process, yet bound rhetorically to do so despite the crippling constraints'.

According to Article 37 of the Rwandan Criminal Procedure Code (RCPC) in force at in the wake of the genocide,[44] in the case of an offence punishable with a sentence exceeding six months, the accused could be held in custody waiting for the trial if 'serious grounds suggesting guilt' existed.[45] According to Article 38 RCPC, the accused person was expected to appear before a court within five days from the issuance of a provisional arrest warrant by the prosecutor's office. This limit could be overstepped only if strictly necessary. Preventive detention had to be allowed by the presiding judge of the court of first instance. Orders of detention were valid for 30 days and their extension on a monthly basis was conditional upon the existence of a public interest and of procedural exigencies.

In the aftermath of the genocide, Rwanda was not able to respect the deadlines imposed by its own criminal legislation. In order to address the issue of the legitimacy of the unlawful arrests and detention, the Rwandan Transitional Assembly in June 1995 passed a new act, suspending application of the norms entrenched in the Criminal Procedure Code regarding pre-trial detention and provisional release of individuals suspected of involvement in genocide and other gross human rights violations. The Constitutional Court, through the judgement 009 of 26 July 1995 declared this act in contradiction to the Fundamental Law, which guaranteed the principle of presumption of innocence.[46] The Constitutional Court also based its judgement on Article 11 of the Universal Declaration of Human Rights[47] and Article 7(b) of the African Charter on Human and Peoples' Rights.[48] The two international human rights instruments (that had been embodied in the Rwandan constitutional system) affirm the principle of presumption of innocence. The Constitutional Court motivated its decision also through Article 8 of the UDHR (right to a remedy) because the amendment to the Criminal Procedure Code

[44] See law of 23 February 1963 on the code of criminal procedure, as modified and complemented to date.

[45] On this point, see Schabas and Imbleau 1997, pp. 60–61.

[46] See also Article 12 of Rwandan 1991 Constitution (Human Dignity, Personal Freedom): (1) The human being shall be sacred. (2) The liberty of the human being shall be inviolable; no one may be prosecuted, arrested, imprisoned, or convicted other than in the cases prescribed by the law in effect at the time of the perpetrated act and within the forms prescribed by that law. (3) No infraction may be punished by penalties which were not prescribed by law before it was committed. (4) Any person shall be presumed innocent of the charges as long as a definite conviction has not taken place.

[47] Article 11 of UDHR affirms: "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed".

[48] See Article 7 of the African Charter on Human and Peoples' Rights: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal".

deprived detainees of the procedural means to contest the detention. In order to sidestep the Constitutional Court's ruling, the National Assembly adopted a law amending the Constitution in January 1996. The amendment made Article 12 of Rwandan Fundamental Law derogable in situations of public emergency threatening the life of the nation.

In September 1996, through Organic Law 9/96, which entered into force retroactively on 6 April 1994 (Law relating to provisional modifications to the Criminal Procedure Code), the Rwandan Government tried to regularise tens of thousands of illegal arrests accomplished since 1994.[49] The goal of Organic Law 9/96 was to provide temporary derogations from deadlines prescribed by the Code of Criminal Procedure for issuing an arrest record, a provisional arrest warrant and a preventive detention order.[50] According to Organic Law 9/96, suspects jailed before the enactment of Organic Law 9/96 were to have a record of arrest filled out and a warrant for arrest issued by 31 December 1997. Afterwards, they had to appear before a judge within ninety days of the issuance of the arrest warrant. For those arrested after the enactment of Organic Law 9/96, a warrant of arrest had to be issued within four months from the actual arrest day. The individuals arrested had to appear before a judge within three months from the issuance of the warrant of arrest. These accelerated deadlines, established as an attempt to improve arrest and detention procedures, were in most of the cases not respected. The Rwandan government was in fact obliged to extend the application of the law until the end of August 1999, with little or no relief for the multitude of detainees waiting for a case file, including a formal accusation. Due to the breakdown of the judicial system, it was nearly impossible for Rwandan authorities to respect the formal elements necessary for legally detaining suspects, i.e., an arrest record (*procès-verbal d'arrestation*) issued by an agent of the judiciary police (*officier de police judiciaire*), a provisional arrest warrant (*mandat d'arrêt provisoire*) issued by an official of judiciary police and a preventive detention order (*ordonnance de mise en detention préventive*) issued by a judge.[51]

In order to justify the derogation from the Code of Criminal Procedure, the Rwandan Government invoked the derogation clause entrenched in Article 4 of the ICCPR. This has attracted the criticisms of René Degni-Ségui, at that time Special Rapporteur of the UN Commission on Human Rights.[52] The ups and downs of the

[49] See Schabas 2002, p. 508, stressing that the preamble of Organic Law 9/1996 expressly refers to Article 4 ICCPR: 'Given that as of 6th April 1994 the Republic of Rwanda faced an exceptional public danger threatening the very existence of the nation, as described in Article 4, para 1 of the International Covenant on Civil and Political Rights and as described in Article 12 of the Constitution, as amended and completed'.

[50] See Vandeginste 1999, p. 10.

[51] Ibid.

[52] See Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under para 20 of resolution S-3/1 of 25 May 1994. In particular René Degni-Ségui points out at para 104 that 'Despite a period of relative calm, violations of the right to personal security continue to be disturbing, given the Government's

human rights situation in the three years following the genocide is efficaciously depicted in the resolution of the UN Commission on Human Rights 1997/66 (*Situation of human rights in Rwanda*), where the Commission:

> Welcomes the start of the trial of those suspected of the crime of genocide and crimes against humanity in Rwanda, remains concerned at the conditions under which the first genocide trials were conducted, especially with respect to legal representation, and encourages the Government of Rwanda to renew its commitment and its efforts to guarantee fair trials in accordance with internationally agreed standards and principles;
>
> Expresses its concern with respect to conditions of detention which are not in conformity with international standards, appeals to the Government of Rwanda to take further action to improve these conditions and urges the international community to assist the Government of Rwanda in that field.[53]

Moreover, the Commission expressed 'its grave concern at the deterioration in the human rights situation in Rwanda since the beginning of January 1997, in particular the increase in the killing of and attacks against genocide survivors and witnesses by members of the former Forces Armées Rwandaises, Interahamwe militia or other insurgents, and the killing of unarmed civilians by some elements of the security forces'.[54]

The basic international human rights norm against which post-genocide detentions are to be evaluated is Article 9 of the ICCPR, which protects personal liberty.

The rights granted in Article 9 ICCPR may be partially derogated 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed', but only 'to the extent strictly required by the exigencies of the situation' (Article 4 ICCPR).

Special Rapporteur René Degni-Ségui expressed serious concerns regarding the amendments brought to the Criminal Procedure Code. According to him, 'Act No. 9/96 of 8 September 1996, which was declared constitutional by the Rwandan Constitutional Court, contains emergency measures that are not consistent with international standards' as they 'consist of the retroactive application of the law,[55] through the extension of detention periods and, in some cases, the elimination of the

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determination to enact emergency measures at all costs. After the failure of the attempt to suspend the right to personal security through the Act of 9 June 1995, which was censured by the Constitutional Council on 26 July 1995, on 8 September 1996 the Rwandan Parliament adopted Act No. 9/96, containing provisional amendments to the Code of Criminal Procedure. The Act suspends the fundamental guarantees granted to convicted prisoners, thereby confirming the practice of arbitrary arrests and detentions'.

[53] UN Commission on Human Rights, Resolution 1997/66 on The Situation of Human Rights in Rwanda, paras 7–8 available at https://reliefweb.int/report/rwanda/commission-human-rights-resolution-199766-situation-human-rights-rwanda. Last accessed 2 March 2018.

[54] Ibid., para 11.

[55] Indeed, Article 8, the closing provision of the law expressively establishes that 'This law comes into force on the date of its publication in the Official Journal of the Republic of Rwanda and is effective as of 6th April 1994'.

right of appeal'.[56] Article 4 of ICCPR explicitly affirms that the principle of non-retroactivity of the criminal law, embodied in Article 15 of ICCPR cannot be derogated even in time of public emergency which threatens the life of a nation. Degni-Ségui pointed out that the amendments to the Criminal Procedure Code did not abide by international standards.[57] For instance he held that, by introducing three different categories of arrested individuals, 'The new Act also introduces discrimination in the treatment of persons being prosecuted for the same acts. It thus violates the principle of equality before the courts, embodied in and guaranteed by Article 14 of the Covenant, and its corollary, the principle of non-discrimination'.[58] Last but not least, the Organic Law 9/1996 repealed the right of appeal, a crucial guarantee of judicial procedure entrenched in Article 2, para 3(b), of the ICCPR.[59]

The Rwandan Government expressly invoked Article 4 of the ICCPR to set up a legal foundation for the emergency measures. It further explained that the situation was marked by overcrowding in prisons, the powerlessness of the judicial system and the perpetuation of the impunity caused by the absence or slowness of criminal proceedings against individuals suspected of genocide. According to Degni-Ségui, the interpretation of the Covenant by the Rwandan Government was not accurate. The Special Rapporteur acknowledged that powerlessness of the judicial system to deal with prisons bursting at the seams was a public emergency to be addressed by the Rwandan Government through emergency legislation. At the same time he stressed that recourse to the derogation clause would have been plausible until early 1995, but later it was 'not materially impossible to respect certain forms and procedures of criminal legislation to the point of endangering the fundamental rights of

[56] On this point, see Article 6 of Organic Law 9/1996: 'The rights of appeal provided for in Articles 46–52 and Article 56 shall, in all cases, until 16th July 1999 inclusive, not apply to persons prosecuted for acts constituting the crime of genocide and crimes against humanity'.

[57] See Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under para 20 of resolution S-3/1 of 25 May 1994, para 109: 'The Code of Criminal Procedure in application before the amendments came into force provided that a report was to be issued whenever a person was arrested. The report was valid for 48 h (Article 4). Under Articles 37 and 38, it was for the official of the Public Prosecutor's Office to issue an arrest warrant on arrest or on transfer of the file by the judicial police inspector. Within five days after the Public Prosecutor's Office had drawn up and issued the arrest warrant, the judge had to issue a pre-trail detention or release order (Article 38). In the event of detention, the order was valid for a period of 30 days (Article 41). A person arrested after having been released had the right to appeal the decision (Article 44). He or she also had the right to appeal a detention order (Article 46) and to appeal the pre-trial detention decision handed down by the court in a formal hearing (Articles 55 and 56)'.

[58] Ibid, para 110.

[59] Article 2, para 3(b) ICCPR requires that 'Each State party to the present Covenant undertakes: To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy'.

individuals, particularly detainees'.[60] Degni-Ségui further noticed that international case law and doctrine provided for a quite restrictive interpretation of Article 4 ICCPR, quoting as examples of danger a situation of war or internal riot officially proclaimed by a state of siege or state of emergency.[61] Moreover, he pointed out that the measures adopted should be temporary, that the other states party to the ICCPR should be informed and that the measures should not constitute an obstacle to the enjoyment of fundamental human rights.[62] Referring to the explanations given by Ergec on the European Convention on Human Rights, the Special Rapporteur explained that derogations in case of public emergency should not affect the core principles of the rule of law.[63] Degni-Ségui also argued that the extension of detention periods was in open contrast to the right to a fair trial, which entails also the right to be tried without undue delay (Article 9, paras 3 and 4 ICCPR).

On this point the Special Rapporteur finally concluded that 'The reasons underlying this reform (prison overcrowding, material impossibility of dealing with cases according to the normal procedure, etc.) cannot justify the questioning of principles and rights so fundamental as those that have just been analysed'.[64]

Degni-Ségui's stance has been criticised by other scholars holding that Act 9/1996 did not establish retroactive crimes and penalties but simply allowed retroactively a new time limit for detention.[65] Schabas for instance depicted Organic Law 9/1996 as 'retrospective, not retroactive'. Furthermore, the discrimination introduced by the law between three categories of arrested individuals in Schabas's opinion was not based on grounds prohibited by international human rights law. Moreover, excluding the rights to appeal decisions regarding provisional arrests did not clash with human rights norms, according to Schabas.[66]

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[60] See Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under para 20 of resolution S-3/1 of 25 May 1994, para 112.

[61] Ibid.

[62] By way of examples, Degni-Ségui quotes the Judgement of the European Court of Human Rights in the Greek Case of 1967.

[63] See Ergec 1987, pp. 391 and 393: 'The right of derogation authorizes only certain clauses of the Convention to be suspended and leaves intact the fundamental principles of rule of law: the suspension of certain liberties does not mean that the rule of law is put on stand-by. The spirit, if not the letter, of Article 15 excludes the total suspension of certain rights, such as individual freedom or the right to a fair trial, whatever the pressure of circumstances. The importance of the obligation to respect the other obligations under international law cannot be underestimated in this regard'.

[64] See Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under para 20 of resolution S-3/1 of 25 May 1994, para 117.

[65] See Schabas 2002, p. 507.

[66] Ibid., p. 509: 'Degni-Ségui relied on Article 2(3) of the Covenant, which establishes the right to a remedy. But the right to an appeal in criminal prosecution is governed by Article 14, and only exists in the case of conviction. Prisoners had a remedy, but they did not have an appeal when the remedy did not work'.

International judicial bodies dealing with the length of pre-trial detention have not articulated a clear general approach, arguing that each case must be individually dealt with.[67] Similarly, the ICTY stressed that such matters need to be decided 'In the light of the particular circumstances of each case'. In *Prosecutor v. Simic et al.* the ICTY judges held that provisional release may be conceded if the accused 'will appear for the trial and, if released, will not pose a danger to any victim, witness, or other person'.[68] The ICTY also pointed out that 'local authorities are better placed to assess local circumstances within those jurisdictions', implying that they must be given a certain amount of credit when deciding on the length of pre-trial detention.[69]

No question can, however, be raised with regard to Degni-Ségui's soundly motivated position on Rwanda's violation of Article 9, paras 3 and 4 ICCPR. The position of the Rwandan Government with regard to the detention of genocide suspects in the aftermath of the genocide was doubtless very difficult. If the principle of duty to prosecute is interpreted without compromise, the release of thousands of genocide suspects might have constituted in itself a breach of other international obligations binding Rwanda, first of all the Convention for the Prevention and Punishment of the Crime of Genocide.

Despite the highlighted challenges, slow but important improvements in the preparation and record of the files were registered by the UN High Commissioner for Human Rights. The Commissioner stressed the 'gradual progress' made in the preparation of the files due to the contribution of mobile squads (*groupes mobiles*) created by the Ministry of Justice and tasked with performing preliminary inquiries regarding the genocide.[70] UN Special Representative Michel Moussali in his 1999 Report held that 'Serious consideration should be given to releasing, on humanitarian grounds the sick and the elderly, minors and children for whom alternatives to imprisonment can be found, and those identified as having case files belonging to the lower categories according to the Organic Law, where the length of their pre-trial detention exceeds that of the sentence they are likely to receive'.[71]

By 2001, the normalisation of the pre-trial detention cases was reached, as detainees imprisoned in accordance with the law were no more the exception but, rather, the rule.

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[67] For instance, in W. v. Switzerland, (Series A N. 254, 17, ECHR. 60 1994) the European Court of Human Rights held that a pre-trial detention of more than four years in the case of economic crime was compatible with the European Convention on Human Rights.

[68] On this point, see *Prosecutor v. Simic et al.*, (Case N. IT-95-9-PT0).

[69] See *Prosecutor v. Simic et al.*, (Case N. IT-99-36-PT), Decision on Motion by Radoslav Brdjanin on Provisional Release, 18 September 2000.

[70] See UN High Commissioner for Human Rights 1998, para 33: 'Their work led in some cases to the provisional release of persons against whom there was insufficient evidence or who fell into certain "vulnerable" categories (e.g. elderly persons and minors), and to the transfer to the central prison of others whose case files were completed'.

[71] See Moussali 1999, para 77.

However, by this date, despite the several years spent in detention, most detainees had no hope of a speedy trial under the ad hoc legislation passed in 1996.[72]

4.1.2.1 The Problem of the Length and Conditions of Detention

International law provides the background against which to assess the conditions of detention in the Rwandan prisons after the genocide. This background includes the Standard Minimum Rules for the Treatment of Prisoners,[73] the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[74] and Basic Principles for the Treatment of Prisoners.[75] This body of soft law norms, although broadly accepted, is not binding for states. The international human rights bodies have been quite strict in interpreting these rules, as can be inferred from the pronouncements of the Human Rights Committee, which held that the Standard Minimum Rules 'are minimum requirements which the Committee considered should always be observed, even if economic or budgetary conditions may make compliance with these obligations difficult'.[76] The appalling conditions in which detainees were held in Rwanda after the genocide, which fully violated international standards[77] are described in details by the High Commissioner for Human Rights:

> In the period immediately following the genocide, there were only a few detention institutions left in a reasonable state to house the country's rapidly swelling number of detainees, the vast majority of whom were accused of genocide-related crimes. Local lock-up cells, known as *cachots*, existed in every commune in the country, but were originally designed as temporary holding centres and were never intended nor equipped to house numerous detainees for extended periods. Since the initial wave of post-genocide arrests, these local detention centres have been used to house tens of thousands of detainees throughout the country, many of whom have been in detention for one year or longer. As the number of genocide-related arrests has increased, particularly in the period following the mass return of the refugees, detentions conditions have worsened correspondingly.[78]

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[72] See Schabas 2002.

[73] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Although not legally binding, the Standards provide guidelines for international and domestic law as regards persons held in prisons and other forms of custody. They set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of penal institutions.

[74] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly on 9 December 1988.

[75] Basic Principles for the Treatment of Prisoners, adopted by The UN General Assembly during 68th plenary meeting on 14th December 1990.

[76] The comment of Schabas on this point is lapidary: "Perhaps this is true under normal circumstances, but it seems manifestly unrealistic in a post-conflict situation like that of post-genocide Rwanda" Schabas 2002, p. 519.

[77] See United Nations 1998.

[78] See UN High Commissioner 1996, para 6.

Cases of death in custody due to physical abuses of detainees were also reported by Amnesty International.[79] In his 1995 Report the Special Rapporteur of the UN Commission on Human Rights Degni-Ségui denounced the tragic situation also affecting old people, women and children.[80] In another report the Special Rapporteur pointed the finger to the scarcity of available food for the detainees.[81] In his initial position the Special Rapporteur took into account the shortage of resources as a justification of the difficult situation, but the following year he expressed stronger criticism as the prison conditions had not improved.[82] Spreading of respiratory diseases, malaria, tuberculosis and dysentery was repeatedly reported, accompanied by rumours of ill treatment and water and food shortages. The situation rapidly improved as soon as the government decided to build new facilities assisted by the international community. Soon after the enlargement of the prison of Gitarama for instance, 'The death rate dropped from two each day to none for the month of November 1995'.[83] The report following the visit of the Special Rapporteur on violence against women in October 1997 to the prisons of Butare, Taba and Kigali, where 3,5% of the population was female, came to a conclusion consistent with Degni-Ségui's report.[84] The situation did not improve in 1998 according to the UN High Commissioner's report.[85] The UN Special Representative Michel Moussali pointed out that such concerns were shared also by Rwandan officials and suggested some measures to temper the harshness of the prison conditions.[86]

The year 1999 marked the first slow improvements at the *cachots* level, even though Mr. Moussali stressed again that the situation was extremely difficult.[87]

Quite surprisingly, and despite the criticisms moved by the Special Representative, in 2001 the Commission on Human Rights decided to follow the

[79] See Amnesty International 2002.

[80] See Question of The Violation of Human Rights and Fundamental Freedoms in Any Part of The World, With Particular Reference to Colonial and Other Dependent Countries and Territories, Degni-Segui 1996, para 72: 'In most prisons the detainees are housed in cramped conditions, most of them barely able to sit down, much less lie down on a floor which is often roughcast. The few beds are sold to the highest bidder or occupied by the strongest. It is extremely difficult for visitors to make their way through this mass of humanity exposed to the sun and the elements. It was impossible for the Special Rapporteur during his visit on 31 March 1995 to move around within Gitarama Prison. Immobilized and at the mercy of bad weather, the detainees eat, drink and defecate on the spot. This "tragic" situation spares neither old people, nor women and even children', available at http://hrlibrary.umn.edu/commission/country52/7-rwa.htm. Last accessed 2 March 2018.

[81] See *Third Report on the Situation of Human Rights in Rwanda* submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission of Human Rights, under para 20 of resolution S-3/1 of 25 May 1994, UN Doc. A/49/508/Add.1, UN Doc. S/1994/1157/Add.1, annex, para 32.

[82] Ibid, para 121.

[83] See Schabas 2002, p. 514.

[84] Ibid.

[85] Ibid.

[86] See Moussali 1998, para 22.

[87] See Moussali 1999, para 30.

Rwandan authorities' opinion claiming that there was no further necessity for an international monitoring on Rwanda's human rights situation. The Commission's resolution affirmed 'Appreciation to the Government of Rwanda for the progress made in restoring the rule of law and the actions taken to consolidate peace and stability and to promote national unity and reconciliation'. Commentators have clearly expressed the paradox of such a situation, highlighting the ambiguous and contradictory role of the international community.[88] In 2003 about 25,000 suspects were released in order to reduce the number of prisoners. This was due to several factors, including the reduction of the costs for the state and international pressure triggered by the excessive length of preventive incarceration. By mid-2005 another 36,000 suspects were released. In early 2007, a subsequent 8,000 suspects were then released. As a result of the *gacaca* trials since 2005, a number of suspects were released from prison when acquitted or when their case resulted in a sentence less than the years already spent in prison. Together with the release of tens of thousands of prisoners between 2003 and 2007, *gacaca* should have emptied the prisons considerably. And they did. However, because of the many new accusations emerging during the *gacaca* hearings, the prisons refilled with new suspects between 2005 and 2007.

4.1.3 The Domestic Trials

The beginning of the genocide domestic trials dates back to December 1996. By 30 June 1999 the total figure of first instance trials amounted to 1,802. According to an Amnesty International's report, in 2002 'only' 7,181 accused were tried out of tens of thousands waiting for trial in prison.[89] Amnesty International has described the atmosphere characterising the genocide trials at that time as follows:

> 'Courts' proceedings continue to reflect the hostile socio-political environment existing outside the courtroom. This climate of fear affects judicial personnel, defendants and witnesses. Defence counsel and witnesses are intimidated causing the former to withdraw from trials and the latter to refuse to testify… Conviction, sometimes, rests more on public acclaim than on the incontrovertible sign of guilt.[90]

As reported by Nicola Palmer, senior Rwandan judicial staff confirmed the fact that in the wake of the genocide, the national judiciary lacked the expertise to grant fair and speedy trials.[91] The situation has remarkably improved thanks to the 2004

[88] See Schabas 2002, p. 518.

[89] See Amnesty International 2002.

[90] Ibid.

[91] Palmer 2015, p. 93 and ff.

reform of the educational levels to qualify as judge and prosecutor.[92] A 2013 law reforming the Rwandan Bar further contributed to improving the qualification of lawyers active in criminal litigation.[93]

Despite Rwanda's efforts to bring to justice all those involved in the genocide, some scholars have calculated that it would have taken between 100 and 200 years to judge the 122,000 accused in pre-trial detention.[94] In 1997, only two trained lawyers declared themselves ready to defend individuals suspected of genocide. While one of them, Innocent Murengezi, disappeared, the other was subsequently accused as to having participated in the genocide, and was consequently imprisoned.[95] According to Sibomana, 'Obstacles have been deliberately put in the way of the justice system, straight after the genocide till today'.[96] Sibomana pointed the finger at several cases in which judges who ordered the release of individuals held in prison without sufficient evidence of guilt were killed. The beginning of the genocide trials was indeed initially characterised by a lack of defence lawyers, despite the remarkable efforts by the Rwandan Government to re-establish an efficient judicial system. An important step in this direction was represented by the creation of a national Bar Association in August 2007, an unprecedented result for Rwanda. Forty-four lawyers holding a law degree were admitted to the bar and allowed to defend suspected *génocidaires* before every instance of jurisdiction. The Bar Law also established a body of legal defenders who, even if lacking a university degree, were entitled to represent parties at the level of first instance. Article 95 of the Bar Law admitted 'those who have earned a six month training certificate in law' to act as defenders. In August 1997 defence lawyers already outnumbered the figures as concerns the situation pre-1994. Most of the judicial activities on behalf of the victims were carried out due to the ASF program 'Justice for all', within which also foreign lawyers, as provided by Article 6 of the Rwandan Bar Law were

[92] See Organic Law No. 6 bis/ 2004 of April 14, 2004 on the Statutes for Judges and Other Judicial Personnel and Organic Law No. 22/ 2004 of August 13, 2004 on the Statute of Public Prosecutors and Personnel of the Public Prosecutions.

[93] See Organic Law No. 83/ 2013 of September 11, 2013 on Establishing the Bar Association in Rwanda and Determining Its Organization and Functioning.

[94] See Vandeginste 1999, p. 10.

[95] See Haile 2008, p. 15.

[96] See Sibomana 1999, p. 28. The author highlights that "'A Belgian human rights organization, Citizen's Network trained more than 200 judicial inspectors in a few months. …their task was to carry out field investigations into crimes committed during the genocide…According to the information I have received, a third of them have been killed or imprisoned. …Their crime was to have done their work properly and to have refused to tolerate the rule of revenge and arbitrary decision'." Moreover he adds that "'a screening committee composed of representatives of various ministries was set up to examine the cases of detainees. As soon as they were set up, it was apparent that dozens of detainees should be released. Hardly, had they been released than all of them were rearrested. When I say 'all', that is not strictly correct: a few had been killed in the meantime'".

allowed to operate.[97] The National Assembly, however, refused to approve a law project aimed at temporarily engaging foreign judges to face the backlog caused by genocide related cases, attracting the criticism of certain experts.[98] Despite this missed opportunity, the number of judges dealing with genocide cases has constantly increased.[99]

A 2002 report by Amnesty International included data regarding the severity of the punishment and the percentage of acquittals. The report showed that out of 7,181 suspected tried from 1997, 9.5% were sentenced to the death penalty, 27.1% to life imprisonment, 40.5% to fixed prison terms and 19.1% were acquitted. When compared to a report by the UN Special Representative Michel Mussali delivered in 2000, Amnesty International's data allows for the identification of a trend as to the penalties determined by the Rwandan courts. A clear decrease can be observed in both instances of the death penalty and life imprisonment, while fixed term imprisonment was substantially increased. This trend is confirmed by a qualitative analysis of the Rwandan courts' case law conducted by Marc Drumbl on the basis of the monitoring conducted by the international NGO Avocats Sans Frontières of the genocide trials.[100]

Both the Rwandan Criminal Code and Organic Law 8/1996 offered poor guidance about the aims of the punishment of mass atrocities. The sentencing reasoning often seemed flawed and lacking a discussion as to how to promote the goals of the punishment.[101] The national courts' practice to accompany the sentence with no explanation made the reasoning of the judges difficult to grasp.[102] A commentary on the Organic Law by the International Centre for the Study and Promotion of Human Rights singled out the following penological purposes: retribution, deterrence, protecting the people and rehabilitating the convicted

[97] Article 6 of the Rwandan Bar Law 1997 states: 'A lawyer who is a member of a bar of a state other than the Republic of Rwanda that has provided in its national legislation for reciprocity may provide legal service in Rwanda on an occasional basis in accordance with the Rwandese rules respecting the regulation of other profession'.

[98] See Schabas 2002: 'Perhaps the duty to investigate and prosecute, which is so clearly more a "positive" rather than a "negative" obligation, should be viewed as falling more fittingly within the category of economic and social rights', he asked what should be the consequences of the decision by a state to reject international assistance in the form of judicial cooperation if such a refusal triggers more obstacles in respecting its duties to investigate and prosecute human rights violations'.

[99] The figures provided by Avocats Sans Frontières stress an improvement between 1998 and 1999: by May 1999 at the Specialized Chambers 104 judges have been appointed, while in 1996 only 76. See Avocats Sans Frontières 1999, p. 5. Vandeginste further notices that "Unfortunately, the absenteeism of the judges remains important, and is a major cause of delayed judgments", Vandeginste 1999, p. 11.

[100] Drumbl 2007, pp. 71–83

[101] Ibid.

[102] Ibid.

person.[103] Reconciliation was declared to be the goal of the guilty plea system. How the punishment of the convicted defendants might contribute to reach such a goal remained however unclear.

The proportionality of the penalties to the degree of individual culpability seemed to suggest that retribution was one of the goals of the punishment of the offences that relate to genocide. However, the fact that some acts such as murder and property offences such as arson are repressed more severely in the Rwandan Criminal Code, suggests that the retributive rationale was not dominant. Punishing genocide seemed to transcend retribution by also pursuing different purposes according to Rwandan ordinary courts.[104] Moreover, the list of the attenuating circumstances was directly borrowed from the Rwandan Criminal Code (Articles 82 and 83), with no effort by the Rwandan tribunals to clarify why and how this transplant satisfies the conditions under which mass atrocities have to be addressed.[105]

From a qualitative review of the national jurisprudence, the following attenuating circumstances have emerged: partial, late or incomplete guilty plea; minor status; coercion; particular features of the defendant, such as lack of education or ethnicity, or particular acts, such as offering shelter to Tutsi during the genocide.[106] Civil party damages were also frequently awarded to the genocide victims by national courts. They represent a useful instrument to differentiate the degree of culpability of individuals falling within the same category.[107] The jurisprudence also showed remarkable disparity as to how the civil damages were calculated from court to court.[108] The Rwandan state was sometimes condemned *in solidum* (held jointly liable) with the perpetrators on the ground that it was incapable of preventing and stopping the slaughters. These rulings were mostly disregarded by the Rwandan state.[109]

Human Rights Watch in its 2008 report Law and Reality Progress in Judicial Reform in Rwanda provided the figures of the genocide trials that took place between 2005 and 2008.[110] 62 trials took place in 2005, 73 in 2006, 83 in 2007 and 4 in 2008, for a total of 222 cases dealt with between January 2005 and March 2008.

Human Rights Watch also provided partial data concerning the trials of RPF soldiers, who, as clarified by the Rwandan authorities, could not be tried before

[103] International Centre for the Study and Promotion of Human Rights, *The Genocide and the Crimes Against Humanity in Rwandan Law*, Commentary 42 (1997). On this point, see also Drumbl 2007, pp. 71–83.

[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] See Waldorf 2009, pp. 515–539.

[110] See Human Rights Watch 2008, Annex 1: Number of Genocide Cases Judged, p. 101.

gacaca jurisdictions. The NGO has stated that 'Information about prosecutions by the military justice service of crimes allegedly committed by RPA soldiers in 1994 is incomplete and sometimes contradictory'.[111]

The total number of crimes prosecuted before military justice according to Human Rights Watch was 21, involving 32 alleged perpetrators and approximately 90 victims. 14 defendants were convicted and sentenced to prison. Five life sentences were later reduced to fixed term imprisonment, two individuals were sentenced to two years of detention, and in seven cases the term of imprisonment was not determined. According to Human Rights Watch, 11 accused were never tried, 4 were acquitted and some trials did not reach the judgement phase.

In 1998, as a consequence of the death sentences issued by ordinary courts, 22 offenders were publicly executed in Kigali's stadium. Since then, more than 500 convicted individuals falling within the first category were convicted and given the death penalty, but none were executed. The death penalty was abolished in Rwanda in July 2007.[112]

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[111] Ibid., Annex 2: Analysis of RPA prosecutions by the Rwandan government for crimes committed in the year 1994, p. 103.

[112] On this point, see African Rights and Redress 2008; and Human Rights Watch 2008.

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Chapter 5
National Responses to the Rwandan Genocide: *Gacaca* Courts

Contents

Abstract This chapter provides an insight into *gacaca* legislation and the unfolding of the *gacaca* experiment. The key features of the pre-colonial *gacaca* are first sketched, which allows us to compare traditional *gacaca* to *inkiko gacaca*. This comparison offers a necessary perspective to discuss some of the main assumptions surrounding the use of these jurisdictions to deal with the legacy of the Rwandan genocide. The different *gacaca* laws which have been adopted between 2000 and 2012 are then scrutinized in-depth. This is necessary to understand the legal frame regulating the courts. Due attention is given to changes in the criteria for the categorization of genocide-related offences established by the *gacaca* legislation, to the confession and guilty plea procedure, to the sanctions and to the mechanisms governing penalty reductions.

Keywords *Gacaca* · traditional justice systems · legal pluralism · guilty plea · compensation fund · restorative justice · categorization of offences · confession

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5.1 Traditional *Gacaca* from Precolonial Time to the Eve of Genocide

Gacaca tribunals survived the German and Belgian colonization of Rwanda. According to investigations by Philip Reyntjens, in the last quarter of the 20th Century *gacaca* was an informal and traditional instrument to settle disputes and predominantly oriented towards preserving harmony.[1] They represented an aspect of the wide and multifaceted phenomenon known as legal pluralism, which characterises both colonial and post-colonial Africa. It is worth reviewing their historical development as well as the way they related to the formal juridical order at different stages, before, during and in the aftermath of the colonisation era. This brief analysis allows us to compare traditional *gacaca* to *inkiko gacaca*, offering a useful perspective to discuss some of the main assumptions surrounding the use of these jurisdictions to deal with the legacy of the Rwandan genocide.

Given the lack of a centralised jurisdictional order, Rwandans used to settle intra-familiar and inter-familiar disputes through customary law administered by the elderly members of the communities.[2] Customary law ignored the divide between criminal and civil law as conceptualised in the Western tradition and aimed at re-establishing social harmony after a conflict involving members of a given family, community or, less frequently, different communities.[3] The premise of such a system was that disputes concerned society as a whole, and not just its members individually. Despite its focus on the re-socialisation of the parties to a conflict, customary law administered by *gacaca* judges (named *inyangamugayo*, literally 'those who hate dishonesty'), also applied to making amends and to punishment.[4] Beside restitution, the payment of damages, interest and amends, the procedure included the possibility of expelling the guilty individual from his family, which amounted to a kind of civil death.[5] Amends to be paid by the individual found guilty when the trial came to an end often included banana beer, which was shared also by the *gacaca* judges.

The attitude of Rwandans towards the abstractness and generality of written law as a tool of conflict management is reportedly marked by scepticism.[6] This anti-legalistic approach is mirrored in the wider debate surrounding the criticisms against normative positivism today.[7] Michel Alliot has held that 'l'Africain a horreur du jugement qui clôt une querelle en appliquant aux deux parties une loi préétablie. La justice n'est pas affaire technique, elle est d'abord expression de

[1] On this point, see Digneffe and Fierens 2002.
[2] Ibid., p. 15.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Alessi 2005.

l'autorité'.[8] It is difficult to establish precisely to what extent the aforementioned scepticism has impacted on the current perception of state-sponsored formal law by Rwandans. What is sure is that state law, by creating *inkiko gacaca*, has transformed traditional Rwandan courts into something deeply different and unparalleled.

In pre-colonial *gacaca* when the *inyangamugayo* had to deal with grave offences such as murder, the custom provided the possibility of bridging the gap between the family of the killer and that of the offended through a marriage. The latter in fact perpetrated the lineage of the victimised family and sealed a new alliance. Due to her peculiar role, the Rwandan woman was excluded from the conflicts involving her family and the mechanisms of vengeance. The latter constituted in fact a compulsory duty for all the male members of a given family. The king was the only subject entitled to order the end of the revenge cycle, which was mandatory for all the parties to a conflict. Failing to comply with the king's order was considered an act of rebellion. The Rwandan system of ascertainment of uses charged elder persons with the duty to proof the existence of customs. The testimony of the elder did not allow for a cross check.

Two leading and conflicting principles are reported to govern the pre-colonial *gacaca* system.[9] The first required telling the truth at whatever cost (*aho kuryamira ukuri waryamira ubugi bw'intorezo*, literally 'instead of hiding the truth one has to accept to be beheaded'). The second stated that it is not always a good thing to tell the truth (*ukuri wavuze uraguhakishwa*, literally 'one does not testify against those who are powerful'). Witnesses during *gacaca* hearings had to strike a balance between these two conflicting rules.

The conflict between an unconditioned duty of speaking the truth and the fear of retaliation experienced by witnesses has emerged also through my field research on *inkiko gacaca*. Alphonse, a teacher from Gitarama stated:

> Here [at the *gacaca* hearings] we are asked to speak out the truth. The survivors want the truth, but not all Rwandans do. Some perpetrators are well hidden and even integrated in the Rwandan society. If we speak the truth, no one will protect us when they come to search for us.[10]

In ancient times, customary rules coexisted with religious or magic practices and ordeals were practiced when the settling of a dispute through social means proved impossible.[11] In parallel with the *gacaca* administered by the elder members of the family, there was a *gacaca* justice delivered by local authorities and by the king (*Mwami*), whose intervention was required in cases that were considered

[8] 'The African is horrified by a judgement which ends a dispute by applying a pre-established law to the two parties. Justice is not a technical matter, it is primarily an expression of authority' (translation by the author). On this point, see Alliot 1965, p. 245, quoted in Digneffe and Fierens 2002, p. 15.

[9] Digneffe and Fierens 2002, p. 16.

[10] Gahogo, 21 October 2009, interview on file with the author.

[11] Digneffe and Fierens 2002, p. 16.

particularly serious.[12] The *Mwami* was entitled to intervene whenever he considered a certain dispute of crucial importance for the collective.

The Belgian colonial authorities reorganised the Rwandan justice system, deeply affecting the role and the procedures concerning *gacaca*. In 1924, through the *Ordonnace-loi* n. 45 of 30 August 1924 they in fact deprived *gacaca* of any criminal jurisdiction, progressively extending the Belgian influence on local *chefs*.[13] The *inyangamugayo* were quickly put under colonial control, and the Belgians *de facto* had the power to appoint them. The colonial authorities reorganised the traditional Rwandan jurisdictions two decades later in 1943 (Ord. lég. N. 348/AIMO du 5 octobre 1943, *B.A.*, 1943, 1498). Indigenous jurisdictions included a *tribunal de chefferie,* a *tribunal de territoire and* a *tribunal du Mwami*. The latter represented the supreme jurisdiction. A *tribunal du parquet* had the power to revoke the decisions issued by the indigenous tribunals, but without deciding 'sur le fond' (on the merits). The courts judging criminal offences in Rwanda applied written law and included an appeal court, a tribunal of first instance and police tribunals. These courts applied the Congolese criminal code (D. du 30 janvier 1940, B.O., 1940 193). A new justice reform passed in 1962 unified these jurisdictions and suppressed indigenous courts (loi du 24 août 1962, J.O., 1962, 308).

Gacaca survived the collapse of the Belgian rule playing an important role in dispute settlements until the starting of the genocide. Over the years the *gacaca* trials evolved and adapted to the new needs of Rwandan communities, until they were adopted as a justice instrument to cope with the genocide. Their flexibility and adaptability has contributed to their survival over the years and to their establishment as a crucial social institution marked by a high degree of hybridity.[14]

5.2 The Legal Framework of *Inkiko Gacaca*

One of the main reasons for establishing the *gacaca* courts was the high degree of popular involvement in the Rwandan genocide and, consequently, the high percentage of adult population to be tried in the country. Fierens has stressed the high number of individuals involved in genocide-related trials:

> if the number of victims is indeed 1,000,000, how many perpetrators, co-perpetrators and accomplices did it take to kill them all? Some say it might have been 4,000,000. The country numbered approximately 7,000,000 inhabitants before April 1994. Subtracting those 1,000,000 victims, as well as young children, the entire adult population is potentially guilty. Others argue that groups of killers were comparatively few in number and that each one could have assassinated an average of 200 people, for example. If so, there are

[12] Ibid., p. 19. This was also confirmed in an interview with Simon Gasibirege, Kigali, October 2009, on file with the author.

[13] On this point, see Karekezi 2001, p. 32.

[14] See Clark 2010.

> approximately 50,000 individuals to try. Within these two extremes, it is exceedingly difficult to evaluate how many people should be held accountable before local courts, but their number will no doubt come to the tens of thousands. Since the *gacaca* process began in March 2005 throughout the country, the number of individuals implicated by witness testimony has increased considerably. There may be over 1,000,000 cases to try.[15]

Surprisingly Fierens' forecast underestimated the daunting challenge faced by the *gacaca* courts, which had approximately two million criminal cases to try involving one million Rwandans.[16] The costs to keep hundreds of thousands of accused individuals on remand resulted in an unbearable burden on the state's finances. A solution had to be elaborated to encourage confession and to empty the prisons.[17] Other important goals of the several *gacaca* laws that followed one after another (such as the speeding up of the trials, establishing the truth concerning the genocide and strengthening the national reconciliation process) will be discussed in the next paragraphs. These pre-established goals provide an important parameter against which to assess *inkiko gacaca* as a socio-legal experiment.

The Rwandan Parliament first passed Organic Law 40/2000 of 26 January 2001, providing for the creation of *gacaca* courts and the organisation of prosecutions of the crime of genocide at four administrative levels.[18] A presidential decree was adopted later on 26 June 2001, organising the election of members of 11.000 *gacaca* courts.[19] *Gacaca* Law 40/2000 was slightly amended six months later by Organic Law 33/2001 of 22 June 2001.[20] Difficulties in implementing the *gacaca* system, coupled with the results acquired through the pilot phase launched in 2002 regarding 752 *gacaca* courts in selected areas, where on an experimental basis the evidence-gathering process had already taken place, pushed the government to pass a third law in 2004 before a single sentence had even been pronounced by *gacaca*

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[15] See Fierens 2005, pp. 899–900.

[16] See Pozen et al. 2014, pp. 31–52 at 36.

[17] Data from the former department of *gacaca* courts, within the Supreme Court, suggest that the state spent 2,000,000,000 Rwandan francs of its budget for 1998 solely on providing food for the detainees. This amount, even though consuming two-thirds of the budget of the Ministry of Justice, still had to be supplemented by a contribution from the ICRC. In 1999, 1,500,000,000 Rwandan francs were spent on food, i.e. half the Ministry's budget of 3,800,000,000 francs; on this point, see http://www.inkiko-gacaca.gov.rw/pdf/solution.pdf and Fierens 2005, p. 900.

[18] See Organic Law 40/2000 of 26 January 2001 Setting Up '*Gacaca* Jurisdictions' and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, 26 January 2001, available at: http://jurisafrica.org/docs/statutes/ORGANIC%20LAW%20N0%2040.pdf. Last accessed 3 February 2018.

[19] See Presidential Decree No. 12/01 of 26 June 2001.

[20] See Organic Law 33/2001 of 2001 Modifying and Completing Organic Law 40/2000 of 26 January 2001 Setting Up '*Gacaca* Jurisdictions' and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, 22 June 2001, available at: http://www.refworld.org/docid/452e37e84.html. Last accessed 3 February 2018.

courts (Organic Law 16/2004 of 19 June 2004).[21] This law is particularly relevant because it reduced the four categories in which defendants were grouped to three, and because under its provisions the first *gacaca* judgements were handed down. Law 16/2004 abolished the *gacaca* courts at district and province level, leaving untouched the courts in cells and sectors. It also established a *gacaca* court of appeal in every sector in which the country was divided. Under this body of laws, *gacaca* courts were not allowed to exercise jurisdiction over those individuals accused of the most serious crimes. As envisioned by Article 51 of the 2004 Organic Law, accused individuals included in this group fell under the jurisdiction of ordinary courts.[22] The often criticised Organic Law 13/2008 extended *gacaca* jurisdiction over some of the most serious crimes categorised in the first group by Organic Law 8/1996. *Gacaca* tribunals have never been entitled to sentence defendants to death.

Punishment of individuals found guilty who were at the time of the genocide between the ages of 14 and 18 years old amounted to half that of the adult penalty. This meant that minors, who normally are held too young to have the *mens rea* to commit genocide, were subject to terms of imprisonment of up to 20 years. Child perpetrators who were younger than 14 in 1994 were not subject to prosecution and had to be released for re-educational purposes.

Inkiko gacaca became fully operational in 2006. In the mind of the Rwandan government the new *gacaca* system, centred on participative justice, embodied truth seeking, reconciliation and healing virtues. According to the Rwandan Minister of Justice, the population who witnessed the massacres during the genocide had to act as 'witness, judge and party'.[23] The aspiration of the Rwandan Government setting up *gacaca* courts was to combine the flexibility, the participatory regime and the inclusiveness of the traditional courts with the attributions of retributive criminal justice. But as *gacaca* neither abided by internationally recognised human rights standards, nor granted accused individuals the assistance of a defence lawyer, it is necessary to evaluate them very carefully, taking seriously into account criticisms expressed by human rights scholars and NGOs. Moreover, the existence of restorative aspects in *gacaca* courts must not be automatically

[21] See Organic Law 16/2004 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 1 October 1990 and 31 December 1994, 19 June 2004, available at https://repositories.lib.utexas.edu/bitstream/handle/2152/4582/3677.pdf?sequence=1. Last accessed 3 February 2018.

[22] According to Fierens 'Therein lies a first paradox. If *gacaca* courts provide adequate guarantees and if they can attain the social goal ascribed to them, why not include first-category crimes in their jurisdiction? One argument is that the individuals in question are, by the serious nature of their acts, 'irretrievable' to an extent, and that reconciliation and rehabilitation prove to be irrelevant in such cases. But it seems that lawmakers opting for such exclusion only fuelled doubts as to the integrity of the new judicial system. *Gacaca* courts cannot impose the death penalty. Does this indicate that they did not wish to remove the threat of that punishment for the perpetrators of the most serious crimes?' See Fierens 2005, p. 902.

[23] On this point, see Penal Reform International 2002a.

inferred from their roots in Rwandan customs. The differences between traditional *gacaca* and *inkiko gacaca* are in fact enormous.[24] Participatory justice moreover is not to be confused with restorative justice. History is replete with experiments with popular election of lay judges (of which the French Revolution, with the Decrees Boumets, is only one example), which is also affirmed by the institution of juries in the US.[25] The involvement of elected lay judges however is compatible with a retributive approach to justice and does not necessarily imply the application of restorative principles. Furthermore, one of the key principles of the restorative justice approach is the voluntary participation of the victim of the crime in the restorative programme.[26] The participation in *gacaca* hearings, on the contrary, was made mandatory by the Rwandan Government.

Another crucial question concerning the success of the *gacaca* process regarded the awareness among Rwandan population of its goals and internal logic. During the pilot phase, scholars and NGOs cast many doubts as to the outreach of the *gacaca* initiative and towards popular participation.[27]

The temporal jurisdiction of *gacaca* courts covered crimes perpetrated between the 1st October 1990 and 31st December 1994. To endow *gacaca* with a broader temporal jurisdiction than the ICTR had significant consequences. *Gacaca* were in theory not only entitled to adjudicate crimes connected with the perpetration of the genocide, but also crimes against humanity committed by other subjects. Among these could have been included crimes by members of the RPA since October 1990 and the infamous killings in Bugesera and Kibilira.[28] War crimes perpetrated by the RPA after 1994, documented by Gourevitch and Prunier, remained out of the reach of *gacaca* courts.[29]

The territorial competence of *gacaca* courts was regulated in Article 44 of the 2004 *gacaca* law. The criterion of the *locus commissi delicti* (the place where the crime was perpetrated) applied to establish which *gacaca* court was competent. The *gacaca* courts focused their prosecutorial and jurisdictional activities on crimes committed on Rwandan soil. However, Article 10 of Organic Law 10/2007 amending and complementing Article 44 of Law 16/2004 opened a window for the adjudication of crimes committed abroad, by providing that for offences committed

[24] See Ingelaere 2016, p. 18.

[25] Alessi 2002.

[26] Sullo 2016.

[27] See Penal Reform International 2002a: 'While many people had been well aware of the coming of the *Gacaca* Jurisdictions, accurate knowledge (period May–July 2001) about the *gacaca* law (which had been passed some months earlier) was very limited: there was limited awareness of the categorisation of crimes and the sentences for these crimes; little was understood of the "confession and guilty plea" provision of this law, and nobody had any idea about a "community service order" as an alternative to a prison sentence. These findings agree with those of others, although ours seemed even less positive, partly it is assumed, because our study was conducted among the rural population of Gitarama with a low level of education'.

[28] See Gourevitch 1998.

[29] See Gourevitch 1998; and Prunier 1997.

beyond the borders of Rwanda, the *gacaca* court of the area where the suspect had residence or domicile was competent. Hence, crimes committed abroad could have been potentially prosecuted before *gacaca*. I have not, however (nor to the best of my knowledge have any other scholars) documented such an instance.[30]

Finally, it must be stressed that ordinary and *gacaca* courts were complemented by military courts, mainly funded by USAID and Great Britain.[31] Rwandan military justice set in motion 843 investigations in 1999. 295 trials were held: 58 individuals were acquitted, 28 sentenced to death and 207 sentenced to prison for periods of one month to life.[32]

In order to ease the understanding of how the *gacaca* process unfolded, I provide Table 5.1 highlighting what activities took place under which Organic Law. The chart is adapted from a table elaborated by ASF in its 2007 fourth analytic report.

5.3 Organic Law 40/2000

Faced with a daunting detainees' load and the prospective danger of further violence if large numbers of prisoners would be released, the Rwandan leadership started to discuss the possibility to reintroduce a modernised version of *gacaca* at the Urugwuiro meetings held under the auspices of the President of Rwanda Pasteur Bizimungu. On 17 October 1998 Bizimungu established a Commission to consider possible mechanisms for increasing public participation in judicial proceedings relating to the genocide. Chaired by the Minister of Justice, this fifteen-member Commission issued an official document including a proposal in view of establishing a modernised version of *gacaca* courts on 8 June 1999. The document sketched out the jurisdiction of these community-based tribunals, their structure and function, as well as their relationship with other judicial bodies charged with dealing with the genocide legacy.

The emphasis at this stage was on the search for an accountability mechanism to fight against impunity: reconciliation as a key goal of *gacaca* courts emerged gradually at a later stage.[33] As stressed by Nicola Palmer, Bizimungu identified 'fighting the culture of revenge' and 'punishing the crime of genocide and massacres' as the two key achievements of the Rwandan Government.[34]

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[30] See also Bornkamm 2012, p. 49.

[31] Ibid.

[32] Ibid. Fierens observes that: 'It is difficult to evaluate how many of these cases concerned former soldiers of the RAF accused of genocide, how many involved soldiers of the RPA accused of human rights violations, and how many related to ordinary crimes or offences against military discipline'. See Human Rights Watch 2008, pp. 89–94, at https://www.hrw.org/sites/default/files/reports/rwanda0708_1.pdf. Last accessed 3 March 2018.

[33] Palmer 2015, p. 118.

[34] Ibid.

Table 5.1 Chronology of *gacaca* activities

Dates	Trial phase	Jurisdictions
15 March 2001	Establishment of *gacaca* jurisdictions through the Organic Law n°40/2000 of 2 January 2001 published in the official Gazette on 15 March 2001	
4–7 October 2001	The election of 254,000 Inyangamugayo took place	
22 June 2001	Organic Law 33/2001 amending Organic Law 40/2000 is approved	
19 June–25 November 2002	Launching of the pilot phase of information gathering	751 *gacaca* cell jurisdictions
19 June 2004	Organic Law 16/2004	
15 January 2005	Information gathering extended at national level	9008 *gacaca* cell jurisdictions
10 March 2005	Pilot phase of judgement	118 *gacaca* sector and 118 *gacaca* appeal jurisdictions
June 2006	End of the collection gathering phase	9008 *gacaca* cell jurisdictions
15 July 2006	Generalisation of the judgement phase in every sector	1545 sector *gacaca* jurisdictions, and 1545 appeal jurisdictions
1 March 2007 (Organic Law 10/2007 is approved)	Speed up of the *gacaca* trials	Establishment of additional 1803 benches within sector *gacaca* jurisdictions, and of 412 benches of appeal in *gacaca* jurisdictions
19 May 2008	Organic Law 13/2008 is approved	
18 June 2012	Closure of *gacaca* courts	

Source P. Sullo: (adapted from Avocats Sans Frontières (2007b) IV Rapport Analytique).

The debate among the participants in the Urugwiro meetings regarding the key features of the revitalised *gacaca* was intense and sometimes heated. The attendees stressed possible issues to be addressed surrounding the competence and neutrality of the *gacaca* judges and the relevance of fair trial standards.[35] At Urugwiro moreover, considering the possible constraints of local courts regarding their non-compliance with international law, the idea to use *gacaca* exclusively as an investigation (and not a trial) mechanism was also advanced.[36] A similar approach was suggested in 1996 by the UN High Commissioner for Human Rights (UNHCHR).[37] UNHCHR highlighted that the *gacaca* system in fact emerged spontaneously again in some rural areas in the aftermath of the genocide. The *gacaca* courts in these cases were given jurisdiction on conflicts regarding land law, real estate, and refugee repatriation directly by the Rwandan population. Informal

[35] Ibid., p. 120.

[36] Ibid.

[37] On this point, see UN High Commissioner for Human Rights 1996.

procedures, popular participation, flexibility and the central role of the judge remained the core characteristics of the *gacaca*. The report of the UNHCHR confirmed the informal support that Rwandan authorities offered to *gacaca* in the aftermath of the genocide. The 1996 UNHCHR report points out that during the *gacaca* meetings in the immediate aftermath of the genocide it was taboo to talk about killings, as this was considered too sensitive a topic. A letter of the prefect of Kibuye recommended that *gacaca* meetings should gather the names of the individuals involved in the violence. All this considered, the UNHCHR report concluded that *gacaca* meetings could be used to address genocide related crimes, but not as a judicial body, and made recommendations in this regard. According to the UNHCHR report in particular, *gacaca* had to work as a kind of truth commission with a twofold aim. On the one hand, they had to collect testimonies on the violence experienced during the genocide to be forwarded to ordinary courts; on the other hand, they had to provide Rwandans with a forum for dialogue to rebuild social unity and achieve reconciliation. The UN report also warned against too much government intrusion, which, as will be showed in chapter six, would be one of the main flaws of the *gacaca* system.

On 12 October 2000, the Transitional National Assembly of Rwanda passed the first Organic Law setting up the *gacaca* jurisdictions. A few months later, on 26 January 2001, President Paul Kagame sanctioned this legislation, which was then approved by the Constitutional Court. Even if characterised by the customary practice of community-based dispute resolution, the post-genocide interpretation of *gacaca* was conceived specifically for the challenges faced when adjudicating offences on a severe scale. The Rwandan government distinguished traditional *gacaca* from the newly adopted *gacaca* tribunals by labelling the latter as '*inkiko gacaca'*, which means '*gacaca* courts', suggesting the idea of a modernised, state-driven judicial model.

The *gacaca* tribunals shared the same jurisdiction *ratione materiae* of the national courts set up by Law 8/1996. The first *gacaca* law also followed the rules provided for by Organic Law 8/96 with respect to the categorisation of suspects. However, *gacaca* jurisdictions according to the original plan were only tasked to adjudicate category 2 through category 4 cases.

It is worth looking in depth at the Organic Law 40/2000, as it sketched out the original architecture of the *gacaca* system, providing the articulated legal provisions on which these jurisdictions were initially based. Organic Law 40/2000 was complemented and amended by Organic Law 33/2001 and was subsequently replaced by Organic Law 16/2004. It means that the first and second *gacaca* laws dominated only the pilot phase of information gathering. The general phase of information collection and the pilot phase of judgement in fact started after the approval of the Organic Law 16/2004. Despite these considerations, it remains of interest to analyse the Organic Laws 40/2000 and 33/2001 as they clarify the evolution and the developments of *gacaca* jurisdictions, which were a dynamic body subject to several modifications.

The preamble of the Organic Law 40/2000 started from the premise that offences constituting genocide 'were publicly committed before the very eyes of the

population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators'. The effort made by the government in pursuing a policy of full accountability was further underlined by stating that 'the duty to testify is a moral obligation, nobody having the right to get out of it for whatever reason it may be' and that 'the committed acts are both constituting offences provided for and punished by the Penal Code, and crimes of genocide or crimes against humanity'. It must be borne in mind that Rwanda had ratified the Genocide Convention without however providing for sanctions for such crimes. The preamble of the Law 40/2000 clarified that justice and reconciliation were envisioned as complementary and not mutually exclusive tools aimed at the reconstruction of the Rwandan society. It stressed 'the necessity, in order to achieve reconciliation and justice in Rwanda, to eradicate for good the culture of impunity, and to adopt provisions enabling to ensure prosecutions and trials of perpetrators and accomplices without only aiming for simple punishment, but also for the reconstitution of the Rwandese society made decaying by bad leaders who prompted the population to exterminate one part of that society'. The preamble of Law 40/2000 encapsulates hence the historical interpretation of the causes of the genocide according to the Rwandan Government, including the idea that the Rwandan family, originally harmoniously united, was the victim of the policies of 'bad leaders'. It emerges from the first sentences of the preamble just how daunting the challenge faced by *gacaca* jurisdictions were. They were in fact conceived as a multitasking mechanism operating in several sensitive fields. Finally, the preamble of the law included among the aims of the penalties provided 'allowing convicted prisoners to amend themselves and to favour their reintegration into the Rwandese society without hindrance to the people's normal life'.

The aim of the Organic Law 40/2000 was to prosecute those responsible for acts committed between 1 October 1990 and 31 December 1994, punished by the Rwandan Criminal Code, which constituted: (1) genocide and crimes against humanity as defined by the Convention of December 9, 1948 preventing and punishing the crime of genocide, by the Geneva Convention of August 12, 1949 relating to protecting civil persons in wartime and the additional protocols, as well as in the Convention of November 26, 1968 on imprescriptibility of war crimes and crimes against humanity; (2) offences provided for in the penal code which were committed with the intention of perpetrating genocide or crimes against humanity.[38] Article 3 of Organic Law 40/2000 set up *gacaca* jurisdiction on four administrative levels, namely in every cell, sector, district and province of the Republic of Rwanda. The courts were organised according to a pyramidal hierarchy whose base were the cells (9500 courts), followed by sectors (1550 courts), districts (106 courts) and provinces (12 courts).[39] Sentences issued could be appealed before the

[38] As we will see in the following paragraphs, some problems emerge with regard to the principle of non-retroactivity of the criminal law (*nullum crimen, nulla poena sine lege*), as Organic Law 40/2000 punished acts perpetrated before its enforcement.

[39] The number of the Provinces was limited to five by the constitutional amendments passed in 2005.

gacaca court at a higher position within the hierarchy. According to Article 5 of Law 40/2000, every *gacaca* jurisdiction was made up of a general assembly, a seat and a coordinating committee. The general assembly for the cell was composed of all the inhabitants of the cell who were at least 18 years old.[40] Article 7 of the law established that 'the General Assembly for a Sector's, District's or Province's *Gacaca* Jurisdiction is made up of at least 50 'honest persons', delegated by its immediately lower *Gacaca* Jurisdiction'.[41] The jurisdiction of *gacaca* courts was defined by Article 37. This endowed *gacaca* with extended competences similar to those of ordinary criminal tribunals, including the trial of defendants based on testimonies against or in favour.[42] The guarantees of impartiality of the *gacaca* bench were mainly embodied in (and dependent on) the honesty of the judges, who, according to the law had to meet the following expectations:

(a) to have a good behaviour and morals;
(b) to always say the truth;
(c) to be trustworthy;
(d) to be characterised by a spirit of sharing speech;
(e) not to have been sentenced by a trial emanating from the tried case to a penalty of at least 6 months imprisonment;
(f) not to have participated in perpetrating offences constituting the crime of genocide or crimes against humanity;
(g) to be free from the spirit of sectarianism and discrimination.

These requirements for acting as an *inyangamugayo* constituted key elements for a fair trial for the defendants, since the *gacaca* system in practice did not allow the

[40] According to the Law if a cell counts more than 200 inhabitants aged 18 years, the cell may be divided 'into as many Cells as none exceeds that figure'.

[41] See Article 9 Organic Law 40/2000: 'The General Assembly for the Cell had to appoint within its members 24 honest persons, 5 of whom were delegated to the Sector's *Gacaca* Jurisdiction, while the remaining 19 formed the bench for the Cell's *Gacaca* Jurisdiction. "Honest persons" delegated to form the Sector's *Gacaca* Jurisdiction had to appoint among themselves 5 delegates to the District's *Gacaca* Jurisdiction, others constituting the General Assembly for the Sector's *Gacaca* Jurisdiction. Those delegated to form the District's *Gacaca* Jurisdiction had to appoint among themselves 5 to delegate to the Province's *Gacaca* Jurisdiction and the others constitute the General Assembly for the District's *Gacaca* Jurisdiction'. The system worked in this fashion along the hierarchic distribution of *gacaca* on the administrative pyramid of the country.

[42] Article 37 Organic Law 40/2000 detailed further powers of *gacaca* courts, including: 'Summon to appear before court any person they consider that his contribution should be necessary; – Order or carry out themselves search of or to the defendant's. This search shall however respect the defendant's private property and basic human rights; – Take protective measures; – Pronounce sentences and fix damages to grant; – Order the withdrawal of the distraint of acquitted persons' property; – Order, if necessary, appearance before prosecution for information complement on files it has investigated on. – Issue justice warrants to alleged authors of offences and order detention in prevention, whenever necessary'.

accused to have a defence lawyer, and lacked details as regards evidence mechanisms. Article 11 of the law listed the cases of ineligibility of members of the seat of the *gacaca* jurisdiction at the cell, sector, district and province level.[43] The law also established the reasons for replacement of the judges.[44] Furthermore, Article 16 clarified the cases in which members of a seat of a *gacaca* jurisdiction could not take their seats in the consideration of a particular matter.[45]

Hearings of *gacaca* jurisdictions were public, except where a hearing in camera was requested by any interested person for reasons of public order or good morals. The deliberation was secret (Article 24). All *gacaca* jurisdictions had to hold their hearings at least once a week (Article 25).

A judgement had to be read in public and reasoned. According to Organic Law 40/2000, *gacaca* jurisdictions could be assisted by judicial advisers appointed by the *Gacaca* Jurisdiction Department of the Supreme Court.[46] Article 32 of the law established a duty to testify. A refusal or an omission was equated with false or slanderous denunciations, which were to be prosecuted before the *gacaca* jurisdiction. The defendant risked in this case a prison sentence from one to three years.

The capillary territorial distribution of *gacaca* tribunals and the large involvement of the population marked the attempt to redistribute responsibility of dealing with the past in Rwanda. While the ordinary criminal process, being highly formalised, limited the numbers of participants, the *gacaca* procedure tried to attract the highest possible number of Rwandans. The cell is the basic unity of the Rwandan administration and is very immediate to the population, which constitutes the cell assembly, and would call to elect the 19 members of the judicial bench, the *siége*. According to the Organic Law 40/2000, the cells were responsible for collecting information on the genocide. The population was invited to take part in this process. The *siége* was tasked with collecting the relevant information and recording it on a specific file (*cahier d'activité*).

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[43] In particular could not be elected the following categories: – the person in charge of centralized or decentralized Government administrations; – the person exercising a political activity; – the soldier who is still in active service; – members of the national police or of the local defence force who is still in active service; – the career magistrate, except that he/she may be called upon as legal adviser referred to in Article 30 of the Organic Law 40/2000; – the member of leading organs of political parties, a religious confession or a non-government organisation.

[44] See Article 12 of Law 40/2000. Reasons for replacement included: (a) three unjustified successive absences in the sessions for the organs of *gacaca* jurisdiction; (b) sentence to a penalty of at least a 6 month imprisonment; (c) culture of divisionism; (d) exercise of one of the activities provided for in Article 11 of the organic law or occupying a post which is likely to impede participation in the sessions for the organs of *Gacaca* Jurisdiction; (e) effects of a disease likely to prevent him from participating in the sessions for the organs of *Gacaca* Jurisdiction; (f) fulfilling any act incompatible with the quality of a honest person; (g) non-residence in the Cell, in the Sector, in the District or in the Province of work; (h) resignation; (i) death.

[45] This occurred when was prosecuted: the defendant with whom himself or his wife is relative or related by direct marriage or up to the second degree; the defendant with whom it was already existing a serious enmity; the defendant with whom he/she had deep friendship relations; the defendant for whom he/she was guardian.

[46] See Article 29 Organic Law 40/2000.

Another important task at cell level was the categorisation of the accused people in the four classes of perpetrators. According to Organic Law 40/2000, cells had jurisdiction over the less serious categories of crimes; the sectors over the third category, and the districts over the second.

Article 34 of Organic Law 40/2000 outlined the tasks performed by the seat at cell level, including the draft of a list of the inhabitants before and after the genocide, the victims and the alleged perpetrators.[47] The *gacaca* jurisdictions of the cell used to deal with offences against property (included in category 4 under Organic Law 40/2000, renamed category 3 according to Organic Law 16/2004). It dealt also with the appeal against the sentences it had pronounced *in absentia*. Similarly, Articles 35 and 36 of Organic Law 40/2000 described the competence of the assemblies and seats at district, sector and province level. The *gacaca* jurisdiction of the sector dealt with offences of the third category, and with appeals against sentences pronounced in the absence of the defendant. The *gacaca* jurisdiction of the district dealt with the second category of offences, the appeal against sentences pronounced at the first level, or with regard to the challenges by *gacaca* courts of sectors of its jurisdiction, and with challenges against sentences that it had pronounced in the absence of the defendant. Finally, the *gacaca* tribunals of Province dealt with appeals against sentences pronounced at the first level, or with respect to challenges by *gacaca* of the district of its jurisdiction, and with appeals against sentences it had pronounced in the absence of the accused. Any issue concerning the demarcation of competence between different *gacaca* jurisdictions was dealt with by the *Gacaca* Jurisdiction Department of the Supreme Court (the so called VI Chamber), on its initiative, upon request of the concerned court seat or of any other interested person (Article 38 Organic Law 40/2000). The territorial jurisdiction of *gacaca* was established by Article 43, stating that 'it is competent, to know an offence, the jurisdiction of the place where it has been committed'. Article 44 settled potential conflicts of jurisdiction.[48]

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[47] These tasks included: (a) Establishing lists of: All persons who were staying in the cell before the genocide and massacres; Persons who have been, in the Cell, victims of crime of genocide or crimes against humanity; Alleged authors of the offences referred to in this Organic Law; Persons who lived in the Cell but who were killed in other places; Persons who were hunted and whose whereabouts remain unknown; Persons who still live in the Cell; Persons who lived in the Cell but who have changed residence; this list having, if possible, to be completed by indications on the locations where the concerned persons have moved to; Damaged assets. (b) bring together the files forwarded by the Prosecution; (c) taking cognizance of evidence and testimony offers; (d) making investigations on given testimonies; (e) making categorisation of defendants as per Organic Law N 8/96 August 30, 1996; (f) knowing offences committed by defendants classified in the fourth category; (g) giving a ruling on objection to Seat members of the *gacaca* jurisdiction of the Cell; (h) receiving the procedure of confession and guilt speech for defence; (i) forwarding to the "*gacaca* jurisdiction of the Sector, the files of the defendants classified in the third category; (j) forwarding to the *gacaca* jurisdiction of the District and Province the files of the defendants classified in the first and second categories; (k) electing members of the Coordinating Committee.

[48] See Article 44 of Law 40/2000: 'When prosecutions are taken against a person suspected of having committed offences in different places, the judgment of the case is suspended. The jurisdiction referred to informs immediately about it the Department of "*Gacaca* Jurisdictions" of the

Chapter three of Organic Law 40/2000 dealt with a very sensitive topic, namely the relationship between the *gacaca* jurisdictions and the public prosecution. The collection of evidence and the categorisation of the perpetrators in the *gacaca* procedure were not simply delegated to the assembly. Article 48 of Organic Law 40/2000 made it possible in fact that 'the files investigated by the prosecutions and military courts, but which are not yet forwarded to competent jurisdictions on the date of this organic law enforcement, shall immediately be forwarded to the *gacaca* courts of the cells for categorisation. The prosecutions and military courts communicate to *gacaca* tribunals of the cells or to the jurisdiction called to recognisance of the case evidences collected against persons prosecuted in the files it has investigated'.

The involvement of the prosecutor in the procedure has generated mixed feelings, with certain scholars minimising its influence,[49] while others have considered this intervention in contrast with the main rationale underpinning *gacaca*, namely popular participation, and a violation of the principles of parity of arms.[50] The intervention of a legally trained prosecutor in a position of authority (not balanced by the intervention of a trained defence lawyer) might in fact exert a certain degree of influence on popularly elected lay judges.

The *Gacaca* Jurisdictions Department of the Supreme Court was in charge of control, inspection and coordination of *gacaca* activities at the national level.

Article 52 of Law 40/2000 provided for aggravating circumstances. The persons in position of authority at the level of sector or cell at the time of genocide were in fact classified in the category corresponding to the offences they committed, but their quality as leaders exposed them to the most severe penalty for the defendants placed in the same category. Article 53 defined the accomplice as the person who has assisted the defendant to commit offences. Article 58(1) established a deadline for confessions, to be given by March 2003 (the date was first postponed and then later abolished in 2004).

The final provisions of Organic Law 40/2000 established that the public action and penalties related to offences amounting to the crime of genocide or crimes against humanity were not subject to a statute of limitation.

Furthermore, Organic Law 40/2000 abolished the Specialised Chambers for the Courts of First Instance, military courts and the public prosecution governing them

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Supreme Court. The latter communicates the information to various "*Gacaca* jurisdictions" of the concerned cells which it invites to give evidence elements for or against. At the request of" *Gacaca* Jurisdiction" of the concerned Cell, the defendant is taken to the spots. The Department of *Gacaca* Jurisdictions of the Supreme Court forwards the files constituted in this way to the jurisdiction referred to. The latter proceeds to a new categorisation of the defendant following collected additional elements and, if need be, forwards the file to the jurisdiction it considers competent'.

[49] For instance, Tully held that 'Although there is some concern that the cases would be judged on the basis of the dossiers compiled and passed on by what can be considered the prosecution, the process by which the actual hearing takes place reduces the risk that a defendant will not have an adequate chance to participate in his defence'. On this point, see Rettig 2008, pp. 25–50.

[50] See, for instance, Avocats Sans Frontières 2007b.

as per Organic Law 8/96 (Article 96). According to Article 96 however, 'all cases forwarded to these specialised chambers by the public prosecution remained handled by the same courts which these chambers belonged to'. Organic Law 8/96 remained applicable for the aforementioned cases. All previous provisions contrary to the Organic Law 40/2000 were abrogated.

In accordance with the spirit of *gacaca* law, around 255,000 lay judges were directly elected by the population on the base of universal suffrage in October 2001. They underwent six days of training over three weeks in April 2002.[51] The *gacaca* project was launched experimentally in distinct pilot zones. The first phase, consisting of gathering demographic data and statistics concerning the genocide, the identification of suspects and formulation of the charges against them, started on 19 June 2002 in specific areas in the 12 sectors or districts in which Kigali is subdivided. In November 2002, the pilot phase was enlarged on a national scale: at this point the total number of *gacaca* courts operating in Rwanda amounted to 751.

5.3.1 Compensation Fund

Law 40/2000, according to the main Rwandan victim organisations, 'drastically reduced the opportunities for survivors to file complaints for compensation as civil parties'.[52] In fact any civil action lodged against the State before the ordinary jurisdictions or before *gacaca* was declared inadmissible on account of the fact that the State had acknowledged its role in the genocide.[53] Rwandan victims' association stressed the incompatibility with international law of this provision preventing survivors from claiming compensation from the State.[54]

According to Organic Law 40/2000, ordinary jurisdictions and *gacaca* courts had to forward to the Compensation Fund for Victims of the Genocide and Crimes Against Humanity copies of rulings and judgements they have passed (Article 90).

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[51] See African Rights 2003, p. 4, (in Clark 2010, p. 68. See also Klaas de Jonge (April–June 2002) Penal Reform International 2002b.

[52] See Ibuka et al. 2012, p. 7.

[53] See Article 91 Organic Law 40/2000: 'Any civil action lodged against the State before the ordinary jurisdictions or before "*Gacaca* jurisdictions" shall be declared inadmissible on account of its having acknowledged its role in the genocide and that in compensation it pays each year a percentage of its annual budget to the Compensation Fund. This percentage is set by the financial law'. The mentioned Compensation Fund was never established.

[54] Ibuka et al. 2012, p. 7: 'This provision not only prevents survivors from claiming compensation from the State, but also led to the dismissal of compensation awards issued against the State by the specialised chambers as the law was applied retroactively (…) Before these courts, survivors could only file claims for compensation in regards to material losses and bodily damages, as *gacaca* courts were not vested with the power to award moral damages'.

The latter had to indicate the following: the identity of persons who have suffered material losses and the inventory of damages to their property; the list of victims and the inventory of suffered body damages; related damages fixed in conformity with the law. The fund, based on the damages fixed by jurisdictions, was charged with fixing the modalities for granting compensation.[55] However, the Compensation Fund has never been established and the taxes paid by Rwandans have been used to set up the *Fonds d'Assistance aux Rescapés du Génocide* (FARG, later renamed FSARG), whose task is basically assistance and not that of providing reparation.

Two draft laws necessary to make the compensation fund operational were discussed but never approved. Further normative developments culminated in the adoption of Organic Law 16/2004, which did not mention a compensation fund. Law 16/2004 concentrated on property damages. Article 96 of the Organic Law 16/2004 in fact established that 'other forms of compensation the victims receive shall be determined by a particular law'. The latter was however never adopted, discriminating therefore against victims of offences against property, who were entitled to reparations, from victims of more serious crimes, who did not benefit from any form of reparation.[56] The frustration of the victims regarding reparation awards is a persistent feature of the post-genocide transitional justice scene in Rwanda and remains an unresolved issue even today. Victims associations, stressing that over 92% of reparation awards before *gacaca* have not been enforced, have proposed to the Rwandan Government a detailed roadmap and the institution of an *ad hoc* task force.[57]

5.4 Organic Law 33/2001

The first *gacaca* Organic Law was slightly modified six months after its adoption, when Organic Law 33/2001 was approved.[58] Article 7 of the new law introduced a new list of incompatibilities for *inyangamugayo* at cell level and for those who wanted to be part of the general assembly at district, sector or province level. The new incompatibilities regarded:

[55] Criminal liability for persons of the first category takes both personal liability and liability binding on all parties for all losses caused in the country, due to the acts committed, or criminal participation whatever the place where offences were committed. Persons of the second, third or fourth category incur personal liability for the criminal acts they have committed.

[56] See Bornkamm 2012, p. 133.

[57] Ibuka et al. 2012, pp. 7–8.

[58] Specifically changes regarded Articles 2, 6, 7, 8, 9, 11, 13, 17, 18, 20, 33, 34, 50, 68, 69 and 96.

(1) Persons fulfilling a political mandate;
(2) Persons in charge of Government administrations, whether centralised or decentralised, who are: the prefect of the province, the Mayor of the city of Kigali, members of the executive committee of a Municipality or a District, members of the administrative or political committee at sector and cell level;
(3) Soldiers who are still in active service;
(4) Members of the national police still in active service;
(5) Professional Magistrates;
(6) Members of leading organs of political parties at national level.

5.5 Organic Law 16/2004

Organic Law 16/2004 was the cornerstone of the *gacaca* system. It amended the previous organic laws setting up *gacaca* jurisdictions in the light of the data collected and the difficulties experienced during the evidence-gathering phase. It repealed both Organic Law 8/1996 and 40/2000. According to the 2004 Organic Law, *gacaca* jurisdictions were established along the administrative structure of Rwanda, which they followed hierarchically, in a simpler way than Law 40/2000. Under the new law, the district and the province *gacaca* jurisdiction were abolished, while the categories of perpetrators were reduced to three. Article 2 of Law 16/2004 established that persons falling within the second and the third category were 'answerable to *Gacaca* jurisdictions', while those put in the first category were to be tried before ordinary courts. The right to appeal had to be exercised at the sector level. Pursuant to Article 3 of Law 16/2004 'a *gacaca* court of cell in each cell, a *gacaca* court of sector and a *gacaca* court of appeal in each sector of Rwanda' were set up.[59] Accordingly, 9,013 *gacaca* courts were established at the cell level. In each of the 1545 sectors in which Rwanda was divided, *gacaca* tribunals of both first instance and of appeal were set up. The composition of the general assembly at cell and sector level was different. The general assembly of the cell was composed by all cell inhabitants aged at least 18 years old (Article 6). Its meetings were legitimate if at least one hundred members were present (Article 18).

According to Article 7 the general assembly at sector level was composed by all the *inyangamugayo* of the sector. These were: the judges of the *gacaca* court of the cells included in that sector; the judges sitting in the bench of the gacaca court of the sector, and the judges of the *gacaca* court of appeal. The general assembly at sector level gathered once every three months in its ordinary sessions, and any time it was deemed necessary in an extraordinary session (Article 19 Organic Law 16/2004). The required quorum was two thirds of its members. To reach the

[59] In fact, as provided for in Article 4, 'the jurisdiction for the *Gacaca* Court of the Cell is the Cell; the jurisdiction for the *Gacaca* Court of the Sector is the Sector; the jurisdiction for the *Gacaca* Court of Appeal is the Sector'.

quorum often proved difficult, as the judges composing the sector general assembly could be simultaneously occupied in activities at the cell level.[60] Law 16/2004 reduced to 14 the number of the judges composing the benches of each *gacaca* jurisdiction, 'nine persons of integrity and 5 deputies' (Article 8). These figures would be later changed through *Gacaca* Law 10/2007, establishing that the seat of *gacaca* jurisdictions was to be composed of 7 members and 2 substitutes.

Representatives of the Rwandan authorities made immediately clear that *gacaca* tribunals had jurisdiction only on genocide-related crimes. Consequently, war crimes committed between the 1990 RPF's attempt to free the country from Habyarimana's regime and the end of genocide remained outside of the competence of *gacaca* courts.[61] Human Rights Watch has documented the criticisms such a decision has triggered among the Rwandan population:

> The biggest problem with *gacaca* is the crimes we can't discuss. We're told that certain crimes, those killings by the RPF, cannot be discussed in *gacaca* even though the families need to talk. We're told to be quiet on these matters. It's a big problem. It's not justice.[62]

The 2004 *gacaca* Organic Law has provided for a crucial modification of the categories of perpetrators established under the 1996 Organic Law.[63] The 2004 law re-categorised the crime of rape, moving it from category 2 to category 1 (which

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[60] See Bornkamm 2012, pp. 47–48; see also Penal Reform International, 2005, p. 39.

[61] See Speech by President Kagame on the occasion of the inauguration of *gacaca*. See Discours de Paul Kagame à l'occasion du lancement officiel des travaux des juridictions *gacaca*, 18 June 2002.

[62] Human Rights Watch 2008, p. 91.

[63] See Article 51 Organic Law 16/2004: 'Following acts of participation in offences referred to in article one of this organic law, committed between October 1, 1990 and December 31, 1994, the accused can be classified in one of the following categories: 1st Category: 1° The person whose criminal acts or criminal participation place among planners, organisers, incitators, supervisors and ringleaders of the genocide or crimes against humanity, together with his or her accomplices; 2° The person who, at that time, was in the organs of leadership, at the in political parties, army, gendarmerie, communal police, religious denominations or in militia, has committed these offences or encouraged other people to commit them, together with his or her accomplices; 3° The well-known murderer who distinguished himself or herself in the location where he or she lived or wherever he or she passed, because of the zeal which characterized him or her in killings or excessive wickedness with which they were carried out, together with his or her accomplices; 4° The person who committed acts of torture against others, even though they did not result into death, together with his or her accomplices; 5° The person who committed acts of rape or acts of torture against sexual organs, together with his or her accomplices; 6° The person who committed dehumanising acts on the dead body, together with his or her accomplices. The Prosecutor General of the Republic publishes, at least twice a year, a list of persons classified in the first category, forwarded by *Gacaca* Courts of the Cell. 2nd Category: 1° The person whose criminal acts or criminal participation place among killers or who committed acts of serious attacks against others, causing death, together with his or her accomplices; 2° The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices; 3° The person who committed or aided to commit other offences persons, without the intention to kill them, together with his or her accomplices. 3rd Category: The person who only committed offences against property. However, if the author of the offence and the victim have agreed on their own, or before the public authority or witnesses for an amicable settlement, he or she cannot be prosecuted'.

previously included acts of sexual torture) and established more rigorous penalties.[64] The first category also comprised the masterminds and planners of the genocide and of crimes against humanity, perpetrators who covered positions of authority in the government, army, militia, political parties or religious groups and those who committed 'dehumanising' acts against dead bodies. Category 2 included murderers responsible for intentional homicide and manslaughter, and those who committed assault with the intention to kill and other offences against persons not falling within the first category. Category 3 only encompassed offenders against property.[65] The *gacaca* courts at the cell level were tasked with collecting all the data relevant to formulate the indictment. To accomplish such a key task, they relied on the necessary participation of the respective general assemblies. It is important to review the duties that the bench at the cell level accomplished pursuant to Article 34 of Organic Law 16/2004, which states that:

> The Seat for the *Gacaca* Court of the Cell exercises the following attributions:
>
> 1. with the participation of the General Assembly, to make up a list of persons:
>   1. who reside in the cell;
>   2. who were residing in the Cell before the genocide, locations where they kept shifting to and routes they took;
>   3. killed in their Cell of residence;
>   4. killed outside their Cell of residence;
>   5. killed in the cell while they were not residing in it;
>   6. victimized and their damaged property;
>   7. who took part in the offences referred to in this organic law.
> 2. to receive confessions, guilty plea, repentance and apologies from the persons who participated in genocide;
> 3. to bring together the files forwarded by the Public Prosecution;
> 4. to receive evidences and testimonies and other information concerning how genocide was planned and put into execution;
> 5. to investigate testimonies;
> 6. to categorize the accused as per the provisions of this organic law;
> 7. to put on trial and judge cases for the accused whose crimes classify them in the third category;
> 8. to give a ruling on objection to Seat members for the Gacaca Court of the Cell;
> 9. to forward to the *Gacaca* Court of the Sector, the files of the defendants classified in the second category;
> 10. to forward to the Public Prosecution, the files for the defendants classified in the first category;
> 11. to elect members of the Coordination Committee.[66]

[64] Article 51 of Organic Law 16/2004 as amended by Article 11 of Organic Law 10/2007. Compare both with Article 1(d) of Organic Law 08/96 of 30 August 1996.

[65] Ibid.

[66] Article 34 Organic Law 16/2004 defines victim as 'anybody killed, hunted to be killed but survived, who suffered acts of torture against his or her sexual parts, suffered rape, injured or victim of any other form of harassment, plundered, and whose house and property were destroyed because of his or her ethnic background or opinion against the genocide ideology'.

Like the previous normative provisions on *gacaca*, the procedure established through the 2004 Organic Law attributed an active role to the national prosecutors in the phase of evidence collection and consolidation of the indictments.[67] This cast doubts on the capacity of the *gacaca* system to respect the principle of parity of arms in a criminal trial. In fact, the presence of laypersons and, on occasion, illiterate judges, obviously is at odds with the principle of the presence of a legal professional able to formulate well-constructed accusations that are properly formulated in legal terms.

The *gacaca* courts at cell level had exclusive jurisdiction over Category 3 suspects.[68] They were also entitled to make a preliminary determination related to the categories where the defendants were placed.[69] Suspects falling within the second category were tried before the *gacaca* tribunals of the sector.[70] Pursuant to Article 29, every Rwandan citizen had the duty to participate in the *gacaca* court's activities. Those who omitted or refused to testify, and those who made a slanderous denunciation, were to be prosecuted by the *gacaca* courts. In these cases, the sentences were to range from three to six months. According to Article 40, the National Service of *Gacaca* Jurisdictions was charged with the follow up, supervision and coordination of the activities of *gacaca* courts. Unlike the previous legislation, Organic Law 16/2004 made popular participation in *gacaca* hearings mandatory.[71]

5.5.1 Confession and Guilty Plea Procedure

The guilty plea procedure envisaged a reduction of sentence in exchange for a full confession for any person who had committed crimes within the jurisdiction of *gacaca* courts. According to Organic Law 16/2004, apologies had to be made publicly both to the victims in case they were still alive and to Rwandan society (Article 54). The defendant's confession, to be accepted, had to: (1) give a detailed description of the offence, including modalities and whereabouts, time of commission, witnesses to the facts, person victimized, location of the bodies and damage caused; (2) reveal the co-authors, accomplices and any other useful information; (3) include an apology for the offences committed.

[67] See also Articles 34(3), 46, 47, 59, 60 and 61 of *Gacaca* Organic Law 16/2004.

[68] See Articles 34(7) and 41 of Organic Law 16/2004.

[69] See Article 34 of Organic Law 16/2004.

[70] See Article 42 Organic Law 16/2004.

[71] Article 29 of Organic Law 16/2004 of 19/6/2004; the previous Organic Law 40/2000 of 26/01/2001 did not contain such a provision.

The persons who did not want to recur to the confession procedure and to a guilty plea were not entitled to a penalty commutation. Unlike Organic Law 40/2000, Law 16/2004 also offered a penalty reduction to perpetrators placed in the first category that confessed and pleaded guilty without their name being previously published in the list of perpetrators drafted by the *gacaca* courts of the cell (Article 55).[72] The underlying rationale was that of encouraging spontaneous confessions.

5.5.2 Sanctions

Gacaca jurisdictions would normally observe the sentencing guidelines established by Organic Law 8/1996. The penalties provided for in the *gacaca* legislation were in general more lenient than those foreseen in the Rwandan Criminal Code. There were however exceptions to this general rule. Penalties issued by *gacaca* since the system became fully operational in 2006 ranged from life imprisonment to community service (*Travaux d'Intéret Général*, hereinafter also TIG). Some concerns surrounded the community service as a form of penalty. Individuals placed in category two and three who confessed were allowed to serve part of the sentence performing community service (the premise to profit from TIG has been changed according to the different *gacaca* laws). This option has sometimes shocked the Rwandan population, as individuals guilty of serious crimes could also be released, thus able to live side by side with their victims. The availability of community service as an alternative sentence has usually concerned those who commit petty crimes and are not considered dangerous to society. The Rwandan context is thus very different in this regard.

The perpetrators of offences to property were not sentenced, but rather had to pay damages. The *gacaca* penalty system aimed at encouraging confessions, which resulted in a reduced sentence for those convicted.

Originally, the sanctions provided for in the first *gacaca* Law 40/2000 were quite harsh. Convicted defendants categorised in the first group that did not confess, or whose confessions were rejected, were subject to a sentence ranging from the death penalty to life imprisonment by ordinary courts. Defendants who had made recourse to the confession and guilt plea procedure were sentenced to imprisonment ranging from 25 years to life imprisonment (Article 68 Organic Law 40/2000).

The sanctioning regime of the *gacaca* courts underwent several modifications. The first convictions were issued under the rule of Organic Law 16/2004. The sanctions provided for under this law are of particular interest. The preamble of the

[72] See Article 56 Organic Law 40/200: 'The persons whose criminal acts or criminal participation place in the first category do not enjoy penalty commutation. However, the persons who will have offered confessions and guilt plea without their names being previously published on the list of persons of the first category referred to in Article 51 of this organic law will be classified in the second category'.

2004 *Gacaca* Law included among the aims of the penalties provided 'allowing convicted persons to amend themselves and to favour their reintegration into the Rwandan society without jeopardizing the people's normal life'. The *gacaca* legislation did not make many other references to penological rationales. *Gacaca* were entitled to rule on sentences of up to thirty years in prison,[73] and those convicted by the *gacaca* jurisdictions were liable to the withdrawal of civil rights.[74] The gravity of the penalties delivered varied depending on the category of the offences and on the decision by the defendant to plead guilty, or not, and to confess.[75] Organic Law 16/2004, as was the case with the previous and subsequent *gacaca* laws, was characterised by the lack of sentencing guidelines, as well as a detailed list of aggravating or extenuating circumstances.

The 2004 legislation however offered a detailed penalties scheme (Table 5.2). The heaviest penalty provided for category one offenders was life imprisonment in solitary confinement,[76] a treatment that according to the UN Human Rights Committee amounts to a form of torture and is contrary to Article 7 of the ICCPR.[77] If the offenders had confessed, the minimum punishment amounted to 25 years imprisonment. Category 2 perpetrators were subject to a fixed term of incarceration, half of which was to be commuted to community service. This is a relevant difference in respect to the punishment scheme provided by the 1996 Organic Law, which did not contemplate community service. The latter became mandatory due to the 2004 *gacaca* law, while under the 2000 law this was optional for the convicted individual (Article 75 Organic Law 40/2000). Based on the confession and its timeliness, considerable penalty discounts were provided. Category 3 offenders were sentenced to civil reparation for the damages they had inflicted. *Gacaca* jurisdictions could complement the conviction to imprisonment through temporary

[73] See Articles 72–81 of Organic Law 16/2004.

[74] Organic Law 16/2004, Article 76: 'Persons convicted of the crime of genocide or crimes against humanity in pursuance of this organic law are liable to the withdrawal of civil rights in the following manner: 1° perpetual and total loss of civil rights, in conformity with the penal Code, for persons classified in the first category; 2° persons falling within the second category as prescribed in points 1° and of Article 51 of this organic law, are liable to permanent deprivation of the right: a. to vote; b. to eligibility; c. to be an expert witness in the rulings and trials, except in case of giving mere investigations; d. to possess and carry fire arms; e. to serve in the armed forces; f. to serve in the police; g. to be in the public service; h. to be a teacher or a medical staff in public or private service. 3. Persons in the first and the second category shall be put on the list which shall be posted at the office of the Sector of their domicile'.

[75] See Articles 72–81 of Organic Law 16/2004.

[76] Solitary confinement as a penalty was not established by Organic Law 16/2004, but was introduced by further legislation, see Article 4 Organic Law 31/2007 of 2007 Relating to the Abolition of the Death Penalty.

[77] On this point, see UN Human Rights Committee (UHRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, available at: http://www.refworld.org/docid/453883fb0.html. Last accessed 2 March 2018.

or permanent *dégradation civique. Gacaca* courts could also order the restitution or payment of the value of the looted property.

Article 52 of the 2004 law elucidated aggravating circumstances such as being in a position of authority during the genocide. This aggravating factor subjected the defendant found guilty to the most severe punishment within the category (s)he belonged to. Mitigating factors were connected with confession, apologies and age. The punishment of persons found guilty who at the time of the genocide were between 14 and 18 years old was half of the corresponding penalty provided for with respect to adults. Individuals who were at that time younger than 14 years old were not subject to prosecution and had to be released in order to attend solidarity camps with an educational purpose.

An additional list of aggravating and mitigating circumstances was also provided in a manual that the national government delivered to instruct *gacaca* judges (*Manuel explicatif sur la loi organique portant création des juridictions gacaca*). This is a crucial document to understand the *gacaca* process as it exerted a strong influence on the law in practice of the courts. Concurrent convictions were listed as an aggravating circumstance leading to the issuance of the most severe penalty foreseen under the law. Under mitigating circumstances the manual listed vulnerability, undue influence, and the fact that the defendant had saved the lives of other victims. The consideration of mitigating factors outside the *gacaca* legislation remained however discretional. The *gacaca* legal framework in general lacked clear criteria to evaluate evidence. Nor were guidelines provided as to how to choose the most suitable community service consistently with the sentencing reasoning. In fact, while the judgement had to be motivated, the sentence had not.[78] Data provided by ASF regarding the years 2005–2010 show that *gacaca* courts tended to deliver quite harsh penalties.[79] Convictions of less than one year regarded 0,6% of the individuals tried; of 1–5 years: 2,4%; to 5–10 years: 6,5%; to 10–20 years: 13,9%; of more than 20 years: 12,4%; of life imprisonment in solitary confinement: 2,8% of the defendants. The acquittal rate was about 16,8% of the total. Whilst in the *gacaca* process by its completion stage in 2012 more than one million genocide suspects had been tried, a comprehensive assessment of the penological reasoning of *inyangamugayo* remains difficult. From the data available, according to Drumbl it can be carefully concluded that: (1) in terms of the variety of the penalties, *gacaca* offered a more nuanced approach than the national courts and ICTR; (2) the *gacaca* case law has not fully expressed the penological rationales aiming at inclusiveness, restoration and reconciliation.[80]

[78] On this point, see Drumbl 2007, p. 90: 'Despite the importance of community service, it is unclear whether judges can give voice to penological rationales, say retribution or restoration, through the choice of which kinds of service projects to assign to particular offenders'.

[79] Avocats Sans Frontières 2010, p. 52.

[80] Drumbl 2007, pp. 89–99.

Table 5.2 *Gacaca* punishment according to Articles 72–73 of Organic Law 16/2004

Category	No confession, confession rejected	Confession after enlistment	Confessed prior to enlistment
One	Life imprisonment or death penalty	Life imprisonment or death penalty	25–30 years imprisonment
Two (with intent to kill)	25–30 years imprisonment	12–15 years imprisonment: half in custody, half in community service	7–12 years imprisonment: half in custody, half in community service
Two (without intent to kill)	5–7 years imprisonment: half in custody, half in community service	3–5 years imprisonment: half in custody, half in community service	1–3 years imprisonment: half in custody, half in community service
Three	Damages	Damages	Damages

Source P. Sullo

5.5.3 Appeal

Law 16/2004 included three modalities of remedy against the verdict, namely opposition, appeal and review. Both the defendant and the victim could lodge an opposition against the judgement issued *in absentia* presenting serious reasons for their absence.[81] According to Article 89 of Law 16/2004, appeals against judgements concerning offences against property issued by the *gacaca* court at cell level could not be lodged. Reportedly, however, the National Service of *Gacaca* Jurisdictions allowed a review of these judgements.[82] Other offences were subject to appeal before the *gacaca* court of the sector. The latter could decide 'in the last resort'. The only subjects provided with a right to appeal under the 2004 Organic Law were the convicted person and the victim (Article 90). This limited appeal opportunities, which might lead to paradoxical outcomes where the victim had died (a quite frequent case for crimes listed in category two) were expanded by an amendment introduced by Organic Law 10/2007. The latter established that 'The defendant, plaintiff or any other interested person may appeal against a judgement passed by a *gacaca* Court, in the interest of justice' (Article 19). The amendment triggered an increase in the appeal rate that the National Service of *Gacaca* Jurisdictions addressed, clarifying that an appeal in the interest of justice was only possible where nobody could act in place of the victim, or the law had obviously

[81] See Article 86 Law 16/2004: 'The judgements passed by default under the provisions of this organic law, opposition may be made against. The objection is brought before the Court which has passed the judgement at the first level. The petitioner registers it to the secretary of the *Gacaca* Court. The opposition is only admissible if the defaulting party pleads a serious and legitimate reason which impeded him or her from appearing in the trial concerned. The Court shall assess the ground of admissibility, admit or reject it'.

[82] See Bornkamm 2012, p. 71.

been applied incorrectly.[83] Appeal was also possible before the *gacaca* court of sector against a sentence regarding offences against the administration of justice issued by the *gacaca* courts of the cell.[84]

According to *gacaca* law, the judges at appeal level had to make a new inquiry into the case concerned. Article 91 Law 16/2004 in fact established that 'The case is judged in the same way as before'. The NGO ASF, however, has stressed that often the *inyangamugayo* in the appeal phase simply relied on the transcripts of the trial at first instance transmitted by the *gacaca* court of the sector.[85] The deadline for lodging the appeal was the same as that for its opposition: fifteen days from the day of the judgement. The written form was required for both the appeal and the judgement. The latter had to be properly motivated to allow the defendant to lodge an appeal.[86] An appeal was lodged in around 15% of the cases decided by *gacaca* courts of the sector.[87]

Article 93 of *Gacaca* Law 16/2004, which listed three cases in which review of the judgement was possible, was amended by Organic Law 10/2007 and 13/2008.[88] According to the last amendment a case decided by a *gacaca* court could be subject to review when: (1) new evidence emerged contradicting what was established at last resort by a *gacaca* court; (2) the accused was given a sentence inconsistent with the law. The subjects entitled to file a review and complain were the convicted person; the victim, or any other person in the interest of justice. Finally, Article 24 of Organic Law 13/2008 established that 'the *Gacaca* appeal court is the only competent court to review a case that was fully determined by another *Gacaca* court. A case determined at a last appellate level by an ordinary or military court

[83] See Bornkamm 2012, p. 72.

[84] See Articles 29, 30 and 32 Organic Law 16/2004.

[85] See Avocats Sans Frontières 2005, p. 13 referring to the following cases: J.A Niyikiza Patalon, Nikozivuze José Ezechiel, Nzabanita Alphonse, Secteur Mukamira, District Buhoma, 19/07/2005, Ruhengeri J.A Nsigayehe Boniface, Rwamaraba/Ville de Gitarama, 16/06/2005, Gitarama J.A Giraneza Ferdinand, Nsigayehe Boniface, Musabyimana Protogene, Rwamaraba/Ville de Gitarama, le 16/06/2005, Gitarama.

[86] Criticisms have concentrated on the lack of reasoning that has characterised the judgement of *gacaca* courts. On this point see Avocats Sans Frontières 2005, p. 32.

[87] See Bornkamm 2012, p. 71.

[88] According to Article 93 the judgement could be reviewed only when: (a) the person was acquitted in a judgement passed in the last resort by an ordinary court, but is later found guilt by the *Gacaca* Court; (b) the person was convicted in a judgement passed by an ordinary court, but is later found innocent by the *Gacaca* Court; (c) the person was given a sentence contradictory to the legal provisions on offences of which is convicted. Article 93 Law 16/2004 was amended by 20 of Organic Law 10/2007 establishing that 'A judgement can be subject to review when: (a) a person was acquitted in a judgement passed in the last resort by an ordinary court, but is thereafter found guilty by a *Gacaca* Court; (b) a person was convicted in a judgement passed in the last resort by an ordinary court, but is thereafter found innocent by a *Gacaca* Court; (c) a judgement was passed in the last resort by a *Gacaca* Court, and later on there are new evidence proving contrary to what the initial judgment of that *Gacaca* Court was grounded; (d) a person was given a sentence that is contrary to legal provisions of the charges against him or her'.

may also be reviewed by the same court'. The rate of review was relatively low, amounting approximately to two per cent of cases.[89] Competent for the admissibility of the review request was the general assembly of the sector where the judgement was issued, while the jurisdiction belonged to the *gacaca* court of appeal (Article 24 Organic Law 13/2008). The 2008 reform of the review system was welcomed by NGOs working in Rwanda, as it solved the problem connected with the possibility given to *gacaca* courts to review judgements passed by both ordinary and military courts.[90] The review system in force since 2008 was considered to be in line with international standards.[91]

5.6 Organic Law 28/2006

This Organic Law slightly modified the previous *gacaca* normative framework by introducing a new list of incompatibilities for those acting as *inyangamugayo*.

The list of incompatibilities, included in Article 4 of the law concerned:

(1) the person exercising a political activity;
(2) a Government official;
(3) the soldier or the policeman who is still in active service;
(4) the career magistrate;
(5) the member of the leadership of a political organization.

Ineligibility, however, was waived if the resignation of the *inyangamugayo* from his or her position was accepted. The government officials considered were the Governor of the Province, the Members of the Executive Committee and of the District of the City of Kigali, and the members of the political and administrative committee at the cell level. Consistently with the previous normative framework, no one whose name appeared on the list of genocide suspects could elect or be elected as a *gacaca* judge. Those who committed only offences against property however remained eligible.

5.7 Organic Law 10/2007

This Organic Law reduced the number of judges composing the bench at both the cell and sector level by establishing that 'Each Bench of the *Gacaca* Court is made up of seven (7) persons of integrity and two (2) substitutes' (Article 1). It also amended Article 51 of Organic Law 16/2004, the norm classifying perpetrators in

[89] See Bornkamm 2012, p. 74.

[90] On this point, see Avocats Sans Frontières 2007, p. 61.

[91] See Bornkamm 2012, p. 75.

the three aforementioned categories. Organic Law 10/2007, by limiting category one perpetrators to planners, organisers, persons in a position of leadership and offenders responsible for sexual crimes, considerably expanded the jurisdiction of *gacaca* courts. While easing the burden of national ordinary courts, this amendment augmented the workload of the *gacaca* courts at the sector level.

Lighter penalties were provided for those who committed acts of torture or dehumanising acts on dead bodies, which were classified in the second category.[92] The continuous shifting of the categories of the perpetrators of genocide-related crimes, which were subject to different penalties according to the distinct *gacaca* laws, generated ambiguity and confusion.

Articles 13 and 14 of the 2007 *gacaca* law reshaped the guilty plea procedure and the penalties provided for those who were admitted to this procedure. Article 20 provided for the cases in which a judgement was subject to review. Another important normative novelty introduced by Law 10/2007 concerned the possibility of *gacaca* courts to establish new benches in the same court. Article one of Organic Law 10/2007 established that the *gacaca* court could include more than one bench, where necessary. The modalities to set up the new benches were dictated in an instruction of the National Service of *Gacaca* Courts.[93] Around 1,800 new benches were added at the sector level, whilst 400 were set up at the appeal level. The increase in the number of the judges had remarkable consequences in speeding up the trials.[94] While under Organic Laws 40/2000 and 16/2004 the accused could delay his/her confession until the appeal phase, under Law 10/2007 the defendant had to confess before the judgement of first instance. The confession at appeal stage in fact had no mitigation effects on the punishment.[95]

5.8 Organic Law 13/2008

Passed when several individuals had already been tried before *gacaca* courts, the Organic Law 13/2008 marked an important shift in terms of prosecution policy in Rwanda. It explicitly allowed some groups of perpetrators falling within the first category to be tried before *gacaca* courts. Article 1 of this law amended Article 2 of the Organic Law 16/2004. As a consequence, *gacaca* courts gained jurisdiction on the following individuals:

[92] See Article 11 of Organic Law 10/2007.

[93] See Instruction N. 11/2007 of 2 March 2007 issued by the Executive secretary of the national Service of *Gacaca* Courts Concerning the creation and Coordination of Additional Benches in *Gacaca* Courts. See also Bornkamm 2012, p. 48.

[94] See Bornkamm 2012, p. 48.

[95] See Bornkamm 2012, p. 68. See Article 58(3) of Organic Law 10/2007.

Table 5.3 Guilty plea procedure according to Organic Law 13/2008

Category	Without confession or confession rejected		Confession after enlistment among the suspects		Confession without enlistment	
	Adults	Minors	Adults	Minors	Adults	Minors
1st Category	Life imprisonment in solitary confinement	Imprisonment 10–20 years	25–30 years	8–9 years	20–24 years	6.5–7.5 years
2nd Category 1, 2, 3	Life imprisonment 30 years	10–15 years	25–29 years half in community service, 1/6 suspended	6,5–7,5 years half in community service, 1/6 suspended	20–24 years half in community service, 1/3suspended	6–7 years half in community service, 1/3 suspended
2nd Category 4, 5	15–19 years imprisonment	4.5–5.5 years	12–14 years half in community service, 1/6 suspended	4–5 years half in community service, 1/6 suspended	8–11 years half in community service, 1/3suspended	2.5–3.5 years half in community service, 1/3 suspended
2nd Category 6	5–7 years, half in community service, 1/6 suspended	2.5–3.5 years half in community service, 1/6 suspended	3–4 years half in community service, 1/6 suspended	1.5–2.5 years half in community service, 1/6 suspended	1–2 years half in community service, 1/3 suspended	0.5, 1.5 years half in community service, 1/3 suspended

Source P. Sullo

(1) instigators, supervisors and ringleaders of the genocide or crimes against humanity;
(2) any person who was at the leadership level at the Sub-Prefecture and Commune (including public administrators, political, army, police and religious leaders who committed crimes of genocide or crimes against humanity or encouraged others to commit similar offences);
(3) any person who committed the offence of rape or sexual torture.

Another important provision introduced by this Organic Law is included in Article 6, which established an *in camera* procedure for those cases related to rape or sexual torture.[96] New mechanisms introduced by Law 13/2008 concerned the execution of the penalty. Article 21 in particular, repealing Article 80 of Organic Law 16/2004, established that a person condemned to both a custodial sentence and community service had to first serve community service. If the convicted person executed the work in an exemplary way, the custodial sentence was commuted into community service. This provision offered to several individuals found guilty of genocide-related crimes the possibility to serve their penalty without being imprisoned. Another interesting innovation introduced by Law 13/2008 concerned the guilty plea procedure, where the request for forgiveness by the perpetrator was made a *condicio sine qua non* for a penalty reduction (Table 5.3).[97] According to Law 13/2008, the request for forgiveness must be addressed to 'a duly constituted bench, a judicial police officer or a public prosecutor investigating the case'.[98]

5.9 Organic Law 04/2012 Terminating *Gacaca* Courts and Determining Mechanisms for Solving Issues Which Were Under Their Jurisdiction

When the *gacaca* experiment was approaching its end in June 2012, the Government of Rwanda promoted the adoption of a law terminating the courts. According to Organic Law 04/2012, the following are tasked with the prosecution of offences constituting genocide previously falling within the jurisdiction of the

[96] Article 6 of the Organic Law 13/2008 states: 'A victim of the offence of rape or sexual torture may submit her or his complaint to the Sector *Gacaca* Court where the offence was committed from, the judicial police or the public prosecution. In case the victim to any other above offences is dead or is incapacitated to lodge such a complaint, a concerned party may secretly lodge such a complaint in a manner provided in preceding paragraph. It is prohibited to publicly confess commission of any of the above crimes. No person shall be permitted to initiate proceedings in respect to any of the above offences against another in public. All formal proceedings in respect to the above offences shall be held in camera. Delegates of the National Service in charge of the follow up, supervision and coordination of the activities of *Gacaca* Courts, security officers, and Trauma Counsellors may follow up a matter being tried in camera'.

[97] See Clark 2010, p. 279.

[98] See Article 12 Organic Law 13/2008.

gacaca courts: The Intermediate Courts; the Primary Courts, and the Mediation Committees known as *abunzi*. In Rwanda there are operational 12 Intermediate Courts, 60 Primary Courts and approximately 2,150 Mediation Committees.[99] Article 4 of Law 04/2012 lists the offences 'constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity' tried at first instance by the Intermediate courts:

(1) offences or criminal participation acts aimed at planning, organising, inciting, supervising and leading the crime of genocide or other crimes against humanity, committed by a person with his/her accomplices;
(2) acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994 by a person who, at that time, was in the organs of leadership, at national and prefecture levels with his/her accomplices.

Article 5 lists the offences falling within the jurisdiction of Primary Courts, which include:

(1) acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994 by a person who, at that time, was in the organs of leadership at sub-prefecture or commune level: in public administration, political parties, communal police, religious denominations, or illegal militia groups or encouraged other people to commit them, with his/her accomplices;
(2) acts of rape or sexual torture, committed by a person with his/her accomplices; homicide; acts of torture; dehumanising acts on a corpse; serious attacks against others causing death; causing injuries or committing other serious attacks against people, with intention to kill them, even if the objective was not accomplished; other criminal acts against persons without any intention of killing.

Article 6 of Law 04/2012 establishes that offences against property which were committed by civilians, gendarmes or soldiers, and were previously within the jurisdiction of *gacaca* tribunals, are to be tried by the Mediation Committees. According to Article 6, offenders are also responsible for paying compensation.

Article 7 of Law 04/2012 defines the competence of military courts.[100] Finally, Article 10 of the law lists four cases where judgements delivered by *gacaca* can be reviewed by a competent court:

[99] See Immigration and Refugee Board of Canada, Rwanda: Whether the *gacaca* courts are still operational; if not, the new mechanisms for solving issues that were under the jurisdiction of *gacaca* courts (July 2010–Sept. 2012), 4 October 2012, available at: http://www.refworld.org/docid/50aa41462.html. Last accessed 4 July 2016.

[100] Article 7 in particular establishes that 'acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity committed by a soldier or a gendarme between 1 October 1990 and 31 December 1994, which were within the jurisdiction of *Gacaca* Courts but not

(1) if a person is convicted of homicide by a *Gacaca* Court final judgment and after the person alleged to have been killed is found alive;
(2) if a person is definitively convicted of homicide by a *Gacaca* Court and it is the only crime to which he/she is convicted, and later another person is convicted of the same crime where there is no complicity between the two;
(3) if, after a person has been acquitted by a *Gacaca* Court final judgement, it is found beyond reasonable doubt that there is reliable information disclosed during the period of collecting information, unknown at the time of adjudicating the case and which however proves his/her criminal responsibility;
(4) if a person has been convicted or acquitted by a *Gacaca* Court final judgement and later it is found that the bench which rendered the decision was corrupt, as decided by a competent court.

It has been reported that the Organic Law terminating *gacaca* courts has been criticised by members of the National Commission for the Fight against Genocide. The reason for the criticism is that, allegedly, the law allows convicted individuals to seek an appeal too easily.[101] Consequently, the Commission for the Fight against Genocide will draft an amendment for a proposal aimed at addressing the loopholes within the law.[102]

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relating to looting and damaging property shall be tried at the first instance by the Military Tribunal'.

[101] On this point, see The New Times, 'Why CNLG seeks to amend law terminating *Gacaca*', 8 December 2014, available at http://www.newtimes.co.rw/section/article/2014-12-08/183818/. Last accessed 4 July 2016.

[102] Ibid.

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Chapter 6
Gacaca Courts Under Human Rights Scrutiny

Contents

Abstract This chapter assesses *gacaca* courts against the background provided by domestic and international norms governing fair trial standards. The question whether *gacaca* courts provided a fair trial has been answered by investigators in different, sometimes contrasting ways. The concerns expressed by scholars and practitioners regarding the respect by *gacaca* of key principles of fairness, such as independence of the judges, non-retroactivity of criminal law, the right to defence, double jeopardy and the presumption of innocence, are given wide room. This investigation answers the questions regarding whether *gacaca* courts respected constitutional and international fair trial standards providing a fair trial in terms of formal justice. To assess *gacaca* however it is also necessary to answer the question whether these courts, despite formal shortcomings, were able to provide fair trial in substantive terms. The latter aspect is in the spotlight on the next chapters, which analyse the daily practice of *gacaca* courts and the perceptions of ordinary Rwandans concerning the fairness of the trial before *gacaca*.

Keywords Fair trial standards · ICCPR · Universal Declaration of Human Rights · Human Rights Committee · African Charter on Human and Peoples' Rights · African Court on Human and Peoples' Rights · Dakar Resolution on Fair Trial and

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Judicial Assistance in Africa (Dakar Declaration 1999) · non-retroactivity of criminal law

6.1 Premise

Writing about *gacaca* courts, Schabas has highlighted that the fairness of a judicial system is also a culturally sensitive issue. In 2005 he in fact wrote that:

> Some of the harsh initial judgements about the shortcomings in the trials were made by lawyers trained in common law jurisdictions, who misunderstood some of the aspects of the "civil law" approach that Rwanda had inherited from Belgium and France. They were shocked, for example, at the relative brevity of the trials, and the reliance on written evidence, and the lack of cross-examination. By contrast, trial observers who came from "civil law" traditions were relatively sanguine and even rather impressed with the proceedings.[1]

Investigators have warned that we should not assess *inkiko gacaca* by comparison with the framework of an ideal, abstract and non-existent model.[2] Distinct legal traditions lead us to evaluate differently the substantial and procedural aspects of a given penal system. A single provision should always be assessed within the more general legal framework and practice context in which it is applied. This is also true for the *gacaca* system, which has operated in a setting marked by the previous failure of the ordinary criminal justice system, where the social fabric has been severely affected by a wave of unspeakable violence. How is it possible then to evaluate the fairness of *gacaca* jurisdictions? Against what paradigms, minimum standards and requirements should this be done? In post-genocide settings, should the performance and the purpose of criminal justice be evaluated in the light of provisions conceived to be applied in context marked by 'ordinary' violence? To what extent do we have to take into account considerations regarding neighbourly violence in such contexts? To answer these questions I first scrutinize the compliance of *gacaca* courts with domestic and international fair trial standards. This investigation answers the questions regarding whether *gacaca* courts provided fair trial in terms of formal justice. To assess *gacaca* however it is also necessary to answer the question whether these courts, despite formal shortcomings, were able to provide fair trial in substantive terms.[3] This is why in the next chapters I assess both the practice of *gacaca* courts and the perception of ordinary Rwandans concerning their procedural and sentencing rationale. All these aspects have to be considered together in order to produce a comprehensive evaluation of *gacaca* courts which is not limited to formal aspects.

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[1] Schabas 2005, pp. 886–887.

[2] Haveman and Muleefu 2011, p. 220.

[3] For a definition of substantive justice, see note 43 in Chap. 1.

Rwanda's duty to respect fair trial standards depends not only on the several international instruments the African country has ratified, but also on internal provisions of constitutional relevance. Very importantly, the provisions of the heterogeneous normative bodies that formed Rwandan constitutional law until 2003 expressly recalled the Universal Declaration of Human Rights (UDHR), the direct application of which has been confirmed by the Rwandan Constitutional Court, as well as the African Charter on Human and Peoples' Rights. Additionally, the international community was allowed to play a monitoring role with respect to Rwanda's compliance with human rights norms.[4] As explained above, proceedings before ordinary courts were marked in Rwanda by disregard of these standards, which was criticized by the international human rights community and NGOs. *Gacaca* trials sparked a dichotomous reaction. On the one hand, some scholars held *gacaca* tribunals as an experiment in violation of the minimum fair trial standards and an instance of politicized justice. On the other hand, certain researchers believe that they should not have to be evaluated against imposed Western standards. Among the former, some held that the *gacaca* system institutionalised breaches of international fair trial standards.[5] Among the latter, scholars Timothy Longman and Phil Clark ground the value of the *gacaca* experiment in the concept of legal pluralism, arguing that what is important is not whether a *gacaca* jurisdiction provided for a fair trial according to western paradigms, but if they provide for a fair trial under a substantive perspective.[6] Clark in particular, has (too optimistically) argued that the *gacaca* system included a certain number of safeguards for the accused, including the active role of the local assemblies, which would lead to a fair trial in substantive terms.[7] The participation in the *gacaca* hearings however has significantly dropped down from time to time, limiting the participatory nature of *gacaca*, allegedly one of its key barriers against abuses.[8]

The Rwandan Minister of Justice in a letter to Human Rights Watch has criticized the application of the western approach to criminal justice arguing that 'due process is a relatively new concept in Rwanda', and that '*Gacaca* was created as an extraordinary measure for solving an extraordinary instance of human rights violation'.[9]

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[4] See Articles 1 and 6 of The Protocol of Agreement between the Government of Rwanda and the RPF on the rule of law of 18 August 1992, Articles 14 and 17 of The Protocol of Agreement on Miscellaneous Issues and Final Provisions of 3 August 1993, and Constitutional Court, (Judgment of 09 of July 26, 1995).

[5] See Haile 2008, p. 21: 'What is more disturbing about the *gacaca* process, however, is that while violations of fair trial standards in regular courts occur in spite of the law, the *gacaca* law institutionalizes such violations in contravention of the Rwandan Constitution, the African [Banjul] Charter on Human and Peoples' Rights (ACHPR) and other relevant international human rights instruments'.

[6] Longman 2006, p. 214.

[7] Clark 2010, in particular pp. 154–161.

[8] Ingelaere 2016, pp. 5 and 66–67.

[9] Human Rights Watch 2011, p. 138.

All this being said, the status of procedure '*extra ordinem*' of *gacaca* under the perspective of international fair trial standards is not easily questioned. The crucial point to focus on is whether these standards should apply to contexts marked by resources constraints like post-genocide Rwanda. Legal scholarship has pointed out that international law instruments don't appear to take into account the resource constraints by which developing countries may be surrounded.[10]

It is crucial at this point to assess the performance of *gacaca* against the duty to respect fair trial standards binding Rwanda. The following evaluation of the *gacaca* experiment, hence, adopts as an evaluation parameter the due process and fair trial guarantees entrenched in the Rwandan Constitution, the international and regional treaties to which Rwanda is a party, and their interpretations by pertinent jurisprudential bodies and the relevant doctrine. In this light, the practice of the African Commission on Human and Peoples' Rights deserves due consideration, as the relativist position of some scholars arguing against the universal application of human rights norms in the African context needs to be assessed against the African legal culture and practices. The Dakar Declaration in particular acknowledged that traditional courts must comply with the fair trial provisions of the Banjul Charter, which are similar to those articulated in Article 14 of the ICCPR.[11] While recognising that traditional courts play a critical role in many African countries, the Dakar Declaration also highlighted that 'these courts also have serious shortcomings which result in many instances in a denial of fair trial'. Therefore, the Dakar Declaration announced unequivocally that, 'traditional courts are not exempt from the provisions of the African Charter relating to fair trial'.

6.2 Principle of Non-Retroactivity of Criminal Law

The Principle of non-retroactivity of criminal law, *nullum crimen, nulla poena sine praevia lege*, one of the cornerstones of contemporary criminal law, is enshrined, *inter alia*, in Article 15 of the ICCPR. According to Article 4 ICCPR, the principle of non-retroactivity is not derogable even in time of public emergency which threatens the life of a nation. Article 15 of ICCPR solemnly affirms that:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be

[10] See Schabas 2002, p. 538: 'Like the International Covenant on Civil and Political Rights, the Convention for the Prevention and Punishment of the Crime of Genocide does not make the obligation to prosecute subject to available resources'.

[11] The Dakar Declaration was adopted on 11 September 1999 following a seminar on the Right to a Fair Trial in Africa organised by the African Commission on Human and Peoples' Rights. See *Dakar Resolution on Fair Trial and Judicial Assistance in Africa*, African Commission on Human and Peoples' Rights (1 September 1999).

imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.

Similarly, also the African Charter on Human and Peoples' Rights embodies the principle of non-retroactivity of criminal law.[12] The Rwandan constitutional system at the time when *gacaca* courts were set up, formally recognised the superiority of certain instruments of international law over both national laws and the constitution. Article 17 of the Protocol on various issues and final provisions included in the Fundamental Law of 5 May 1995 pointed out the primacy of the Universal Declaration of Human Rights (which embodies fair trial standards). The Protocol affirms that 'Concerning fundamental rights and freedom, the principles contained in the Universal Declaration of Human Rights of 10 December 1948 have primacy over the corresponding principles in the Constitution of the Republic of Rwanda of 10 June 1991 in case of conflict'.[13] With the adoption of the 2003 Constitution, the primacy of international treaties on ordinary and organic laws was upheld, while every reference to the constitutional norms was avoided. This might suggest that the 2003 Rwandan Constitution, in case of conflict, should prevail over international norms.

Rwanda tried to punish criminal acts committed between 1990 and 1994 by adopting a set of laws dating from 1996 onwards without violating principle *nullum crimen, nulla poena sine lege*. How could this be argued, and what was the rationale underlying this attempt? The issue of retroactivity regards both Organic Law 8/1996, giving jurisdiction to ordinary courts on genocide and crimes against humanity, and the *gacaca* normative framework which followed, being *inter alia* the principle *nullum crimen, nulla poena sine lege* embodied also in Article 20 of the Rwandan Constitution of 2003.[14] Rwanda ratified the 1948 Genocide Convention in 1975 without adopting internal legislation providing for

[12] See Article 7.2 ACHPR: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender'.

[13] I rely on the translation from French into English of Fierens 2005, p. 906.

[14] See Article 20 of Rwanda's Constitution: 'Nobody shall be punished for acts or omissions that did not constitute an offence under national or international law at the time of commission or omission. Neither shall any person be punished with a penalty which is heavier than the one that was applicable under the law at the time when the offence was committed'.

corresponding penalties. The problem surrounding the prohibition of crimes against humanity is also rather complicated.[15]

Rwanda ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968, which however does not include specific prohibitions. It simply prohibits a statute of limitation with regard to crimes against humanity, whether committed in time of war or in time of peace, as defined in the Charter of the International Military Tribunal at Nuremberg of 8 August 1945, and confirmed by Resolution 3(I) of 13 February 1946 and Resolution 95(I) of 11 December 1946 of the General Assembly of the United Nations.[16] The ratification of this Convention has neither introduced crimes against humanity into Rwandan criminal law, nor provided for specific penalties.

Through Article 1 of Organic Law 8/96 the National Transitional Assembly tried to solve the problem of retroactivity by providing a link between the criminal offences and the penal code in force at the time when the crimes were committed.[17] The offences had to be punished under both the penal code, which also provided for the penalties for the offences committed (with a few exceptions),[18] and the Organic Law referring to international instruments. Organic Law 8/96 required in fact a sort of double incrimination.[19] The first *gacaca* law adopted the same criteria, as it also required a sort of double incrimination by both the Rwandan Penal Code and Organic Law 40/2000 recalling the international norms.[20]

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[15] For a legal analysis of the instruments binding Rwanda to the due process of law principle see also Fierens 2005, p. 896: 'Customary international law could have been invoked to justify the prohibition on crimes against humanity, although this argument prompts discussions over the existence of such customary nature. The prohibition was established in 1994, though these crimes were only included twice, in the Charters of the International Military Tribunals at Nuremberg and for the Far East'.

[16] Ibid., p. 907.

[17] See Article 1 Organic Law 8/1996.

[18] See Article 14 of Organic Law 8/1996 and 40/2000.

[19] See Fierens 2005, p. 907: 'The reasoning stood as follows: the 1977 Rwandan Penal Code incriminated acts equivalent to genocide or crimes against humanity, but under different appellations. Thus, it was put forward that punishing such acts with the sentences provided for in the code would suffice to counter retroactivity. The argument's weakness is immediately apparent. Applying penalties from the Penal Code to acts prohibited elsewhere than in the Code bears more resemblance to legalistic block-building than respect for the principle of non-retroactivity. A genocide or crime against humanity does not contain the same acts as those laid out in the Penal Code. The overarching social necessity of going beyond the traditional incriminations of murder, assault and battery or rape is one such clue of this. The point, as it was in 1945, is to adopt different prohibitions precisely because what happened went beyond the penal code. Furthermore, the international prohibition, which purports to express the exceptional gravity, even supreme gravity, of certain crimes, calls on judges to inflict particularly severe penalties, and thus engenders retroactive effects'.

[20] 'Organic Law no. 40/2000 of 26 January 2001, establishing the creation of *gacaca* courts, also contained a double prohibition, phrased in rather awkward terms inherited from the Organic Law of 1996. The ambiguity stems from the unfortunate juxtaposition of para 1 and *lit.* b, which reads:

The effort to respect the inderogable principle of non-retroactivity is unfortunately not convincing. Rwandan lawmakers have considered the acts committed during the genocide as equivalent to the acts punished under a different name by the criminal code, thus ignoring that the *mens rea* or psychological element of the crime of genocide and of the crimes against humanity is different from the psychological element of ordinary crimes. A murder of several individuals for instance, is punished by the penal code without referring to the 'intent to destroy in whole or in part a national, ethnic, religious or racial group' and amounts to a crime that is substantially different from genocide. Surprisingly, the 2004 *Gacaca* Law abandoned any pretence to non-retroactivity and did not require any double incrimination.[21] As a consequence, attempts to punish the crime of genocide without violating the principle of non-retroactivity were instead totally lacking in Article 1 of the 2004 *Gacaca* Law.

Article 3 of the 2004 Organic Law, abandoned every reference to the 1977 Rwandan Penal code by stating that *gacaca* courts 'are in charge of putting on trial, within the limits established by this organic law, the offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994'. The Law included only in its Preamble some statements concerning the necessity of a link between punishable acts and the Rwandan Penal Code in force at that time,[22] and certain references to international law instruments.[23] As a consequence, the law expressly permitted the punishment of crimes against humanity and genocide committed prior to its enactment. In the words of Dadimos Haile:

> The reference to the Penal Code apparently concerns those acts that are qualified under the new law as having been "carried out with the intention of committing genocide or crimes against humanity" but, otherwise, do not constitute those crimes. It is unclear what type of acts can be carried out "with the intention of committing genocide and crimes against humanity" but are not covered by the laws applicable to the latter categories of crimes. What is clear is that the new law is partly designed to allow the punishment of acts that are proscribed under the Penal Code but on the basis of modifications and penalties introduced after the fact; which is a clear violation of the principle of the non-retroactivity of criminal law.[24]

'acts qualified and punished by the penal code and which constitute … offences aimed at in the penal code…". See Fierens 2005, p. 907.

[21] For a contrary opinion, see Bornkamm 2012, p. 51.

[22] See Organic Law 40/2000, preamble: 'Considering that the committed acts are both constituting offences provided for and punished by the Penal Code, and crimes of genocide or crimes against humanity (…) Considering, consequently, that prosecutions must be based on the penal code of Rwanda'.

[23] Ibid.: 'Considering that the crime of genocide and crimes against humanity are provided for by the International Convention of December 9, 1948, relating to repression and punishment of the crime of genocide; Considering the Convention of November 26, 1968 on imprescriptibility of war crimes and crimes against Humanity'.

[24] See Haile 2008, p. 22.

In fact, the 2004 *gacaca* legislation also moved offences from a lower category to that of more serious ones, as in the case of rape, which was suddenly included in category one, a category for which *gacaca* tribunals had at that time no jurisdiction as it fell within the jurisdiction of ordinary courts.[25] In other cases, the *gacaca* legislation has introduced new offences, such as 'dehumanizing acts on dead bodies',[26] displaying a certain disregard for the principle of non-retroactivity. Once again in order to deal with the crime of genocide the path chosen was to derogate from the principle *nullum crimen sine lege*, making the Nuremberg paradigm the rule more than the exception.[27]

6.3 Fair Trial Standards

Trials before *gacaca* are to be assessed against Article 14 ICCPR, which embodies a detailed number of provisions and guarantees concerning the due process minimum standards and enshrines the same guarantees provided in the African Charter on Human and Peoples' Rights and in the Universal Declaration of Human Rights.[28]

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[25] On this point, see the amendments to the legislation allowing *gacaca* courts to try category 1 perpetrators adopted through Organic Law 10/2007 and 13/2008.

[26] This offence has been newly introduced and added to the first category of offences, the most serious ones, in the 2004 *Gacaca* Law, (see Article 51(6)).

[27] See Judgment of the International Military Tribunal for the Trial German Major War Criminals: Nuremberg, 14 November 1945–1 October 1946, Vol. 1: 'It is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished', available at http://avalon.law.yale.edu/imt/judlawch.asp. Last accessed 4 February 2018.

[28] Article 14 ICCPR in particular affirms that: 1. 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend

Two important instruments of the interpretation of the meaning and implications for human rights protection of Article 14 ICCPR are the UN HRC General Comment 13 and 32.[29] Both General Comments recognise immediately the complex nature of Article 14, which combines 'various guarantees with different scopes of application'.[30] General Comment 13 clearly affirmed that the guarantees enshrined in the concept of 'fair and public hearing' pursuant to Article 14 ICCPR only represent a minimum standard.[31] States are hence invited to offer higher levels of fair trial guarantees than those included in Article 14 ICCPR.

In General Comment 32 the right to equality before the courts and tribunals and to a fair trial is regarded as 'a key element of human rights protection' that 'serves

himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

[29] See UN Human Rights Committee 1984; and UN Human Rights Committee 2007.

[30] GC 32 (2007) provides a general overview of Article 14 at para 3: 'Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of para 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the third sentence of para 1. Paragraphs 2–5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted. States parties to the Covenant, in their reports, should clearly distinguish between these different aspects of the right to a fair trial'.

[31] See HRC General Comment 13 (1984), para 5: 'Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of para 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by para 1'.

as a procedural means to safeguard the rule of law' and 'aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights'.[32] Interestingly, General Comment 32 makes explicit that 'Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees'.[33] This interpretation of Article 14 of the ICCPR seems to leave no room for the derogations that *gacaca* jurisdictions introduced to universal fair trial standards.

According to Article 4 of the ICCPR, Article 14 does not fall within those articles that cannot be derogated, however 'a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant'.[34] At this stage it is necessary to take a closer look to the guarantees embodied in Article 14 of the ICCPR.

6.3.1 Equality Before Courts and Tribunals

The principle of equality before the law requires guarantees of equal access to courts and equality of arms between the parties.[35] This principle is, *inter alia*, embodied in the Universal Declaration of Human Rights[36] and in Article 3 of the ACPHR.[37] The principle of equality before courts and tribunals 'must also be respected whenever domestic law entrusts a judicial body with a judicial task'.[38] The right of access to courts and tribunals and equality before them is not limited to citizens of states party to the ICCPR, 'but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum

[32] See HRC General Comment 32, para 2.

[33] Ibid., para 4.

[34] On this point, see General Comment 32 (2007) and General comment, No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, para 8.

[35] See General Comment 32 (2007), para 8.

[36] See Article 10 of the UDHR: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.' See also Article 7 UDHR: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

[37] Article 3 of the ICCPR affirms that: 'Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law'.

[38] See General Comment 32 (2007), para 7; see also Communication No. 1015/2001, *Perterer v. Austria,* para 9.2 (disciplinary proceedings against a civil servant); Communication No. 961/2000, *Everett v. Spain*, para 6.4 (extradition).

seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party'.[39] The right to equality before courts implies also that equality of arms is to be granted. In the words of the UN Human Rights Committee 'this means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision. (…) In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined'.[40] Moreover, the UN HRC has highlighted that 'Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases objective and reasonable grounds must be provided to justify the distinction'.[41]

The full compliance by *gacaca* courts with the aforementioned principles seems to be rather questionable. First, *gacaca* courts did not abide by the principle of equal access to justice. They were formally entitled to try both genocide and crimes against humanity committed in Rwanda between October 1990 and December 1994 independently from the identity of the victims and perpetrators. In other words, *gacaca* courts had (potential) jurisdiction over crimes against humanity, regardless of genocidal intent, and over acts of genocide perpetrated against a group other than Tutsi. The political interpretation of the *gacaca* laws has, however, prevented these courts from exercising their jurisdiction in a comprehensive way, as the Rwandan Government soon clarified that *gacaca* only dealt with crimes committed against the Tutsi minority. Hutu perpetrators were consequently punished before these courts, had no right to defence lawyer and were judged by lay judges who might be illiterate. The crimes committed in the effort to stop the genocide by Tutsi affiliated with the Rwandan Patriotic Front, labelled as 'revenge crimes' (often amounting to crimes against humanity and war crimes) vice-versa were punished before military courts granting the formal fair trial guarantees. Moreover, the Rwandan authorities had limited the jurisdiction of *gacaca* tribunals only to genocide-related crimes, i.e. to crimes committed by the Hutu majority, depriving *gacaca* courts of the possibility to try Tutsi responsible for crimes against humanity committed against Hutus.[42] This political interpretation of the *gacaca* laws, which does not comply

[39] See General Comment 32 (2007), para 9.

[40] See General Comment 32 (2007), para 13.

[41] See General Comment 32, para 14.

[42] See Haile 2008, pp. 28–29 'The maintenance of two separate systems of justice on the basis of a rather arbitrary classification violates the first aspect of the principle. In effect, the above classification leads to an illogical situation where a person who is accused of stealing a cow from a Tutsi or a Hutu moderate during the genocide will be tried before *gacaca* tribunals, whereas a member of the Tutsi-dominated RPF who had killed any number of people will not. This has significant

with its literal reading, is crystallised in the words of the President Kagame: 'We have to analyse meticulously what has happened in our country. Establish the difference between genocide and other crimes committed during or after the war. We should not confuse those crimes. (…) There are individuals - Rwandans as well as foreigners—who do not want the Rwandans to go forward and abandon their old cleavages. They call the crimes of vengeance, genocide, which is absolutely false'.[43]

The *gacaca* system also cast doubts on the implementation of the principle of the equality of arms. The judges in fact could rely on (and might be influenced by) files drawn up by national prosecutors, whose technical approach to criminal law was difficult to counter by defendants with no legal background bereft of the assistance of a lawyer. Finally, the *gacaca* legislation was silent as to the possibility for the accused to consult his/her file before the hearing and as regards the provision of an effective defence when the accused was illiterate.

6.3.2 The Prohibition Against Trial by Special Tribunals

The Rwandan post-genocide constitutional order explicitly prohibits the establishment of special courts by acknowledging the right of the defendant to be tried

discriminatory effect because as discussed earlier, those who stand accused before *gacaca* tribunals do not have any recourse to regular courts and are denied many of the fair trial guarantees reviewed in this section. They are required, in certain cases, to respond to criminal files or "dossiers" prepared by trained prosecutors. Defendants do not have sufficient time and resources to prepare their defense whereas the prosecution and the accusers can rely on the exculpatory information compiled by government-supported institutions, including the tribunals themselves and the technical advice of the National Service (…) In sum, there are two main points that make the above practice deeply problematic. In the first place, even if all those who are to be tried before the *gacaca* tribunals are said to have committed genocide pursuant to the internationally accepted definition of the term, there is no valid rationale for selectively denying them access to the regular courts. Second, the official distinction between "genocide" and "revenge crimes", does not justify the discrimination in respect of access to the regular courts because it is not based on any objective determination of the conducts constituting such crime'.

[43] See Discours de Paul Kagame à l'occasion du lancement officiel des travaux des juridictions *gacaca*, le 18 juin 2002, Klaas de Jonge (April–June 2002). The *gacaca* research project in Rwanda. An in-depth field study concerning *gacaca* jurisdictions and Community Service, Report III, Kigali, Penal Reform International. The Rwandan Justice Minister repeated the same view when asked why crimes committed by RPF are not subject to *gacaca*. Rwandan Minister of Justice, Jean de Dieu Mucyo, in Exclusive Interview: Rwanda Pushes Ahead with *Gacaca* Tribunals, Foundation Hirondelle, Open Document, 6 December 2002.

before ordinary tribunals obliged to apply standard rules and procedures.[44] As Fierens has stressed, the term 'special', when referred to courts, can be ambiguous and needs to be clearly analysed.[45] According to most researchers, *gacaca* jurisdictions share the main features of extraordinary or special courts. In fact, they were created to face a politically exceptional situation, were temporary by nature and, most importantly, were composed of judges appointed after the commission of the facts they are tasked with judging.[46] The UN HRC General Comment 13 is very clear with respect to the possibility of establishing special or specialised courts. Even though they are in principle not prohibited if abiding by fair trial standards, they should be set up in very exceptional cases.[47] Derogations from standard procedures required by Article 14 of the ICCPR however are only admissible in case of a public emergency properly communicated to the UN Secretary General and other States Party. This communication was not issued by Rwandan Government with regard to *gacaca*. Moreover, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 9 December 1988 declare that 'everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals'. The same

[44] See Article 26 of the Power-Sharing Protocol between the Rwandan Republic and the RPF, signed in Arusha on January 9, 1993, which before the enactment of the 2003 Constitution was part of the post-genocide constitutional framework: 'Les Jurisdictions ordinaries suivantes sont reconnues: les tribunaux de canton, les tribunaux de première instance, les Cours d'appel et la Cour Suprême. Les jurisdictions militaries suivantes sont également reconnues: les conseiles de guerre et la Cour Militaire. La loi peut créer d'autres jurisdictions spécialisées. Toutefois, il ne peut être créé de jurisdictions d'exception'.

[45] See Fierens 2005, p. 905, who states that the term 'special' referred to courts 'is a highly ambiguous term, since "special courts" could also refer to courts specialized in certain proceedings, such as military tribunals or juvenile courts, and their institution is not currently in question. It seems preferable to use the terms "extraordinary courts" for courts whose creation is prohibited by classical democratic constitutions'.

[46] Ibid. See also Haile 2008, p. 23.

[47] See General Comment 13 (1984), para 4: 'The provisions of Article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14 (…) In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of Article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by Article 4 to derogate from normal procedures required under Article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation and respect the other conditions in para 1 of Article 14'.

position was adopted in the *travaux préparatoires* of the ICCPR concerning the fair trial provisions of Article 14(1), which affirm that Article 14 is aimed at ruling out the establishment of 'exceptional courts' in criminal cases.[48]

The African Charter on Human and Peoples' Rights also guarantees 'the right to be presumed innocent until proved guilty before a competent court or tribunal'.[49] Accordingly, the establishment of a special tribunal with exclusive competence on matters relating to state security in Mauritania has been considered by the African Commission on Human and Peoples' Rights a breach of the Banjul Charter.[50] In several cases the African Commission has also stated that special tribunals violate the African Charter on Human and Peoples' Rights because they do not provide the fair trial guarantees required.[51]

Under a domestic perspective, *gacaca* courts have been 'retroactively constitutionalized'[52] by the 2003 Rwandan Constitution through Article 143, which does not permit the creation of special courts and qualifies *gacaca* as specialised tribunals. Article 152 of the 2003 Constitution invests *gacaca* with the jurisdiction of all genocide-related cases except those falling within the jurisdiction of other tribunals. Scholarly literature has challenged the legitimacy of *gacaca* courts under a human rights perspective by stating that 'The *gacaca* tribunals are special tribunals set up to handle specific categories of suspects, displace the jurisdiction of the ordinary courts and apply exceptional procedures'.[53] Considering that the creation of special or specialised criminal tribunals is not prohibited under the ICCPR, commentators have stressed that the Rwandan Government either should have refrained from prohibiting special courts under its 2003 Constitution, or should have established specialised and not special courts.[54] Recalling the *Canal*

[48] See Haile 2008, p. 22; see also the Chilean Proposal and the response of Professor René Cassin, in the Travaux préparatoire of the International Covenant on Civil and Political Rights (ICCPR), UN Commission on Human Rights 2010, pp. 3–4.

[49] See Article 7.1 ACHPR.

[50] On this point, see Haile 2008, p. 23, referring also to *Malawi African Association et al v. Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97-196/97, 210/98, 11 May 2000, paras 99–100, Institut pour les droits humains et le développement (Banjul, Gambie), *Compilation des décisions sur les communications de la Commission africaine des droits de l'Homme et des peuples. Extraits des rapports d'activité 1994–2001*, (Banjul: Institut pour les Droits Human et le Development, 2002).

[51] See International PEN, Constitutional Rights Project, and Civil Liberties Organization Interights (on behalf of Ken Saro-Wiwa Jr. et al.) v. Nigeria, Comm. Nos. 137/94, 139/94, 154/96 and 161/97, para 86, Compilation des Decisions, p. 247.

[52] See Haile 2008, p. 23.

[53] Ibid.

[54] Ibid.: 'First, the law establishing *gacaca jurisdictions* contradicts every provision of the new Constitution guaranteeing due process and fair trial (…) To the extent this is the case, the recognition of the *gacaca* courts under Articles 143 and 152 of the new Constitution does not make them immune to the unconstitutionality challenges based on those other provisions of the Constitution'.

decision[55] handed down by the French *Conseil d'Etat*, in which it was stated that extraordinary courts are admissible if absolutely necessary and if in harmony with the public interest, Fierens has argued that Rwanda 'could have opted for this solution when creating the *gacaca* courts, instead of pretending they are only specialized courts'.[56]

6.3.3 The Right to Be Tried by a Competent, Impartial and Independent Tribunal

According to *gacaca* legislation, *inyangamugayo* were expected to be persons of integrity who had not participated in the genocide, were free from the spirit of sectarianism and from 'genocide ideology'.[57] The independence of the *gacaca* judges was affirmed in Article 30 of the Organic Law 16/2004 that established penalties for those who exercised pressure on the *inyangamugayo*. Criticisms surrounding the *gacaca* experiment focused on the composition of the judicial bench. The bench consisted of lay judges lacking legal training (and sometimes even composed of illiterate individuals) but were entitled to issue penalties that could amount to a life sentence. The right to be tried by a competent, impartial and independent tribunal is a key element of the right to a fair trial with strong implications. It is universally recognised by the main international law instruments, as well as by the 2003 Rwandan Constitution.[58] The basic requirements for the courts: namely competence, impartiality and independence, all influence one another.

Article 140 of the Rwandan 2003 Constitution for instance, affirms that 'the Judiciary is independent and separate from the legislative and executive branches of government'. Assessed against Article 60 of the Rwandan Constitution, which affirms that 'The State shall ensure that the exercise of legislative, executive and judicial power is vested in people who possess the competence and integrity required to fulfil the respective responsibilities accorded to the three branches' it is difficult to demonstrate that *gacaca* tribunal pass the concerned threshold. Moreover, Article 26 of the ACHPR declares that 'State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall

[55] On this point, see Long et al. 1999, p. 596.

[56] See Fierens 2005, p. 905.

[57] Ideology of genocide consists in 'behaviour, a way of speaking, written documents and any other actions meant to wipe out human beings on the basis of their ethnic group, origin, nationality, region, colour of skin, physical traits, sex, language, religion or political opinions'; see Article 3 of Organic Law N° 10/2007 of 01/03/2007.

[58] See Articles 7(1) and 26 of the African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* Oct. 21, 1986, Articles 14(1) and 5 of the International Covenant on Civil and Political Rights, G.A. RES. 2200A (XXI), 1966 and Article 10 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), (1948).

allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter'.

Similarly, the UN Basic Principles on the Independence of the Judiciary affirm that 'persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law'.[59] This position has been adopted also by the African Commission in the communications *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association des members de la Conférance épiscopale de l'Afrique de l'Est, v. Sudan*.[60] In the communications, the African Commission argued that the term 'competent' in Article 7(1)(a) of the African Charter refers to factors such as the expertise of judges.[61] In the case *Constitutional Rights Project (on behalf of Wahab Akamu, Gbolahan Adeaga and others) v. Nigeria*[62] the Commission consistently declared that the special tribunal established under the Nigerian Robbery and Firearms Act was essentially constituted of individuals who not only covered positions in the executive branch of the government, but also lacked legal expertise.[63] As a consequence, it pointed out a violation of Article 7(1)(d) of the African Charter.[64] Moreover, also the Inter-American Commission has held that there is a necessary connection between the expertise of judges and their impartiality and independence.[65]

The issue of the competence of *gacaca* judges must be assessed together with a further factor, namely the involvement of state prosecutors in the preparation of the accusatory files, which amongst other concerns, constitutes a breach of the principle

[59] See Article 10 of the Basic Principles on the Independence of the Judiciary, UN Congress on the Prevention of Crime and the Treatment of Offenders 1985.

[60] Comm. Nos. 48/90, 50/91, 52/91, 89/93, Compilation des decisions, pp. 358–59, paras 61 and 62.

[61] Haile 2008, p. 24.

[62] On this point, see Comm. no. 60/91, Id., Compilation des decisions, p. 198, para 14.

[63] See Haile 2008, p. 24.

[64] Ibid.

[65] Ibid. Dealing with the revolutionary courts established in Sandinista Nicaragua, the Inter-American Commission held that it amounted to a violation of the Article 8.1 of IACHR the creation of tribunals that made defendants liable for 'legal judgment of people, some of whom at least, were not lawyers; the judicial decision of people who were not judges; the verdict of political enemies and the judgment of people, influenced by the psychology of their victory, who were more inclined to be severe rather than fair'. On this point, see Inter-American Commission on Human Rights, *Reports on the situation of Human Rights in the Republic of Nicaragua*, (1981) OEA/Ser. L/V/II.53 doc. 25 (30 June 1981) and (1982–1983), OEA/Ser.L/V/II.61, Doc. 22 rev. 1, 27 September 1983. Similarly, the commission has cast doubts on the independence and impartiality of judges in military courts in Chile because of their lack of legal competence and training. See *Report on the Situation of Human Rights in Chile*, OEA/Ser.L.V/II.66, doc 17 at p. 185 (27 September 1985).

of equality of arms enshrined in Article 14 of the ICCPR.[66] In fact, pursuant to Article 34 of Organic Law 16/2004, the *gacaca* court of cell had 'to bring together the files forwarded by the public prosecution'.[67] Furthermore, the *Basic Principles on the Independence of the judiciary* state that 'The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or any reason'. As Penal Reform International (PRI), an NGO based in London with a long experience in the Great Lakes region has stressed, the 'success' of the *gacaca* experiment had been carefully planned and prepared through the involvement of administrative authorities which strongly relied on the role played by the *Nyumbakumi*, the 'Ten-House groups'.[68] These small administrative units, with their local leaders, were officially among the protagonists during the campaign of sensitisation that preceded the election of *inyangamugayo* in 2001, and were unofficially one of the engines during the phase of evidence gathering before *gacaca* courts.[69] This was also confirmed by representative of ASF, who stressed that several *Nyumbakumi* were elected as *inyangamugayo*, undermining the independence of the *gacaca* benches from administrative authorities.[70] This intrusion by the administrative authorities in the election of *gacaca* judges, even though at a very decentralised level, took place in the open and is a factor which needs to be taken into account when assessing the competence, independence and impartiality of *gacaca* jurisdictions. In the words of PRI, 'people were very conscious of this controlled way of proceeding and some made quite vociferously critical remarks (such as: "*it looks like a play that we are performing here*")—when the leaders of the Ten-House groups on election day mentioned the names of the "elected" *inyangamugayo* to be put forward as candidates'.[71] Moreover, the *gacaca* legislation conceded a particular power to local government officials to exercise 'a steady monitoring of the functioning of *gacaca*

[66] Articles 34(3), 46, 47 and 59 through 61 of *Gacaca* Organic Law No. 16/2004.

[67] Haile 2008, p. 25 stressing that during the *gacaca* procedure 'the criminal files that are presented to such judges, which, when available, comprise the results of the prosecution's investigations and the charges, are usually prepared by the Prosecution. The judges, whose functions are also 'supervised and coordinated' by an executive organ, do not have the necessary background to challenge or make an independent evaluation of the legal and factual issues formulated by learned civil servants'.

[68] See Penal Reform International 2010, p. 30.

[69] Ibid.

[70] Interview with ASF representative, Brussels, 13 March 2016, on file with the author.

[71] Penal Reform International 2001, p. 35.

courts'.[72] The National Service of *Gacaca* Jurisdictions was endowed with the power to follow up and coordinate the activities of the courts.[73]

Last but not least, the composition of the judging bench has been changed several times by *gacaca* legislation that has progressively reduced the number of judges, lessening the guarantees of independence and made *inyangamugayo* more vulnerable to corruption.

A report delivered by the Ombudsman in 2009 ranked *gacaca* judges among the four most corrupted organs at grass-root level in Rwanda.[74] Moreover, from observation of the *gacaca* hearings it has emerged that the judges were subject to pressure in order to speed up the trials and conclude them in a very short time.[75]

Finally, a remarkable number *gacaca* judges, 46,000, amounting to 27,1% of the total number, was replaced due to the participation in genocide-related crimes.[76]

It is hence possible to conclude that the *gacaca* tribunals did not fully abide by the fair trial principle, which requires judges to have a sound legal training and to be independent from various external influences.

Certain scholars have argued that *gacaca* courts, even if the lay judges clearly lacked legal training, offered a 'contextual competence',[77] due to the fact that the *inyangamugayo* knew well the setting in which they operated and the historical, political and social frameworks of the 1994 genocide. This competence, argues part of the scholarship, could efficiently replace the legal training. It is possible that *gacaca* judges in several cases delivered justice in substantive terms, even though formally disregarding Article 14 of the ICCPR. However, the structure of *inkiko gacaca*, coupled with the extreme flexibility of the procedure they applied, made them vulnerable and exposed to external pressure.[78] Scholarship on *gacaca* has

[72] Article 49 of Organic Law 16/2004 affirms that 'Leaders of administrative organs in which *Gacaca* Court function shall provide them with premises in which they shall perform their duties, as well as sensitize the population for their active participation. They exercise a steady monitoring of the functioning of *Gacaca* Courts and provide them with necessary materials, in collaboration with the National Service in charge of follow up, supervision and coordination of the activities of *Gacaca* Courts'.

[73] Article 50 of Organic Law 16/2004 affirms that: 'The National Service in charge of follow up, supervision and coordination of the activities of *Gacaca* Courts, follows up, supervises and coordinates *Gacaca* Courts' activities in the country. It also issues rules and regulations relating to the smooth running of *Gacaca* Courts, as well as the conduct of persons of integrity, without prejudice to the *Gacaca* Courts' ways of trying'.

[74] See The New Times, Ombudsman's report exposes misconduct in Gov't circles, available at http://www.newtimes.co.rw/section/read/9070/. Last accessed 22 February 2018, quoting the Ombudsman saying that 'The top four corrupt organs at the grass-root levels were; cell leaders, Gacaca judges, local defence and local mediators'.

[75] See Ingelaere 2016, p. 28.

[76] Ibid., p. 26.

[77] See Longman 2006, p. 215.

[78] See Haile 2008, p. 26: 'The structure of the *gacaca* process, the absence of any procedural and evidentiary rules, and the fact that the judges lack basic training, tenure or official standing makes the entire process particularly susceptible to mob pressure. (…) It is precisely because mob pressure does not always work in favor of the truth that formal procedures and safeguards have

repeatedly stressed instances where external pressure was exerted on *gacaca* judges. As Haile has reported, 'In a case involving a person who was said to have revealed the whereabouts of certain displaced persons to their alleged killers, the judges reportedly confided to the researchers that they were told by their trainer that the informer should be treated as the killer'.[79]

6.3.4 The Right to a Counsel and the Right to a Defence

Much of the criticism concerning the *gacaca* jurisdictions concentrated on the lack of legal representation for the accused as well as for the victims, and on the flawed right to a defence. Actually, the *gacaca* organic laws, even if they did not mention the right to be represented by a counsel, did not specifically exclude it. However, attempts to provide legal defence to individuals belonging to vulnerable groups by ASF, despite some public statements of Rwandan authorities asserting that before *gacaca* a technical defence was allowed, were *de facto* boycotted and failed. This was confirmed also during interviews I conducted in Rwanda with staff of international and national NGOs specialised in legal support for victims and alleged perpetrators of genocide-related crimes.[80] Researchers, NGOs,[81] the UN High Commissioner for Refugees,[82] the UN Commission for Human Rights[83] as well as the European Union,[84] expressed their concern in this regard. *Gacaca* jurisdictions marked the shift from traditional, harmony-oriented informal courts to a sophisticated, formalised and state-shaped system with clear retributive features. The

been developed in criminal justice systems. (…) It is also important to note that mob trials may be detrimental to victims and their relatives as they are to the accused. One observer of the pre-*gacaca* trials noted "(…) some of the witnesses are jeered and laughed at, including a woman who everyone says is crazy from grief because of her dead children'. See also Fierens 2005, p. 913.

[79] See Haile 2008, p. 25; in note 113 the author stressed that, 'The researchers also observe that the judges did not have a clear idea and could not reach a consensus as to how to categorize the conduct in question'.

[80] Interviews with ASF representatives, Kigali, November 2009 and Brussels, March 2016, on file with the author. See also the case of Xavier Byumba reported by ASF at www.asf.org.

[81] See Human Rights Watch 2000.

[82] UN High Commissioner for Refugees 2000.

[83] See Economic and Social Council of the UN 1999.

[84] See Council Common Position of 18 September 2000 on Rwanda, 2000/558/CFSP *Official Journal* L236 (20 September 2000). See also, more recently, Council Common Position of 21 October 2002 on Rwanda and repealing Common Position 2001/799/CFSP, *Official Journal* L285 (23 October 2002), at 3. The Council "welcomes the official launch of *gacaca* tribunals and encourages the Government of Rwanda to monitor the forthcoming procedures in close cooperation with national and international non-governmental organization;…encourages the Government of Rwanda and the Supreme Court to ensure that *gacaca* justice is administered in line with international human rights standards; … also encourages the *gacaca* courts to establish clemency in general as a basic working principle and to safeguard rights guaranteed by law both to the accused, particularly as regards defence and appeals, and to civil parties".

powers they enjoyed were quite penetrating and resembled under several aspects those of ordinary courts. This can be easily inferred from Article 39 of the 2004 Organic Law. It states that '*Gacaca* Courts have competences similar to those of ordinary courts, to try the accused persons, on the basis of testimonies against or for, and other evidences that may be provided.

They may in particular:

(1) summon any person to appear in a trial;
(2) order and carry out a search of or to the defendant's. This search must, however, respect the defendant's private property and basic human rights;
(3) take temporary protective measures against the property of those accused of genocide crimes;
(4) pronounce sentences and order the convicted person to compensate;
(5) order the withdrawal of the distraint for the acquitted person's property;
(6) prosecute and punish troublemakers in the court;
(7) summon, if necessary, the Public Prosecution to give explanatory information on files it has investigated on;
(8) issue summons to the alleged authors of offences and order detention or release on parole, if necessary.[85]

Gacaca jurisdictions were endowed with subpoena powers, they could order search and seizure, adopt temporary measures, issue arrest warrants and order provisional detention or liberation. In the sentencing phase, they had the power to convict or acquit the defendants. They hence enjoyed a blend of prosecutorial and sentencing powers.[86]

The *gacaca* legislation did not grant the accused the right to remain silent, which is recognised by international law instruments. Also for victims, no legal representation was provided.[87] No exception to this rule was established, neither for victims or supposed perpetrators who were minors during the genocide, nor for victims of sexual violence.

The right of the defendants to defend themselves by counsel of their own choosing is granted under several international covenants (see Article 7(1)(c), of the ACPHR, Article 11(1) of the UDHR and 14(3)(a)(d) of the ICCPR) and by the Rwandan 2003 Constitution, (Articles 18 and 19). Interestingly, in *Amnesty International (on behalf of Orton and Vera Chirwa v Malawi),* the African Commission on Human and Peoples' Rights established that even though the two accused were tried and sentenced to death by 'traditional courts' (the Southern

[85] See Article 39 Organic Law 16/2004.

[86] Fierens 2005, p. 911.

[87] On this point see Fierens 2005, p. 912: 'The fact that interested persons may participate and testify in hearings could somewhat mitigate this serious breach of international standards, but, as such, the right to counsel and, generally, defence rights are not provided for. The right to be defended by an individual wholly distinct from the prosecution, witnesses or judges is nevertheless one of the most universally recognized human rights. Victims cannot be assisted either'.

Regional Traditional Court and the National Traditional Appeals Court), the right to a counsel had to be guaranteed.[88]

Finally, it must be highlighted that the right 'to have adequate time and facilities for the preparation of the defence and to communicate with counsel of his own choosing' is one of the minimum guarantees of fair trial provided under Article 14 of the ICCPR. The *gacaca* laws however did not mention explicitly the right to sufficient time and facilities for the preparation of the defence.

6.3.5 Presumption of Innocence

In General Comment 32 the UN HRC has clarified the implications of the principle of presumption of innocence. The HRC stated that

> According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecutor the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable any doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. (…) Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence.[89]

International law instruments, both universal and regional and the Rwandan Constitution grant the right of the accused to be presumed innocent in criminal trials.[90]

As the Human Rights Committee has pointed out, the principle of presumption of innocence has several corollaries. On the one hand, it is deeply linked to the issue of burden and standards of proof, according to which criminal responsibility must be proved beyond any reasonable doubt. The right to silence as well as the right not to be compelled to testify against oneself are both aspects of this right. On the other hand, presumption of innocence means that the accused has the right to be treated as

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[88] See Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi, African Commission on Human and Peoples' Rights, Comm. Nos. 64/92, 68/92, and 78/92 (1995), Compilation des Decisions: 158, para 10.

[89] See General Comment 32 (2007), para 30.

[90] Article 19 of the Rwandan 2003 Constitution states that 'Every person accused of a crime shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair hearing in which all the necessary guarantees for defence have been made available'.

an innocent individual as long as his/her responsibility is not fully proved. *Gacaca* jurisdictions raised concerns in this respect. The length of the pre-trial detention for instance, could be misinterpreted by lay judge and the *gacaca* assemblies as a sign of guilt. For those defendants who under the Habyarimana's regime covered important positions in the state administration, it was sometimes difficult to prove their innocence when tried. A sort of presumption of guilt for civil servants working at the time of genocide is rooted in Rwanda. This was confirmed by my field investigation, where Rwandans confirmed that those who were working as public servants under Habyarimana's rule were all involved in the genocide.[91] During *gacaca* trials in Gahogo for instance, it was clear that covering a position in public administration was seen as a sign of guilt. Witnesses who testified were questioned in a very thorough manner if at the time of the genocide they were public servants. The same can be said for witnesses who had friendship or kinship links with accused individuals, a further sign of a certain presumption of guilt animating the *gacaca* system.[92]

Representatives of NGOs such as ASF, Human Rights Watch and Liprodhor which have extensively monitored genocide trials since 1996, have confirmed that it was very easy for witnesses in *gacaca* hearings to become an accused if during the genocide they were public servants.[93]

When monitoring the *gacaca* hearings Amnesty International stressed that the presumption of guilt by the Rwandan authorities exacerbated the issue of prolonged detention.[94] Certain characteristics of the 1994 genocide such as the widespread popular involvement, the solidarity among perpetrators who belong to the main 'ethnic' group, the low number of survivors, and the consequent lack of evidence in certain areas of the country might have triggered the temptation among some judges to balance this situation by reverting the presumption of innocence through a kind of presumption of guilt. This is not to deny that *gacaca* have also acquitted public servants. However, in general those individuals who ranked high in the genocidal regime during *gacaca* hearings were subject to hard questioning, as if they necessarily had a responsibility in the tragic 1994 events.[95]

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[91] Group interview with Rwandan citizens participating in *gacaca* trials, Butare, 9 October 2009, on file with the author.

[92] *Gacaca* jurisdiction of sector of GAHOGO, Muhanga District, South Province, 01/09/2009, trial of Habimana Laurent, on file with the author.

[93] Interviews with representative of ASF, HRW, Liprodhor, Kigali, September–November 2010, on file with the author.

[94] Amnesty International 2002. Last accessed 4 February 2018, p. 35: 'The presumption of guilt on the part of the Rwandese authorities is as much the cause of prolonged detention without trial of tens of thousands of Rwandese as their repeated claim that it is due to the government's lack of resources. Likewise, the lack of fair trial guarantees in the legislation establishing the *gacaca* tribunals refers as much to the government's presumption of detainees' guilt as it does to the lack of resources to provide a fair trial'.

[95] On this point see the ASF communication concerning the case of Theodore Munyangabe.

6.3.6 *The Burden and Standards of Proof*

One of the main shortcomings of the *gacaca* legislation, even for those who think that in such a context fair trial standards do not apply, is the lack of guidelines as to how to assess evidence. The *gacaca* laws enacted since 2000 did not explain to the judges how they had to evaluate the evidence collected. Neither did the *gacaca* laws explain which criteria to use to identify the admissible evidence and the way cross-examination must be conducted. This feature of the *gacaca* laws, coupled with the absence of a defence lawyer for defendants and victims was one of the key flaws of *gacaca* jurisdictions. A report by Amnesty International confirmed this concern:

> Assembled community members with evidence against the defendant spoke first. Their testimony was not cross-examined by the OMP [Officier du ministère public or Public Prosecutor] representatives. If no one stepped forward, OMP representatives, assisted by the LDF [Local Defense Forces], required all community members from the detainee's sector to step forward. One-by-one, they were harangued to provide evidence. In some cases, there were no community members from the detainees' sector, including the individual(s) who had initially accused the detainee. In a number of cases, the same group of individuals stepped forward to accuse the assembled detainees and no one else corroborated their accusations. On the defence side, detainees were not allowed to speak on their behalf, challenge the allegations made against them or cross-examine witnesses. They were repeatedly told that only those wanting to confess could speak. Family members were generally not allowed to speak unless they provided evidence against the detainee. Witnesses for the defence were only allowed to speak after all accusations had been made. Moreover, they were cross-examined in an intimidating manner that implied they shared in the detainees' alleged guilt.[96]

Amnesty International also reported a case where 'the Public Prosecutor's office told community members that anyone providing information for the defence would either have to name the individual responsible for the crime(s) allegedly committed by the detainee or take his or her place in prison'.[97] Other similar incidents have been described by national and international NGOs.[98] Amnesty International also held that several testimonies given during *gacaca* hearings were based on hearsay, and that it was therefore difficult to assess how the judges would evaluate this kind of evidence.[99]

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[96] See Amnesty International 2002, pp. 23–24.

[97] Ibid., p. 24.

[98] See Haile 2008, p. 30: 'A journalist working for Internews notes that in one of the sessions she observed a detainee was taken back to prison despite the fact that only exculpatory information was obtained from the public. The insistence by the authorities on finding incriminating evidence on people who have been in detention for years and the pressure applied on reluctant villagers to speak only against the detainees suggests an underlying presumption of guilt'.

[99] See Amnesty International 2002, p. 24.

Finally, scholarship has stressed that because the *gacaca* system strongly encouraged detainees' confessions, guilty pleas should always be double-checked in order to be sure that no undue pressure was exerted on the defendants.[100]

6.3.7 *Trial in Absentia*

Trial in absentia was allowed before *gacaca* jurisdictions. Article 14 of the ICCPR, explicitly prohibits trial in absentia, stating that every accused person has the right 'To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing' (para 3(d)).

The *gacaca* legislation, by allowing trial in absence, was not in harmony with Article 14 of the ICCPR. It must be clarified that this violation is common in other justice systems, especially in those rooted in Romano-Germanic tradition, while it is firmly rejected in common law systems.[101] The possibility of trials in absence could also include deceased individuals. In fact, according to Organic Law 16/2004 suspected individuals were not tried in absentia by *gacaca* tribunals if they had reportedly died in their villages. However, the death of those who passed away outside their community or abroad must be confirmed by three relatives, otherwise they were tried in absentia.

6.3.8 *Ne bis in idem*

The internationally recognised criminal law principle *ne bis in idem* binds both Rwandan ordinary and *gacaca* courts. Even though not constitutionally sanctioned, the principle is embodied in Article 5 of the Rwandan Criminal Code and through Article 190 of the Rwandan Constitution, it was binding on *gacaca* jurisdictions.[102] Article 190, by stating that international treaties prevail over ordinary as well as organic laws, makes Article 14 of the ICCPR binding for the Rwandan judicial system. Paragraph 7 of Article 14 of ICCPR affirms that 'No one shall be liable to

[100] Haile 2008, p. 31.

[101] On this point, see Haveman and Muleefu 2011: 'Criticism on the fact that the *gacaca* know trials *in absentia* do not so much regard the *gacaca* in particular, as well it regards practice in at least half of the world. A trial and conviction *in absentia* may be abhorrent for an adversarial educated lawyer, but is accepted in an inquisitorial process model; the person who rejects this has to acknowledge that (s)he not only rejects *gacaca* but an important part of the world penal systems'.

[102] Article 190 of the Rwandan Constitution 2003 states that 'Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non-compliance by one of parties'.

be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

The meaning and the implications of this principle are explained in the UN HRC General Comment 32 on Article 14 of ICCPR as follows:

> This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it but applies to the second conviction.[103]

The prohibition of double jeopardy 'is not at issue if a higher court quashes a conviction and orders a retrial'.[104] Moreover, Article 14 ICCPR 'does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal'.[105]

Finally, the UN HRC clarifies:

> This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant. Furthermore, it does not guarantee ne bis in idem with respect to the national jurisdictions of two or more States.[106]

Despite these provisions, the *ne bis in idem* principle was not entrenched in the *gacaca* legislation until 2008. Moreover, Organic Law 16/2004 explicitly recognised the possibility to try at review level individuals who had faced a trial before ordinary or military courts. Article 93 of Organic Law 16/2004 in fact states that

> The judgement can be subject to review only when:
>
> 1) the person was acquitted in a judgement passed in the last resort by an ordinary court, but is later found guilt by the *Gacaca* Court;
> 2) the person was convicted in a judgement passed by an ordinary court but is later found innocent by the *Gacaca* Court.

When Organic Law 13/2008 entered into force, this provision was repealed, and since then *gacaca* tribunals were no more allowed to violate the norms aimed at preventing double jeopardy.[107] The violation of the principle *ne bis in idem* however remained by far one of the main reasons of concern regarding *gacaca* courts, as ASF has frequently reported. A paradigmatic example of the repeated violation

[103] Human Rights Committee General Comment 32 (2017), para 54.

[104] General Comment 32 (2017), para 56.

[105] Ibid.

[106] Human Rights Committee General Comment 32 (2017), para 57.

[107] On this point see Article 24 of Organic Law 13/2008.

of the principle *ne bis in idem* is represented by the case regarding Theodore Munyangabe, which was reported on and analysed by HRW in 2011.[108]

This linkage cast doubts on the *gacaca* commitment to respect another important cornerstone of the fair trial doctrine, the principle of the presumption of innocence. The exceptional backlog that post-genocide justice had to face in Rwanda cannot be considered a valid excuse to disregard the prohibition of double jeopardy.

My conclusion on fair trial standards granted by *gacaca* courts is hence in tune with Fierens:

> The Rwandan authorities believe or pretend to believe that people's justice is infallible. It is immediately apparent that Rwandans have no more reason to tell the truth than anyone else in a given judicial system; that certain judges in those hills are themselves implicated in the genocide; that potential witnesses have been threatened directly and indirectly; and that, at times, the genocide's effectiveness was such that perpetrators, co-perpetrators and accomplices could simply establish *gacaca* courts among themselves. The Rwandan authorities have adopted contradictory responses to these issues, either by asserting the *gacaca* courts' conformity with obligations under international law, or by stating that such conformity is irrelevant given the particular context. If the latter is true, Rwanda should have at least notified its intent to override provisions of the ICCPR under Article 4.[109]

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Chapter 7
Gacaca Jurisdictions in Practice

Contents

Abstract This chapter provides an overview concerning the daily practice of *gacaca* in order to verify to what extent the modus operandi of these courts corresponded to, and respected, their legal framework. Attention is paid to the phases of preparation of the *gacaca* courts, their launch and the training of the judges. Attention is also paid to the extent to which the non-compliance with human rights norms that grant a fair trial has jeopardized the *gacaca* experiment. The way in which the *gacaca* procedure has unfolded is consequently analysed in order to detect whether the participation of local communities and the *gacaca* judges have granted a fair trial in substantive terms. Also provided is an overview regarding the judgements delivered by *gacaca* courts covering their sentencing rationale. Room is devoted to child victims and perpetrators of genocide-related crimes as well as gender issues. Finally, relying on direct observation of *gacaca* practice, scholarly sources and accounts by NGOs, the main concerns regarding local ownership and administrative intrusion, truth-telling and respect for the procedures established by law are exposed.

Keywords Pre-*gacaca* · *nyumbakumi* · *ceceka* · *kugura umusozi* · sentencing · RPF crimes · presumption of guilt · *cahier d'activités*

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7.1 Overview

It is important to pay attention to the way *gacaca* courts have worked in practice and to verifying how *gacaca* legislation was implemented. *Gacaca* was a system of courts with deep ramifications inside Rwanda's basic administrative units, a participatory mechanism whose success largely depended on the individual commitment of Rwandan citizens and on the guidance provided by *inyangamugayo*. The *gacaca* system was initially received with caution by the Rwandan population, though with time it progressively evidenced an increasing curiosity. The opportunity of gathering information, including details about the whereabouts of the victims, proved to be of great interest for Rwandans. The degree of attendance at the hearings and Rwandans' opinion about the courts varied significantly from sector to sector, and from time to time.

The challenges that *gacaca* faced are well documented by scholars, international and national NGOs, and by human rights monitoring bodies. Lars Waldorf has criticised *gacaca*, labelling them as an example of 'Mass justice for mass atrocities'[1], while Jaques Fierens has stressed their non-compliance with international human rights standards.[2] NGOs have stigmatised the lack of a defence counsel (PRI 2006) and the peril of reprisals against those who testify (ASF 2007b), categorising *gacaca* as a paradigm in the realm of victors' justice (HRW 2008). Despite these criticisms, and even whilst clearly not abiding by international fair trial standards, however, *gacaca* courts were also said to provide a fair trial in substantive terms. This is the opinion for instance of Phil Clark, who holds that the objectives of *gacaca* jurisdictions were not fixed but varied depending on the particular community concerned.[3] This was supposedly possible thanks to the role played by the involved communities and actors, who were able to perform the role of accuser, defender, witness, within a criminal liturgy unfolded according to local paradigms. This allegedly enabled the *gacaca* trial to be perceived by the involved population as intrinsically fair. Timothy Longman has seen in the *gacaca* hearings the translation of a general state's duty to provide fair trials into a culture-sensitive environment, a mechanism recalling the doctrine of the 'margin of appreciation' elaborated in the jurisprudence of the European Court of Human Rights.[4] Helena Cobban, holding a retributive approach based on ordinary criminal justice is an unacceptable solution in post-genocide Rwanda, considered *gacaca* as a valuable alternative.[5] Mark Drumbl praised the mechanism of 'reintegrative shame' that *gacaca* enacted.[6] While initial scholarship on *gacaca* was dominated by foreign commentators, the voice of Rwandans has at a later stage emerged too, giving an important contribution

[1] On this point, see Waldorf 2006a, pp. 1–88.

[2] Fierens 2005.

[3] See Clark 2010, pp. 311–319.

[4] On this point, see Longman 2006, p. 214.

[5] Cobban 2002.

[6] Drumbl 2000, p. 1324.

regarding post-genocide justice.[7] All this said, it is worth analysing the way *gacaca* courts have been set up as well as how *gacaca* laws have been implemented, in order to appreciate more closely their merits and possible shortcomings.

Independently from the law in force, the *gacaca* trial unfolded in three steps.

The process started with the collecting of information, a task at the very heart of the cell courts' duties. The cell general assemblies were responsible for drafting a certain number of lists aimed at establishing a big picture of the genocide events in their area of competence. The lists included:[8]

(1) Names of persons residing in the cell in September 1990 and in March 2004;
(2) Names of persons arrested as RPF accomplices;
(3) Names of promoters of the genocide in the cell;
(4) List of genocide-preparation meetings in the cell (including the names of those who prepared and led them and of those who participated in these meetings);
(5) Names of persons who should be killed (including persons on these lists and names of those who drew up these lists);
(6) Distributions of weapons in the cell;
(7) List of armed militia present in the cell;
(8) Lists of roadblocks constructed in the cell (including the date and place of their creation, names of those who gave the order to construct them, those who were in charge of these roadblocks, those who were present at these roadblocks to work, and those who were killed at these roadblocks;
(9) List of genocide victims who were originally from the cell and who were killed in this same cell;
(10) List of genocide victims killed in the cell, but originating from another cell;
(11) List of genocide victims originally from the cell, but killed in another cell (indicating the place where they died);
(12) List of people originally from another cell, but who were killed in the cell for refusing to participate in the genocide;
(13) List of people from the cell killed in the cell for refusing to participate in the genocide;
(14) Place where the remains were thrown (including people whose bodies were thrown out and those who chose the place);
(15) Damaged or stolen goods from each household;
(16) Families attacked in the cell;
(17) Location of the cells where hunted people found refuge;
(18) Survivors of the genocide;
(19) People who helped the victims who were hunted;

[7] See, for instance, Kaitesi 2014. See also Ndahinda and Muleefu 2012.

[8] This detailed list is drawn from National Service of *Gacaca* Courts, *Procedure of information-gathering in the Gacaca courts. Truth-Justice-Reconciliation*, NSGC, Kigali, November 2004.

(20) Attacks carried out in the cell (including names of those who organized the attacks, those who participated in these attacks, victims of these attacks with mention of crimes committed against them);
(21) Attacks led by the residents of the cell outside of the cell;
(22) List of killers of renown in the cell, with mention of acts they are accused of;
(23) For each victim of genocide, identification and condition of their death, with particular attention to inhuman acts or torture committed on his corpse.

The information gathering phase was followed by the crucial phase of categorisation, carried out by the seat of the cell courts which had to distribute the suspects in one of the three categories set out by the law. From the categorisation descended thus the referral of a case to the regular courts (for some crimes included in category 1) or to a *gacaca* court (for crimes included in category 2 and 3, and since 2008 for some crimes included in category 1 over which jurisdiction was attributed to *gacaca*).

Finally, the verdict was issued by the court that had jurisdiction over the case, pursuant to the category into which the accused had been placed. The *gacaca* courts at cell level faced third category cases. Sector *gacaca* dealt with cases falling within the second category. First category cases from 2008 onwards were partially referred to *gacaca*, partially to the regular courts (while before 2008 they fell entirely within the jurisdiction of ordinary domestic courts).[9]

7.2 The Preparation of *Gacaca* Jurisdictions

According to the data provided by the Rwandan Government in December 2001, the genocide claimed the lives of more than a million of individuals. From 1 October 1990 until 31 December 1994, 1.074.017 persons were reportedly killed out of which 93,7% were Tutsi.[10] The Rwandan Government, given the appalling number of individuals to be prosecuted, decided to recur to a home-grown alternative justice system. The praises of *gacaca* were enumerated by the Vice-Ministry of Defence in 1999, during an official speech:

(1) Neither victims nor suspects will have to wait for years to see justice done: *acceleration of trials*;
(2) It will *reduce the costs* to the taxpayers of maintaining prisons and make it possible to meet other urgent needs;
(3) The participation of everyone in the community in telling what happened, will help—better than any other way—to *establish the truth*;

[9] It must be taken into consideration that the distribution criteria have been changed several times according to the legislation in force. *Gacaca* have been attributed jurisdiction over part of the category one crimes pursuant to the Organic Law 13/2008.

[10] Penal Reform International 2001, 2002b, p. 9.

(4) The *gacaca* tribunals will ensure the accountability for genocide and other crimes against humanity faster than the classic courts: *uprooting the culture of impunity*;
(5) The new tribunals will introduce *innovative approaches to the criminal justice process* of Rwanda, such as work-related penalties (Community Service), which will help the re-integration of criminals in society;
(6) The rule of law will help the process of *healing and national reconciliation* in Rwanda, which is seen as the only guarantee for peace, stability and the future development of Rwanda and the empowerment of its people.[11]

Field research has showed that the survivors' attitude towards *gacaca* at the beginning of the process was very different from that of detainees. While the former were sceptical of and scared by the possibility of a sudden release of former perpetrators, the latter showed much more enthusiasm.[12]

Despite the optimism shown by the Rwandan Government, NGOs stressed that the coordination of the *gacaca* jurisdictions appeared problematic from the beginning. One of the key issues was the distribution of crucial tasks among different ministries.[13] Until Organic Law 16/2004 created the National Service of *Gacaca* Jurisdictions, *gacaca* courts fell under the supervision of the Supreme Court. The Ministry of Justice was in charge of the drafting of the texts of all *gacaca* laws and decrees (the *Gacaca* Jurisdictions Department of the Supreme Court was in fact deprived of any legislative power). Even if crucial for the success of the *gacaca* courts, the Community Service programme did not fall under the competence of the *Gacaca* Jurisdiction Department of the Supreme Court but under the authority of the Ministry of Justice.[14] The community services have been

[11] Ibid., pp. 9–10, 'Speech of the Vice-President and Minister of Defence on the Occasion of the Opening of the Seminar on *Gacaca* Tribunals'; Kigali, July 12, 1999.

[12] Ibid., p. 19: 'From the consistent responses recorded within our research process during the concerned period, it is clear that the Tutsi population interviewed (genocide survivors and returnees)—although they didn't say that they were actually against the *gacaca* jurisdiction—didn't believe very much in its potential or claimed "benefices". They blame the old regime for organising the genocide and now criticise the Government "for liberating dangerous criminals who should remain in prison". They doubt if the truth will come out because the few survivors didn't see very much that they could present as evidence and they question the willingness of the detainees and their families to speak out. They reported overwhelmingly that they felt very insecure and abandoned by everybody, even by their own organisations such as Ibuka. The remaining population (especially the detainees and their families) is much more positive: the *gacaca* courts can accelerate the trials, release the innocents (the majority according to them) and punish the real criminals. But they also have many doubts about the role of the State and the fairness of the trials. They complain about the slowness of the process and the lack of efforts aimed at awareness-raising'.

[13] See Penal Reform International 2001.

[14] Ibid., p. 2011.

designed through a presidential decree that in January 2002 was not yet signed.[15] The Ministry of Interior (*Mininter*) was responsible for prisons and the transfer of the detainees while *Minifin* (the Finance Ministry) controlled and delivered the *gacaca* budget.[16]

The *Gacaca* Jurisdictions Department of the Supreme Court, supported by the NGO ASF, drafted the first version of a training manual for the *inyangamugayo*. The training of thousands of judges was scheduled for March and April 2002. During this phase, the Office of the Prosecutor was charged with sending to *gacaca* jurisdictions information files regarding the investigations carried out. As I have stressed in Chap. 6, the accomplishment of this task by a trained, professional lawyer has raised concerns among human rights NGOs, as written files might heavily influence lay judges. Moreover, this practice seems at odds with the main rationale underpinning *gacaca*, the ownership of local communities over post-genocide mechanisms in Rwanda. Another crucial issue regarding the first phase of *gacaca* implementation was the alleged lack of awareness in the Rwandan population of the way *gacaca* should function.[17]

The initial phase of implementation of the *gacaca* system can be subdivided into three stages: (1) the pre-*gacaca*; (2) the election and training of the judges; (3) the phased launch of the courts.

7.3 The Pre-*gacaca*

In order to reduce the pressure on the overcrowded detention system, before launching the *gacaca* experiment at the national level, the so-called pre-*gacaca* were implemented. Pre-*gacaca* took place at two levels, in prisons and within a joint project led by the Justice Ministry and the Belgian NGO RCN *Justice et Démocratie*. At the first level, pre-*gacaca* meetings were organised in several Rwandan prisons. Pre-*gacaca* were based on committees of detainees who heard the confessions of their inmates according to geographical criteria. In Rilima detention centre in Kigali for instance, in three years the detainees' commission heard around 1,127 confessions from a total number of 8,000 inmates. The capacity of such informal meetings to recover information concerning the genocide was on occasion impressive, as PRI has reported:

> We asked the *Gacaca* committee of Kigali prison (PCK), which seemed the best organised of those we witnessed, to give us the complete results of their work for two "communes" about which the prisoners had given a lot of information regarding what had happened

[15] Ibid., note 21: 'Certain specialists would have preferred if the Community Service would be defined by a law and its legal issues discussed and decided in parliament, and not by a presidential order'.

[16] Ibid.

[17] Ibid., pp. 16–17.

> during the Genocide: one urban commune, Kacyiru, in 1994 consisting of 5 sectors and 23 cells, and a rural, Bicumbi with 15 sectors and 90 cells. The results were really amazing: 230 handwritten pages with tables and descriptions in French and also a version in Kinyarwanda (211 pages). They presented lists with names of persons originating from these communes who were killed (during the genocide as well as during the fighting between combatants) indicating where that had happened, lists of wounded, cases of rape which took place in these selected areas and lists with material damage caused. Finally they listed the persons, as far as was known, who according to them had committed these crimes: the names of the killers; the groups they belonged to and their leaders; the names of minors who participated in the genocide; the place where the surviving perpetrators are now and names of individuals who could give additional information.[18]

A projection based on the data collected by PRI confirmed that as a result of the accusation process stimulated by *gacaca* hearings, the prisons would remain overcrowded for several years.[19]

As to pre-*gacaca* outside the detention centres, prisoners were presented to the population to validate the charges against or to release them. During these meetings with the population, which showed for the first time how *gacaca* would work in practice, the defendants were brought before their community to collect evidence. If the local assembly discharged them then they were provisionally released. These sessions were planned at the beginning for the purpose of redressing and normalising the situation of countless detainees without files, and to introduce to the population detainees found innocent by the prison *gacaca* whose files were not complete.[20] Observers reported a good rate of popular participation during this phase, which served also as a litmus test for both, authorities and common citizens. The former had, for the first time, the chance to test the *gacaca* system and, most importantly, the way the population perceived *gacaca* and reacted to it. Moreover, thanks to this procedure, the Public Prosecutor was able to count the prison population more precisely. During sessions in which accused, bystanders and victims gathered together, Rwandans were instructed about the functioning and the meaning of the whole *gacaca* experiment. The outcomes were encouraging. The NGO RCN *Justice et Démocratie* estimated that 11,659 detainees were presented to the population by the end of 2002. 23,3% of them (2,721 persons),

[18] Ibid., p. 30.

[19] Ibid., p. 32.

[20] On this point, see Penal Reform International 2005, p. 13: 'It is, in fact, indisputable that the principle of the presumption of innocence was profoundly disrespected throughout this immediate post-genocide period, which saw thousands of people arrested and incarcerated on the basis of simple accusations and without the least argumentation or defense. It seemed evident, in the eyes of certain political and judicial authorities, that a certain number of these incarcerations had been the product, at worst, of massive arrests and malevolent accusations, and at best, erroneous testimony. If this could be explained by the chaotic environment of the first years after the genocide, it can no longer be justified in a context in which the rule of law is being restored and true justice for genocide is being put in place'.

amounting to 2,5% of the total prison population, were provisionally released.[21] Even though a crucial step in the implementation of the *gacaca* system as well as in the regularisation of the files of several detainees, the *pre-gacaca* also anticipated a certain trend that was criticised. *Gacaca* tended to postpone the trial of those defendants who did not confess and who were in part obviously innocent. This led to the paradox that innocent Rwandans had to wait in jail while those guilty of genocide who plead guilty immediately benefited from remarkable reductions in the penalties applied.[22] As a consequence, reportedly innocent detainees in pre-trial detention opted for pleading guilty in order to be tried sooner and possibly released.

7.4 The Election and Training of the Judges

The election of *gacaca* judges by the population is one of the key features of the *gacaca* system. Between 4 and 7 October 2001 about 254.400 *inyangamugayo* were elected. The turnout was high and peaked to 87%,[23] in spite of the late sensitisation campaign organised by the government. Part of the tasks concerning the *inyangamugayo* election process was performed by *Nyumbakumi*, the head of the smallest administrative unit of Rwanda consisting of 'Ten-House groups'. *Nyumbakumi* were charged with drafting documents including the lists of those supposed to have the pre-requirements to be eligible as *gacaca* judges. It seems likely that the position of authority of *nyumbakumi* has to some extent influenced and oriented the voters' choice. Critical voices held that this intrusion in the election by the administrative authorities has undermined the *gacaca* process, depriving the population of ownership of it. As reported by PRI, the original draft of the electoral law did not envisage this role for the *nyumbakumi*.[24] PRI and ASF reported instances where Rwandans openly criticised the lack of respect for the procedures established by the *gacaca* legislation.[25] Generally speaking, ethnicity influenced the

[21] Ibid., p. 14.

[22] Ibid., p. 15.

[23] Ibid., (data provided by the National Electoral Commission and distributed by the Commission at a meeting organised by GTZ, October 31, 2001). PRI reported some pressure on the population: 'in certain places, and especially in Kigali, participation was lightly forced by the intervention of the *Local Defense Force* which urged the population to close stores and small markets', ibid., p. 16.

[24] Ibid., p. 15: 'It is interesting to note that in a previous (undated) version of the electoral law, the role of the *nyumbakumi* was never mentioned, although the vote was presented to them as mandatory: "*The vote is mandatory for every Rwandan (…)*" (Article 5). In a later version of June 26, 2001, this article was withdrawn. Instead, a greater emphasis was placed on the role of the *nyumbakumi*: "*Each nyumbakumi shall designate a number of persons of integrity at least equal to the number required, to be presented by each nyumbakumi* (…). "*After the election in the nyumbakumi, the General Assembly shall meet and the chosen candidates shall be introduced*" (Article 38)'.

[25] Ibid.

attitude of the population towards the election of the *gacaca* judges. The Tutsi segment of the citizenry was very active during the election and tried to cover the highest number of seats within the *gacaca* jurisdictions in order to counterbalance the numerical disproportion. Nevertheless, Tutsis during this phase also expressed concerns regarding the *gacaca* experiment. The words of this survivor point the fingers to critical features of the *gacaca* system:

> At judgement time, a judge from the family of a detainee will have a tendency to be partial, while the survivor judge will feel insecurity. Where are they going to find judges who are not closely related? During the elections, will there be a fixed percentage of judges who are survivors? Since family members of those who took part in the genocide are in the majority, I can't see how we will be able to get judges who can defend us. Won't they tend to side with detainees who are part of their families? On hills where all the Tutsis were killed and where only Hutus are left, who will give testimony to convict the detainees? Who will lead the elections? Who will be elected, won't it be those who killed?[26]

Hutus, on the contrary, were less interested in the process and expressed different concerns:

> They will find capable judges, except that it is difficult to find a real sage or a person who is one hundred per cent objective. There will be few people they call "sages" to run the *gacaca* trials successfully. As long as they are not paid, their work will not be efficient [corruption] and justice will not be done.
>
> All the authorities are, in general, Tutsis, and people say they [the authorities] are the ones who are responsible for preparing the population for the election of the judges. How are they not going to corrupt this population, and even these judges?
>
> NGOs should monitor the election of the *gacaca* judges so that there is no corruption or intrigue because the outcome of the *gacaca* depends a lot on the judges.[27]

The election of the judges took place through an indirect vote. The candidates, proposed by the *nyumbakumi*, were publicly presented to the population, who were free to express their opinion and to propose alternative names. The basic requirement for running for *inyangamugayo* was 'honesty', which was however not strictly defined. It might be possible to infer what was meant by 'honest' by considering the reasons why the population rejected certain candidates. Exclusion was based on alcoholism, adultery, prostitution, failure to pay debts, different forms of violence and participation in the genocide.

The candidates elected at the cell level were mandated to appoint, this time through a written and secret vote, the members of the cell coordination committee and those judges to be sent to the sector level. The same process took place at the upper levels. Quite predictably, some of the persons elected as judge had covered administrative functions at cell level or had previously acted as *nyumbakumi*.[28] The

[26] Ibid., p. 16.

[27] Ibid.

[28] Ibid., p. 17.

Table 7.1 Election of judges

Administrative level	Female judges (%)	Judges not having finished primary school (%)
Cell	35	44
Sector	23	35
District	26	5
Province	19	0

Source Penal Reform International 2005, p. 17

election's result favoured male candidates; the percentage of female judges was quite low, as demonstrated by Table 7.1.

The distribution of the judges' seats reflected the level of education and literacy, which in Rwanda, especially for those older than 30 years, is higher for the male segment of the population.[29] The majority of the judges appointed at cell and sectors level were farmers, respectively 91% and 80%, while within the higher jurisdictions, the majority of *inyangamugayo* worked as civil servants or teachers (48% at district level and 68% at province level). As PRI has highlighted, 'All are interesting indicators with regard to which social classes bear the greatest responsibilities in the *Gacaca*, and indicators that may shed light on the reproach often made about the lack of involvement of elites'.[30] The training of the judges took place in the months of April and May 2002 and proved to be inadequate. To redress this lack of training, given also the frequent amendments in the law, further training sessions were organised later and the judges were helped by '*gacaca* coordinators'. These early developments of the *gacaca* system raised some doubts on the independence and competence of the *inyangamugayo*.

7.5 The Launch of *Gacaca* Courts

The Rwandan Government decided to experiment with *gacaca* trials during a restricted pilot-phase in selected areas. Beside the issue of the insufficient judicial training, other crucial problems were still unsolved when this phase began. Among them, the pressing problem of the reparation law, never adopted up to date. Similarly, the funds to start the community service system were not yet available and the National Human Rights Commission set up in 1999, charged with monitoring the *gacaca* process, was not yet operational. Finally, the *gacaca* judges were

[29] Ibid., p. 17: 'As the table indicates, level of education was also an important factor in selection, at cell level as well, since the majority of judges had at least finished primary school. At district and province levels, a large percentage of elected judges (46 and 60% respectively) had finished their secondary education'. See also Department of Statistics, *Rwanda Development* Indicators, n° 3, Ministry of Finance and Economic Planning, Kigali, July 2000, p. 267.

[30] Ibid.

not provided by the office of the National Prosecutor with the information sheets regarding defendants that were necessary to start the hearings.

Despite problems and uncertainty, *gacaca* debuted on 19 June 2002 in 79 cells across 12 sectors, one for every province. Their work was regulated under articles 33 and 34 of Organic Law 40/2000. The selection criteria were mainly based on the number of confessions per sector, on the available infrastructures, the results of the training of the judges and finally on the cooperation and good willingness showed by the concerned population. The second phase started on 25 November 2002 involving 106 new sectors (including 672 new cells). The pilot phase of information gathering took two and a half years and was accomplished by 2004. The government then opted for the simultaneous launch of the phase of information gathering at national level and of the judgement in the pilot areas.[31] Some clarifications regarding the collection of evidence are necessary given its crucial relevance within the *gacaca* experiment.

Pursuant to the 2004 Organic Law, the National Service of *Gacaca* Jurisdictions was tasked with coordinating the activities of the courts. The SNJG soon made clear that some changes in the technique of information gathering would mark the evidence collection at national level launched in 2005. In fact, it affirmed that 'the old method of information collection differs from the one today. During the pilot phase, it was the *gacaca* judges in charge of the information collection. In the national phase the information-gathering was driven by the authorities'.[32] It must be clarified that there is no provision in the 2004 *gacaca* law for recurring to administrative support in any operation of the judicial process. In the words of PRI, 'At no time did the Rwandan legislator intend for the jurisdictional *gacaca* functions of information-gathering to be entrusted to an authority other than the one legally vested with these functions, namely

[31] An alternative to this solution might have been to wait for the end of the nationwide collection phase before starting the trials. On this point, see Penal Reform International 2005: 'Two possibilities thus presented themselves. The first consisted of waiting until all of the *Gacaca* courts, at the national phase, had also finished their work of gathering information and categorization, in order to begin all of the judgement phases. The reason that this option was interesting was due to the fact that all of the sectors would then be at the same level, which would mean that the actual culpability of persons having committed crimes in different places would be established. This would then allow for the judgement phase of these accused persons to occur only in the cell where they had committed the most serious offenses. The purpose of this option was to avoid the duplication of trials. Ultimately, however, the second option was chosen: the concomitant launch of the national data collection phase (on January 15, 2005) and the judgement phase of the pilot jurisdictions (on March 10, 2005). Thus the choice was made to have the accused appear in each cell where they committed crimes. The government put forth the following arguments in favor of this solution: First, this solution permitted the population who had participated at the pilot phase to avoid having to attend the judgements indefinitely. At the time this choice was to be made, however, no one could actually say how long the data collection during the national phase would take. Second, having each accused person appear in each cell where he committed offenses was supposed to facilitate reconciliation by allowing all victims to face perpetrators'.

[32] This change in the evidence collecting is however not reflected in the words of the 2004 *Gacaca* Organic Law, which only relies on *inyangamugayo* for this procedure.

the *gacaca* court'.[33] Furthermore Article 49 of Organic Law 16/2004 established only that 'Leaders of administrative organs in which *Gacaca* Court function shall provide them with premises in which they shall perform their duties, as well as sensitise the population for their active participation'. This norm made it possible for local authorities to assist *gacaca* courts in the logistics but did not allow any other kind of intrusion. Article 15 of the same law clearly affirmed that individuals that covered positions in the administrative sector could not act as a *gacaca* judge. The SNJG disregarded the principle of independence of the *gacaca* magistrates from the administrative authorities explicitly by publishing a document entitled *Procedure for the Collection of Information in the Gacaca Courts. Truth-Justice-Reconciliation* in November 2004.[34] The document, referring to the information gathering procedure, urged the local authorities to complete 'lists in collaboration with the population under their authority'. The evidence-collecting phase was consequently to large extent delegated to the *nyumbakumi*. The procedure described in the SNJG manual requested the *nyumbakumi* to summon information on the genocide 'by questioning those who live in his ten-house cluster, and then to fill in one or more notebooks that include the 24 lists depicted as forms by the SNJG'.[35] As to the methodology to be applied to the search, the *nyumbakumi* were left free to choose the most suitable approach. While some of them organised meetings inviting all the inhabitants of the ten houses, others preferred to perform a house-to-house visit. Reportedly several *nyumbakumi* found their task very challenging because of difficulties in filling the forms provided by the SNJG. The interpretation of key terms such as 'roadblocks', 'barriers', 'work' varied significantly depending on the *nyumbakumi*. Reportedly, this has led to the insertion in the lists of suspects of individuals who had nothing to do with the genocide.[36] The progressive involvement of the local authorities turned out sometimes to be an actual interference consisting 'primarily in preventing certain testimonies from being heard in order to protect the relatives of the authorities in question, as well as the members of the administrative units (…) under their authority, if not the authorities themselves'.[37]

The judges again became the focal point of the *gacaca* procedure at the next step, the so-called 'validation' phase, when they were required to verify the

[33] On this point, see Penal Reform International 2006, p. 4: 'Both the 2001 law 16 and the June 2004 reform entrust this responsibility to the *gacaca* courts, which are composed of a General Assembly and a Seat (bench) of *gacaca* judges elected by the population. The June 19, 2004 law, which is currently in force, remains true to this principle and in no way calls for authorities other than that of the judiciary to intervene in the gathering of information'.

[34] On this point, see National Service of *Gacaca* Courts, Procedure for the gathering of information in the *Gacaca* Courts. Truth-Justice-Reconciliation, NSGC, Kigali, November 2004 (Penal Reform International translation of the document entitled Gahunda yo gukusanya amakuru akenewe mu nkiko *Gacaca*, ibid.).

[35] On this point, see Penal Reform International 2006, p. 8.

[36] Ibid., pp. 11–12. The lists included, for instance, the names of those who killed at the barriers as well as of those who stood there passively. Moreover, roadblocks, the attendance of which was mandatory for all males older than 18, were organised by the government after the RPF invasion of October 1990. Consequently, it seems that the names of several individuals who had nothing to do with the genocide were included in the lists drawn by the *nyumbakumi.*

[37] Ibid., p. 17.

accuracy of the evidence gathered. The term 'validation' appeared in the SNJG's Procedure Manual for the gathering of information, which described the new function assigned to the *gacaca* judges as follows: '*When the gacaca judges have just examined and confirmed this information (collected by the nyumbakumi), the president of the gacaca court convenes a meeting of the General Assembly for the validation*'. The content of the *nyumbakumi*'s notebook was subsequently transcribed in another document drawn at cell level, the ledger, by the *gacaca* secretary, often outside the *gacaca* session and without any form of control. The difficulties the secretary had to face were remarkable: sometimes, in order to fill a ledger, the secretary had to read and integrate more than ninety notebooks from the *nyumbakumi.* The cell population was, on some occasions, not allowed to question the information gathered. Moreover, as Human Rights Watch has reported, 'when persons placed in category one were brought to trial in conventional courts, judges in these courts sometimes relied on the untested information gathered during the *gacaca* accusation process in deciding the case'.[38]

The last step was the categorisation of the suspects before the cell assembly.

The phases of judges' election and information gathering, (at both pilot and national level) took place altogether without major incidents. Concerns, on the contrary, were raised by the limited opportunity enjoyed by the accused individuals to defend themselves during the information-gathering phase. The key feature of the *gacaca* courts system, which according to its supporters compensated the lack of a legal counsel, was the necessity that every procedural phase, including the pre-trial phase, was supervised by the population summoned in the general assembly. Among the tasks of the *gacaca* assembly at the cell level, Article 33 of Organic Law 16/2004 enumerated 'to assist the Seat of the *Gacaca* court with the establishment of the list' and to 'present the evidence and testimonies for the prosecution or for the defence of persons suspected of the crime of genocide or other crimes against humanity'. However, reportedly on occasion the suspects were not able to challenge the accusation formulated against them. This is what happened for instance when an exonerating witness of the defendant was jailed and the authorities did not provide adequate means to organise his/her appearance.[39] In addition,

[38] On this point, see Human Rights Watch 2008, p. 21: 'In one appeals trial in the High Court in 2006, a three judge panel used information from a *gacaca* jurisdiction to justify its confirmation of the conviction of the accused without independently assessing the credibility of the information. In another such case, the judges accepted only part of the information provided by the *gacaca* jurisdiction but again did not attempt to verify the part accepted'. See High Court, Kigali, Cases no. RPA/ GEN/ 0235/ 05/ HC/ KIG, June 20, 2006 and JRPA/Gen/0035/0S/HC/KIG, August 8, 2006. See also Kamashabi Felicien, 'Ngoma/Mugesera: Gakware Léopold a commencé à plaider', Journal Umukindo N°29, March 2007.

[39] See Penal Reform International 2006, p. 27: 'PRI regretted that during the pilot phase it was unfortunately not always possible to hear all of the defendants, in particular because many were prisoners and the authorities encountered significant practical difficulties organizing their appearance before the *gacaca* court and transporting them. However, at the launch of the national phase, it would have been desirable to be equipped with additional ways to make the right of any defendant to be heard by the *gacaca* court more tangible, prior to being categorized'.

the collection of evidence in small groups as the 'ten houses groups' on the one hand may have encouraged spontaneous confessions of those who pleaded guilty, but on the other may also have favoured the practice of providing false accusations. This practice was also used to settle personal scores, especially concerning property issues, and was also reported on by Alison des Forges in the immediate aftermath of the genocide.[40] In Rwanda it assumed different forms. Some of them known as '*kugura umusozi*'[41] and '*ceceka*'[42] have been in the spotlight of monitors, representing a plight for the *gacaca* system, undermining its potential as a truth-telling mechanism. Rwandans I have interviewed since 2005 have always confirmed the wide scope of these practices. Agathe, a widow who lost her husband and children during the genocide and actively participated in the *gacaca* process in Gahogo, affirmed that:

> The quantity of lies circulating during the hearings are certainly one of the main problems. We, the victims, witness daily that perpetrators organize among themselves in order to invent stories exempting them from any responsibility. The problem here in Rwanda is that the account of the perpetrators is necessary, as they only know exactly who killed who and the whereabouts of the corpses of the victims.[43]

The lack of an actual implementation of the right to a defence during the pre-trial phase is seen very critically by scholars and was strongly stigmatised by NGOs monitoring *gacaca*. In particular, PRI made this point very clear by affirming that 'The observation of this first phase of information-gathering in 2005 has shown that it is nearly impossible for a person accused before a *nyumbakumi*, or later during information-gathering meetings in the cell and sector, to bring the least element of defence'.[44]

An important role in this sense was played by the new forms delivered by the SNJG to gather evidence on genocide-related crimes, which, unlike during the pilot phase, did not include any space for the record of defence testimonies.[45] During the pilot phase in fact another collection method was practiced, allowing the secretary

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[40] On this point, see Des Forges 1999.

[41] This practice, literally meaning 'to buy the hill' consists of a transfer of guilt: a person convicted for genocide assumes on him/herself the responsibility for crimes committed by others in order to get them rid of any possibility of being accused.

[42] *Ceceka* is a solidarity pact, the silence agreement among genocide perpetrators who refuse to testify and protect themselves collectively against accusations. In areas where the survivors are a few, given the fact that they used to hide during the genocide, this pact made investigations and evidence gathering de facto impossible. On the practice of *ceceka*, see Bornkamm 2012, p. 142; Palmer 2015, p. 143; Penal Reform International 2010, p. 17.

[43] Interview in Gahogo, 2 October 2009, on file with the author.

[44] On this point, see Penal Reform International 2006, p. 31.

[45] Ibid.: 'In fact, all of these forms aim to establish the nature of the criminal acts (distribution of weapons, participation in militia or roadblocks, etc.) and the identity of their perpetrators, hence accused persons, as well as the identity of the victims or survivors. As such, this method of information-gathering differs considerably from what was practiced in the pilot phase, where the secretary of the court took into account all the debates and therefore also the testimonies for the prosecution and for the defence'.

of the *gacaca* bench the record of the account of all the debates, including defence testimonies. This detail was of great importance, as it emerged from the opinions expressed by my interviewees who stressed the importance of inclusion of defence testimonies in *gacaca* trial records.[46] A drastic limitation of the right to defence was also reported during the information gathering meetings at national level.[47] The attitude to disregard defence testimonies and the fact that suspected individuals were not allowed to defend themselves, has marred the phase of validation of information by the general assemblies of the cell level *gacaca* tribunals.[48]

Other interesting data emerged during the information-gathering phase regarding the misuse of Article 29 of the 2004 *Gacaca* Law, aimed at repressing false accusations and the refusal to testify during the trial phase, but sometimes mistakenly used during the pre-trial phase.[49] Article 29 punished omission and refusal of testimony, false testimony and slanderous denunciations with a penalty ranging from 3 to 6 months of incarceration. In case of recidivism, the penalty amounted to up to one year. *Gacaca* commentators have stressed that this provision was aimed at addressing pitfalls in the truth-recovering process before *gacaca*.[50] In December 2005 the SNJG reported that during the information-gathering phase '808 people [were] imprisoned on the basis of Articles 29 and 30 of the *Gacaca* Law'.[51] It is a legitimate question to ask how to determine if a witness is lying if the trial has not yet started and the witness has not given a testimony. As Penal Reform International has stressed, Article 29 was a measure to be applied within the trial phase and its large-scale use during the evidence-gathering phase is worrisome.[52] Hence the suspicion that the power to

[46] Kigali, interview with a representative of LIPDRODHOR, 16 October 2009, on file with the author.

[47] See Penal Reform International 2006, p. 31: 'The cell coordinator asked the population to let everyone speak freely, although when one person makes false testimonies against another, the latter is to keep silent and wait until the trial to defend himself'. PRI states on this point that 'During all of PRI's observations and interviews in 2005, only two cases were found where the individuals had been authorized to react to the accusations brought against them'.

[48] Ibid., pp. 33–37.

[49] Article 29 of Organic Law 16/2004 states that: 'Any person who omits or refuses to testify to what he or she has seen or on what he or she knows, as well the one who makes a false slanderous denunciation, shall be prosecuted by the *Gacaca* Court which makes the statement of it. He or she incurs a prison sentence for three (3) months to six (6) months. In case of repeated offence, the defendant may incur a prison sentence from six months (6) to one (1) year. Is considered as refusing to testify on what he or she has seen or known, any person who apparently knew something on a given matter denounced by others in his or her presence, without expressing his or her own opinion'.

[50] See Palmer 2015, p. 144: 'The inclusion of both denunciation and false testimony in 2004, as additional offenses suggests an increasing reliance of the judges on these powers, and highlights some of the constraints on truth-telling in *gacaca*'.

[51] See Penal Reform International 2006, p. 38, referring to data available through National Service of *Gacaca* Courts, "Summary Chart on information-gathering", Appendices.

[52] Ibid.: 'Yet how is it possible to know, even before the judgment phase – which brings together all the elements brought by the prosecution and the defense – has taken place, that a witness is lying or giving an incomplete testimony? The conclusion that testimony is false or incomplete cannot be reached until the matter is judged on the merits. This is the reason that Article 29 should be considered as applicable only during the judgment phase and not during the information-gathering phase.'

sanction false accusations has been abused to put witnesses under pressure surrounds the pre-trial phase of the *gacaca* experiment.[53]

The issue of popular participation also deserves some comments, as the fairness of the *gacaca* procedure strongly depended on the capacity of the assemblies to recover the truth acting as both accusers as well as defenders. Disengagement of the population has been reported in several areas of the country during the pre-trial phase. This is one of the reasons why the 2004 Organic Law made participation in the *gacaca* sessions mandatory. It is questionable if the resort to coercion in forcing turnout is consistent with the restorative and reconciliatory objective of *gacaca*. It must at the same time be taken into account that attendance in the hearings was unpaid and Rwandans missed working hours to join the *gacaca* sessions. Article 29 of Organic Law 16/2004 law states that 'Every Rwandan citizen has the duty to participate in the *gacaca* courts activities', but it does not envisage any penalty for the transgressors. The punishments applied consequently lacked any legal foundation and were characterised by an arbitrary case-by-case rationale. The most common sanction was a fine from 200 up to 1000 Rwandan Francs on average, according to the social status of the transgressor.[54] Another way to encourage and control participation of Rwandans in *gacaca* was the delivery of certificates of good conduct in the cell of origin where citizens were expected to attend *gacaca*. These certificates were later asked for by the authorities of the new cell in case the person had moved. This practice was however bereft of any legal foundation.[55]

One factor on which a general consensus by scholars exists regards the role played by ethnicity. Rwandans perceived themselves as Hutu and Tutsi when the *gacaca* project was launched, an attitude that, despite the government's rhetoric on unity and reconciliation is strongly rooted even today. Despite the official government's policy denying ethnicity, the social polarisation was acutely felt during the first phases of the *gacaca* launching. All the Rwandans interviewed perceived themselves as Hutu or Tutsi and have confirmed that the two groups maintain a distinguished identity. During an interview in Kigali for instance, a Rwandan farmer stressed that even now the Hutu and Tutsi do not gather in the same bars.[56] Rwandans seem aware of the ethnic groups that frequent bars, pubs and other public spaces and also follow the ethnic affiliation nowadays.[57]

[53] Ibid.

[54] Ibid., pp. 42–44.

[55] Ibid., pp. 44–47.

[56] Kigali, interview with Arsene, 28 October 2009, on file with the author.

[57] Venice, 10 January 2014, interview with a former RPF member.

7.6 The Judgement Phase

The nation-wide election of the *inyangamugayo* occurred under the provisions of the first two *gacaca* organic laws, which were however never applied in the judgement phase. The latter took place after these laws were deeply changed by Organic Law 16/2004. Amendments to the *gacaca* legislation introduced through Organic Law 13/2008 have strongly reduced the groups of suspects to be tried by ordinary courts.[58] Since 2008 onwards, *inkiko gacaca* have also gained jurisdiction over sexual crimes. This trend was already anticipated by the Organic Law 10/2007, which had restricted the inclusion within first category to offences perpetrated by planners and organisers of the genocide, political, administrative, military and militia leaders and those guilty of sexual crimes.[59]

The 2004 reform, in order to increase the pace of the trials promoted the reduction of the number of judges composing the bench (diminishing the guarantees against corruption of the magistrates) and suppressed the *gacaca* courts of district and province. A remarkable speeding up of the trials was recorded in 2007, when additional courts were set up.[60]

Another crucial consequence of the law amendments was the progressive reduction of the terms of sentence. First of all, the sentence reduction could be applied also to those offenders placed in category 1 who plead guilty, which was not possible under the Organic Law 8/1996. Pursuant to the *gacaca* law as emended after 2008, every category of wrongdoer could have the sentence commuted. According to the international NGO Redress 'the possibilities for suspension of a portion of the sentence and commutation to community service are so extensive for category 2 perpetrators that few spend more than the time they have already served in prison prior to the commutation of their sentence'.[61]

The judgement phase launched in 2005 in restricted areas and later extended to the entire country dragged at length, despite the repeated rumours of a peremptory deadline issued by the government. This proved to be no more than wishful thinking and the *gacaca* courts, initially expected to accomplish their work within the end of 2007, were still at work until June 2012.

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[58] On this point, see Article 9 of the Organic Law Nº 13/2008. Since 2008 fell within the jurisdiction of ordinary courts the planners of the genocide at national and provincial level, the cases transferred from foreign countries or from the ICTR and those trials regarding individuals accused after the closure of *gacaca* courts.

[59] See Article 11 of the Organic Law Nº 10/2007 of 01/03/2007.

[60] This speeding up of the trials represented a prejudice for the quality of the justice delivered according several observers. On this point, see Avocats Sans Frontières 2007b, p. 15.

[61] On this point, see Redress 2008, p. 27. Article 21 of the Organic Law 13/2008 envisaged that 'a person sentenced to both a custodial sentence and to serve community services shall first serve community services and if it is proved that the work was exemplary executed then, the custodial sentence shall be commuted into community service'.

7.6.1 *The* Gacaca *Judgements: An Overview*

Overall, the *gacaca* courts completed 1,958,634 cases regarding 1,003,227 individuals including the appeal phase by the date of their closure on 18 June 2012.[62] The archiving and analysis of such a gigantic number of sentences is a work in progress that will last for years.

The official records of the National Service of *Gacaca* Jurisdictions allow us to get an overview of the cases dealt with providing data regarding the crimes committed, their whereabouts and time, the damages caused, perpetrators and victims.[63]

As the Table 7.2 illustrates, the vast majority of the cases faced by *gacaca* courts regarded property-related crimes, (1,26632 67% of the total).[64]

Approximately, 33% of the crimes were categorised in category 2 and 1, involving crimes against people, with 3% of the crimes being included in the most serious category.[65] The conviction percentage reached 96% for category 3 crimes and amounted to 88% for category 1 and 63% for category 2.[66] 134,394 cases were appeal cases, corresponding to approximately 9% of the overall amount with a percentage of acquittal of 26% (45,839).[67]

Investigating how *gacaca* faced property cases is of utmost interest, because it is in settling property issues that *gacaca* have displayed their restorative aspect.

As stressed by Nyseth Brehm et al., the most common penalty for property-related crimes was a fine, issued in 980,529 cases (approximately 87%).[68] The median fine amount was 7,100 Rwandan Francs corresponding to US $11. The amount of the fine was calculated through a list of damaged, destroyed or stolen

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[62] Hola and Nyseth Brehm 2016, p. 64.

[63] I rely here on the data provided by Nyseth Brehm et al. 2014. The analysis excludes appeal trials, trials in absentia and trials the transcript of which was marked by evident errors including a total of 1,441,555 out of 1,958,634 cases.

[64] Ibid., p. 339.

[65] Ibid.

[66] Ibid. These data regard trials at first instance and exclude the appeal phase. The authors explain that the 'high percentage of those convicted in Category 3 may be explained in part by the relatively modest sanctions (…) In addition, the discrepancy between those convicted in Category 1 as opposed to Category 2 (63%) may be due in part to the percentage of confessions in each category (approximately 41% and 30%, respectively) or the notoriety of the perpetrators'.

[67] Ibid., p. 340.

[68] Ibid.: 'The median fine amount was 7,100 Rwandan Francs (RWF), which corresponds to approximately US$11 at the current exchange rates (649 RWF per U.S. dollar) and a relatively modest percentage of Rwanda's per capita gross national income of US$560 (World Bank, 2013, data for 2011). Approximately half of the fines were between 1,285 and 25,000 RWF, or US$2 to US$39 (…) Almost one fourth of the fines were less than 1,000 RWF, and another third were below 10,000 RWF, likely reflecting the economic circumstances of the perpetrators. At the other end of the distribution, 9% of fines exceeded 100,000 RWF, or US$154 (and 1% of fines exceeded 680,953 RWF, or US$1,049)'.

Table 7.2 *Gacaca* judgments

Category	Number of cases	%	Number found guilty	%	Appeals
1	60,552	3	53,426	88	19,177
2	577,528	30	361,590	63	134,394
3	1,320,554	67	1,266632	96	25,170
Total	1,958,634	100	1,681,648	86	178,741

Source Nyseth Brehm et al. 2014

property that the victim read during *gacaca* hearings. The community was involved in this process recalling damages when there was no survivor on the side of the victim. Where no member of a family survived the genocide, the fines were saved in a special account in case relatives of the deceased victim claimed them at a later stage.[69]

More than 9% of the property related cases were regulated through an agreement (*ubwumvikane*) between the perpetrator and the victim, a sort of negotiation which was finally ratified by the *gacaca* bench at the cell level.[70] An agreement between victim and perpetrator was reached in 104,289 cases.

Instances of 'exemption' (*gusonerwa*) were also registered, where after the mutual acknowledgement of the crime the victim allowed the perpetrator to repair the damage for a lesser amount. Over 25,000 cases (2.3%) were settled via exemption.[71]

Approximately 1% of category 3 cases were settled through restitution, with the return of a variety of different goods to the victim. In all the mentioned procedures the request for forgiveness by the perpetrator played an important role. When it was accepted it could exempt the perpetrator from paying damages.[72] Property cases were marked by a high level of flexibility, with victims and perpetrators experimenting with informal agreements allowing the latter to re-build houses damaged or working directly for those whose property was looted. In this context the potential of the *inkiko gacaca* as a restorative justice instrument aimed at improving the relations between victim and perpetrator emerged, with the former directly benefiting from the reparative actions of the latter.

The more severe crimes falling within category 1 or 2 were largely punished through incarceration. Circa 93% of the accused falling within these groups received a sentence ranging from a few months to 30 years. A life sentence was issued in 4.85% of the cases. The database of the SNJG also includes 329 cases where agreements were reached between victim and perpetrator. 100 cases of perpetrators sentenced to re-educational training camps were also recorded. In total,

[69] Ibid., pp. 340–341.
[70] Ibid.
[71] Ibid.
[72] Ibid.

296,295 prison sentences were delivered: 91,556 with community services and 204,689 without. 6,670 fines complemented the incarceration sentences.

According to Nyseth Brehm et al., perpetrators falling in category 1 were punished more severely than those in category 2, with an average term of incarceration of 19 years if we exclude the life sentence. The latter was delivered in 17% of the cases. As to category 2, where only 2% of the convicted perpetrators received a life sentence, the average term of incarceration was 15 years. Nyseth Brehm et al. showed that *gacaca* courts have punished less severely than US criminal courts dealing with murder cases.[73]

Demographic and social characteristics of the perpetrators emerge to some extent from the data made available by the SNJG too. A higher percentage of men had fines imposed for offences against property than women. For category 1 and 2 crimes, men and women were generally sentenced in a similar way.[74] A discrepancy emerges however comparing life sentence received by men (17%) and women (7%) included in category 1. The same trend has been recorded for category 2, where men were more likely to receive life sentence than women.[75]

Taking into consideration age, approximately 16% of perpetrators aged 32 years of age or younger received life sentences for category 1 crimes, while only 11% of older perpetrators in the same category received the same punishment.[76] The difference in the age distribution of life sentences for category 2 crimes is modest.

A comparison of the sentencing practice of the three jurisdictions dealing with the Rwandan genocide, the ICTR, Rwandan domestic courts and *gacaca*, is of great interest.[77]

The ICTR legal documents left the judges in Arusha a wide margin of discretion regarding the sentencing phase.[78] An exam of the ICTR case law however allows the identification of a set of principles that the judges have consistently abided by.[79] The first parameter to be considered by the ICTR judges to determine the sentence

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[73] Ibid., p. 344: 'As a point of reference, 23% of U.S. homicide offenders were given life sentences in 2006. The remainder were sentenced for an average of 21 years (Rosenmerkel et al. 2009, p. 6), significantly longer than sentences given to genocide perpetrators tried in the *gacaca* courts. While the United States remains an outlier in regard to sentence length, the sparing use of life sentences for *gacaca* Category 2 crimes also appears tough but fair by international standards (Bernaz 2013)'.

[74] Ibid., p. 345: 'In general, a greater percentage of men received fines for Category 3 crimes, with a median fine amount of 7,480 RWF for men and 5,000 RWF for women. Yet, for Categories 1 and 2, the median length of years in prison (15) was the same for men and women, and community service was given in a similar percentage of cases. With regard to age at the time of offense, the average fine was 8,155 RWF for people at or below the median age of 32, relative to 7,435 RWF for people 33 and above. In addition, the median length of prison sentences was 12 years for those less than age 33 and 13 years for those over age 33 and above'.

[75] Ibid.

[76] Ibid.

[77] Hola and Nyseth Brehm 2016.

[78] Ibid., p. 67.

[79] Ibid.

was the gravity of the offence (determined *in concreto* referring to the specific circumstances of the case).[80] The judges in establishing the sentence have taken into consideration aggravating and mitigating factors. While aggravating circumstances had to be directly related to the commission of the crime, mitigating factors had to refer more generally to the defendant.[81] Among the aggravating factors the ICTR jurisprudence has often referred to the abuse of position of authority or leadership, while the support provided to victims was categorised as a mitigating factor.[82]

Judges in domestic and *gacaca* courts had a much narrower margin of discretion than their colleagues at the ICTR with respect to sentencing. In both domestic and *gacaca* trials the severity of the sentence depended on the categorisation of the offence within the categories established by law, with little discretion for the judges. Where Rwandan judges were given a certain margin of appreciation was in the phase of categorisation of the offences.[83] The primary factor influencing the sentence before ICTR, domestic and *gacaca* courts was culpability, based on the position of authority, the role played in the offence, and the modalities of the execution of the crime.[84] The gravity of the offence determined the sentence to a lesser extent than the prior mentioned factors.[85] A comparison of the sentencing practice at ICTR, domestic and *gacaca* courts dealing with category 1 offences conducted by Barbora Hola and Hollie Nyseth Brehm allows us to assess how these three courts dealt with the most serious offences relating to the genocide (the analysis is limited to first instance trials and does not take into account the appeal phase). The percentage of conviction is similar in domestic courts and the ICTR (71.1% at the ICTR, 76% at domestic courts and 75.4% at *gacaca*).[86] Differences however existed with regard to the length of the sentence. The median sentence was 25 years before the ICTR, 14 and 19 years respectively before domestic courts and *gacaca* for category 1 crimes. The length of the median sentence before the ICTR is not surprising considering that the tribunal in Arusha has concentrated its action on the key actors responsible for the planning and execution of the genocide.[87] The percentage of life sentences was 42.2% before the ICTR, 12.2% before domestic courts (to which it must be added 66% of the death penalties converted into life sentences) and 16.5% before *gacaca*. The percentage of determinate sentences below five years was restricted before both ordinary Rwandan courts and *gacaca*,

[80] Ibid.

[81] Ibid., p. 68.

[82] Ibid.

[83] Ibid., p. 70: 'Judges and *inyangamugayo* were able to circumvent limitations on their sentencing discretion by exercising greater discretion in the offfender categorization stage or by re-categorization cases'.

[84] Ibid., p. 72.

[85] Ibid.

[86] Ibid., p. 73. In the case of *gacaca*, the remaining cases were acquitted, while in the case of the ICTR and ordinary courts they were transferred to other jurisdictions, never held or dismissed.

[87] Ibid.

while the ICTR did not deliver sentences as lenient. In more than 10% of the cases both the ICTR and *gacaca* delivered sentences between six and ten years in prison, while domestic courts delivered few sentences in this range.[88] Most of the perpetrators in category 1 before ordinary courts (circa 70%) received a penalty ranging from eleven to fifteen years in prison. Such a penalty range was given to slightly more than 20% of those convicted by the ICTR and *gacaca*. Sentences of 26 years or more were delivered in approximately 29.7% of the cases by the ICTR, and in 30.5% by *gacaca*. The percentage before domestic courts of such a long penalty was much less significant (below 5%). Interestingly, from the analysis conducted by Hola and Nyseth Brehm it has emerged that the ICTR has delivered life sentences based on an internal scale of comparison of the culpability regarding only those tried in Arusha without taking into account other genocide perpetrators.[89] Finally, Rwandan judges in some instances seem to have disregarded the sentencing guidelines provided for by the law.[90] Category 1 defendants before *gacaca* and ordinary courts in fact were subject to a sentence ranging from 20 years to life imprisonment.[91] Most of the determinate sentences delivered however were in general below 20 years. This is in line with an earlier analysis by Rugege and Karimunda regarding the sentencing Rwandan of ordinary courts.[92]

To conclude on this point, it would appear that ordinary domestic courts in Rwanda were more severe in the sentencing of genocide-related crimes than the ICTR and *gacaca*. The data analysed have to be assessed with caution because data regarding domestic courts are partial and the database set up by Hola and Nyseth Brehm mainly included trials which took place under Organic Law 8/1996, which established very harsh penalties. At a later stage, a drop in the retributivism marking the legislation regarding genocide sentencing can be observed. This was due to both the inclusion of strictly non-retributive goals, such as the reintegration of the perpetrators, and pragmatic reasons such as dealing with the backlog of the genocide and emptying prisons.[93] Moreover, the ICTR seems to have delivered less severe penalties than Rwandan domestic courts, which may be surprising considering that the court in Arusha exclusively tried high-profile perpetrators.[94] The three systems of courts: *gacaca*; the ordinary courts, and the ICTR, refrained from delivering exclusively the most severe sentences established by the respective legislation.[95]

[88] Ibid.
[89] Ibid., p. 75.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid., p. 78.
[94] Ibid.
[95] Ibid., p. 77.

7.7 The Perspective of Women and Children

Concerns have been expressed by NGOs and international monitoring bodies with regard to the safeguard of the rights of vulnerable groups directly affected by the genocide, particularly women and children. The transitional justice strategy pursued in Rwanda has not made redressing the wounds of these categories of victims a priority, in spite of the government's declared intentions.[96] On paper, the new constitution has prioritised the needs of genocide survivors, paying particular attention to vulnerable groups. As we have already stressed, Article 14 of the Constitution in fact affirms that the Rwandan State shall adopt special measures for the welfare of survivors, especially vulnerable groups. The failure to prioritise their needs affected both women and children, compromising their reintegration in society as well as their role as actors in the reconciliation process. Street and orphaned children, children heads of households, HIV-positive children and children deprived of an access to education and basic care were among the victims of the genocide in Rwanda.[97] Rwanda's transitional justice and reconciliation strategies have not adopted a specific focus on children, despite the large-scale victimisation they suffered during and after the genocide.[98]

The transitional justice policies Rwanda has set in motion were mainly aimed at pursuing a program of full criminal accountability for all those involved in genocide-related crimes (and only for them), no matters if those concerned were adults or children. It remains rather questionable however whether a child might

[96] Within the political program of the GNU, in the wake of the genocide, fell the duty to set in motion efforts in order to rehabilitate vulnerable groups, especially those who had survived the war and the genocide: orphans, widows and the disabled. The accomplishment of this task was confirmed five years later, when, due to the remaining challenges, the transition had to be extended for an additional period of four years: the updated political program of the Rwandan Government gave priority to areas such as 'rehabilitation of the victims of the war, massacres and subsequent migrations with special attention to children in difficult circumstances' and 'strengthening unity and reconciliation among Rwandans, democracy and good governance'.

[97] UN General Assembly 2000, Concluding observations: Rwanda.

[98] Ibid., para 72: With regard to juvenile justice, the Committee on the Rights of the Child has stressed that: 'Is concerned at the limited progress achieved in establishing a functioning juvenile justice system throughout the country. In particular, the Committee is concerned at the lack of juvenile courts, juvenile judges and social workers in this field. In addition, it is deeply concerned at the very poor conditions of detention'. Moreover the Committee recommended that 'The State party take additional steps to reform the system of juvenile justice in the spirit of the Convention, in particular Articles 37, 40 and 39, and other United Nations standards in the field of juvenile justice, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System'.

have the *mens rea* necessary for committing the crime of genocide. Moreover, Rwandan policies implied a lack of attention to the needs of children victims of the genocide, deprived of both, the expected reparation programs as well as suitable healing plans.

Children accused of genocide-related crimes did not benefit from any of the child-sensitive opportunities provided by international hard and soft law instruments. This is true, in particular, with respect to important pillars of the CRC, upon which General Comment 10 on juvenile justice[99] of the Committee on the Rights of the Child has drawn attention. These pillars are the general principles embodied in Article 2 (Non-discrimination), Article 3 (Best Interests of the Child), Article 6 (The right to life, survival and development) and Article 12 (Right to be heard) of the CRC. These 'leading principles of a comprehensive policy for juvenile justice' were disregarded when implementing transitional justice strategies in Rwanda.[100] The principle of the best interest of the child for instance, means that 'the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders'.[101] This was contradicted by the strict policy of prosecution of genocide-related crimes in Rwanda. With respect to the *gacaca* system, the Committee on the Rights of the Child has clearly expressed its concerns:

> The Committee notes the establishment of *gacaca* courts but is deeply concerned that no specific procedure has been established for those who were under 18 at the time of their alleged crime, as required by article 40, paragraph 3, of the Convention, and are still in what could be considered as pre-trial detention.[102]

Gacaca legislation lacked child-friendly procedures and disregarded reparation programmes targeting minors although the majority of the Rwandan population was under eighteen at the time of the genocide. Minors involved in the genocide as perpetrators were treated by the *gacaca* law by the same yardstick as adults, except for allowing for reduced penalties. In other words, the best interests of the child were not considered a parameter when drafting the *gacaca* law. Cases of minors tried as adults have also been reported, as well as cases of children tried despite their being less than age fourteen years old, the minimum age for criminal responsibility.[103] Moreover, trauma-healing experts admit that the procedure before *gacaca*, where outbursts of sorrow and rage are understandably admissible, can be risky for traumatised child victims. *Gacaca* trials in fact were not designed to foster

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[99] On this point, see General Comment No. 10 (2007) Children's rights in juvenile justice, /C/GC/10, 25 April 2007, pp. 4–7.

[100] Ibid.

[101] Ibid.

[102] Ibid., p. 17.

[103] During an interview, a Rwandan lawyer referred to the case of a girl child who was tried in a group with her relatives despite the fact that she was below 8 years at the time of genocide. The girl was convicted for stealing clothes of a young genocide victim to pay a large amount of money as compensation. Interview on file with the author, Kigali, 25 September 2009.

the healing of the participants in the hearings.[104] During interviews with members of an association of children orphaned by the genocide it has also emerged that the testimonies of those who were children in 1994 were often undervalued during *gacaca,* as the audience did not rely on their credibility.[105] During an interview one of the members of the Dukundane Family,[106] an association of orphans of the genocide has stated:

> In my understanding, *gacaca* jurisdiction is a system set by the government to speed up cases of those criminals, but it provides also justice that heals. That is true but there are some issues that I do not agree with *gacaca* system: how come they compel a person to confess and plead guilty so that his/her punishment could be reduced? There are also other issues of *gacaca* that give me headache, when a killer narrates all the evil things he committed, for example, he/she hacked a person, another confesses that after raping a woman he killed her by introducing a big sharpened stick (locally known as "igisongo") into her sex, and another admits to have killed a person by an old hoe (locally known as "agafuni"), and they say all of this in front of the relatives and friends of the deceased victims by smiling as if they are happy. There are other people who do not consider confession seriously and others when they are accused, they prefer to confess crimes committed by their family members.

The words of this survivor, stressing that the *gacaca* system was for some aspects imposed on victims of the genocide cast serious doubts on the alleged restorative nature of the *gacaca* procedure. This passage also clarifies in part the attitude and the disappointment of children survivors toward transitional justice policies in Rwanda, as they were put in the general category of survivors (*rescapés*) and their specific needs as children were not addressed. Promoting child-oriented transitional justice strategies in a country as young as Rwanda is not simply a policy option, it is a *condicio sine qua non* in order to address the scars of the past violence, taking into consideration that most of the population is under fifteen years of age.

Moreover, threats against survivor children as a consequence of *gacaca* processes have also been reported.[107] Particular concerns were also raised regarding the discussed attempt to amend the Rwandan Penal Code with respect to the minimum age of criminal responsibility, which the government proposed to fix below the age of eighteen.[108] This policy strengthened the impression that despite

[104] Interview with Professor Simon Gasibirege, Kigali, September 26, 2009, on file with the author.

[105] Interview with the 'Dukundane Family', 29 October 2009, on file with the author.

[106] The Dukundane Family (literally 'Let's love us family') is an association mainly composed of orphans of the genocide.

[107] On this point, see the Immigration and Refugee Board of Canada 2006: 'An article in the Rwandan daily newspaper The New Times reports that the home of a Rwandan woman who had testified before a *gacaca* court in the Rwamagana district was set on fire while she and her son were inside (22 Oct. 2006). Another article from the same newspaper indicates that a woman who testified before a *gacaca* court in the Nyagatare district was killed, along with her husband and son (The New Times 24 Sept. 2006). The motive for the crime was not known, but the woman had complained to the police that her family had been "attacked" on more than one occasion'.

[108] Interview with ASF representative, 6 Kigali, October 2009, on file with the author.

its participatory features, post-genocide justice remained in Rwanda strongly punishment-centred and marked by retributive features. Those who were children during the genocide also criticised *gacaca* because of the possibility of a penalty reduction for the perpetrators.[109]

Finally, *gacaca* did not embody a gender perspective to address the issue of women and girls who were victims of rape or other sexual crimes. Despite the fact that the Rwandan lawmaker considered rape a very serious crime categorised in the first class of offences, trials before ordinary courts were very slow. In October 2008, according to the National Service of *Gacaca* Jurisdictions, out of the 9,362 category one cases remaining, 6,608 regarded sexual crimes. Several reports confirmed that a high percentage of rapists remained at large and that efforts by authorities to bring them to trial were not fully convincing.[110] Survivors interviewed were adamant in stating that *gacaca* is not the most suitable place to address sexual violence.[111] Women particularly feared that the *in camera* procedure established by the last *gacaca* law did not offer sufficient guarantee of confidentiality. In small communities, the likelihood that amongst the sitting *inyanamugayo* there were also relatives of the defendant accused of rape was relatively high. The failure in pursuing sexual crimes is particularly disappointing because the key role assumed by rape as a genocide weapon was clarified early on by the jurisprudence of the ICTR in the ground-breaking judgement *Akayesu*.[112] The modification of the *gacaca* law regarding the crime of rape envisaged by Organic Law 13/2008 referred cases of rape to *gacaca* trials without taking account of the recommendations formulated by NGOs and human rights monitoring bodies. Serious concerns triggered the conferral of jurisdiction over sex crimes to the lay *gacaca* judges, despite the fact that experts urged for the matter to be dealt with by professional lawyers. Moreover, the introduction of a norm in Article 6 of the 2008 *Gacaca* Law that allowed the presence of observers of the SNJG and security officers during the hearings regarding sex crimes has also attracted criticisms. Article 6 of the 2008 *Gacaca* Law provided in fact that 'delegates of the National Service in charge of the follow up, supervision and coordination of the activities of *Gacaca* Courts, security officers, and Trauma Counsellors may follow up a matter being tried in camera'. Moreover, in the view of Ibuka, the main association of genocide survivors and Avega, the most prominent association of widows, the introduction of *in camera* hearings with closed sessions in the *gacaca* procedure seemed to be contradictory.[113] Ibuka and Avega held it to be at odds with the purpose of the *gacaca*

[109] On this point, see the Immigration and Refugee Board of Canada 2007.

[110] On this point, see Redress 2008, p. 89, reporting the testimony of Costasie, a 54-year old survivor victim of rape whose rapist has been released without any apparent reason after serving only 3 months of the sentence.

[111] Ibid., p. 90.

[112] See Akayesu, Case No. ICTR-96-4T, Judgment on 2 September 1998, Trial Chamber.

[113] Interview with representative of Ibuka, Kigali, 10 October 2009, on file with the author.

system, which in essence was aimed at encouraging public debate and the highest possible level of participation by common Rwandans.

7.8 Shortcomings of *Gacaca* Trials

Victims, perpetrators and independent researchers have progressively identified and underscored flaws of *gacaca* courts. These encompassed in particular the lack of inclusion of the survivors in the designing of the tribunals and in the drafting of the *gacaca* laws, the limited reparation modalities and the exclusion of RPF crimes from the *gacaca* jurisdiction. Other concerns regarded the practice of false testimony and accusations, false or not carefully evaluated confessions and procedural mistakes. More generally, the capability of *gacaca* to reconstruct the truth(s) regarding the genocide, and to encourage reconciliation and healing, were repeatedly questioned.[114]

Field monitoring has reported cases in which the *inyangamugayo* proved to be unable to manage the procedure governing *gacaca* hearings, particularly with regard to the cross-examination.[115]

Interestingly, the number of requests aimed at introducing witnesses exonerating the defendants was on average surprisingly low.[116] Reportedly, this was due to the fact that the information-gathering phase was marked by 'offensive' features, as the goal of *gacaca* was mainly perceived to be the production of crime-related evidence. This might have undermined the defence rights and altogether the fairness of the hearings. The process of speeding up the trials implemented in 2007 further exacerbated this problem. The judges also on occasion omitted to remind the audience of procedural norms. This omission regarded in particular the procedure concerning sexual violence as outlined in Article 38[117] of the Law 16/2004, which states that 'It is prohibited to publicly confess such an offence. Nobody is permitted to publicly sue another party. All formalities of the proceedings of that offence shall be conducted in camera'. The violation of the procedure was also usual during my

[114] Ingelaere 2016, pp. 76–97.

[115] On this point, see Avocats Sans Frontières 2007b, pp. 14–15.

[116] Ibid.

[117] Article 38 of Organic Law 16/2004 states that: 'As regards offences relating to rape or acts of torture against sexual parts, the victim chooses among the Seat members for the *Gacaca* Court of the Cell, one or more to whom she submits her complaint or does it in writing. In case of mistrust in the Seat members, she submits it to the organs of investigations or the Public Prosecution. In case of death or incapacity of the victim, the complaint shall be secretly lodged by any interested party in the manner provided for by the para 1 of this article. The person of integrity entrusted with such a complaint, forwards it secretly to the Public Prosecution for further investigations. It is prohibited to publicly confess such an offence. Nobody is permitted to publicly sue another party. All formalities of the proceedings of that offence shall be conducted in camera'.

direct observation in the *gacaca* jurisdiction of the sector of Gahogo, where a *rescapé* clarified that he survived an attack because the offenders concentrated on a woman who was raped.[118]

Inyangamugayo were sometimes unable to properly motivate the sentences they issued, many of which lacked any reference to the motivation.[119] Sometimes, in violation of Articles 64(6)[120] and 65(5)[121] of the *Gacaca* Law, witnesses, before testifying, were not required to take an oath. Concerns also surrounded the way the confessions, one of the cornerstones of the *gacaca* procedure, were given and received.[122] The law required confessions to include some specific elements to be validated and accepted by the *gacaca* judges, who otherwise would be required to reject them. These elements included a full account of the crime, the name of the victim and of accomplices, the place, the date of the offence and a sincere apology. Partial and false confessions clearly aimed at obtaining a lesser punishment or a transfer of guilt, together with silence agreements among perpetrators, were widely reported, placing the capacity of *gacaca* to recover the truth regarding genocide-related events seriously to the test. This was confirmed during my direct observation in the area of Gahogo in 2009, where outbursts of rage by the survivors were frequently triggered by the fact that perpetrators and eyewitnesses of the massacres refused to reveal the place where the corpses of the victims were buried.[123] This attitude deeply affected the *gacaca* process, especially in cases where the truth about the genocide could not emerge through the testimonies of the survivors, as they were often hiding during the 1994 slaughters. Without the contribution of perpetrators and bystanders, the truth-telling process in Rwanda is in fact not possible.

Moreover, it has been reported that in the sentencing phase on occasion the judges did not clarify whether the confession was accepted. *Inyangamugayo* also reportedly omitted to specify the moment of the confession, which had important consequences on the penalty reduction (the sooner the accused confessed, the bigger the penalty reduction should have been).[124] In other cases, the acceptance by the judges of the confession without any preliminary control or verification of its elements was reported. Worrisome too is the way cases of offences against property

[118] Observation of the trial of Habimana Laurent, *gacaca* jurisdiction of sector of Gahogo, Muhanga District, South Province, 1 September 2009.

[119] See Avocats Sans Frontières 2007b, p. 15.

[120] See Article 64(6) of Organic Law 16/2004, which states: 'any interested person takes the floor to testify in favour or against the defendant; responds to questions put to him or her. Every person taking the floor to testify on which he or she knows or witnessed, takes oath to tell the truth by raising his or her right arm, saying: 'I take God as my witness to tell the truth'.

[121] See Article 65(5) of Organic Law 16/2004.

[122] See Avocats Sans Frontières 2007b, pp. 16–18.

[123] Direct observayion of the trial of UMPFUYISONI Goretti and HABIMANA Laurent, 1 September 2009, *gacaca* jurisdiction of sector of GAHOGO, DISTRICT of MUHANGA, South PROVINCE.

[124] See ASF 2007b, pp. 16–18.

were dealt with.[125] The property restitution or indemnification due to the victims of category 3 crimes were one of the few forms of possible reparation and were supposed to play a role in the reconciliation process in Rwanda. *Gacaca* jurisdictions at the sector and appeal level omitted to deal with property issues even though *gacaca* law tasked them with this duty with respect to crimes of category 2 and 3. In such a case the sector and appeal tribunals, violating Article 94[126] of Organic Law 16/2004, sometimes referred the case to the cell *gacaca*. Instances where the courts omitted to deal with cases of pillage because establishing the value of the plundered goods was a time-consuming task were also reported. Sometimes those responsible for the pillages, which were usually accomplished in groups, were condemned to first give full reparation to the victim and to later make an arrangement with the co-accused. ASF has reported cases of category 3 convicted individuals who were forced to provide reparations to their victims through a procedure '*extra ordinem*' by selling their house and distributing the money they gained to the survivors.[127]

Accusations and convictions based on conduct that does not amount to genocide have been also reported.[128] Some individuals have been convicted only because they carried firearms, because they were in the place where people were slaughtered or because they were members of certain political parties.[129] Given the indeterminacy of some charges formulated by the judges, it is in certain cases impossible to understand what was the crime the defendants were accused of, which clearly represents a violation of the right of the accused to be informed of the charges against him/her.[130] The presence of the accused at a barrier on a certain day was sometimes evaluated as a presumption of culpability that was sufficient to condemn them. This was further confirmed by my direct observation of *gacaca* hearings. During a trial involving several accused of genocide, a pastor of a protestant church raised his hand to testify before the *gacaca* judges in Gahogo. The pastor was a well-known Hutu, who during the genocide had rescued the lives of several Tutsi and for this reason he was also awarded a special prize by the Rwandan Government. A few days after his testimony, he was indicted by the *gacaca* judges of Gahogo and accused of genocide-related crimes. The indictment was based on the presence of a relative of his at a checkpoint were Tutsi were intercepted and slaughtered during the genocide. The trial attracted a remarkable degree of attention due to the high consideration attributed to the indicted person by both Tutsi and Hutu in Rwanda. The accused was tried and eventually acquitted. During the trial I was allowed to interview him although he feared that talking to a stranger would

[125] Ibid., p. 18.

[126] Article 94 of the 2004 Organic Law Nº 16 states: 'Cases relating to damaged property shall be brought before the *Gacaca* Court of the Cell or other courts before which the defendants appear'.

[127] See ASF 2007b, p. 18.

[128] See ASF 2007b, pp. 20–21.

[129] Ibid.

[130] Ibid.

worsen his position. In order not to draw the attention of Rwandan authorities he required me to avoid open spaces. The interview took place in my car. The driver who accompanied me in my daily monitoring activities of *gacaca* hearings took us to remote areas in the countryside in central Rwanda. I was deeply touched by the personal story of this man in his early fifties, who was praised by the post-genocide Rwandan state to have rescued the life of several Tutsi, risking his life, and at the same time was accused of genocide. Unsure whether I would be able to understand the complexities of his story, I tried not to miss a lot of his speech. The pastor opened up and started to talk, expressing his strong disappointment for the paradoxical situation he was facing. Here is an extract of his narrative:

> It is not easy to handle so many crimes, the government is facing an unprecedented challenge. To be Hutu is very difficult in Rwanda today. Many have perpetrated heinous crimes. You know what I mean. Many are guilty. Many thousands. But not all. (…) To be an innocent Hutu, is even more difficult. You feel sorry for the victims, neighbours, friends, children, old inoffensive persons. You feel sorry for the perpetrators. They deserve punishment, but first they deserve re-humanisation, otherwise they will not understand what they have committed. (…) You feel sorry for the bystanders, for those who could have done something but didn't. To be Tutsi may be different, but it is equally difficult. (…) You have lost a big part of your family, relatives, of your world. You have experienced fear, rage, trauma, no surprise if you have no hope today. I see them every day, the genocide is part of our daily landscape. The survivors can speak aloud in *gacaca*, they can help to convict perpetrators, but the lost they suffer cannot be repaired by *gacaca*, it is mainly about punishing. To be Rwandan is even more difficult than being Hutu or Tutsi. It means to overcome the past, to acknowledge, to forgive, to repair. *Gacaca* is an effort, an attempt, but the government should first check if it has the resources to prosecute so many individuals simultaneously. *Gacaca* should encourage dialogue, this is the basis for our new national story-telling. There is the need to make justice, but assuming that every Hutu is guilty, will not take us far. Collective ethnic identities took us to the disaster.[131]

These words sum up the challenges that transitional justice has brought to Rwanda and shed light on the 'offensive' nature, characterised by a sort of presumption of guilt that is sometimes acquired by the procedures before *gacaca*.

The charges' vagueness in cases where the accused was held responsible for 'participation in genocide' or 'criminal participation' led several NGOs to ask *gacaca* jurisdictions to avoid incriminating individuals whose personal intent in participating in the genocide was not proved beyond any reasonable doubt.[132]

According to Article 32[133] of the 2004 Gacaca Law, intimidation and pressure against the witnesses and judges had to be pursued by the bench. In such a case, the bench had to suspend the hearing and to establish a date in which the offence would be dealt with. The practice of delivering the sentence (of up to a two-year prison

[131] Interview with Faustin, 28 September 2009, on file with the author.

[132] See Avocats Sans Frontières 2007b, p. 20.

[133] Article 32 of Organic Law 16/2004 states that 'The Seat for the *Gacaca* Court taking cognisance of offences stated in Articles 29 and 30, decides all matters ceasing and retires to deliberate on whether it is an offence to be prosecuted according to these articles. When the prosecution of the offence is confirmed, the Seat announces the day of the hearing, notifies it to the defendant, and records it in the notebook of activities before carrying on the Court's activities'.

term) at the end of the same hearing where the offence was recorded has also been reported. Such a practice also constituted a violation of the principle of adversarial debate and of the right to defence.[134]

Cases in which the sentence was delivered by default mainly regarded people who lived in areas far from the competent *gacaca* court, or individuals who had fled the country. Field monitoring has reported that in such cases usually the judges did not make sufficient efforts to grant the right to defence carrying out sufficient investigations and summoning witnesses. In one case, ASF has reported the conviction of an individual to 15 years in prison *in absentia*; the man having been suspected of helping a group of assailants, while the only witness in the audience pointed the finger to another person without any further debate or investigation.[135] In cases of trial by default, there has existed a practice of charging relatives of the accused instead of the absent person; this has even been reported when the latter had died. This practice represented a violation of the principle of the personal nature of individual criminal responsibility. The relatives of the accused, when responsible under civil law, could only be demanded to award the due compensation, but they could not be subjected to a criminal trial. Cases in which the parents of the absent accused individual have apologised while replacing the defendant have also been reported. During the phase of acceleration of the pace of the trials, cases of mismanagement of the hearings' dossiers were reported too. The *inyangamugayo* had a duty to verify the content of the dossiers. If some information was lacking or contested by the defendant or by somebody in the audience, the *gacaca* judges had to ask the competent cell tribunal for the *cahier d'activités* that included the contested or absent data. Researchers of ASF have witnessed cases where the judges delivered the sentence without requiring the *cahier d'activités*.[136]

Instances in which the judges did not allow members of the audience to intervene in the debate, violating Article 64 of the 2004 *Gacaca* Law have also repeatedly been reported.[137] The same phenomenon has occurred with regard to witnesses at discharge and, to a lesser extent, to the witnesses of the surviving victim.[138] A lack of willingness to carry out the due investigations when new elements were introduced in the debate marred the work of certain *gacaca* jurisdictions. Violations of the right not to be compelled to testify against oneself, or to confess as being guilty, as embodied in Article 14(3)(g) of the ICCPR, were also

[134] Avocats Sans Frontières 2007b, p. 22.

[135] On this point, see Avocats Sans Frontières 2007b.

[136] Avocats Sans Frontières 2007b, p. 29.

[137] Article 64 of the *Gacaca* Law 16/2004 states that: 'In case of confirmed confessions, guilt plea, repentance and apologies, the hearing proceeds as follows: (…) any interested person takes the floor to testify in favour or against the defendant; responds to questions put to him or her. Every person taking the floor to testify on which he or she knows or witnessed, takes oath to tell the truth by raising his or her right arm, saying: "I take God as my witness to tell the truth"'.

[138] On this point, see Avocats Sans Frontières 2007b, p. 33.

reported. Certain jurisdictions, in fact, pressed for their conviction on the ground that 'the defence is not reliable because the accused denies every charge'.[139]

Some convictions attracted particular criticisms because they seemed to be somewhat arbitrary. For instance, the conviction of Théodore Munyangabe, the former deputy-*préfect* of the Cyangugu *préfecture* in Rwanda, has triggered wide debate. On 6 March 1997, Munyangabe was convicted by the *Tribunal de Première Instance de Cyangugu* of charges including genocide and was consequently sentenced to death. Nevertheless, on appeal the Court of Appeal for Cyangugu overturned the conviction and acquitted Munyangabe of all the charges brought against him. In spite of the acquittal sentence, Munyangabe was placed under house arrest and later re-arrested on the basis of a single new charge. His detention was mentioned in an Amnesty International report as an example of the problems associated with the delivery of justice in post-genocide Rwanda and was subsequently long in the spotlight of the ASF campaign for fair trial standards.

Munyangabe has also testified as a defence witness in the case of *Ntagerura et al.* before the International Criminal Tribunal for Rwanda.[140] Surprisingly, Munyangabe was retried by *gacaca* courts in 2009 and found guilty of the same charge formulated by ordinary courts. Independent observers have reported strong pressure by the judges on key witnesses who were expressly invited to 'refresh their memory' with regard to the events of the genocide after they testified that the defendant was not involved in the hunting of Tutsis. The conviction and sentencing of Munyangabe represent a rampant violation of the principle of *ne bis in idem*.

Another interesting case is that of Father Guy Theunis. Father Guy Theunis, a Belgian priest, human rights activist and journalist, worked in Rwanda for the periodical 'Dialogue'. The journal was based in Rwanda before 1994 and was later published in Belgium. The journal often published father Theunis' critical remarks against the current Rwandan government. According to HRW, the case shows 'how the prosecutor's office in the conventional system interfaces with the *gacaca* jurisdictions'.[141]

The prosecutor's office charged Theunis with genocide when he was travelling through Rwanda from Congo on his way to Europe in September 2005. Theunis was brought before a *gacaca* tribunal five days after his arrest. During his long experience in Rwanda, in 1990 Theunis contributed to the launch one of the first human rights organisations in Rwanda criticising violations against both Tutsi and Hutu alike.[142] After being evacuated during the genocide, he returned to Rwanda in 2004 and at that time no charge was issued against him, nor were charges

[139] Ibid., p. 36.

[140] In its findings of fact, the Trial Chamber stated that Munyangabe had participated in the preparation of lists of Tutsi civilians to be targeted and assisted in the selection of refugees to be killed from the stadium where they had fled. The Chamber also acknowledged that Munyangabe had sheltered Tutsi civilians from militias.

[141] Human Rights Watch 2008, p. 61 and ff.

[142] Ibid.

formulated against him as a result of the judicial cooperation between Rwandan authorities and the Belgian judicial system. HRW has reported that when Theunis stopped in Rwanda, a group 'including some important RPF leaders was attempting to take control of the name and bank account of the journal Dialogue.[143] Having learned of Theunis' presence in Kigali, a leader of the group sought Theunis out to ask his help in that effort. He declined, saying he had no further connections with the journal'.[144] The day after, Theunis was arrested on a warrant delivered by the prosecutor's office as he was about to board a plane for Europe. The person who sought his assistance on Tuesday accused him of genocide in front of the *gacaca* the following Sunday.[145] At this *gacaca* hearing, the usual tight restrictions on the attendance of foreign nationals and on audio and visual recordings were all relaxed, apparently to attract greater attention to the proceedings.[146] An estimated 1,700 persons, some alerted by repeated announcements on the radio, attended the hearing. A score of witnesses, several of them prominent in the RPF, denounced Theunis for having supported the genocide.[147] They relied on a tendentious and unfair reading of some of his writings ignoring, for example, the distinction between his words and those he was quoting (and had indicated by quotation marks).[148] Some of the witnesses read from prepared statements, which as unusual in *gacaca* sessions, where participants usually speak spontaneously.[149] One high-ranking military officer in the audience remarked to a Human Rights Watch researcher that he was 'gratified' to see the church humiliated by the proceedings.[150]

Finally, the procedure of re-categorisation of the suspects after the adoption of Organic Law 10/2007 (which restricted the numbers of offenders falling within category 1) confirmed the progressive trend to involve administrative authorities in the *gacaca* process. The re-categorisation procedure was managed by SNJG authorities that worked closely with *inyangamugayo* following undeclared criteria, working against the main *gacaca* rationale, namely the grassroots discussion fully involving the local communities.[151]

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[143] Ibid.

[144] Ibid.

[145] Ibid.

[146] Ibid.

[147] Ibid.

[148] Ibid.

[149] Ibid.

[150] Ibid.

[151] Ibid., pp. 21–22: 'As the accusation phase of *gacaca* ended, some 818,000 persons had been accused, 77,000 of them placed in category one and so designated for trial in conventional court. These numbers, particularly those in category one, far exceeded those originally foreseen by Rwandan officials. Recognizing that so many conventional trials would take decades—one of the eventualities that the government intended to avoid by creating *gacaca*—lawmakers redefined the categories in a March 2007 law and provided for some persons to be moved from category one to category two where they would be tried by *gacaca* jurisdictions. During 2007 the National Service

All this being considered, from the data collected it emerges that the involvement of the local communities in the *gacaca* process, when not complemented by strategies aimed at the redressing the aforementioned shortcomings, was not sufficient to grant always a fair trial in substantive terms. This was also confirmed by the testimonies of the inhabitants of Gahogo, as I show in the next chapter.

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of *Gacaca* Jurisdictions sent its agents throughout the country to meet with local administrative officials and *gacaca* staff to select the persons who would benefit from this reduction in the assessed gravity of their crimes. The goal of the reclassification of the accused was to have no more than 10,000 and perhaps as few as 2,000 left in category one. The qualifications of agents charged with the reclassification as well as the rules under which they operated were not publicly announced. Like the use of the nyumbakumi to prepare accusations, this process ran counter to the basic premise of *gacaca*—that is, open discussion with full community participation. Only those persons selected by the reclassification teams benefited from the change in the assessment of the gravity of their supposed crimes. Those not chosen were deprived of this benefit on what may have been an arbitrary basis, and without having had any opportunity to speak on their own behalf.'

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Chapter 8
The Reconciliation Process in Rwanda

Contents

Abstract This chapter faces the issue of reconciliation in Rwanda focusing on the contribution made by *gacaca* courts. Efforts to build unity and reconciliation made by Rwandan post-genocide state are initially sketched and different *ad hoc* mechanisms are discussed, including the National Unity and Reconciliation Commission, *ingando* and *abunzi*. Due to the initial lack of definition of the concept of reconciliation by the Rwandan Government, the progressive conceptualization of the term is also given attention. Genocide denial laws and 'memory wars' occurring in Rwanda are in the spotlight of the chapter, as this allows us to have an in-depth insight in the governmental policy of memorialization of the genocide. This policy, culminating in the adoption of the contested Law 13/2008 on genocide ideology, is a clear instance of 'public use of history' and has imposed severe limitations on freedom of expression in post-genocide Rwanda. The results of interviews conducted in Rwanda regarding the role of *gacaca* in Rwanda's reconciliation process are presented. Particular attention is paid to the conceptualization of the concept of reconciliation by Rwandans and its key components, namely truth, justice, healing and reparation.

Keywords National Unity and Reconciliation Commission · *ingando* · *abunzi* · truth · justice · reparation · healing · post-traumatic stress disorder · freedom of speech · genocide ideology

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8.1 Post-Violence Reconciliation: A Framework for Rwanda

In order to evaluate the contribution of *gacaca* courts to the reconciliation process, it is crucial to define what reconciliation is and what its main components and goals are.[1] Reconciliation has been often seen as a watchword for impunity, a substitute for justice in all those settings where a prosecution policy was not possible and as a by-product of other processes. Nowadays however it is considered an autonomous concept (and research field) claiming for itself specific features. It is increasingly depicted as the overarching objective of transitional justice processes,[2] a rhetorically stated goal that is as popular as evanescent, a must-be in the post-conflict and peace-building realm whose definition often forces scholars into a conundrum. Johan Galtung 'admits the defeat' of researchers in defining reconciliation, affirming that 'Reconciliation is a theme with deep psychological, sociological, theological, philosophical, and profoundly human roots—and nobody really knows how to successfully achieve it'.[3] David Bloomfield tellingly highlights the doubts and uncertainness surrounding the concept of reconciliation and clarifies that it can be conceived as both, a process and an outcome:

> Is reconciliation a national, societal, even political, process? Is it an individual, psychological, even "theological", process? Is it a process at all, or does it describe a state of relationships at the end of a process? (…) it can be all these and more; but that it is critical to try to separate at least some of these complex strands, if only for the very pragmatic reason that different types, levels and facets of reconciliation demand very different approaches, mechanisms and contexts.[4]

The United Nations has declared 2009 the International Year of Reconciliation.[5] The UN 'Brahimi Report'[6] includes 'promoting conflict resolution and reconciliation techniques' in the set of peace-building tools, while Dan Smith's Utstein Study indicates reconciliation as one of the strongest post-conflict sectors in attracting western donors' funding.[7] In essence, there is a growing awareness that a lack of focus on the legacy of the past violence might undermine the consolidation of democracy. Why is reconciliation considered so important today?

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[1] On reconciliation, please see Parmentier and Sullo 2011, pp. 335–352, on which I strongly rely.

[2] See UN Security Council 2004.

[3] On this point, see Galtung 2001. See also Bloomfield 2006, p. 4.

[4] Bloomfield 2006, p. 4: 'Crucially, this absence of consensus is observable not only among scholars and their writings; it is also reflected in policy circles, within governments, donor agencies, INGOs, IGOs, and so on. Moreover, it also finds parallels among most actors in real post-violence contexts, too: victims, offenders, governments, individuals, politicians, community leaders, NGOs, religious and cultural organisations, and the like'.

[5] See UN Security Council 2003, p. 3.

[6] Ibid.

[7] See Smith 2004.

Peace building studies have long focused on pre-negotiation, negotiation and mediation. These techniques are currently deemed insufficient to end most contemporary conflicts. This is also due to the fact that the nature of conflicts has changed in the last decades. In fact, most violent conflicts take place today not between states, but within them. They are, in other words, intra-state conflicts. Researchers have stressed that 80 out of the 83 wars fought between 1989 and 1992 had an internal nature.[8] This factor has a strong impact on the way a sustainable peace needs to be pursued, as former enemies after a civil war are required to live side by side, while in inter-states conflict parties are much less likely to be forced to live within the same homeland. This is also the case for post-genocide Rwanda. Conflict studies have established that only one third of the peace deals putting an end to ethnic conflicts resulted in a lasting peace.[9] Reconciliation within the current post-conflict debate is increasingly depicted as a necessary element to address the issues arising in settings marked by internal (and, in the case of Rwanda neighbourly and even fratricidal) conflicts.

Bloomfield's argumentation regarding the necessity of reconciliation in peace-building realm is consistent with this idea. He argues that, 'the key point can still be made with reasonable force: unreconciled issues from past violence never disappear simply by default, and the potential threat to stability and security suggests a need to ensure they are dealt with. Moreover, bringing justice to bear on past misdeeds is one of the most effective means to build a guarantee against future violence'.[10] This argument has been often challenged by scholars on the basis of the Spanish post-Franco transition. Despite both the lack of attention being paid to the crimes of the past and a comprehensive reconciliation policy, Spain's transition has not been seriously endangered.[11] Recent developments of the political arena in Spain, however, have shown a new trend. Efforts to address the legacy of Franco's dictatorship through an *ad hoc* law (providing among others also reparation and pensions for victims and their relatives, the so-called *Ley de la Memoria Historica*)[12] as well as new prosecution efforts by judge Baltazar Garcon,[13]

[8] On this point, see Goodhand and Hulme 1999, pp. 13–26.

[9] On this point, see Lambourne 2001, pp. 311–317.

[10] Bloomfield 2006, p. 9.

[11] Ibid. Bloomfield summarises the main reason for the Spanish 'exception' as follows: 'There is no evidence whatsoever that in thirty years Spanish democracy has been under any direct threat from untreated wounds related specifically to the civil war or the dictatorship. Spain, however, remains something of an exception. Couched securely within Western Europe and – crucially – in the stabilising context of the European Union, its democratisation was always protected and underpinned by that regional stability'.

[12] See on this point *Ley por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la Dictadura*, passed by the Congress of Deputies on 31 October 2007.

[13] On this point, see BBC News, *Franco inquiry polarises Spain*, http://news.bbc.co.uk/2/hi/europe/7679457.stm. Last accessed 28 February 2018.

indicated that in Spain, too, addressing the legacy of the past is considered a necessary step to try to overcome it.

At the same time, however, it is important to bear in mind that significant segments of violence-affected societies often vigorously reject the concept of reconciliation. This perspective has clearly emerged during my field research in post-genocide settings. When conducting interviews in the Guatemalan town of Chinique involving NGOs' staff active in the reconciliation process, for instance, I asked a traditional healer working with Medicos Descalzos, an NGO treating post-traumatic stress disorder affecting both, victims and perpetrators of the internal conflict, what the meaning of reconciliation was for the victims of the Guatemalan conflict. The interviewee replied clearly stating that in contexts where there is no acknowledgement of the suffering of the victims the term reconciliation has no meaning, or, even worse, it is offensive for the victims.[14] This attitude has been confirmed also by victims of the Khmer Rouge regime interviewed in May 2008.[15]

Despite its central role in the peace-building and post-conflict reconstruction discourse, reconciliation remains an ill-established field, navigated through uncertain instruments due to a lack of both a consensus on its scope and definition and an adequate set of research tools. Moreover, the understanding of reconciliation is complicated by the term's strong religious implications and by its multi-layered composition of several aspects (cultural, legal, psychological, economic and political). Reconciliation is often seen at the same time as a process and an outcome, which augments the confusion surrounding the term. Another key issue to be addressed regards the actors of the reconciliation processes as well as the levels at which the latter may take place. Finally, the need for prudence in approaching such a difficult field is pointed out by scholarly literature clarifying how apparently irrational the behaviours of the stakeholders involved can be.[16] A brief overview on the current debate is a helpful tool to unpack the concept of reconciliation for the purposes of this research.

John Paul Lederach, considers reconciliation to be a 'dynamic, adaptive process aimed at building and healing' and 'a process of change and redefinition of

[14] Chinique, May 2009, interview on file with the author.

[15] Phnom Penh, May 2008, interview on file with the author. Interestingly Bloomfield explains some of the reasons why victim groups can resist reconciliation, Bloomfield 2006, p. 6: 'When informed of a forthcoming reconciliation process, victims often jump to the conclusion, and on good grounds, that this will mean they must give up some claims, or accept imperfect justice, or be forced unilaterally to forgive those who made them suffer. Here is the confusion of process and end-state.'

[16] See Bloomfield 2006, p. 5: 'Perhaps we should not expect such perfection of understanding: we are dealing with an area of human activity – violent conflict and its aftermath – which has by its nature a degree of confused, emotional and apparently non-rational thinking and behaviour in its workings (…) The positive side of this multiplicity means that we can generate distinct and multidimensional versions of practice that better suit specific contexts, without the need to produce definitive, universal models. The downside, however, is that we must learn to live with a degree of flexibility and self-conscious contradiction in our processes of definition'.

relationships'.[17] For Audrey Chapman, 'national reconciliation can best be understood as a multi-dimensional and long-term process'.[18] Erin McCandless notes that, 'the idea that reconciliation is a *process* of building or changing relationships is growing'.[19] Recognising that reconciliation does not mean an end-state of harmony, other scholars acknowledge it as both a process and an outcome consisting of 'mutual recognition and acceptance, invested interests and goals in developing peaceful relations, mutual trust, positive attitudes, as well as sensitivity and consideration for the other party's needs and interests'.[20] Implicit and crucial in the definition of reconciliation as an outcome is the recognition that a common narrative concerning the divisions of the past shared by the former enemies is a necessary element, which underscores the important link between reconciliation and truth. Most of the scholars agree on defining reconciliation as a relationship-building process. Here are some examples.

According to Lederach,[21] 'Reconciliation is first and last about people and their relationships', for Chapman it 'establishes the framework for new types of relationships', particularly for 'social and political relationships'.[22] Brandon Hamber and Grainne Kelly[23] see reconciliation as 'moving from the premise that relationships require attention to build peace. Reconciliation is the process of addressing conflictual and fractured relationships'. According to Erin McCandless, it is 'a relationship-building process', the goal of which is 'a more co-operative relationship'.[24] In addition, for Bar-Tal and Bennink 'the essence of reconciliation is the construction of lasting peaceful relations'.[25] Louis Kriesberg defines the term as 'the processes by which parties that have experienced an oppressive relationship or a destructive conflict with each other move to attain or restore a relationship that they believe to be minimally acceptable'.[26]

Reconciliation is composed of several different elements or aspects. The SIDA Handbook on reconciliation for instance identifies religious, cultural, political, economic, juridical and psychological aspects of reconciliation.[27] One of the possible sources of terminological confusion is the fact that both reconciliation's discourse and vocabulary have been developed mainly with regard to the interpersonal level, while they are also commonly used in different contexts. The question then

[17] See Lederach 2001, p. 842.
[18] See Chapman 2002, p. 1.
[19] See McCandless 2001, pp. 209–222.
[20] See Bar-Tal and Bennink 2004, pp. 11–38.
[21] See Lederach 2001, pp. 841–854.
[22] Ibid.
[23] See Hamber and Kelly 2004.
[24] See McCandless 2001, pp. 213.
[25] See Bar-Tal and Bennink 2004, pp. 26–27.
[26] See Kriesberg 2001, p. 48.
[27] See Brounéus 2003.

arises whether at a macro level concepts like healing or forgiveness fade and lose their specific applicability and meaning. For instance, can a nation forgive or heal itself?

Considering the cultural orientation of the term reconciliation, I have tried to fine-tune it with the Rwandan post-genocide settings, asking Rwandans directly what reconciliation means to them. The Rwandans interviewed have stressed four factors that are relevant components of reconciliation, namely truth (with a strong emphasis on the acknowledgement of the victimisation by the perpetrators and by the Rwandan society), justice (in a broad sense including various forms of accountability), reparation and healing. This framework needs to be elaborated on. First of all, in my interviews the four elements in which reconciliation is articulated have emerged as key objectives to be pursued on the long path to reconciliation according to Rwandans. The lies that circulated in the *gacaca* process; the false testimonies; the refusal of the perpetrators to recognise their crimes: all have been depicted as considerable obstacles on the pathway toward reconciliation. The same can be said for the lack of reparations and healing mechanisms for most of the victims of the genocide. These data are in line with the results gathered through other field studies focused on *gacaca*.[28] The Rwandan Government in its reconciliation barometer has recognised the importance of reparative measures, stressing that the delay in delivering reparation to the victims of the genocide is a factor which hinders the reconciliation process.

The results of both the research work carried out in Rwanda and the analysis of the key literature on reconciliation suggest that the best way to accommodate and harmonise the elements of (and the possible tensions within) our object of analysis is to frame them not as a set of irreconcilable or dichotomous values (truth vs. justice, justice vs. peace etc.), but as converging elements of an overarching process aimed at achieving improved relationships. Following Bloomsfield's idea of reconciliation as an umbrella term for the 'over-arching process which includes the search for truth, justice, forgiveness, healing and so on',[29] I assume that the main reconciliation-related areas are truth, justice, healing and reparations.

This assumption offers the great benefit to underscore four macro areas within which the research in the realm of reconciliation is to be accomplished. This theoretical articulation 'renders the various instruments of reconciliation (…) complementary and interdependent instruments of the overall relationship-building process of reconciliation. Thus, reconciliation is not one instrument among several, including justice, healing, truth-telling and reparations. Rather, it is the overall relationship-oriented process within which these diverse instruments are the constitutive parts'.[30] These instruments are very much overlapping and cross-referential and together they can contribute to the process of reconciliation, whose overarching objective is the rebuilding of relationships.

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[28] See, for instance, Molenaar 2005. See also Ingelaere 2016.

[29] See Bloomfield 2006, p. 11.

[30] Ibid.

With regard to the inclusion of justice as a component of the 'umbrella', most of the literature agrees that justice is a fundamental ingredient in order to reconcile post-violence societies. However, in practice, as well as in certain research works, the justice-reconciliation trade-off is still in the spotlight. Basing their analysis on the South African TRC for instance, some scholars underscore that an uncompromising pursuit of justice would have had a destabilising effect during the post-apartheid transition. Following Bloomfield, I argue that it is possible to frame justice and reconciliation as two mutually reinforcing elements by considering the whole gamut of nuances that the term justice embodies, without reducing it to a purely criminal and retributive dimension. Justice can be seen and evaluated in its regulatory, social and restorative aspects. Regulatory justice, for example, is not merely anchored in a punitive realm, but is aimed at 'setting fair rules for all social behaviours'.[31]

The social dimension of justice is also very relevant as a reconciliation-oriented instrument. Social justice includes distributive and economic justice and makes it possible that all the goods within a certain society are shared in a fair fashion. This multi-dimensional definition of justice, including a retributive, restorative, regulatory and social aspect, creates what Lambourne defines as the 'justice which restores community'.[32]

Finally, it is worth clarifying the meaning of the term 'healing', which has also been associated with transitional justice and reconciliation. This is because transitional justice and reconciliation processes usually involve deeply traumatised individuals and societies. Genocide is the cause of deep psychological wounds and psychosocial trauma which require specific techniques in order to heal. As Regine U. King, a genocide survivor born and raised in Rwanda with expertise in the field of mental health has stressed, psychosocial trauma implies feelings concerning a past traumatic event linked to the issues of victimhood, guilt and fear.[33] This kind of trauma 'encompasses the struggles of individuals and collectives for systemic social transformation'.[34]

The need for healing within the Rwandan society is strong, as victimisation (through different modalities and to different extents) has regarded both Hutu and Tutsi. In fact, the victimisation experienced by Hutu and Tutsi during Rwanda's recent history has strongly shaped the relationships between the two groups. This is particularly relevant considering the complex dynamics connected with the colonial period and its aftermath. Mamdani for example has stressed that Hutus' victimisation during the colonial period (and their elaboration of the victimhood) has turned into one of the premises for the eventual eruption of the genocidal violence.

Consequently, today there is a growing awareness that the success of post-conflict reconstruction processes also largely depends on the work of

[31] Ibid., p. 21.

[32] On this point, see Lambourne 2004, p. 24.

[33] King 2011, p. 135.

[34] Ibid.

psychologists and trauma counsellors. In order to simultaneously address the causes and the symptoms of the trauma, healing should take a holistic approach. To conclude on this point, I consider healing as 'integral to achieving positive peace and ultimately reconciliation' and something that 'requires re-humanising survivors and perpetrators to overcome the negative identities that they assumed during the conflict'.[35]

It must be clarified however, that the capability of transitional justice institutions to heal deep psychological wounds has been repeatedly challenged.[36] The results of the truth telling process within *gacaca* hearings in particular have been criticised because in several instances the process has had traumatising effects on the attendants.[37]

Despite repeated efforts to unpack it, reconciliation remains a complex, cross-cutting issue. The results of my research and those of other scholars show that Rwandans have different understandings of reconciliation, which are not ascribable to a unique paradigm. Moreover, the development of a proper *ad hoc* set of methodological strategies to assess reconciliation is a work in progress.[38] A variety of competences, some beyond the expertise of the author, is required to squarely address the full range of issues stemming from reconciliation processes. My effort here is limited to advance the state of the art concerning the Rwandan context, with the limits of internal and external validity highlighted.

8.2 The Official Discourse

When conceiving the most suitable approach to reconciliation after the genocide, Rwandan authorities had no ready-made lessons that had been learned to draw upon. The cyclical waves of violence that characterised national history between 1959 and 1994 and the genocide impacted the country so deeply that models from abroad could not simply be transplanted. Moreover, the forced cohabitation of victims and perpetrators within the same rural communities was a specific feature of Rwandan post-genocide setting which posed several challenges and demanded specific responses. The International Institute for Democracy and Electoral Assistance has identified three stages along which reconciliation processes after violent conflicts unfold.[39] These steps are 'coexistence', to some extent resembling

[35] On this point, see Clark and Kaufman 2009, pp. 199–201.

[36] King 2011, pp. 145–146.

[37] Ibid., p. 140; see also Brounéus 2010.

[38] On this point, see Van der Merwe et al. 2009.

[39] Bloomfield et al. 2003.

the concept of negative peace[40] (i.e. absence of violent conflict), 'building confidence and trust', and 'moving towards empathy'. Rwanda is currently moving somewhere along the path between the two extremes of this line. Reconciliation is not a linear process and backlashes and relapses back into violence are often possible.[41] Where exactly the reconciliation process stimulated by the government is going to lead Rwanda remains at the moment unpredictable. Backlashes against the official policy are not impossible and have to be consequently taken into account.[42] Some scholars, aware of the internal tensions inside Rwanda, where the categories Hutu and Tutsi are still widely dominating daily life despite the abolition of ethnic identities, held that 'Full reconciliation is not a realistic option for Rwanda'.[43]

The Rwandan government has made explicit the role it wants to play in promoting unity and reconciliation in the country by abolishing ethnicity and ethnic identity cards. The post-genocide state has widely invested on reconciliation, a goal towards which a multitude of mechanisms, judicial as well as non-judicial, are oriented.

Before setting up the National Unity and Reconciliation Commission, the Rwandan government experimented with a settlement programme named *Imidugudu* aimed at addressing the housing crisis caused by the repatriations of hundreds of thousands of refugees. The authorities regrouped the Rwandan population in new settlements, holding that the new grouping would provide citizens with an opportunity for dialogue. This programme was one of the different expressions of the government's reconciliation efforts.

An *ad hoc* National Unity and Reconciliation Commission, whose role was confirmed by the 2003 Constitution, was set up in 1999. The commission was already envisaged in the Arusha Peace Agreement signed in 1993. According to the Rwandan Constitution, the mission of the National Unity and Reconciliation Commission includes the following:

(1) Preparing and coordinating the national programs for the promotion of national unity and reconciliation;
(2) Putting in place and developing ways and means to restore and consolidate unity and reconciliation among Rwandans;

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[40] See Galtung 1969, pp. 167–191. He sharply distinguished between negative peace as the outcome of efforts to stop physical or personal violence (direct violence), and positive peace as the goal of efforts to end indirect structural and cultural violence (indirect violence) that threaten the economic, social and cultural well-being and identity of individual human beings and groups.

[41] Bloomfield et al. 2003, p. 18.

[42] When Rwanda was approaching the presidential election scheduled for August 2010 worrisome deeds were reported, including the launch of grenades in Kigali city centre. See Reuters, *UPDATE 1-Grenade Attacks Kill 1, Wound 30 In Rwandan Capital*, http://af.reuters.com/article/rwandaNews/idAFLDE61J0AD20100220 as well as ANSA, *Ruanda, attentati a Kigali: un morto* http://ansa.it/web/notizie/rubriche/mondo/2010/02/20/visualizza_new.html_1706123122.html.

[43] On this point, see Molenaar 2005, p. 40.

(3) Educating and mobilizing the population on matters relating to national unity and reconciliation;
(4) Carrying out research, organizing debates, disseminating ideas and making publications relating to peace, national unity and reconciliation;
(5) Making proposals on measures that can eradicate divisions among Rwandans and to reinforce national unity and reconciliation;
(6) Denouncing and fighting against acts, writings and utterances which are intended to promote any kind of discrimination, intolerance or xenophobia;
(7) Making an annual report and such other reports as may be necessary on the situation of national unity and reconciliation.[44]

The NURC is constituted of different units. Among them an important role is played by the Department of Civic Education, whose official task is contributing to 'the promotion of social cohesion by raising awareness for Rwandans on their rights and duties as well as the functioning of the government institutions'. The Department of Civic Education is charged with tasks including the development of the national syllabus promoting national unity and reconciliation, training Rwandan society on unity and reconciliation and the evaluation of national unity and reconciliation initiatives.

Since the outset, the NURC took part actively in the legislative process. It made contributions to the Organic Law No. 40/2000 establishing the *gacaca* jurisdictions and gave advice on the national prosecution strategies and on the legislation against discrimination. The NURC has played an important role in communicating the official vision of the Rwandan Government regarding the reconciliation process. It has also produced a plurality of documents analysing the causes of the genocide. Stressing that, before colonialism, Hutu and Tutsi lived peacefully together for centuries, the NURC has promoted several (re)-education activities involving the Rwandan population.[45]

One of the most important activities of the NURC is organising and coordinating *ingando*. The term '*ingando*' is derived from the Rwandan verb '*Kugandika*' that refers to the suspension of normal activities to reflect on and find solutions to national problems. In ancient Rwanda *ingando* were first developed by the army. Whenever Rwanda faced national emergencies, wars or natural calamities, the king used to mobilise the population through *ingando*.

By the advent of colonialism, the practice of *ingando* was already well established, but it did not survive Belgian rule. When the NURC was established, it formally developed *ingando* as an instrument to strengthen unity and the sense of coexistence within communities. The first beneficiaries were ex-combatants from the Democratic Republic of Congo. The programme later expanded to include students going to secondary and tertiary schools.[46] By 2002, the training was expanded and extended to other categories such as genocide survivors, prisoners,

[44] See Article 178 of the Rwandan 2003 Constitution.

[45] See NURC 2004, p. 15; and Thomson 2011, p. 333.

[46] Today all those who are admitted to a university in Rwanda are first required to attend *ingando*.

community leaders, and vulnerable groups. Topics covered comprehend five main thematic areas: national history; analysis of Rwanda's contemporary problems; political and socio-economic issues in Rwanda and Africa; rights, obligations and duties of Rwandans and leadership. Approximately 3,000 pre-university students participate in *ingando* camps each year.[47] *Ingando* solidarity camps, targeted towards political and civil society leaders, university students, and *gacaca* judges, have to be distinguished from *ingando* re-education camps, targeted towards ex-soldiers, confessed *génocidaires*, released prisoners and street children.[48] From the research work of Susan Thomson, a Canadian researcher who directly experienced *ingando*, it emerges that, while the former are a form of political indoctrination, the latter are a form of social control to keep the Hutu out of the political arena.[49]

Another sector of activity of the NURC is conflict mediation. An active role in this field is played by conflict mediators called *abunzi*, whose role is outlined within the Rwandan constitution.[50]

Around 80% of the conflicts at a local level are handled by the *abunzi*, who thus make a remarkable contribution in relieving the build-up of backlogs in the judicial sector. Trainings of *abunzi* as well as of *inyangamugayo* are often organised by the NURC. To accomplish its tasks the NURC relies also on peace volunteers, the *abakanguragamba*. 720 peace volunteers, countrywide, mediate conflicts and mobilise to solve problems at the level of local communities.[51]

The NURC has conducted a nation-wide survey to assess the contribution of *gacaca* to the process of national reconciliation in 2003, when the courts were still in the pilot phase.[52] The initiative was laudable, as this was the first opinion survey ever launched in Rwanda involving 4,813 individuals. The result of the survey was encouraging, showing a positive attitude Rwandan towards *gacaca*.

The NURC's survey lacks a precise definition of what reconciliation means for Rwanda. Assuming that a definition is necessary develop indicators to measure and assess the process of reconciliation, during my field research, I directly asked a high-ranking NURC official what is the definition of reconciliation according to the commission.[53] The officer answered that there was no definition, because the government is 'in touch with people' and common Rwandans can express their

[47] A National *ingando* Centre was constructed in Nkumba, Northern Province, as a permanent facility house with the capacity to accommodate up to 900 residents.

[48] Thomson 2011, pp. 333–334.

[49] Ibid., p. 334.

[50] See Article 159 of the Rwandan Constitution.

[51] According to a report issued by the NURC, their role should be better defined, as it could overlap with that of the *abunzi*. On this point, see Evaluation and Impact Assessment of the National Unity and Reconciliation Commission (NURC), Final Report Institute for Justice and Reconciliation (IJR), December 2005, p. 12.

[52] See NURC Opinion Survey on Participation in *gacaca* and National Reconciliation, January 2003 (Hereinafter: NURC Opinion Survey 2003).

[53] Interview, Kigali, 20 July 2009, on file with the author.

view about reconciliation, clarifying their views and needs. It would appear that the government itself when promoting and evaluating *gacaca* as a reconciliation instrument lacked a clear vision of what reconciliation precisely means for post-genocide Rwandans.[54] The concept of reconciliation, consequently, had to be deduced from the body of activities carried out by the government for this purpose. The government of Rwanda seemed to consider reconciliation a by-product of several activities, including primarily that of *gacaca*. The NURC has progressively engaged in an effort of conceptualisation of the meaning of reconciliation. In 2010, inspired by the South African Reconciliation Barometer, the NURC has developed a Rwanda Reconciliation Barometer.[55] The Barometer includes a review of the literature regarding reconciliation.[56] As to the meaning of the concept of reconciliation the Rwandan Barometer states that it is 'a consensus practice of citizens who have common nationality, who share the same culture and have equal rights; citizens characterised by trust, tolerance, mutual respect, equality, complementary roles/interdependence, truth, and healing of one another's wounds inflicted by our history, with the objectives of laying a foundation for sustainable development'.[57] The definition is very broad, and thus it proves quite problematic to unpack its meaning and assess all the possible nuances. It is hence useful to infer what is meant under 'reconciliation' by the Rwandan Government analysing the various policies carried out in the aforementioned fields.

The NURC clarifies that the reconciliation process is characterised by the following principles:

(1) To promote the spirit of Rwandan identity and put national interests first instead of favours based on ethnicity, blood relations, gender, religion, region of origin;
(2) To combat the genocide and its ideology;
(3) To strive at creating a nation governed by the rule of law and respect for human rights;
(4) To combat any form of divisionism and discrimination;
(5) To promote interdependence and synergy in nation building;
(6) To multiply strive to heal one another's physical and psychological wounds while building future interpersonal trust based on truth telling, repentance and forgiveness;
(7) To commemorate the 1994 genocide with the aim of making 'Never Again' a reality;
(8) To strive for self-determination and passion for work.

[54] Kigali, July 2009, on file with the author. This data is confirmed by other field research. See for instance Molenaar 2005, p. 50.

[55] See NURC, Rwanda Reconciliation Barometer, October 2010, available at http://www.nurc.gov.rw/index.php?id=70&tx_drblob_pi1%5BshowUid%5D=16&tx_drblob_pi1%5BbackPid%5D=70&cHash=e13dfe7c26d96b9cdc19d7531ba78bfe. Last accessed 6 June 2015.

[56] Ibid., p. 15.

[57] Ibid., p. 18.

According to the NURC, indicators to assess the reconciliation process in Rwanda are mainly linked with the rule of law, human rights and the fight against divisionism, discrimination, genocide ideology and healing the wounds of the genocide. Moreover, to achieve reconciliation, in the governmental discourse it is necessary to reverse the policies of the previous governments, namely those of the colonial period and Habyarimana's rules. The responsibility of Belgian colonisers and 'bad leaders' who contributed to the genocide is strongly emphasised by Rwandan authorities. In order to reinforce the unity of the country, the government fights openly against divisionism, ethnic-based association and hate propaganda. This policy is epitomised by the legislation adopted on genocide denial in Rwanda, which deserves an in-depth analysis.

Following some of the indicators for reconciliation provided by the NURC such as rule of law and respect for human rights would not always give encouraging results however. As I have stressed in the previous chapters the rule of law has been disregarded when implementing the policy of accountability and reparation for the crimes surrounding the genocide event. Adopting human rights as an evaluation parameter, Rwanda ranks 161st out of 180 in the 2016 World Press Freedom Index issued by Reporters Without Borders. In its 2013 country report Freedom House declared that Rwanda is not an electoral democracy because the Rwandan Patriotic Front, the ruling party since 1994, tightly controls the electoral process.[58] The strict control over the process of elaboration of historical memory concerning the genocide is useful to unpack the reconciliation policies the government of Rwanda is promoting. This is also because, as we will see below, the different laws prohibiting divisionism, genocide minimisation and denial have had an impact on the truth-recovering process which took place before the *gacaca* courts.

8.3 Genocide Denial and Memory Wars

Historical truths are the outcome of elaboration, selection, manipulation and reinterpretation processes that sometimes provide room also for the shocking opinions of revisionists and negationists. As the Perincek case before the European Court of Human Rights has demonstrated, genocide is constantly subject to a process of denial.[59] Consequently, the question as to how opinions that clearly deny established historical truths are to be dealt with in societies that have witnessed genocide and other gross human rights violations has therefore emerged. Lawyers and historians hence debate how freedom of expression and research should be balanced

[58] Report available at https://freedomhouse.org/report/freedom-world/2013/rwanda. Last accessed 10 February 2018.

[59] See *Perinçek v. Switzerland*, application n. 27510/08, Judgement, 15 October 2015, Grand Chamber. See also https://globalfreedomofexpression.columbia.edu/cases/ecthr-perincek-v-switzerland-no-2751008-2013/. Last accessed 19 March 2017.

with other values in contexts where the universal condemnation of mass atrocities is a central element of peaceful coexistence.[60]

Successive waves of historical revisionism targeting the main assumptions underlying the pledge to prevent a new genocide in Europe and elsewhere have pushed several states to reinforce the historical memory through criminal law. This choice has been questioned: can the lawmaker replace the historian establishing an uncontroversial truth about the past by limiting the freedom of opinion and speech? What are the consequences of such a policy under the perspective of criminal law and memory-building process?

The criminal punishment of the crime of negationism has proved extremely problematic both in Europe and Rwanda, two post-genocide contexts that are extremely diverse, and where the adoption of anti-denial provisions was scheduled and prioritised in different ways. In Europe, some countries punish exclusively Holocaust denial, whilst others more comprehensively tackle the negation (but sometimes also the trivialization) of genocide.[61] The ambiguous way some criminal provisions are drafted has often raised concerns as to the precise content of sanctioned conduct.

The denial of crimes against humanity, war crimes and crimes against peace is also in certain respects criminalised. While some EU Members adopt a rather careful approach to restriction of freedom of expression, requiring several conditions for genocide denial to be punishable, the French Loi Gayssot represents a case of pure 'content-based' restriction of the freedom of expression.[62] The United Kingdom considers the adoption of an *ad hoc* law against negationism inconsistent with the constitutionally granted right to freedom of speech as well as a dangerous limitation to historical research. The negation of historically established truths is punished in Germany, but not in Spain, where only the justification of genocide, but not the denial, is criminalised. From such a diverse attitude towards negationism it is difficult to understand what the object protected by criminal law should be: whether social peace, public order or historical memory.[63] Moreover, if the fight against oblivion is a reasonable and legitimate goal, can we conclude that an obligation to remember also exists? Contesting the statement by Santayana that 'Those who forget the past are condemned to repeat it',[64] Tzvetan Todorov has warned us that 'the memory remedy seems to be ineffective'.[65]

All this said, the rising hostility of historians toward norms that prevent them from freely qualifying and interpreting historical events is not surprising. Human history, they argue, is replete with instances of mass atrocities the gravity of which cannot and should not be subject to a process of legal hierarchisation. The denial of

[60] See Cajani 2012.
[61] Sullo 2013, p. 443.
[62] Ibid., p. 444.
[63] Cajani 2012.
[64] Santayana 1905, p. 284.
[65] Todorov 2009, p. 448.

historically established facts should not be confused with the free interpretation of the same facts. In other words, to deny that the Holocaust occurred and to deny that a certain massacre, the occurrence of which is not questioned, amounts to genocide, are two different issues. Moreover, the analogy with Holocaust-denial laws on which worldwide the request to approve norms to protect the memory of certain events is often based, is fallacious.[66]

The very concept of genocide is heatedly debated in both legal and historical terms, in particular with regard to the psychological element of the crime, the so-called mens rea of the perpetrator and to the targeted group. While some scholars consider the Holocaust a historically unique event, the quintessence of the notion of genocide, others place under the genocide label a body of heterogeneous events such as colonial slaughters and the conquest of the Americas; the conflict in Darfur; the Vendée uprising during the French revolution; the Revolt of the Hereros in South Western Africa; the al-Anfal Campaign against the Kurds; the Ukrainian Holodomor, and the Third Punic War (149–146 BC). The director of the Journal of Genocide Research has confirmed this state of uncertainty by affirming that to date genocide 'lacks both a satisfactory conceptual definition and a consensus as to the inner make-up (…). Without a conceptual definition one is impeded in separating genocidal events from the non-genocidal'.[67]

The 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, while requiring contracting states to prohibit 'direct and public incitement to genocide', does not include any provision criminalising the denial of genocide. The only international agreement aimed at criminalising the denial of genocide is the 2003 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through the use of computer systems.[68] Article 6, para 1 of the Protocol in particular requires each state party to adopt legislative measures criminalising conduct such as 'distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law'.[69] The general debate on genocide denial needs to be located in the Rwandan context, where different *lois mémorielles* have been adopted in the aftermath of the genocide.

[66] Cajani 2012, pp. 371–373.

[67] See Huttenbach 2002, p. 167.

[68] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through the use of computer systems, 28 January 2003.

[69] Surprisingly, however, under para 2 of the mentioned Article 6, a party may also 'reserve the right not to apply, in whole or in part, para 1 of this article'. This protocol shows the reluctance of member states of the Council of Europe to punish conducts consisting of the simple expression of ideas, no matter how historically unfounded or reproachable. See Cajani 2012, note 1, p. 382.

8.3.1 *Rwandan Policy on Divisionism, Sectarianism and Genocide Denial*

In the aftermath of the genocide the Rwandan Government has actively campaigned against 'divisionism', 'sectarianism' and 'genocide ideology', which constitute the target of criminal provisions respectively adopted in 2001, 2003 and 2008.[70] Four parliamentary commissions have dealt with these phenomena between 2003 and 2008. Legislation to fight genocide denial, unlike in Europe, (where initiatives aiming at protecting the memory of gross human right violations were adopted four or five decades after the commission of these crimes), was enacted in Rwanda a few years after the 1994 massacres. This makes the Rwandan context very different from the European setting. In fact, whilst the majority of the witnesses of the Holocaust in Europe have passed away, considerable numbers of victims, perpetrators and eye-witnesses of the genocide are alive in the African country.[71] Rwandan policy regarding genocide denial allows us to glance simultaneously at the government's idea of reconciliation, as well as at the respect granted for human rights.[72]

In the aftermath of the genocide several incidents have demonstrated that the ideology underlying the 1994 slaughters has not completely been eradicated in the country. In April 2008, during the month devoted to genocide mourning, the Kigali Memorial Centre was attacked with a grenade which killed a guard.[73] The ideas of negationism have reportedly been disseminated in Eastern Congo, during ICTR hearings and nationwide through radio broadcasting.[74] A 2009 study conducted by Harvard Kennedy School of Government concluded that 10% of the perpetrators (around 51,000 individuals) took part in the genocide because of the propaganda campaign orchestrated by the RTML.[75] Considering the crucial role that hate speech and hate propaganda played during the genocide, it is not surprising that provisions aimed at fighting the genocide ideology and negationism were adopted in Rwanda.

Article 13 of the Rwandan Constitution establishes that 'Revisionism, negationism and trivialisation of genocide are punishable by the law'. The Rwandan Constitutional Charter also protects freedom of opinion and expression (Article 34). Pursuant to the Rwandan Constitution limits to freedom of expression are 'public order and good morals, the right of every citizen to honour, good reputation and the privacy of personal and family life' as well as the protection of the youth and

[70] Amnesty International 2010, p. 11.
[71] Sullo 2013, p. 434.
[72] Sullo 2018.
[73] Waldorf 2009a, p. 102.
[74] Ibid.
[75] See Jansen 2014, p. 194.

minors.[76] The conditions for exercising freedom of expression are determined by Rwandan law. Rwanda is also a party to the African Charter on Human and Peoples' Rights, which in Article 9 embodies and protects freedom of expression.[77]

On 18 December 2001, the Rwandan Parliament adopted Law 47/2001 on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism. Article 3 of the Law defines respectively the crime of discrimination and sectarianism:

> The crime of discrimination occurs when the author makes use of any speech, written statement or action based on ethnicity, region or country of origin, colour of the skin, physical features, sex, language, religion or ideas with the aim of denying one or a group of persons their human rights provided by Rwandan law and International Conventions to which Rwanda is party.
>
> The crime of sectarianism occurs when the author makes use of any speech, written statement or action that causes conflict that causes an uprising that may degenerate into strife among people.

Both crimes are punished with a term of incarceration ranging from three months to two years (one to five years for government or NGO officials). On the basis of the 2001 law a parliamentary commission accused the main opposition party, the *Mouvement Democratique Republicain* (MDR), of spreading divisionism and lobbied for its dissolution.[78] According to Human Rights Watch and Avocats Sans Frontières, the definition of the prohibited conduct under the law is too vague, such that judges who had convicted individuals for this crime were unable to define 'sectarianism'.[79]

A qualitative analysis of the Rwandan jurisprudence based on Law 47/2001 reveals several problematic issues.[80] In fact cases have been reported where Rwandan tribunals did not explain whether the conviction was based on discrimination or sectarianism (Tribunal de Base Nyakabuye, District Rusizi, 09/11/2007;

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[76] See Article 34, Rwandan Constitution 2003: 'Freedom of the press and freedom of information are recognized and guaranteed by the State. Freedom of speech and freedom of information shall not prejudice public order and good morals, the right of every citizen to honour, good reputation and the privacy of personal and family life. It is also guaranteed so long as it does not prejudice the protection of the youth and minors. The conditions for exercising such freedoms are determined by law. There is hereby established an independent institution known as the "High Council of the Press". The law shall determine its functions, organization and operation'.

[77] See Article 9 of the African Charter on Human and Peoples' Rights: '1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law'.

[78] Waldorf 2009a, note 69, p. 108. The Commission held that 'government must prosecute and take measures against persons who continue to stir up … the ideology of MDR PARMEHUTU which is based on discrimination and division, particularly those leaders of MDR who head these actions'. See also Amnesty International 2010, note 14, p. 11.

[79] Human Rights Watch (HRW) has reported that 'when asked to define "divisionism" not one judge interviewed by HRW researchers was able to do so, despite each having adjudicated and convicted defendants on divisionism charges'. See Human Rights Watch 2008, p. 34.

[80] Avocats Sans Frontières 2011.

Tribunal de Grande Instance Gicumbi, 04/02/2010).[81] Moreover the analysis of elements constituting the offences, namely 'the aim of denying one or a group of persons their human rights' and causing 'conflict that causes an uprising that may degenerate into strife among people' was often missing in the Rwandan case law. The 2009 report by the Rwandan Ministry of Justice to the African Commission on Human and Peoples' Rights made a clear link between divisionism, which is not defined by Rwandan law, and sectarianism and discrimination. In fact, in the words of the Ministry of Justice divisionism

> is closely linked to discrimination and sectarianism, [defined in Law 47/2001]. Divisionism is though generally understood as the use of any speech, written statement or action, that is likely to divide people or spark conflict among people, or cause an uprising which might degenerate into strife among people based on discrimination (…) It is thus considered illegal to do anything that is tantamount to divisionism based on race, tribal, ethnic, religion or region in Rwanda.[82]

The UN Human Rights Committee in 2009 expressed concerns regarding the abuse of divisionism laws aimed at limiting the freedom of expression and affirmed that Rwanda 'should cease to punish the so-called acts of divisionism'.[83]

The denial or minimisation of the genocide was criminalised through Law 33 bis of 2003. Article 4 of the latter affirms that

> Shall be sentenced to an imprisonment of ten (10) to twenty (20) years, any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence. Where the crimes mentioned in the preceding paragraph are committed by an association or a political party, its dissolution shall be pronounced.

It would appear that Law 33 bis 2003 concerns two categories of conduct. On the one hand, the negation, (rude) minimisation, justification and approval of the genocide; on the other, the concealment or destruction of genocide-related evidence. Furthermore, in this case the wording adopted by the legislator was very broad. The law in fact lacks the necessary specificity that must characterise criminally sanctioned measures. It results for instance in a difficulty in understanding what the terms 'rudely minimising' mean. Article 17(3) of the law raises further concerns as it punishes attempts to prompt others to commit the offences proscribed as if such offences had actually been perpetrated. It is, in fact, considered a crime in respect of 'incitement, by way of speech, image or writing, to commit (…) such a crime, even where not followed by an execution'.[84] Moreover, the penalties established in the law are extremely harsh, ranging from ten to twenty years of

[81] Ibid., pp. 79 and 83.

[82] Rwandan Republic, Ministry of Justice, the 9th and 10th periodic report of the Republic of Rwanda under the African Charter on Human and Peoples' Rights, July 2005–July 2009, July 2009, p. 22.

[83] UN Human Rights Committee 2009.

[84] See Jansen 2014, p. 196.

imprisonment. ASF has expressed concerns regarding the impact of such a provision on testimony sworn before *gacaca* courts.[85] A telling case regarded a 46-year-old farmer who, before a *gacaca* court, declared: '*Est-ce que je vais témoigner sur le génocide des Tutsi, sur celui des Hutu ou sur celui des Twa?*' ('Will I testify on the genocide of the Tutsi, of the Hutu or of the Twa?').[86] On the basis of Article 4 of Law 33 bis 2003 he was convicted to 3 years imprisonment by the Tribunal de Grande Instance of Nyagatare. The judge held that '*ces parole démontrent que le prévenu n'accorde aucun valeur au genocide de Tutsi de 1994 commis au Rwanda, car il n'y a eu au Rwanda qu'un seul génocide qui a été commis à l'encontre des Tutsi, qu'il n'y a eu aucun génocide des Hutu ou des Twa, qu'il a ainsi minimisé le génocide en disant qu'il y a eu d'autres génocides*' (Those words show that the accused does not value at all the 1994 genocide of the Tutsi which was committed in Rwanda, because in Rwanda there has been only one genocide committed against the Tutsi, that there has been no genocide of the Hutu or the Twa, that he has therefore downplayed the genocide in saying that there have been other genocides' (translation by the author)).[87] Also in this case both the analysis of the element constituting the offence and any reasoning regarding the intentionality of the crime were missing. Amnesty International has reported that the Rwandan judiciary has also stressed the flaws of the 2003 law by affirming that its definitions are 'broad' and 'not scientific'.[88]

8.3.2 The Rwandan Law 18/2008 on Genocide Ideology

The policy surrounding the memorialisation of the genocide in Rwanda is epitomised by the law on the genocide ideology.[89] This measure, passed in July 2008, raised deep concerns as to its compatibility with basic human rights norms and in particular with the right to freedom of opinion and expression granted in universal and regional human rights instruments ratified by Rwanda. What is striking is that the Rwandan authorities have reportedly started to prosecute suspects of 'genocide ideology' even before the 2008 law was adopted.[90] The law on the genocide ideology finds a basis in Article 9 of the Rwanda Constitution, which demands the state's engagement in 'fighting the ideology of genocide and all its manifestations'. The constitution however does not define the scope and the meaning of 'genocide ideology'.

[85] Avocats Sans Frontières 2011, note 74 p. 51.
[86] Translation by the author.
[87] See Avocats Sans Frontières 2011, note 74 p. 78.
[88] See Amnesty International 2010, p. 18.
[89] Law N° 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology.
[90] Waldorf 2009a, note 69. p. 109.

According to Article 1 of Law 18/2008, the objective of the Genocide Ideology Law, is to prevent and punish the crime of genocide ideology. The law states that 'it is necessary to prevent and punish genocide ideology in order not for genocide to be committed again in the country', implicitly supposing that the law is a crucial mechanism in order to grant the non-recurrence of the genocide. According to Article 2, the genocide ideology is:

> an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.

The crime of genocide ideology, outlined in Article 3 of the law:

> is characterized in any behaviour manifested by facts aimed at dehumanizing a person or a group of persons with the same characteristics in the following manner: 1) threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred; 2) marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred; 3) killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology.

The law punishes several heterogeneous conducts conducive to genocide ideology and is not limited to criminalising the denial of the 1994 genocide. Some actions, such as, 'creating confusion aiming at negating the genocide which occurred', 'mocking', 'boasting' or 'laughing at one's misfortune' are ill-defined. As a consequence, they may easily become the object of abusive interpretation, violating the principle that criminal law has to be strictly construed. The concept of genocide ideology is hence set out too broadly, which does not allow Rwandans to identify the prohibited conduct. In order to include a wide range of behaviours within the reach of criminal law, the Rwandan Legislator seemed to disregard the principle of legality and specificity. According to the British NGO Article 19, the inaccurate definition by the lawmaker of the precise criminal offences is equivalent to a breach of the prohibition of the retroactive application of criminal law. This principle is established under instruments to which Rwanda is bound, such as the International Covenant on Civil and Political Rights (Article 15), and the African Charter on Human and Peoples' Rights, (Article 7.2). According to Article 4 of the ICCPR, even in time of public emergency which threatens the life of a nation, non-retroactivity of criminal law is a non-derogable principle. The principle *nullum crimen, nulla poena sine lege* is also embodied also in Article 20 of Rwandan Constitution of 2003.

Law 18/2008 also lacks any reference to the intentionality of the criminalised conduct, namely the requirement that the offender wants to cause harm. This has attracted the criticism of the European Union, that before the law was passed required the Rwandan Government to pay 'attention to the quality of the drafting, in particular in relation to specifying more clearly the principles of legality,

intentionality and supporting freedom of expression'.[91] Similar concerns were raised at an earlier juncture by the 2001 Rwandan law prohibiting 'sectarianism'.

An assessment of the Genocide Ideology Law requires its review against the background provided by the ICCPR, in particular Articles 19 and 20. Article 19 outlines the right to freedom of opinion and expression providing also the cases in which a limitation can be established by the law.[92] According to the UN Human Rights Committee General Comment 10 of June 1983 on Article 19 ICCPR (later replaced by General Comment 34/11), the right to hold opinions without interference 'is a right to which the Covenant permits no exception or restriction'. Restrictions to the freedom of expression are admissible under Article 19(3) ICCPR only when they are necessary and established by the law for pursuing specific aims, namely 'for respect of the rights or reputations of others or the protection of national security or of public order, or of public health or morals'. Consequently, 'the list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression'.[93] The conditions spelled out in Article 19(3) need to be met in order for a limit to freedom of expression to be in tune with international law.

The aims provided by the Rwandan legislator, namely 'to prevent and punish genocide ideology in order not for genocide to be committed again in the country', however seem to fall outside the umbrella provided by Article 19(3). Similar conclusions can be drawn on the basis of the new General Comment 34 (hereinafter GC 34) of 2011 on Article 19 ICCPR. According to the Human Rights Committee's GC 34, freedom of expression is a necessary condition for the full development of the person and is essential for any society.[94] It is also the basis for 'the full enjoyment of a wide range of other human rights'.[95] Pursuant to GC 34 the obligation to respect freedom of opinion and expression is binding on executive, legislative and judicial power.[96]

Article 20 ICCPR prohibits 'any propaganda for war' as well as 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

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[91] Joint Government Assessment, Rwanda, Draft Final, 23 July 2008, pp. 73 and 79.

[92] Article 19 ICCPR states that: (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in para 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

[93] See Article 19, *Comment on the Law Relating to the Punishment of the Crime of Genocide Ideology of Rwanda*, London, UK, September 2009, at 9.

[94] Paragraph 2, General Comment No. 34, 12 September 2011.

[95] Paragraph 4, General Comment No. 34, 12 September 2011.

[96] Paragraph 6, General Comment No. 34, 12 September 2011.

Rwanda, as a signatory to the ICCPR, is obliged to implement the principles entrenched in Article 20 approving consistent national legislation prohibiting the actions referred to therein.[97] According to GC 34 'Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in Article 20 are all subject to restriction pursuant to Article 19, para 3. As such, a limitation that is justified on the basis of Article 20 must also comply with Article 19, para 3'.[98] According to the Human Rights Committee, the only difference between acts addressed in Article 20 and acts that may be subject to restriction under Article 19 consists of the fact that states have an obligation to criminalise only the former. Merely under this point of view Article 20 ICCPR 'may be considered *lex specialis* with regard to Article 19'.[99]

In the light of the reasoning of the Human Rights Committee and given the ambiguous formulation of the prohibited conducts, the aims pursued and the restriction of the freedom of expression under the Genocide Ideology Law, one may conclude that the latter is in conflict with international standards protecting freedom of expression.

Law 18/2008 provides for severe penalties for those convicted of genocide ideology. According to Article 4 'Any person convicted of the crime of genocide ideology (…) shall be sentenced to an imprisonment of ten (10) years to twenty five (25) years and a fine of two hundred thousand (200.000) to one million (1.000.000) Rwandan francs. In case of recidivism, the penalty provided for in the preceding paragraph shall be doubled'. Moreover 'Any person found guilty of the ideology of genocide who was convicted of the crime of genocide, shall be sentenced to life imprisonment' (Article 5). The Law on Genocide Ideology also targets organisations, imposing fines and their dissolution on those that commit the crime in question.[100] Of most concern, however, is the body of provisions concerning children. Article 9 establishes that a child guilty of genocide ideology is brought to a rehabilitation centre for up to 12 months, if (s)he is younger than 12. If between 12 and 18 years, the child receives half of the sentence envisaged by the law for adults, which can be partially or fully served in a rehabilitation centre. This provision clearly contravenes international children's rights instruments requiring the 'best interest of the child' as a parameter governing child-focused policies.[101] The

[97] See Human Rights Committee, General Comment No. 11: Prohibition of Propaganda for War and inciting national, racial or religious hatred, (Article 20): 07/29/1983.

[98] Paragraph 50, General Comment No. 34, 12 September 2011.

[99] Paragraph 51, General Comment No. 34, 12 September 2011.

[100] See Article 19, 2009, note 84, p. 11: 'Article 7 provides that any association, political organisation or non-profit making organisation convicted of the ideology of genocide shall be punished through its dissolution or a fine of 5,000,000 to 10,000,000 Rwandan francs (approximately €6,145–€12,290) without prejudice to individual liability of any participant in the commission of the crime. Many such associations and organisations, including non-governmental organisations in Rwanda, would be bankrupted if they were levied such a fine for overstepping the low threshold for genocide ideology.'

[101] See Article 3(1) of the Convention on the Rights of the Child, entered into force in Rwanda on 23 February 1991.

principles set out in the Convention on the Rights of the Child (CRC) and in the Beijing Rules[102] demand that recourse to prison is used only as a last resort and for the shortest time for children, while the Law on Genocide Ideology provides the possibility that children 12 years old serve their sentence in prison, where they risk being abused, as often they are not separated from adults.[103] The law risks to limit debates among children in classrooms on crucial matters such as Rwanda's history, strongly undermining the right to freedom of expression (Article 13 CRC) and children's right to education (Articles 28–29 CRC) embodied in the CRC.[104] Finally, the law embodies provisions regarding adults guilty of inoculating genocide ideology in children (Article 11): 'In case it is evident that the parent of the child referred to in Article 9 of this Law, the guardian, the tutor, the teacher or the school headmaster of the child participated in inoculating the genocide ideology' they risk a sentence of 15 up to 20 years. Under Law 18/2008 the meaning of the wording 'in case it is evident' remains obscure. Similarly, the law does not clarify whether the aforementioned wording suggests a burden of proof lower than the minimum standard usually required in criminal trials such as proving facts 'beyond any reasonable doubt'.[105] It is also possible that such a provision criminalises parents, guardians, tutors and teachers who respect and encourage the freedom of thought of children, consequently violating Article 14(2) of the CRC affirming that 'States Parties shall respect the rights and duties of the parents, and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child'.[106] Interestingly, a provision aimed at punishing false accusations of genocide ideology encompassed an earlier draft of the law was finally deleted. According to that draft, slanderers were subject to half of the sentence foreseen for those found guilty of genocide ideology.

8.3.2.1 Impact of Law 18/2008 on Rwandan Society

Thousands of Rwandans have been prosecuted under the memory laws passed between 2001 and 2008. The three laws share with the Rwandan constitution a lack of guidance as to how to interpret the term 'genocide ideology', providing judges and prosecutors with an unfettered margin of appreciation when applying the relevant provisions. Referring to the 2003 law, René Lemarchand has declared that 'So vague and all-embracing is the language of the law as to give the courts

[102] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), adopted by General Assembly resolution 40/33 of 29 November 1985.

[103] See Sullo 2012, pp. 127–151.

[104] See Article 19, 2009, p. 12.

[105] Ibid.

[106] Ibid.

extraordinary latitude to indict suspects on the flimsiest grounds'.[107] Data provided by the Rwandan Government to Amnesty International show several cases of prosecution based on the crimes of genocide ideology and sectarianism.[108] In 2007, a year before the law was approved, the Rwandan courts of first instance had to deal with 792 cases of genocide ideology. The following year, 618 cases were heard at first instance. In 2009, the cases of genocide ideology discussed before Rwandan courts numbered 435. The percentage of acquittals was generally high.[109] The broad fashion in which the ambiguous terms and prohibitions of the law have been interpreted have raised the concerns of human rights monitoring bodies and NGOs. Among the latter, Article 19, a London-based NGO has stated that:

> Reports of authoritative media and human rights non-governmental organisations indicate that the legacy of genocide is being manipulated by the Rwandan government to suppress political dissent and opposition in a range of ways, but most significantly through the cases involving the crime of genocide ideology. According to available information, about 1,300 such cases were initiated in the Rwandan courts in the 2007-2008 judicial year, even before it was defined by the Genocide Ideology Law itself. Rwandan authorities have used prosecution, or the threat of prosecution under the law to trample opposition, including calls for justice for war crimes committed by the ruling Rwandan Patriotic Front (RPF). A range of Rwandan and foreign individuals and media organisations have been caught as actual or potential violators of the Genocide Ideology Law… Moreover, teachers and pupils at schools have been directly warned by prominent political figures that children "found guilty of harbouring the genocide ideology [can] be denied admission in any school in the country … [and] also be prosecuted in the courts of law when he or she turns the prescribed age".[110]

The goal of the reconciliation policies run by the Rwandan Government seem to be fixing an uncontroversial version of national history based on non-questionable truths.[111] According to a study conducted by Human Rights Watch regarding the handbooks used to train Rwandans during solidarity camps named *ingando,*[112] the 'Three tenets of that "truth" relevant to judicial issues and frequently mentioned by officials are:

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[107] See Lemarchand 2006, p. 26.

[108] Amnesty International 2010, p. 19.

[109] Ibid., Rwandan Government statistics on genocide ideology in 2009: 'When Amnesty International requested statistics which disaggregate convictions, acquittals and sentences for "genocide ideology" or "divisionism" and which demonstrate which courts these cases had been tried in, the National Public Prosecution Authority said they did not hold such records (…). Of 749 cases of "genocide revisionism and other related crimes" which were brought before Rwandan courts in 2009, 260 resulted in acquittals. It is not clear, however, from the statistics what constitutes a crime related to "genocide revisionism" and how many of these were prosecuted under the 2008 law on "genocide ideology".

[110] See Article 19, op. cit., *supra*, note 84, p. 4.

[111] See Waldorf 2011, pp. 48–60.

[112] See National Unity and Reconciliation Commission, Manuel pour les camps de solidarité et autres formations, October 2006, p. 81, 83, 154, 162. See also Tim Davis, Rwanda: Ingando Camps a 'Government tool for social engineering', NGO News Africa, at http://ngonewsafrica.org/archives/9805. Last accessed 5 April 2013.

(1) The Catholic Church assisted the colonial administration in introducing the divisions among Rwandans that led to the genocide and hence bears responsibility for much of the violence against Tutsi from that time forward.
(2) Hutu political leaders organised a genocide of the Tutsi minority and the Hutu population—perhaps all of it—was misled into following their evil plan.
(3) Although some RPA soldiers may have killed civilians, these crimes were the unfortunate result of wartime or were occasional acts of revenge and have been punished'.[113]

Four parliamentary investigation commissions set up between 2003 and 2008 on 'divisionism' and 'genocide ideology' have established a clear link between these offences and the speaking out against the RPF crimes.[114] According to the commissions examples of revisionism include affirming that 'Hutus [are] detained on the basis of some simple accusation' or that '[there are] unpunished RPF crimes'. The fourth commission, moreover, has reported the spreading of genocide ideology in 26 schools out of the 32 visited.[115] The list of the organisations accused of spreading genocide ideology include CARE International, Trocaire, Norwegian People's Aid, 11-11-11, Kolping Family, Pax Christi, Voice of America, British Broadcasting Corporation and Human Rights Watch as well as the Catholic Church, the Association of Pentecostal Churches in Rwanda, Jehovah's Witnesses, Seventh Day Adventists, the International United Methodist Church and the Mennonites.[116] In order to eradicate genocide ideology, six thousand teachers have been trained and the investigation commissions urged them to start their classes every day with three minutes aimed at stigmatising the genocide ideology.[117] Such a climate, which is inclined to the sanctioning of the speaking of a truth different from the official one, has reportedly wielded a remarkable influence on post-genocide justice and on *gacaca* trials in particular, conditioning debates and testimonies. This was also confirmed in an interview with representatives of ASF, an NGO which has an extensive experience of monitoring genocide trials since the establishment of the domestic courts in 1996.[118] The case of Célestin Sindikubwabo, reported by Human Rights Watch, is a clear example of such a climate. When testifying before a *gacaca* court in Nyakizu district in October 2006, he declared that the person accused fled

[113] See Human Rights Watch 2008, p. 36.

[114] Ibid., p. 38.

[115] National Assembly, 'Rapport d'analyse sur le problème d'idéologie du genocide evoquée au sein des établissements scolaires', December 2007.

[116] République Rwandaise, Rapport de la Commission Parlementaire ad hoc crée en date du 20 janvier 2004 par le Parlement, Chambre des Députés, chargée d'examiner les tueries perpétrées dans la province de Gikongoro, l'idéologie génocidaire et ceux qui la propagent partout au Rwanda, at 161; Rwandan Senate, Rwanda, Genocide Ideology and Strategies for its Eradication, 2006.

[117] Ibid., p. 40, National Assembly, 'Rapport d'analyse sur le problème d'idéologie du genocide evoquée au sein des établissements scolaires', December 2007.

[118] Interview with Avocats Sans Frontières representatives, Brussels, 13 March 2016, on file with the author.

to Burundi in order to escape RPF troops that were killing civilians. As a consequence, he was later arrested and sentenced to a prison term of 20 years for 'gross minimization of the genocide'.[119] Sindikubwabo is not the only victim of this policy, which risks jeopardising the process of national reconciliation because it does not allow Rwandans to debate and freely reconstruct the events connected with the genocide. NGOs and human rights defenders have also stressed the political use of the memory laws in Rwanda. The most (in)famous case of application of Law 18/2008 concerns Victoire Ingabire, a political opponent who was prevented from running for the 2010 presidential election due to accusations also formulated on the basis of Law 18/2008.[120] An exiled political opponent, Victoire Ingabire returned to Rwanda to run for the presidency in 2010. Following her declarations that the crimes committed during the genocide by the Rwandan RPA should also be prosecuted, Ingabire was charged with genocide ideology under the 2008 law and arrested. Her political party was refused registration and she was not allowed to run for the presidency. Paul Kagame received 93.08% of the votes. In March 2012, Ingabire filed a constitutional challenge before the Supreme Court asking to nullify Articles 2 through 9 of the Genocide Ideology Law.[121] Ingabire also stressed that Articles 2 and 3 of Law 18/2008 contradicts Articles 20, 33 and 34 of the Rwandan Constitution.[122] The challenge was rejected in October 2012, but the Supreme Court acknowledged that the law lacked clarity. Despite the acknowledgement, the Supreme Court extended Ingabire's sentence from eight to fifteen years of imprisonment.

Another interesting case regards the journalists Agnès Uwimana-Nkusi and Saidati Mukakibibi, who were arrested in July 2010.[123] The two journalists wrote for the biweekly publication *Umurabyo*, a Kinyarwanda-language newspaper with a print run of between 100 and 150 copies per issue, where they had criticised the Rwandan Government. The two journalists were tried before the High Court of Kigali. Ms. Uwimana-Nkusi was convicted for four separate charges including genocide minimisation (Article 4 of Law 33 bis of 2003) and divisionism (Article 1 of the 2001 Law on Sectarianism).[124] Ms. Mukakibibi was sentenced for threatening national security due to one article published in *Umurabyo*, but was acquitted of the divisionism charge.[125] In one article Ms. Uwimana-Nkusi wrote that 'Rwandans lived for a long time with this hatred until they ended up killing each other after [former President] Kinani [Habyarimana]'s death'. The expression 'killing each other' triggered the accusation of genocide minimisation. As the Court

[119] See on this point Court of Higher Instance, Huye, No. RP 0015/07/TGI/HYE RPGR 40832/S2/06/MR/KJ, Prosecutor versus Célestin Sindikubwabo, 24/4/07.

[120] Amnesty International 2010, *supra,* note 14, pp. 21–22.

[121] See Jansen 2014, p. 211.

[122] Ibid.

[123] Ibid., p. 199.

[124] Ibid., p. 200.

[125] Ibid.

explained 'Uwimana-Nkusi Agnes claims that hatred between Rwandans grew, which led to them killing each other. The High Court has found that here she has shown that it was hatred that caused the killings, and this is not true as there was an intention of exterminating the Tutsis. The defendant intentionally minimises the genocide in her article, since before the Court she admitted that genocide took place against the Tutsis and that killings did not occur from both sides'.[126] Found guilty of genocide minimisation, Ms. Uwimana-Nkusi was convicted and given a ten-year term of imprisonment and a fine. She was also sentenced to five years of prison for threatening national security, a sentence of one year and a fine for divisionism, and a one-year prison term for defaming the President. In total, Uwimana-Nkusi received a prison term that amounted to seventeen years.

Ms. Mukakibibi received a sentence of seven years of imprisonment in respect of her actions representing a threat to national security. The two journalists appealed the conviction before the Supreme Court of Rwanda. Referring to Article 4 of Law 33 bis 2003 the Supreme Court stated that 'This article does not explain clearly the acts constituting the crime of genocide minimisation. It only shows that the denial of genocide can be punished when it is made public either through speech, writing, image or photo or any other way. The Supreme Court has never taken a decision in a trial explaining what it means to minimise the genocide. The Rwandan dictionary also does not give an explanation of what is 'the minimisation of genocide'.

The Court elaborated on the concept of genocide minimisation (in Kinyarwanda '*gupfobya*'), affirming that:

> In the current language of Kinyarwanda 'gupfobya' means giving something minimal worth it does not deserve. This idea is developed in the law project on the criminalisation of genocide ideology in which it says: "The minimisation of genocide is any behaviour exhibited publicly and intentionally in order to reduce the weight or consequences of the genocide against Tutsis, minimise how the genocide was committed, alter the truth about the genocide against the Tutsis in order to hide the truth from the people; asserting that there were two genocides in Rwanda: one committed against the Tutsis and the other against Hutus".[127]

The Court concluded that even though Ms. Uwimana-Nkusi had actually used a word minimising the genocide, due to the lack of intention inferred from her writings, she had to be acquitted. While acknowledging that the 2003 law does not clarify the meaning of genocide minimisation, the Supreme Court unfortunately refrained from providing any clarification that could guide judges and prosecutors in the interpretation of such a widely debated term. This was definitely a missed opportunity. Despite this, the Supreme Court made clear two important points: (1) The 2003 law does not clarify what 'minimization of the genocide' consists of; (2) in order to commit the crime of minimization, a degree of intentionality is required).[128] Ms. Uwimana-Nkusi was acquitted of the charges of genocide

[126] Ibid.

[127] Ibid., p. 192.

[128] Ibid., p. 205.

minimisation and divisionism. Her sentence for threatening national security was reduced from five to three years, representing a total incarceration term of four years instead of seventeen. Ms. Mukakibibi's sentence was reduced from seven to three years. The journalists appealed the sentence to the African Commission on Human and Peoples' Rights, because of a violation of their fair trial rights. The case was still pending when this book was finalised.

Accusations were also formulated against Alison des Forges, a leading scholar and author of a seminal work on the Rwandan genocide.[129] Serious concerns have been expressed by the ICTR Trial Chambers as to the influence that the genocide ideology law might exert on witnesses testifying before Rwandan courts in the *Kanyarukiga* Case:

> The Appeals Chamber considers that there was sufficient information before the Trial Chamber of harassment of witnesses testifying in Rwanda, and that witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances, were killed. There was also information before the Trial Chamber of persons who refused, out of fear, to testify in defence of people they knew to be innocent. The Trial Chamber further noted that some defence witnesses feared that, if they testified, they would be indicted to face trial before the *gacaca* courts or accused of adhering to "genocidal ideology".[130]

Similar reasoning was evident in the British High Court in cases regarding the extradition to Rwanda of individuals suspected of genocide indicted in the United Kingdom.[131] In order to address this issue the Rwandan Government amended the domestic legislation regulating the trials of accused transferred from other jurisdictions by establishing that 'no person shall be criminally liable for anything said or done in the course of trials'.[132] In November 2012 Tharcisse Karugarama, Rwandan Minister of Justice argued before parliament for amendments to the law against genocide ideology. In the word of Karugarama the new draft law addresses the ambiguity of Law 18/2008 on genocide ideology by defining 'clearly constitutive elements of such offences'.[133] The review process of Law 18/2008 has culminated in amendments passed in October 2013, which improved the quality of the drafting making the definition of the offence clearer. The new draft of the law

[129] See Waldorf 2011, p. 48.

[130] ICTR, Kanyarukiga Decision on the Prosecution's Appeal Against Decision On Referral Under Rule 11bis, para 26, 30 October 2008.

[131] High Court of Justice, Vincent Brown aka Vincent Bajinja (et al.) v. Government of Rwanda and the Secretary of State for Home Department [2009] EWHC 770, 8 April 2009, para 62.

[132] Organic Law modifying and complementing the Organic Law No. 11/2007 of 16/03/2007 concerning the transfer of cases to the Republic of Rwanda from The International Criminal Tribunal for Rwanda and other states, Official Gazette, 26 May 2009, Article 2—Guarantee of rights of an accused person.

[133] On this point, see Emmanuel R. Karake, Rwanda: Govt Seeks to Amend Genocide Ideology Law, All Africa, http://allafrica.com/stories/201211030056.html. Last accessed 12 February 2018.

also provides for more lenient penalties.[134] However, serious reasons of concern remain. In fact, only minor changes have been introduced in Law 33 bis of 2003 on minimising the genocide through a reform of the penal code enacted in 2012 exclusively concerning penalties.[135] The new norm affirms that:

> Any person who publicly shows, by his/her words, writings, images, or by any other means, that he/she negates the genocide against the Tutsi, rudely minimizes it or attempts to justify or approve its grounds, or any person who hides or destroys its evidence shall be liable to a term of imprisonment of more than five (5) years to nine (9) years. If the crimes under paragraph one of this Article are committed by an association or a political organisation, its dissolution shall be pronounced.

The aforementioned pitfalls marking the law, consequently, remain in place.

The 2008 Law on Genocide Ideology was amended in August 2013, introducing two important requirements, namely that the crime of genocide negation has to be both deliberate and committed in public (Article 5).[136] The improvement however seems less significant considering that Article 2.4 of the law defines 'public' any place accessible to two or more persons.[137] According to Article 5 of the law, genocide negation is 'any deliberate act, committed in public, aimed at:

(1) stating or explaining that genocide is not genocide;
(2) deliberately misconstruing the facts about genocide for the purpose of misleading the public;
(3) supporting a double genocide theory for Rwanda;
(4) stating or explaining that genocide against the Tutsi was not planned'.

The law includes a very detailed interpretation of Rwandan history, the contradiction of which raises criminal liability for genocide negation. The wording remains to a certain extent ambiguous. It is difficult for instance to understand what 'the purpose of misleading the public' means. Further ambiguity characterises Article 6 of the law, affirming that those who downplay 'the gravity of the consequences of the genocide' or the 'methods through which it was perpetrated' are guilty of minimisation.

Article 2 of the 2013 law defines the term 'deliberate', which means 'willingly and with a desire to promote genocide ideology'. The latter is defined as:

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[134] On this point, see Human Rights Watch 2014: 'A revised version of the 2008 law on genocide ideology was promulgated in October. It contains several improvements to the 2008 law, including a more precise definition of the offense and the requirement to demonstrate intent behind the crime, thereby reducing the scope for abusive prosecutions. However, several articles retain language that could be used to criminalize free speech. The new law reduces the maximum prison sentence from 25 to 9 years', available at https://www.hrw.org/world-report/2014/country-chapters/rwanda. Last accessed 12 February 2018.

[135] See Law No. 01/2012/OL, Instituting the Penal Code, Official Gazette of Rwanda, June 14, 2012.

[136] See Law No. 84/2013, Law on the Crime of Genocide Ideology and Other Related Offenses, Official Gazette of Rwanda, Sept. 9, 2013.

[137] See Jansen 2014, p. 208.

> any intentional act, done in public whether by oral, written or video means or by another means and through which may show that a person is characterized by ethnic, religious, nationality or racial-based with the aim to: 1. advocate for the commission of genocide; 2. support the genocide'. In order to commit the crime of genocide ideology it is hence necessary either 'to advocate for the commission of genocide' or 'support the genocide'.

The law emphasises the necessity of intentionality in the commission of the crimes, which obliges prosecutors to prove beyond any reasonable doubt the deliberate will to deny the Tutsi genocide supporting genocide ideology. The elusive wording of the law has been stressed by scholarly literature, which has urged interim measures to provide guidance as to how apply the law until a more radical reform is enacted.[138] Article 162 of the Rwandan Constitution allows the Minister of Justice to decide prosecution policies and in the public interest to deliver instructions to 'the Prosecutor General to undertake or refrain from investigating and prosecuting an offence'. The Minister of Justice may also 'issue written instructions to any Prosecutor to investigate and prosecute or refrain from investigating and prosecuting an offence and inform the Prosecutor General of such instructions'.[139] Until the legislation on genocide denial will be amended pursuant to international standards the violations of freedom of expression will continue in Rwanda. This may have severe consequences on the post-genocide reconciliation process.

The Rwandan Government has paid constant attention to the way the genocide is elaborated and remembered and has established countrywide memorial centres. An interesting 2008 amendment has replaced the more ethnically neutral term 'genocide' included in the Preamble, Articles 51 and 179 of the Rwandan Constitution by the new wording 'genocide of the Tutsi'.[140]

No doubt exists that the 1994 genocide, like other atrocities, constituted a watershed in the national history of Rwanda, the causes of which must be analysed, openly discussed and, to the extent possible, understood. Several *fora*, formal and informal were and are available for this purpose including schools, solidarity camps, universities, debates organised by the National Reconciliation Commission and, last but not least, hearings before *gacaca* courts. All these settings could be used to improve the dialogue on Rwanda's history. *Gacaca* courts, in particular, offered the setting where the truth regarding the genocide could in principle be reconstructed by the local communities that were directly affected by its

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[138] Ibid., p. 209: 'Genocide ideology is an element of negationism under the 2013 Law. However, what constitutes genocide ideology remains elusive. (…) Furthermore, if negationism has as an element the willing advancement of genocide ideology, it is unclear what differentiates crimes under Article 5's "negationism" from "genocide ideology" as proscribed by Article 3'.

[139] Ibid., p. 210.

[140] See Waldorf 2009a, note 69, p. 104: 'Since 2008, however, the government has reemphasized ethnicity in describing the 1994 genocide. A constitutional amendment added new ethnicized language to that portion of the preamble that stresses reconciliation: "Emphasizing the necessity to strengthen and promote national unity and reconciliation which were seriously shaken by the 1994 tutsi genocide and its consequences" (original emphasis). References to the genocide throughout the 2003 Constitution were modified in a similar fashion.'

unparalleled violence. The Rwandan Government however, has not resisted the temptation to adopt a law that hindered such a debate, fixing an uncontroversial version of the genocide-related events. This is not unusual in post-genocide contexts, as the European saga on the Holocaust denial provisions has demonstrated.

Data available does not allow a systematic assessment of the actual impact of the Law of Genocide Ideology on testimonies during criminal trials in general and *gacaca* hearings. It is however possible to conclude that, as the case law of the ICTR and foreign courts has also stressed, the memory laws adopted discouraged a real dialogue before *gacaca* courts. This is a missed opportunity for post-genocide justice in Rwanda. One of the most effective ways to ensure a non-recurrence of mass atrocities is to encourage free circulation of ideas and enable access to education, rather than only attempting to criminalise views which question the existence or seek to belittle the horror of past crimes.

8.4 The Meaning of Reconciliation According to Rwandans

To squarely address the issue of reconciliation in post-genocide Rwanda I have opted for an in-depth analysis restricted to a small geographic area. I have carried out a series of interviews aimed at assessing the reconciliation process in Rwanda in the area of Nyabisindu, Muhanga district, southern province. Through semi-structured interviews I have collected the testimonies of 56 Rwandans participating in the hearings before the *gacaca* courts of the Gahogo (jurisdiction of sector). The fieldwork has informed my research, and its outcomes have provided me with a useful interpretation tool for my findings. In fact, the assessment of the reconciliation process has been conducted thanks to the conceptualisation of reconciliation directly provided by Rwandans. Even though the limited sample of interviewees does not allow me to generalise my results to the whole of Rwanda, they provide interesting material regarding the contribution of *gacaca* courts to the reconciliation process.

Nyabisindu is located in a rural area. The dynamics of the genocide in this area were very complex. Internally displaced persons (IDPs) of both the Hutu and Tutsi groups who had fled Kigali (where the fight between the genocidal government and the RPA was ongoing) were present in this area during the genocide.

Because both victims and perpetrators were often IDPs who did not know each other, to reconstruct the local dynamics of the genocide proved to be particularly challenging. This is why a supplementary phase of information gathering was necessary in 2008 in order to give momentum the investigations and encourage the confessions and the participation in *gacaca*. Another key feature of the genocide in Nyabisindu was the role played by the Pentecostal Church of Rwanda (ADEPR) in

the massacres.[141] The Tutsi internally displaced in this area that found shelter in the church facilities were betrayed by the Pentecostal pastors who sent them to face their killers. At the moment of my field research the Pentecostal church of this sector was deeply divided, because the pastors who participated in the massacres shared a solidarity pact of silence, while those who did not participate tried to encourage justice. As a consequence, the truth-recovery process in this area during my observation work was still ongoing before the local *gacaca* courts. Consequently, the fate of many victims of the genocide remained unknown. As Agnes, a farmer in her 30s, told me, about 300 corpses that were still missing and those who knew something regarding their whereabouts were silent, which generated deep conflicts within the Nyabisindu community.[142]

On the first day of my monitoring activities a young woman, a survivor, started shouting out loud in addressing the crowd gathered to attend the *gacaca* hearing:

> You know where the corpses have been thrown; you know where they are hidden. We want to know where the common graves are!!! We deserve to know. Not to share this information is like killing us too, this is not leading us to reconcile.[143]

This was one of several ways the expression of the frustration of the victims of the genocide took form during my field work. Taking into account the need for truth expressed by the local community, the judges of the *gacaca* bench questioning a defendant nicknamed 'Scania' (he was a truck driver) demanded information from him on the location of the graves. After some hesitation, the defendant, who was accused of murder, agreed to show the whereabouts of the corpses to the community. It was the first time in fifteen years that a deeply divided community gathered to search for the truth on the genocide. All together we stood up and

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[141] On this point, see the National Commission to Fight against Genocide, at http://cnlg.gov.rw/news-details/?L=1&tx_ttnews%5Btt_news%5D=405&cHash=6fb6516eb965683bbae1ad37e6cefec9. Last accessed 15 February 2018, 'The Pentecostal church in Rwanda (ADEPR) Commemorates the Genocide against the Tutsi': 'The event took place at Nyabisindu parish in the Nyamabuye sector, a Muhanga district in the Southern Province where ADEPR members on the national level gathered to remember victims who perished at the parish. The event was attended by Muhanga Mayor, ADPER Spokesman at the national level, Police and army officials in the district, and CNLG representative Ndahigwa Louis who was the guest of honor at the function. Among the speeches and testimonies given at the event, various people condemned the priests who during the genocide, participated or stood by as innocent people were being mercilessly murdered. It is believed that hundreds of people, who had sought refuge in the God's temple thinking they will be safe, were left to the hands of killers who brutally killed them. At the event, 121 victims were decently buried. In his speech, Mr. Ndahigwa Louis stressed that if priests kept their faith and act according to God's word, there would have been a much bigger number of people who survived the genocide. He further explained the stages of genocide which end with genocide denial. He therefore called on those present at the event to play their role in fighting genocide denial through telling the real story of what happened during the genocide. He ended the speech thanking those who had courage to hide people who were being hunted and also the former RPA soldiers who bravely engaged the genocidal forces and halted the genocide'.

[142] Interview with Agnes, participant in the *gacaca* hearings before Gahogo judges, 27 September 2009, on file with the author.

[143] 1 September 2009, *gacaca* jurisdiction of sector, Gahogo.

silently followed Scania. Crossing the outskirts of the village disseminated with barracks, he led us to through the path approaching the place where the lives of hundreds of Rwandans secretly ended. The result was impressive. Scania led the local community through the woods towards the place where were hidden the bodies of tens of Rwandan women and men who were hurriedly buried. On the graves where hundreds of bodies were thrown, often still alive, somebody had planted trees and intentionally built school facilities in order to cover the past. Scania showed us an outhouse where several corpses were abandoned. The outhouse had been dismantled without any clear reason, apparently to destroy evidence of the massacres. The local community started to dig into its murky past with naked, determined hands, until the first clothes of the victims emerged. The memory of those moments is carved in the minds of the participants in that sombre search and recorded in the *cahier d'activités* filled in by local *inyangamugayo*. *Gacaca* hearings were the first truth-recovering possibility for hundreds of habitants of this Rwandan small community. The dynamic that I observed on this day was repeated to various degrees, during the *gacaca* hearings that ensued.

8.4.1 Questioning Rwandans

I developed a set of questions to assess the impact of *gacaca* courts on the reconciliation process. The questions were aimed at gathering personal data such as age, gender, employment status, level of instruction, residence in Rwanda and abroad, and religion. Another set of questions concentrated on the personal experience during the genocide, including personal accounts, presence of victims in the family and damages suffered, both financial and psychological. Other questions were aimed at assessing the relationships with other families in the neighbourhood and the frequency of mixed marriage Hutu-Tutsi. As ethnic characterisation is prohibited nowadays in Rwanda, the terms 'Hutu' and 'Tutsi' had to be circumvented, unless the interviewees spontaneously used them. Further questions targeted the feelings towards perpetrators and the trust in post-genocide justice. Specific questions regarding the trust placed in *gacaca* judges, the success of the truth-telling initiatives promoted by *gacaca* and their capacity to address ethnic polarisation were also formulated.

A large majority of the people interviewed—86%—declared having victims of the genocide in their family, as is clarified in the following figure. This is not only due to the dynamics of the genocide in Nyabisindu, but also to the fact that marriages between Hutu and Tutsi were very frequent until 1994. Consequently, perpetrators also counted several victims among their relatives, consistently with the general national frame (Fig. 8.1).

A series of questions was formulated in order to understand how the neighbourhood relations were and how *gacaca* impacted them. When asked if the neighbours used to help them in daily household activities, only 11% of those interviewed declared that had received help for free. 18% of the interviewees

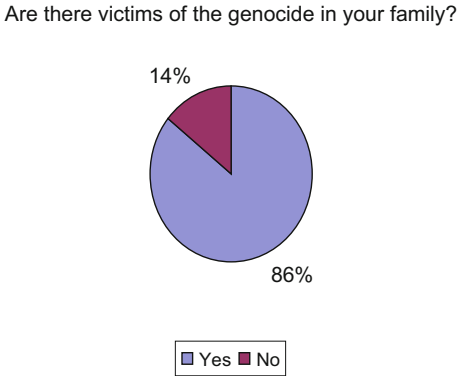

Fig. 8.1 Genocide victims in the family (*Source* P. Sullo)

Fig. 8.2 Neighbour assistance (*Source* P. Sullo)

declared that the neighbours were ready to provide help only if paid, while 39% declared that the neighbours would not provide any help (Fig. 8.2).

As to mixed marriage, a possible index of unbiased relations between Hutu and Tutsi, a large part of the community stated that mixed marriages were common before the genocide and that they continue also nowadays. The respondents however stressed that the number dropped after the genocide (Fig. 8.3). Antoine, a 43-year-old farmer from Muhanga sector noticed that

> In the past marriages between Hutu and Tutsi were very common, today much less (…) Those who have experienced the massacres of 1994, on both sides, have developed a suspicious approach. We [the Hutu and the Tutsi] live side by side, sometimes make small business together, but things have changed. It is simply no more as it used to be.

Such a statement is not surprising considering the high level of tension between the two groups after the violence culminated in the genocide. The drop of the mixed marriages was confirmed during other interviews I carried out throughout Rwanda. Interestingly, from the data collected, it has emerged that there exists a double cleavage inside the Rwandan community, articulated along both a Hutu-Tutsi divide and a Tutsi-Tutsi divide. In fact, while the Hutu community, despite the internal differences, perceived itself as a united body, Tutsi perceive themselves as

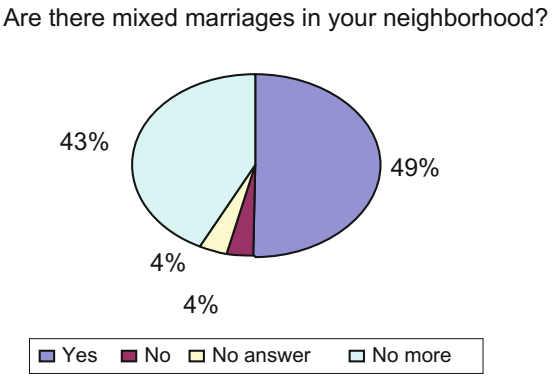

Fig. 8.3 Mixed marriages (*Source* P. Sullo)

belonging to two groups. The first group included those Rwandans who left the country in 1959 and later, most of whom found shelter in Uganda, and came back after 1994. The second group constituted the remaining Tutsi who did not flee the country and later directly experienced the genocide. This division was to some extent symbolised by the language the two groups speak: while the 'Ugandan' returnees are in fact mostly anglophone, the others are francophone. Interviewees confirmed this trend. A young woman interviewed in Kigali in October 2009 provided a lengthy account regarding the situation of the *rescapés* in Rwanda. According to her, genocide survivors do not to enjoy the same opportunities as the returnees from Uganda close to the RPF clique. The interviewee in particular complained about access to employment within the public administration. She also stressed that the returnees from Uganda constitute an elite detached from the rest of the Tutsi community, and noted that several instances of marriages between members of the two groups were prevented by the respective families.[144] Similar results have also emerged from the field work of Ingelaere, who has stressed that the 'decrease in trust at the intraethnic level, especially on the side of Tutsi, where a rift between survivors and old-caseload returnees seems to be growing'.[145]

When asked to convey their feelings towards the perpetrators, the interviewees expressed their need for justice, truth, and confessions from the perpetrators. Approximately two thirds of the respondents (63%) declared that they want justice, and that the perpetrators of the genocide should be punished. The need for justice was tightly linked to the desire for truth and the acknowledgement of their victimisation.

A full confession, namely truth associated with acknowledgement of the guilt of perpetrators and victimisation of the survivors in particular, seemed to be a *condicio sine qua non* to forgive perpetrators. Based on the overall results of the interviews, the truth appeared to be the most desired element on the side of survivors, as it was

[144] Kigali, October 2009, interviews on file with the author.

[145] Ingelaere 2016, p. 91.

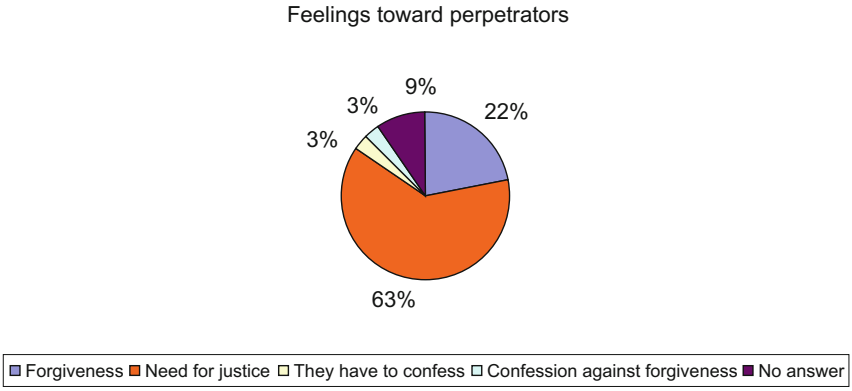

Fig. 8.4 Feelings toward perpetrators (*Source* P. Sullo)

tightly linked to justice and reparations. Survivors have often referred to their will to know what actually happened during the genocide at an individual, a community as well as at a national level. The need to discover the whereabouts of their beloved ones was a predominant element in their narratives (Fig. 8.4).

Martin, a 63-year-old security guard declared that:

> We Rwandans need to talk about the past. *Gacaca* provide this possibility, but this is not enough. Today we have policemen and authorities attending the hearings, people are afraid to talk. The setting is different from old and traditional *gacaca*.

When asked about their expectations toward perpetrators, the interviewees have almost unanimously (89%) indicated what the offenders should do: namely to confess; to ask for forgiveness, and to provide reparations to the victims. In other words, the need for justice in both retributive and reparative form, was equally important to the survivors (Fig. 8.5).

When questioned about their trust in the outcome of the *gacaca* trials, most of the interviewees showed a positive attitude and a certain degree of confidence. At the same time however, they stated that they were aware of the possible flaws of the *gacaca* system. Corruption of the *inyangamugayo* and a partial truth turned to be the most concerning issues surrounding *gacaca* (Fig. 8.6).

Dorothée, a 25-year–old woman from Gitarama was very outspoken in campaigning against the corruption of *inyangamugayo*:

> 'What we see during the hearings' she said, 'Is not mirrored in the final judgements. Here with a few dollars also the worst génocidaire can buy a new life. I have my personal feelings towards the perpetrators, justice has to be done. I can understand also the need for forgiveness. But lies, and injustice crystallised through a judgement, are a few things that I cannot accept. This poisons our society already shocked by the genocide.'[146]

[146] Nyabisindu, 16 September 2009, interview on file with the author.

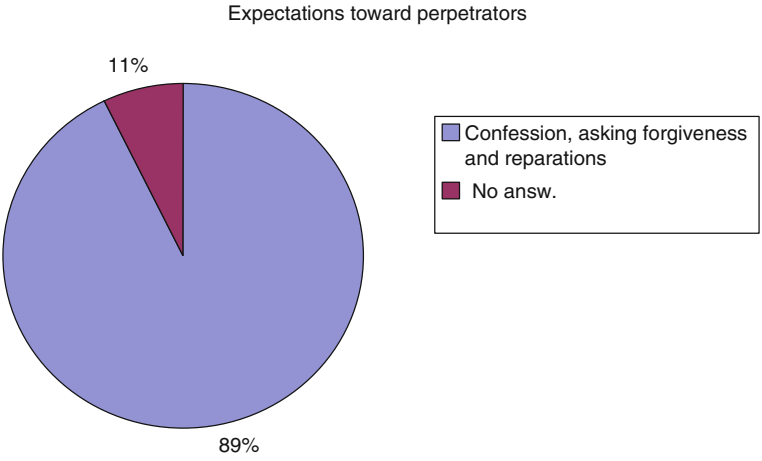

Fig. 8.5 Expectations toward perpetrators (*Source* P. Sullo)

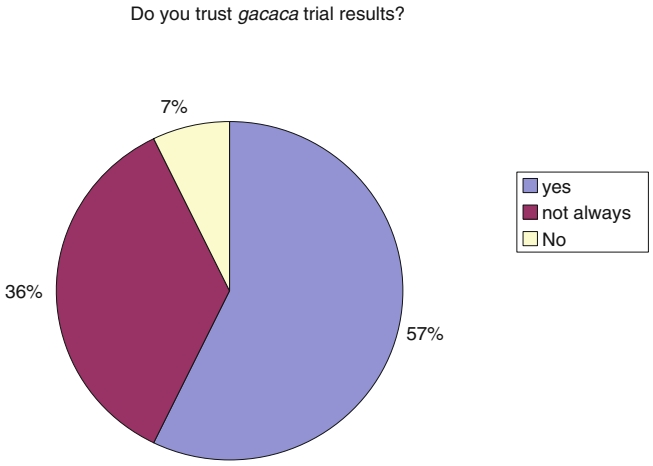

Fig. 8.6 Trust in *gacaca* trial results (*Source* P. Sullo)

Half of the interviewees (51%) considered the trial before *gacaca* in general to be fair. As Fig. 8.7 shows, 19% of the interviewees considered *gacaca* trials unfair, whilst 26% were of the opinion that the trials were characterised by pitfalls that often would lead to unjust results.

These data however need to be read together with those provided in Fig. 8.8, which shows that only 25% of the interviewees thought that *gacaca* judges were impartial. In other words, some of the interviewees made contradictory statements. This attitude has been confirmed by other field studies which have shown a

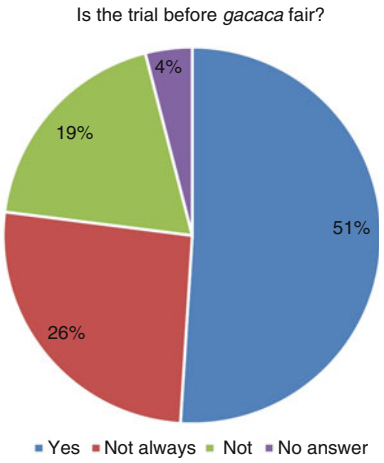

Fig. 8.7 *Gacaca* trial fairness (*Source* P. Sullo)

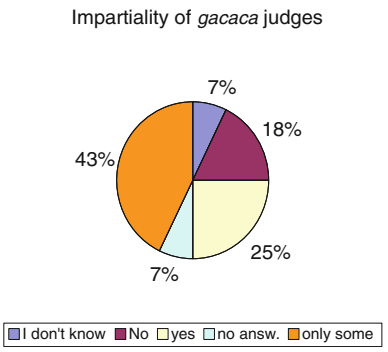

Fig. 8.8 Impartiality of *gacaca* judges (*Source* P. Sullo)

discrepancy in answering global and granular questions, with the former receiving a much more positive answer.[147]

In general Rwandans seemed to be afraid that external pressure exerted by state actors, as well as attempts by *génocidaires* to corrupt the judges, would negatively influence the outcomes of the *gacaca* trials.

Some questions were formulated in order to understand whether *gacaca* trials contributed to the eradication of the ethnic cleavage (Fig. 8.9). The majority of the population was clearly convinced that Rwandan society applies ethnic categories and that *gacaca* had a limited and not always positive impact on social polarisation. Only 39% of the interviewees were convinced that the ethnic division could be addressed through *gacaca* trials.

[147] Pozen et al. 2014, pp. 31–52.

Alfonse, a former soldier from Cyangugu who after the genocide relocated to Gitarama, elaborated at length on this issue:

> The government has a lot to do to cope with the legacy of the genocide, it is not easy to live together again. (…) Ethnic divisions have caused the fall of our country and spread a lot of hate. Ethnic identity cards did not belong to our history, it was a right step to prohibit them. But this is not enough, and you can't pretend that Hutu and Tutsi do not exist from one day to another, you can't deny our identities. Here we live on small hills, we know each other since the day we were born, we know who is a Hutu, we know who is a Tutsi. And when we go to *gacaca*, we don't forget this. Hutu have their own agenda, their strategies, most of the perpetrators are Hutu and they defend themselves before *gacaca* judges. They have constructed a wall to stop the truth. Similarly, also the Tutsi act according to their ethnic identity. They assume that a Hutu is a person guilty of genocide, they question Hutu witnesses as if they would be the defendant before *gacaca*. There is a lot of tension during the hearings and this is strengthening ethnic affiliation. We are not yet Rwandans.[148]

Interviews with members of the Rwandan diaspora in Europe and staff of NGOs working in Rwanda confirmed this trend.[149] Rwandans seemed to be convinced that the cleavage Hutu-Tutsi played a major role in the *gacaca* dynamics, with Hutu, the large majority of the population, sharing a pact of silence aimed at protecting against the efforts to uncover the truth during the *gacaca* process.[150] Perpetrators, on the other hand, were convinced that the *gacaca* initiative was conceived by the survivors' ethnic group, the Tutsi, pursuing the aim of labelling the entire Hutu population collectively guilty.[151] The interviewees strongly stressed that there is no instrument in place to target the indiscriminate violence against Hutu by the RPF, which undermines the legitimacy of the *gacaca* experiment.[152]

Questions concerning the capacity of *gacaca* to improve the relationships among Rwandan families and among Rwandans in general were also formulated. 39% of the interviewees held that *gacaca* had a positive influence on both relationships among Rwandans and inter-familiar relations, 36% considered such an influence negative, 11% held that the impact was sometimes positive sometimes negative and 14% did not provide an answer.

When asked to explain what reconciliation means, the interviewees defined it as a combination of several factors including truth, justice and reparative measures aimed at healing victims (and sometimes the perpetrators) of the genocide. Truth had a strong component of both factual elements and the acknowledgement of the roles played during and after the genocide. Truth was described as the element capable of bridging the gap between victim and perpetrator. When coupled with an apology, according to the respondents, truth may allow a process of forgiveness.

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[148] Nyabisindu, 15 September 2009, interview on file with the author.

[149] Interview with a representative of the Rwandan diaspora in Belgium, The Hague, 10 October 2010; interview with representatives of Penal Reform International, Human Rights Watch, Liprodhor, Kigali, September–October 2009, on file with the author.

[150] Ibid.

[151] Ibid.

[152] Ibid.

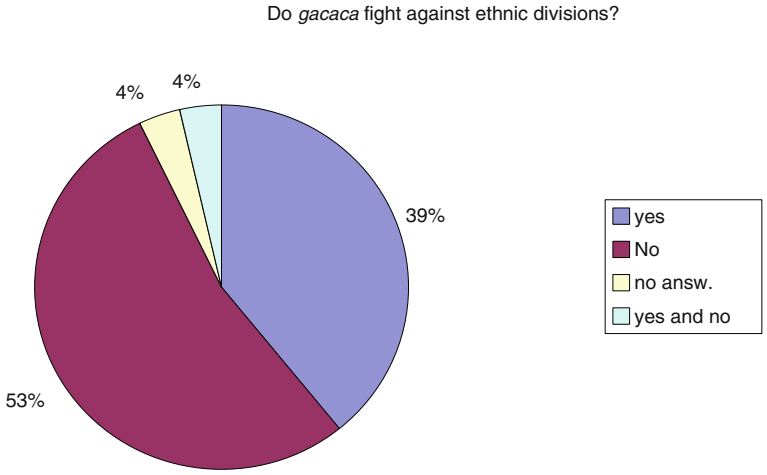

Fig. 8.9 *Gacaca* and fighting against ethnic divisions

The interviewees conceived reconciliation as an individual, interpersonal issue between survivor and perpetrator, making poor reference to other dimensions of the reconciliation process such as intergroup reconciliation. This mirrors the results of previous research activities carried out by scholarship focusing on the role of *gacaca* in the reconciliation process in past years.[153]

A policy of reparation was referred to as an essential element to achieve reconciliation between victims and perpetrators of the genocide by a large majority of the interviewed. Less than 4% held that both pacific cohabitation and reconciliation have already been reached in Rwanda. Many interviewees pointed out that to achieve reconciliation the standards of security in the country need to be increased, in particular with respect to the protection of witnesses involved in the *gacaca* process.

Healing is another widely debated topic relating to *gacaca*, which was addressed also by a survey conducted by the National Unity and Reconciliation Commission.[154] When asked about the *gacaca* contribution to healing from the wounds of the genocide, the Rwandans interviewed have split again, reflecting the different positions within the Rwandan society.[155] 42% of the respondents thought that *gacaca* were able *per se* to heal Rwandan society. On the contrary, 39% of the interviewees held that *gacaca* have no healing virtue. When asked to elaborate on this point the respondents argued that the lies circulating in the *gacaca* circuit, and the cases of corruption of *inyangamugayo*, worsen the wounds of the genocide victims. Of those interviewed, 4% were of the opinion that the *gacaca* procedure

[153] See Clark 2010, p. 316.

[154] See NURC Opinion Survey 2003.

[155] On this point, see Clark 2010, pp. 257–307.

mainly poisons Rwandan society instead of healing it. Interviewees stressed that attending the *gacaca* hearings could be a highly traumatising experience. In fact, to face perpetrators who, having confessed, received remarkable discounts to the penalties then applied, may constitute a humiliation for certain victims. Second, respondents argued that the high prevalence of mistruths circulating in the *gacaca* system was at odds with the purpose of healing. Lies triggered new tensions in the body of Rwandan society. With regard to the possibility of healing, most of the interviewees stated that to know the whereabouts of their relatives would appreciably contribute to healing their wounds. Knowledge expressed in the form of truth recovered through *gacaca* however not always provided a form of healing to Rwandans. Some perpetrators might feel relieved after confessing their crimes, but this could simultaneously be a traumatising experience for survivors who learn harmful details regarding the death and suffering of their loved ones. For the truth to produce healing, according to the interviewees, it needs the acknowledgement of Rwandan society.[156]

The interviewees showed a high degree of awareness that the reconciliation process in Rwanda will require decades for it to take place. They seemed to be aware of the fact that the *gacaca* experience is only one of the several steps needed to promote reconciliation and that after the closure of the local courts new instruments are to be implemented. Finally, the large majority of the inhabitants of Nyabisindu declared that they have reached pacific cohabitation, and that reconciliation is necessary in post-genocide Rwanda.

8.4.2 Assessing Reconciliation

The data collected in the field has encouraged me to decipher reconciliation in post-genocide Rwanda through the lenses offered by the Bloomfield's paradigm of reconciliation. Reconciliation in Rwanda is consequently assessed against its main elements, namely truth, justice, healing and reparation, in the light of the results of field research carried out. Needless to say, the paradigm suggested by the results of the interviews with the Rwandan population is only one of the possible approaches to reconciliation. It offers at least two advantages. First, it was directly validated by ordinary citizens affected by the genocide. Second, it offers the possibility to articulate reconciliation in four main components, allowing for identification of the indicators useful for an assessment. Reconciliation however remains a deeply subjective concept, with different meanings and implications for different individuals, the content of which varies according to the relationship and the subjects it relates to.

[156] This is also in line with the position expressed by other scholarship. See, for instance, Clark 2010, p. 273.

8.4.2.1 Reconciliation and Truth

Truth seeking is a crucial transitional justice area as the proliferation of truth commissions on post-conflict settings has evidenced.[157] Truth has also been portrayed as the main goal of international criminal justice after a systematic analysis of the normative framework embodied in the Rome Statute of the ICC.[158] In parallel with the consolidation of an individual and collective right to the truth under international law, progressively different and multifaceted truth-seeking mechanisms have been developed. The call for truth in post-violence settings represents one of the main societal needs to be addressed. Truth is also considered crucial to fulfil the guarantees of non-recurrence of severe abuses.[159] Victims often ask for the truth about perpetrators' identities, about the fate of their beloved ones and the whereabouts of their remains so as to be able to bury them.

Truth as a transitional justice element is strongly intertwined with justice, of which it constitutes a precondition. Criminal trials can punish perpetrators by delivering justice but are not a proper instrument to reconstruct a full account of the truth about large-scale abuses. On the other hand, non- or quasi-judicial bodies such as truth commissions can help to reconstruct the patterns of widespread human rights violations, name and publish the identities of perpetrators, individualise guilt, encourage accountability process, analyse and underscore the long-term roots of conflicts and, by doing so, contribute to eradicating them.

The term truth can hardly be adopted in the singular. In fact, the clash between different interpretations (individual, collective, by victims, perpetrators or bystanders) of historical records leads societies to elaborate different coexisting truth narratives. The efforts by truth-telling bodies to establish a universally acceptable truth through an official report summarising the testimonies gathered may be frustrated.[160] Despite these challenges, however, the search for truth continues to be seen as a necessary step in post-conflict reconstruction, as a shareable account of the past is considered a key element of every reconciliation process. The South African

[157] Ibid., p. 203: 'The theme of truth, its discovery, propagation, and the extent to which it should be pursued along with other objectives in the post-conflict environment, is a perennial consideration in transitional societies'.

[158] Donat-Cattin 1999, p. 873.

[159] See Rotberg 2000, p. 3: 'If societies are to prevent recurrence of past atrocities and to cleanse themselves of the corrosive enduring effects of massive injuries to individuals and whole groups, societies must understand—at the deepest possible levels—what occurred and why'.

[160] See Clark 2010, p. 203: 'Individuals' and groups' recollection of the past often clash and may be expressed for a variety of well-intentioned or cynically instrumentalist reasons. Therefore, attempts to produce an account of the past that will adequately represent, and be acceptable to, all individuals and groups who engage in the post-conflict truth process are inherently limited and likely to prove acrimonious'.

Truth and Reconciliation Commission has identified four levels of truth: (1) factual or forensic; (2) personal or narrative; (3) social; (4) healing or restorative.[161]

Truth in its factual or forensic dimension is related to the objective of shedding light on actual facts that took place. According to Michael Ignatieff, factual or forensic truth is a useful tool to 'reduce the numbers of lies that can be circulated unchallenged in public discourse'.[162] It includes two dimensions, an individual and a collective one. At the individual level, truth refers to a fact-finding process regarding specific persons and specific events: individuals want to know what happened to their relatives or beloved ones and the outcome of this discovering process has a strong impact on individual lives. At a more general collective level, the concept of truth corresponds to reconstructing the big picture of the past violence, its causes, its long-term roots and its consequences on the interested community. The distinction between individual and collective level of factual or forensic truth is also endorsed in the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*.[163] The latter highlight the individual dimension of the victims' right to the truth as far as it refers to 'the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate' (Principle 4). Moreover, the *Updated Set of Principles* frames the right to know the truth as a collective right.[164]

Personal or narrative truth is the second aspect of truth discussed by the South African TRC. It regards 'the validation of the individual subjective experience of people', in other words, it has to do with the elaboration exercised by individuals of the violence they have experienced and with the narrative emerging from it. The third level of truth considered by the TRC is the social one, which refers to the different ways in which truth is elaborated and outspoken by different groups through debates and dialogue.[165]

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[161] See Truth and Reconciliation Commission of South Africa, *Report*, Vol. I, 1998. The case of the South African TRC is quoted by way of example and not because its efforts in truth finding have necessarily brought to always unveil the 'real truth' about the abuses of apartheid regime. On the contrary, the problem of the truthfulness of the declarations made by the applicants before the Amnesty Committee of the TRC remains open. The number of the applicants requiring amnesty is undoubtedly lower than the figures of the crimes perpetrated during the time covered by the TRC's investigative mandate which unquestionably challenges the idea of a perfect reconstruction of the truth. For more details see Lollini 2005, pp. 198–201; and Mamdani 2001, pp. 58–61.

[162] See Ignatieff 1996, p. 113.

[163] See UN Commission on Human Rights 2005.

[164] Principle 3 states that: 'A people's knowledge of the history of its oppression is part of the heritage and, as such, must be preserved by appropriate measures in fulfilment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments'.

[165] See on this point Truth and Reconciliation Commission of South Africa, *Report*, Vol I, 1998, p. 113.

Finally, the healing or restorative truth is defined by the TRC as 'the kind of truth that places facts and what they mean within the context of human relationships- both among citizens and between the state and its citizens'.[166] In this sense the truth-seeking process works also as platform of debate for the construction of a collective memory that can contribute to healing the wounds of the past.

In the Rwandan context an important distinction between 'knowledge' and 'acknowledgement' has emerged when discussing the role of truth within reconciliation processes with participants in *gacaca* trials.[167] Through inquiries, public hearings, interviews, and surveys, truth-seeking bodies can reconstruct the pattern of abuses perpetrated by a certain regime, creating a platform for a debate generating knowledge. But their task is not limited to this duty: by seeking and documenting the truth, they oblige the state and perpetrators to acknowledge their responsibilities.[168] To use the words of Juan Mendez, a prominent human rights lawyer 'Knowledge that is officially sanctioned, and thereby made part of the public cognitive scene … acquires a mysterious quality that is not there when it is merely 'truth'. Official acknowledgement at least begins to heal the wounds'.[169]

It is worth at this juncture quoting the *Azapo* judgement[170] of the South African Supreme Court, led for the first time by a black Chief Justice, Ishmael Mahomed, which stressed the importance of truth-telling mechanisms for the victims of the apartheid regime:

> The Truth and Reconciliation Act seeks to address this massive problem by encouraging survivors and dependants of the tortured and the wounded, the maimed, and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what in truth happened to their loved ones, where and under what circumstances it happened, and who was responsible.

It emerged clearly from the interviews conducted that truth is what the survivors of genocide expected from *gacaca*. This is confirmed by other research works, which established that the truth is a cornerstone of the reconciliation process in Rwanda.[171] Truth is fundamental in order to provide former antagonists with a shared account of the past. The truth moreover helps in individualising the guilt enabling victims to distinguish the offenders from those who did not recur to

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[166] Ibid., p. 114.

[167] Ibid., p. 26 and p. 258, note No. 3, Chapter 3; the first who has articulated this distinction was Professor Thomas Nagel of New York University.

[168] See Aryeh Neier, *What Should Be done about the Guilty?*, New York Review of Books, 1 February, 1990, p. 34: 'Acknowledgement implies that the state has admitted its misdeeds and recognized that it was wrong', available at http://www.nybooks.com/articles/1990/02/01/what-should-be-done-about-the-guilty/. Last accessed 16 February 2018.

[169] Mendez 1991, p. 8.

[170] See on this point Azanian Peoples Organization (Azapo) and Others v. the President of the Republic of South Africa and Others 1996 (8), in Butterworth's Constitutional Law Reports/BCLR 1015 (CC), available at http://www.saflii.org/za/cases/ZACC/1996/16.html.

[171] See Molenaar 2005, p. 144; and Pozen et al. 2014, pp. 41–48.

violence during the genocide. This is crucial in contexts such as Rwanda, where the temptation of labelling Hutu as collectively guilty might be strong.

In ordinary justice systems the difference between 'legal truth' and 'factual truth' is a well-established concept. The criminal trial is able to provide a truth that has a legal and judicial meaning, which may or may not overlap with the material truth. The same principle should be applied to *gacaca*. If the defendant is allowed to lie in ordinary trials why should one expect that Rwandans reacted differently when questioned by *gacaca* judges? Given the fact that there is not one single objective truth, the *gacaca* were supposed to work as a discussion forum where Hutu and Tutsi, the two former antagonistic groups, should negotiate a common truth. It is to be taken into account that within the violent colonial dynamics that marked the Rwanda's recent history, Hutu have perceived themselves as victims and the Tutsi as allied to the colonial perpetrators. This factor has further complicated the self-perception of the two groups, triggered reciprocal bias and contributed to enhance the difficulties in the truth recovery in Rwanda. In such a context it was doubtless difficult for *gacaca* courts to fully meet the high expectations of the Rwandan population relating to truth-seeking.

The possibility for the participants in the hearings to tell their stories is one of the most appreciated aspects of *gacaca*, which undoubtedly represented under this point of view an unprecedented transitional justice experiment. Problems however also concerned *gacaca* as a truth-recovering mechanism. Rwandans are aware of the fact that witnesses and defendants for several reasons were not always ready to speak the truth when questioned. Cases of corruption involving both *inyangamugayo* and witnesses have often emerged when the *gacaca* process was unfolding. The practice of false accusation was also widely reported and criticised by survivor groups. This was also reported several times by investigators conducting field research and appeared to be one of Rwandans' main concerns in one of the first systematic surveys carried out when the *gacaca* courts were approaching the closure.[172] This practice might have also contributed to augmenting the tensions and to strengthening the cleavage between Hutus and Tutsis.[173]

Moreover, the judge in *inkiko gacaca* no longer played the mediation role they used to perform in traditional, informal *gacaca*—at least when dealing with crimes classified in category 1 and 2. In *inkiko gacaca* only one version of the truth was accepted through the sentence, while the other was rejected, according to a paradigm deeply influenced by retributive models.

The shortcomings of *gacaca* as a truth-telling mechanism depended however not on the way Rwandans behaved during the hearings, but also on the constraints the government has imposed on the system. *Gacaca* had a temporal jurisdiction that extended from 1990 to 1994, when war crimes and crimes against humanity were committed by members of the RPF. To discuss such a topic was *de facto* prohibited during *gacaca* meetings. Risky attempts in this direction were constantly repressed

[172] Pozen et al. 2014, pp. 31–52 and pp. 41–48.

[173] See Ingelaere 2016, p. 82 and pp. 84–91.

by the Rwandan authorities. The acknowledgement of a partial truth might worsen the ethnic cleavage between Hutus and Tutsis. The *gacaca* trials were also influenced by ethnicity-related factors, although the divide Hutu-Tutsi is currently denied in Rwanda. The establishment of a one-sided truth through legislative mechanisms ruled by the law on genocide ideology has further imperilled the *gacaca* system, while simultaneously spreading bitterness among Rwandans. In addition, the phase of evidence collecting before *gacaca* at cell level was marked by a certain governmental intrusion, which resulted in an 'administratisation' of the procedure limiting the ownership of Rwandans on such a mechanism. The state intrusion, in other words, risked depriving *gacaca* of their most remarkable feature, namely their roots in the Rwandan society. In this regard some scholars argued that state-sanctioned speaking of the truth goes against social practices in Rwanda where social and family ties are very important in daily life.[174]

Furthermore, *gacaca* were reportedly also used to settle personal scores and the practice of false accusations or false confessions was widely exploited. Survivors and perpetrators often feared revenge.[175] Some scholars argued that the accusatory practice embodied in *gacaca* procedure has increased tensions between groups and families. Moreover, 'The narrative chosen by the government might strengthen divisions, portraying Hutus either as perpetrators or as bystanders'.[176] All this considered, more than one scholar has depicted *gacaca* as a mechanism to gain legitimacy for the government and to freeze the truth regarding the genocide, which did not help Rwandans in achieving national reconciliation.[177] The latter in fact cannot be considered as an automatic by-product of retributive justice. The contested judicial truth that *gacaca* provided brings us to another crucial issue regarding the relationship of these courts with justice.

8.4.2.2 Reconciliation and Justice

Gacaca courts did not respect international fair trial standards, as they were conceived of in spite of these minimum rules and based on a different premise and rationale. This is confirmed by the Human Rights Committee, which has stated that

> The State should ensure that all tribunals and courts in Rwanda operate in accordance with the principles set out in article 14 of the Covenant and paragraph 24 of the Committee's general comment No. 32 (2007), on the right to equality before courts and tribunals and to a fair trial. According to that general comment, courts based on customary law cannot hand down binding judgements recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their

[174] See Ingelaere 2008, pp. 25–58.

[175] See Waldorf 2006a, p. 75, holding that as a consequence of this climate only in 2002 about 6,500 Hutus left the country afraid to be accused before *gacaca*.

[176] See Mamdani 2002, p. 267 and Haile 2008, p. 13.

[177] See Molenaar 2005; Ingelaere 2016; Thomson 2011.

> judgements are validated by State courts in light of the guarantees set out in the Covenant and can if necessary be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary courts.[178]

Part of the scholarship has held that *gacaca* were able to grant fair trial in substantive terms, being an expression of popular and not formal justice. Formal and informal justice however should not be conceptualised in antagonistic, dichotomous terms. Formal and substantive justice should not be disconnected and the former is in place to also grant justice in substantive terms.

If on the one hand it seemed possible for *gacaca* to sidestep the legal straightjackets and constraints characterising formal justice, on the other hand it is exactly the flexibility of the procedure they applied, coupled with the lack of guarantees for the accused, that jeopardised the possibility of achieving substantive justice. The cases reported in the previous chapters offer wide evidence in this regard. It is possible that *gacaca* have delivered substantive justice in some instances, but in several others, they have denied it. The quality of justice delivered depended on the individuals composing the *gacaca* judging bench and assembly involved in the hearings. The data collected allows one to affirm that the individuals involved in *gacaca* hearings have in some instances compensated for the lack of a legal defence providing exculpatory evidence in favour of the defendant. At the same time, however, there is strong evidence of instances of miscarriages of justice, intrusion by public authorities, and politicised justice. Rwandans interviewed in Nyabisindu expressed concerns regarding cases of corruption of the *inyangamugayo*. As has been the case before every other jurisdictional authority in the world, people have lied before *gacaca* and have put their private interest before the fairness of *gacaca* justice. In other words, the *gacaca* participatory system did not systematically compensate for the lack of compliance with domestic and international fair trial standards.

It is also difficult to justify the non-compliance of *inkiko gacaca* with international human rights standards through their conformity to Rwandan traditions. *Inkiko gacaca* were a machinery endowed with strong subpoena powers characterised by a retributive rationale (at least when dealing with crimes against people falling within category 1 and 2). The cell *gacaca*, dealing with offences against property and lacking sentencing powers, were closer to the pre-colonial model and were characterised by some elements of a restorative rationale. Sector *gacaca*, on the contrary, were firmly grounded on punitive mechanisms, which were not essentially aimed at restoring harmony inside a community, nor at mediating. Their purpose was primarily to punish, first and foremost, those who do not confess their

[178] See *Consideration of Reports Submitted by States Parties Under Article 40 Of the Covenant, Concluding observations of the Human Rights Committee*, Rwanda, Human Rights Committee Ninety-fifth session, New York, 15 March–3 April 2009.

crimes.[179] The basic penalties established were in fact quite heavy for those who did not confess, and rather light for those who plead guilty. This rationale has sometimes aggrieved both the accused individuals and the victims. The former, especially those who were innocent and consequently had nothing to confess, were subject to the abuse of pre-trial detention and risked heavy penalties. The latter considered the punishment for those who confessed too light and were accustomed to see convicted individuals set free in a relatively short time because of the policy based on community services known as *Travaux d'intérêt général*. Furthermore, concerns were also raised by the penalties *gacaca* were empowered to deliver, as the UN Human Rights Committee has noted.[180] The UN Human Rights Committee's concerns moreover regarded other values enshrined in the principle of the rule of law, associated with minimum prison standards and the right to a legal defence.[181] In a nutshell, *inkiko gacaca* shared many features of the modern criminal justice system but were not surrounded by the body of guarantees that characterise them. Some scholars even argued that they were a blend of the flaws of both, traditional and state-enforced jurisdictions.[182] The controversial issues surrounding the truth-telling capacity of *gacaca* also reverberated on justice-related issues. *Gacaca* have in fact often been depicted as a form of victor's justice because the crimes committed by the RPF could not be prosecuted before the *inyangamugayo*. Finally, Rwandan victims' associations have stressed that the purpose of justice remains unserved as far as the survivors of the genocide have not received adequate reparations.[183]

The rationale behind the *gacaca* experiment was grounded on a relativistic discourse.[184] Its supporters justified *gacaca* anomalies under the perspective of fair trial standards by asserting the courts' purported traditional foundation.

[179] On this point, see Waldorf 2006a, p. 26: 'Where East Timor and, to a lesser extent, Sierra Leone adapted local dispute resolution practices to their truth and reconciliation commissions, Rwanda did something radically different, transforming a largely moribund local dispute resolution mechanism into a highly formal system for meting out (largely retributive) criminal justice" and p. 52: 'Some observers have described the *gacaca* for genocide cases as traditional or indigenous even though few "customary" features remain. The new *gacaca* system is an official state institution intimately linked to the state apparatus of prosecutions and incarceration, and applying codified, rather than "customary" law. Second, *gacaca* courts are judging serious crimes, whereas traditional *gacaca* mostly involved minor civil matters. Third, *gacaca* judges are not community elders as in the past, but rather elected, comparatively young, and nearly one-third women. Finally, "[t]he main difference between the traditional and the new systems is probably the destruction of the social capital that underlies the traditional system".

[180] Human Rights Committee, ninety-fifth session New York, 15 March–3 April 2009, Consideration of reports submitted by States parties under Article 40 of the Covenant Concluding observations of the Human Rights Committee, Rwanda, para 14.

[181] Ibid., paras 15 and 18.

[182] Haile 2008, p. 34: 'At best, therefore, they combine the worst features of the two different systems: the arbitrariness of some of the traditional justice systems and the coercive features of the modern criminal justice system'.

[183] See Ibuka et al. 2012, p. 9.

[184] See Haile 2008, p. 33.

Consequently, argued the supporters of *gacaca*, human rights standards do not apply to *inkiko gacaca.* It is possible to challenge this argument by stressing that *inkiko gacaca* were very different from traditional and informal *gacaca*, tribunals rooted in local customs whose jurisdiction was freely accepted by the parties and were not enforced by the state's agents. *Inkiko gacaca*, conversely, were state-sanctioned courts which had their source of legitimation in the law and administered retributive rather than harmony-oriented justice. The competence of traditional *gacaca* was mainly restricted to civil offences and petty crimes, and prisons sentences were not envisaged.[185] Moreover, traditional *gacaca* as designed in pre-colonial time did not allow the participation of women, who were heavily targeted by genocidal and sexual violence. Finally, also in question is the use of a 'traditional' and inclusion-oriented justice system where the concerned social capital has been torn apart so strongly by the colonisation and by the genocide. Post-genocide *gacaca* have been associated with revolutionary courts such as the Resistance Councils and Resistance Committee Courts established by Uganda's Resistance Army and similar experiments enacted in Malawi, Ethiopia and Mozambique more than with traditional tribunals.[186] *Inkiko gacaca* were essentially designed to face an emergency situation in speeding up the prosecution of defendants. Reconciliation falls within their reach to the extent that this can be achieved through criminal punishment.

8.4.2.3 Reconciliation and Reparation

The frustration expressed by survivors interviewed throughout Rwanda regarding the lack of reparation measures within and outside the *gacaca* system is particularly evident. Criticisms targeting Rwanda's reconciliation process concentrate in fact on the lack of reparation programmes for the victims of the genocide, a problem widely stressed by Ibuka and other survivors' organisations.[187] The victims of the genocide, according to Organic Law 8/1996, were entitled to benefit from a reparation fund that however has never been established.[188] According to Organic Law 8/1996 'Victims acting either individually or through legally constituted associations for the defence of victims (…) may request the commencement of a public prosecution

[185] Ibid.

[186] Ibid., pp. 34–35. Ugandan President Museveni and some of the founders of Rwandan Patriotic Front for instance, have been trained with Mozambique's liberation movement (FRELIMO), which established revolutionary courts.

[187] See Ibuka et al. 2012, p. 9 and ff.

[188] Article 32 of Organic Law 8/1996: 'Damages awarded to victims who have not yet been identified shall be deposited in a victims Compensation Fund, whose creation and operation shall be determined by a separate law'. Prior to the adoption of the law creating the fund, damages awarded shall be deposited in an account at the National Bank of Rwanda opened for this purpose by the Minster responsible for Social Affairs and the Fund shall be used only after the adoption of the law'.

by submitting a written petition setting out the grounds for the prosecution to the public prosecutor of the competent jurisdiction'.[189] Being allowed to act as civil parties within the criminal trials, survivors of the genocide could lodge claims for the damages they have suffered. The difficulties faced under the Organic Law 8/1996 by the civil claimants, who registered to take part in two thirds of the criminal cases tackled by ordinary courts, have been extensively documented.[190] About half of the applicants were awarded damages for moral grief and material prejudice, and often the Rwandan state was held jointly liable either because the offenders were public officials or because it failed in protecting its citizens. The award of compensation however remained only on paper, as convicted perpetrators were either unable or refused to pay, and judgements holding the state responsible for paying civil damages were not enforced.[191]

The *gacaca* legislation has worsened the situation of the genocide victims by providing a legal basis legitimising the denial of reparations. At the end of the *gacaca* process approximately 92% of reparation awards issued by *gacaca* courts had not been enforced.[192] Moreover, Ibuka and other victims' associations have stressed that, according to the National Service of *Gacaca* Jurisdictions, surprisingly the *gacaca* courts have not compiled a list of damages and losses that have to be compensated.[193]

Article 91 of the *Gacaca* Law 40/2001 established that civil actions lodged against the Rwandan State before ordinary or *gacaca* courts were inadmissible because of both the acknowledgement by the state of its role in the genocide and the compensation it pays on a yearly basis to the Compensation Fund.[194] To solve the issue of reparation the government has worked on a new draft law on compensation, the rationale of which was to make the awarding of reparation independent from the willingness to pay of the perpetrators. As the first *gacaca* law empowered the judges to make an inventory of the losses suffered by genocide victims, the indemnification mechanism was supposed to work in tight connection with *gacaca* jurisdictions. The compensation law was however never passed, and the 2004 *Gacaca* Law established a form of reparation centred on property offences.[195] Other forms of reparation, such as those for moral damages, should be dealt with by the reparation fund, yet it was never established. The reparations provided were

[189] Article 29 Organic Law 8/1996.

[190] See on this point African Rights and Redress 2008, p. 100.

[191] Ibid.

[192] See Ibuka et al. 2012, p. 8.

[193] Ibid.

[194] As a consequence, only the Specialized Chambers could deliver orders of compensation.

[195] Article 95 Organic Law 16/2004 establishes that: 'The reparation proceeds as follows: 1° restitution of the property looted whenever possible; 2° repayment of the ransacked property or carrying out the work worth the property to be repaired. The Court rules on the methods and period of payment to be respected by each indebted person. In case of default by the indebted person to honour his or her commitments, the execution of judgement is carried out under the forces of law and order'.

consequently limited to the restitution of property when this was possible. However, the enforcement of the restitution orders has reportedly made slow and difficult progress. Perpetrators have in fact in several instances successfully managed to sell their property to avoid the payment of the reparation in contrast to the civil order issued by *gacaca* jurisdictions at the cell level.[196] This is surprising because the Rwandan Government considered those committing crimes against property in the context of the genocide as *génocidaires*. To address these crimes, it should make the reparation and restitution process independent from the economic situation of the perpetrators. Disappointment was triggered by the government's decision to provide reparations for demobilised soldiers, seen by victims as perpetrators, while leaving victims of the genocide largely unassisted.[197] *Gacaca* were able to provide some actual or symbolic reparations, in terms of property restitution or apology statements by the perpetrators, but a fund for victims with a special focus on those most needy was missing.

In 1998 through the Law No. 2 the government established the *Fonds d'Assistance aux Rescapés du Génocide* (FARG), a form of humanitarian support for the most vulnerable survivors. In 2009 legislation regulating the FARG has further limited the right of victims to act as a plaintiff in civil actions against suspects grouped in category 1. The law in fact established that 'Only the Fund is entitled to [bring a] civil action on behalf of the victims of the Tutsi genocide, and other crimes against humanity, against persons convicted of crimes classifying them in the first category'.[198] The FARG law has triggered criticisms in Rwanda. According to survivors' associations, this provision clashes with Rwanda's Constitution which provides victims of crime with the right to have their case heard.[199] The FARG Law seems to introduce provisions discriminating against survivors compared to victims of ordinary crime, as the latter are entitled to apply for compensation as civil parties under Rwandan criminal law.[200]

The FARG has benefited orphans, widows and other particularly needy persons especially by setting up education, health and assistance projects. It is important to stress that the FARG is an extra-judicial mechanism aimed at reaching the needy survivors, regardless of the conviction or not of any perpetrator, and isn't a reparation mechanism. In general, survivors have perceived positively the establishment of the fund, which however is not sufficient to address the basic needs of all of them. In fact, difficulties regarding the implementation and management of the housing, medical and educational programmes have been reported.[201] The two most

[196] See African Rights and Redress 2008, p. 102.

[197] See Waldorf 2006a, pp. 17–18.

[198] See Organic Law No 69/2008 of 30 December 2008 relating to the establishment of the Fund for the support and assistance to the survivors of the Tutsi genocide and other crimes against humanity committed between 1 October 1990 and 31 December 1994, and determining its organisation, powers and functioning, Article 20.

[199] Ibuka et al. 2012, p. 8.

[200] Ibid., p. 9.

[201] See Rombouts 2006, pp. 194–233.

relevant criteria to qualify as a beneficiary of the FARG are being a '*rescapé*' of the genocide and associated massacres and being 'in need'.[202] The law expressly ruled out the possibility to award benefits to those who participated in the genocide. Because of the lack of guidelines, reportedly the victims have encountered problems in interpreting the law and particularly the concept of '*rescapé*'. The FARG also tried to launch a trauma-counselling program, which did not take off. Consequently, the possibilities of benefiting from treatments aimed at 'healing' remains limited for genocide survivors, especially for vulnerable groups such as women and children.

Reparative purposes also marked community service, known as *Travaux d'intérêt général*, which constitutes an important aspect introduced in post-genocide justice in Rwanda. Whereas community service is usually adopted for less serious offences, in Rwanda it has been promoted as an instrument to achieve reconciliation. In its very essence, community service 'is a penalty pronounced by a court, in suppression of a violation to a criminal/penal law'.[203] As a result of the crime committed the wrongdoer carries out unpaid work for the benefit of the community without being imprisoned. The overall aim of this penal policy is to encourage a better integration of the offenders in society, by giving them the opportunity to redeem themselves through work. Moreover, community service as a sentence allows for the avoidance of the negative impact of detention in prison for the offenders and their family. In addition, this policy strongly reduced the costs for the state depending on the high number of detainees. Another advantage of TIG is that an effective reintegration in the society of the offender might limit the risk of recidivism. The developing of a shared sense of responsibility towards the society by the offenders is consistent with the principle stated in the United Nations Standard Minimum Rules for Non-Custodial Measures (the so-called Tokyo Rules).[204]

During TIG the work is carried out in the public interest without any particular focus on genocide survivors. The victims of the genocide have criticised this aspect of the TIG.[205] The Rwandan authorities have tried to adapt the community services to the particular post-genocide context pursuing simultaneously different goals, namely 'punishment, unity and reconciliation, (and) development'.[206] According to

[202] Ibid.: 'The adoption of the categories of genocide and massacres to define beneficiaries has not allowed for explicit reference to the many forms of gender-based violence, such as rape, sexual violence, and gender-specific mutilations. The only harms indirectly recognized are those done to orphans, handicapped, and widows, who are mentioned as explicit examples of people in need'.

[203] See Penal Reform International 2007, p. 5 and Jean-Marie Mbarushimana, then Executive Secretary to Community Service, *Community Service in Rwanda,* Kigali, February 2004.

[204] See point 1.2. This text drafted in 1990 is available via the website of the United Nations High Commissioner for Human Rights at https://www.ohchr.org/EN/pages/home.aspx.

[205] Interview with a representative of IBUKA, Kigali, 3 October 2009, on file with the author.

[206] See Penal Reform International 2007, p. 7, interview with Mr. Anastase Nabahire, Associate Executive Secretary of the Executive Secretariat of the National Committee of Community Services (SNTIG), 13 January 2006, n°1146.

Anastase Nabahire, Associate Executive Secretary of TIG, the purposes of the introduction of the TIG in Rwanda are the following:

(1) to serve as an instrument of reconciliation and national unity;
(2) to serve as an instrument of reconstruction and rehabilitation of development infrastructure;
(3) to serve as an instrument of social rehabilitation for the people who have confessed to the crime of genocide and who have been accused and convicted;
(4) to considerably reduce the prison population as well as related budgetary implications.[207]

By 5 August 2008, 94,318 individuals had been sentenced to TIG. 25,664 of these individuals were working in the camps, while 11,000 were working in their original communities, which meant that they were allowed to get back home at night. 3,000 people had already served their sentence.[208]

Pursuant to the 2008 *Gacaca* Law, convicted offenders who had to serve both a TIG and a prison sentence had to start with community service. In case of good conduct, the remaining time to be served in prison may be converted in TIG. As the executive secretary of SNJG, Domitilla Mukantaganzwa, explained, the rationale behind this choice was to address prison overcrowding, which has peaked from time to time due to the waves of confessions promoted by *gacaca.*[209] This is to some extent confirmed by the fact that while the first *gacaca* law allowed the defendant to choose whether to serve the prison sentence or have it converted into community service once his confessions was accepted, such a possibility was repealed in the later *gacaca* legislation. The achievements of the TIG were reported by Anastase Nabahire:[210]

(1) The construction of 114 houses in hydraform brick and 1,124 houses in adobe brick for the survivors of the genocide. The quality of the bricks used depends on the means granted by the basic authority;
(2) 2,828 ha of embankments to fight against erosion;
(3) Tracing of 83,481 km^2 of roads;
(4) Repairs to 85,301 km of existing roads;
(5) Planting of manioc on 6,700 ha in the Southern Province;
(6) Cutting 6,000,000 stones for the construction of roads or houses.

The TIG reportedly generated US$61 million for the Rwandan State.[211] The community service could be carried out in two manners. In the two Presidential Orders of December 2001 and March 2005 establishing the organisation of TIG, the favoured system was that of a *Neighbourhood Community Service*, carried out by

[207] See Penal Reform International 2007, p. 8.
[208] See African Rights and Redress 2008, p. 105.
[209] Ibid., p. 106.
[210] See African Rights and Redress 2008, p. 106.
[211] See Chakravarty 2015, p. 17, quoting an article on the Rwandan Newspaper The New Times.

the '*tigistes*' in close proximity to their dwelling three days a week. Caught between logistical and management constraints, the government also experimented with community service in camps. In this case the '*tigistes*' work harder for six days a week.

Problems surrounding the TIG concerned security issues and the survivors' fear of being threatened, as well as the fact that they were sometimes seen as a form of state pardon. In the words of PRI, 'Many survivors of the genocide fear that Community Service is not enough to transform the ex-killers and render them harmless, and some of these ex-killers fear revenge by survivors or by those people whom they have accused'.[212]

This was confirmed by field research carried out jointly by the international NGO Redress and African Rights, which stressed that genocide survivors have been often threatened, harassed and sometimes killed. It is necessary however to point out that the prisoners were also scared when they were reintroduced within their original communities.

The TIG are an interesting instrument in Rwanda's transitional justice realm, as they offered the possibility to introduce a certain confrontation between victims and perpetrators and, to some extent, to complement the retributive approach experimented on in Rwanda with restorative aspects. According to PRI, which has conducted a wide programme of TIG monitoring, 'Community Service elicits positive reactions in each group, even if opinions are divided and numerous fears persist, primarily due to the difficulty the survivors and the former genocide perpetrators have in imagining a life together again'.[213]

All this considered, victims' associations in Rwanda have stressed the lack of resources devoted to reparations for the victims of genocide. According to Ibuka, the overall financial resources supporting domestic restorative justice programmes for survivors of the genocide corresponded to less than one-half of one per cent of the ICTR budget.[214]

8.4.2.4 Reconciliation and Healing

Despite recent research on this topic the concept of healing in transitional justice settings is not easy to circumscribe squarely. My assessment is based on the empirical data collected through the opinions expressed by Rwandan genocide witnesses and victims, on a set of interviews with NGOs and trauma experts such as professor Simon Gasibirege, a Rwandan trained psychologist with wide experience on *gacaca* and on a review of the recent literature on trauma healing.

The aftermath of the genocide was characterised by scarcity of interventions aimed at improving the mental well-being of survivors, bystanders and

[212] See Penal Reform International 2007, p. 2.

[213] Ibid., p. 65.

[214] See Ibuka et al. 2012, p. 14.

perpetrators.[215] Regine U. King has highlighted that *gacaca* seemed at the beginning to be a promising instrument to address post-genocide trauma as they focused on collective aspects of psychosocial trauma, an area normally neglected in the western approach that is individual-based.[216] Specific studies conducted by trauma and healing experts however consider negatively the impact of *gacaca* on traumatised individuals.[217]

The terms *ihungabana*, (more or less corresponding to 'being disturbed') and *ihahamuka*, (meaning 'without lungs' or 'traumatised') became part of the Kinyarwanda lexicon in the aftermath of the genocide.[218] The two terms correspond to the concepts of trauma and post-traumatic stress disorder (PTSD) used by international NGOs providing psychological support to genocide victims since 1994.[219] *Ihahamuka* is 'an advanced state of *ihungabana*', characterised by strong negative feelings of fear, anger, and grief.[220] Usual symptoms include 'shortness of breath, shaking, loss of control, and energy that overwhelm the sufferer to the point that he or she loses consciousness for more than two hours'.[221] *Ihungabana* is a form of stress which can be experienced in the normal private sphere of daily life of the genocide survivors. *Ihahamuka*, on the contrary, is not experienced in the private sphere but in the public, particularly during events recalling the genocide such as *gacaca* hearings and official commemorations.[222] The idea expressed by the interviewees in Nyabisindu that *gacaca* hearings can be traumatising for those who attend them is broadly debated in post-genocide Rwanda and is shared by other survivors and trauma specialists.

Studies regarding the effects of testimonies within transitional justice processes have stressed that recalling traumatic events without proper psychological support can be a traumatising experience.[223] In fact, the transfer of models conceived for individual healing on a broader social level enacted by some transitional justice experiments can be a counterproductive experiment when the necessary psychological counselling is not provided.[224] Criticisms have for instance targeted the

[215] King, 2011, p. 135.

[216] Ibid., p. 136.

[217] Kanyangara et al., "Collective Rituals, Emotional Climate and Intergroup Perceptions: Participation in *Gacaca* Tribunals and Assimilation of the Rwandan Genocide", Journal of Social Issues 63, no. 2 (2007): 387–403, pp. 398–400, quoted in U. King, "Healing Psychosocial Trauma in the Midst of Truth Commissions: The Case of *Gacaca* in Post-Genocide Rwanda. "Genocide Studies and Prevention 6, 2 (August 2011):134–151.

[218] King and Sakamoto 2015, p. 389.

[219] Ibid.

[220] King and Sakamoto 2015, p. 389.

[221] Ibid.

[222] Ibid.

[223] Regine U. King, "Healing Psychosocial Trauma in the Midst of Truth Commissions: The Case of *Gacaca* in Post-Genocide Rwanda. "Genocide Studies and Prevention 6, 2 (August 2011):134–151, p. 145.

[224] Ibid.

South African TRC, stressing that the impact of statements regarding the apartheid violence on the audience have been underestimated. Allan has stressed that the psychological support provided during the TRC hearings was aimed at assisting exclusively those who testified, while the statements given were potentially traumatising not only for those testifying but for the entire audience.[225] Similar problems arose during *gacaca* hearings, where no trauma counsellor was assisting either the audience in in general, nor the survivors or the witnesses in particular.

The Rwandans interviewed have expressed doubts concerning the healing capability of the *gacaca* process challenging the validity of an old Rwandan proverb, '*Ukuri kurakiza*' ('the truth heals') in this context. It is possible to believe that the truth-telling process encouraged by *gacaca* trials has benefited certain Rwandans. However, also the opposite can be asserted, namely that the *gacaca* procedures can be traumatising or re-traumatising for the victims of the genocide. Outbursts of rage, sorrow and pain were experienced daily by the *gacaca* protagonists, particularly by the survivors and were extensively reported. A woman who had lost her husband and several children during the genocide and participated actively in every *gacaca* hearing in Gahogo told me that when the *gacaca* experiment was launched she was not able to participate.[226] In fact every time the genocide was discussed during *gacaca* hearings, she inexorably fainted. The hardships victims had to face during *gacaca* trials were confirmed during several interviews.[227] Based on direct observation of *gacaca* hearings and on the interviews carried out, it emerged that no particular mechanism was enacted during *gacaca* hearings with the aim to prevent episodes of re-traumatisation. The assumption that *gacaca* courts have healing virtues remains undemonstrated and other studies have confirmed the negative effects of *gacaca* hearings on the participants.[228]

This was confirmed during an interview with professor Simon Gasibirege, an authority in the field of trauma healing deeply involved in assisting the victims of the genocide.[229] According to Gasibirege, highly traumatised individuals were not able to participate in *gacaca* hearings, despite the fact that the government at the beginning has tried to encourage them. These individuals remain very isolated in Rwanda and some categories, as for instance the genocide orphans, they display signs of deep rage and depression, and suffer from headaches, insomnia and lack of appetite. Gasibirege has stressed that Rwandans benefited from attending *gacaca* hearings when a sincere exchange of dialogue between victim and perpetrator took place. This was, for instance, the case when a genuine exchange of apology and forgiveness between wrongdoer and victim existed. According to Gasibirege in fact a sincere apology can constitute a key element for a transformation that allows a

[225] Alfred Allan, "Truth and Reconciliation: A Psycholegal Perspective", Ethnicity and Health 5, no. 3–4, 2000, p. 193, quoted in King, p. 134.

[226] Interview with a genocide victim in Gahogo, September 2009, on file with the author.

[227] Interviews with members of the Dukundane Family, Kigali, 26 October 2009.

[228] Ingelaere 2016, pp. 84–90.

[229] Interview with Simon Gasibirege, Kigali, 27 September 2009, on file with the author.

real, two-way emotional exchange between the victim and the perpetrator. However, Gasibirege warned of the possibility of a secondary traumatisation when such a sincere exchange did not occur. Gasibirege has trained 30 trauma counsellors who worked in *gacaca* jurisdictions, a number unfortunately insufficient to cover all the courts. Gasibirege indicated that there were certain mechanisms that could to some extent encourage healing in the *gacaca* process. The first was the possibility to foster dialogue within members of the local communities. The second was the possibility that *gacaca* had to uncover the truth which was still unknown to several survivors. The third was the fact that identifying the perpetrator *gacaca* also acknowledged the role of the victims, who deeply need to be recognised as such in order to start a healing process. Finally, Gasibirege also stressed that to bring about reconciliation was a key feature of the traditional *gacaca*, which were however not focused on criminal punishment. According to Gasibirege, post-genocide Rwanda needs mechanisms aimed at inclusiveness and a punitive approach to justice was not suitable to reach such a goal. According to Gasibirege, the Rwandan Government should have strengthened inclusive aspects of *gacaca* justice such as reparation, especially in the form of rehabilitation opportunities. Gasibirege has stressed that the *gacaca* procedure often unfolded in a very confrontational manner that closely resembled ordinary criminal trials. This approach might trigger new anxiety and trauma in the audience.

The concerns regarding the possibility of generating new trauma expressed by Gasibirege were confirmed by a survey carried out by the National Unity and Reconciliation Commission concerning the expectations of Rwandans towards *gacaca*.[230] According to the survey, 85% of Rwandans thought that the level of trauma was slowly decreasing after the genocide, while 9% thought that the trauma did not diminish after 1994. 57% of the interviewees thought that *gacaca* would increase the trauma in the population, whilst 35% believed that on the contrary, that the *gacaca* would not increase trauma.[231] The data concerning the opinion of the survivors are of particular interest. In fact, among this group, the conviction that *gacaca* would increase the trauma was stronger and was shared by 92% of women and 95% of men.[232]

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[230] See National Unity and Reconciliation Commission, Opinion Survey on Participation in *Gacaca* and National Reconciliation, January 2003, available at http://www.nurc.gov.rw/index.php?id=70&no_cache=1&tx_drblob_pi1%5BdownloadUid%5D=18. Last accessed 26 June 2016, pp. 91–92.

[231] Ibid., p. 92. According to the survey 'Women are less inclined than men to believe that traumas caused by the genocide have been decreasing since 1995 (difference of 7%) and are many to give credit to the hypothesis of trauma increase (difference of 5%) with *Gacaca*'.

[232] Ibid. According to the survey 'Survivors think that trauma levels have decreased since 1995, but with much less conviction than the general population. They strongly believe, more than prisoners and the general population, that traumas will increase during *Gacaca* (94%). However, it is necessary to state that, among prisoners, those who are young are more convinced that *Gacaca* will increasingly traumatize (approximately 10%) survivors. Catholic survivors are more convinced (+9%) that there has been a reduction in the trauma since 1995. Followers of new churches do not notice as much of a decrease (−6%) in trauma levels. Prisoners who attend the same new

This seems to confirm what Karen Brounéus has written, namely that 'The common idea that truth telling is healing has not been systematically tested'.[233] A specific study conducted by Brounéus on 1,200 adults in four provinces of Rwanda has showed that *gacaca* witnesses were more likely to suffer from depression and PTSD than non-witnesses. The exposure to truth telling in *gacaca* hearings has proved to be traumatising for *gacaca* judges too. Additionally, Rwandan scholarship has challenged the idea that *gacaca* hearings might satisfy the need for healing of victims and perpetrators.

This is why Regine U. King has warned that 'Asking people to relive traumatic experiences without adequate and appropriate support in place and trying to achieve on the social level what the psychological models attempt to accomplish on an individual level might actually be more traumatising than healing'.

The healing aspect of truth telling before *gacaca* has been questioned for several reasons. From the testimonies of survivors and researchers it has emerged that the truth before *gacaca* is not always discussed in a dialogical way. On the contrary, first-hand experience of survivors has pointed out the sense of hopelessness they have experienced in cases where the *gacaca* audience passively attended the hearing.[234] King has argued that this was due to the fact that *gacaca* has developed as a top-down institution which primarily satisfied the needs of the post-genocide Rwandan state. According to King, pursuing two dichotomous aims such as retribution and restoration induced perpetrators to manipulate their testimonies to escape penalties, preventing *gacaca* from addressing the needs of survivors.[235] Instead of addressing the victims during *gacaca* hearings, perpetrators reportedly addressed the *inyangamugayo*, who would be the final judge in deciding guilt or innocence.

Moreover, despite the predictability of scenarios where victims might experience deep distress by recalling traumatic events, *inyangamugayo* were not provided with any training to allow them to address the psychological needs of the audience attending *gacaca* hearings.

In addition, a lack of a focus on vulnerable groups, in particular women and children, has negatively impacted the healing possibilities of the transitional justice strategy run in Rwanda. Due to financial constraints, the FARG did not reach all the needy people, who were rarely provided with psychological counselling. This has sparked frustration among the genocide survivors, as the interviewees in Gahogo have highlighted.

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church anticipate a greater increase in these trauma levels during *gacaca* (+17%). New churches seem to sensitize prisoners more about survivors' traumas and alleviating anticipations of sufferings by survivors outside of prisons. Survivors who attend their church services regularly (one time a week) believe more strongly (10%) that the traumatisms of the genocide have gradually decreased since 1995'.

[233] Brounéus 2010, p. 409.

[234] King 2011, p. 138.

[235] Ibid., p. 142.

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Chapter 9
Conclusion

The simultaneous pursuit by *gacaca* courts of a diverse set of goals such as emptying prisons; providing justice according to local culture; speeding up the genocide-related trials; providing Rwandans with a shared record of the genocide events and achieving reconciliation appears to have been overambitious. Despite this concern, the attempt to strictly abide by the principle of duty to prosecute (all) the perpetrators of genocide-related crimes as well as its participatory, community-based approach, made *gacaca* the most courageous effort ever in the search for post-genocide justice. This assessment also emerges when considering the achievements of post-genocide justice in the other settings, where impunity, a lack of measures of redress for victims, poor reparation programmes and instances of genocide denial were the rule. Despite the Nuremberg example, Europe in the aftermath of World War II has prosecuted few Nazi criminals. Those responsible for the Cambodian genocide have escaped justice as well, even though the current efforts by the Extraordinary Chambers in the Courts of Cambodia is a positive sign. The Government of Guatemala, where the *Comisión para el Esclarecimiento Histórico* has reported acts of genocide against the Mayan population, was unable or unwilling to prosecute the large majority of those responsible for these atrocities. The multiple mechanisms elaborated in Sudan to cope with the allegations of genocidal violence in Darfur correspond more with a mechanism aimed at preventing and limiting the ICC intervention, than to a genuine prosecution effort.

Generalising what Giorgio Agamben has stressed with regard to the Holocaust, criminal trials in in post-genocide settings have neither solved the issue of responsibility nor addressed the needs of the victims of international crimes.[1] On the contrary, the crime of genocide has questioned the legitimacy of a legal approach to crimes that are so serious and difficult to understand and redress 'to call into question the law itself, dragging it to its own ruin'.[2] This is confirmed by the

[1] Agamben 1999, p. 18.
[2] Ibid.

P. Sullo, *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda*, International Criminal Justice Series 20,
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argument made by some scholars that ordinary criminal trials and fair trial standards should not be adopted as an instrument to overcome the legacy of genocide in Rwanda. The experience drawn from other settings clarifies the severity of the post-genocide challenges and provides a background for a balanced analysis of the achievements by *gacaca*.

Abandoned by the international community, in 1994 Rwandans had to find their way to face the *génocidaires* and to stop their violence. The trauma experienced has entirely shaped the state and society-rebuilding process. The Rwandan post-genocide constitutional system and the transitional justice agenda were primarily aimed at answering the queries posed by the explosion of violence triggered by the genocide.

When assessing post-genocide justice, it is important to bear in mind the extent to which the state machinery and the social tissue were destroyed in 1994. It should also be taken into account that according to data provided by the National Service of *Gacaca* Jurisdictions, the courts' overall costs ranged between US$45 and 65 million dollars, against a yearly budget of the ICTR of approximately US$200 million.

The justice policy pursued in the aftermath of the 1994 massacres has been punishment-focused and generally marked by a retributive approach. Rwanda's commitment to precisely honouring the duty to prosecute has cast down the African country into a rule of law 'Catch-22': the compliance with the highest (but unfortunately selective) prosecution standards has caused the reiterated violation of fair trial standards and *habeas corpus* guarantees. Rwanda's interpretation of the duty to prosecute after the massive human rights violations that characterised the genocide era has triggered new human rights violations. Most war-torn countries are criticised because, when striking a balance between justice and political stability, they compromise on their prosecution-related duties. This feature, in particular, marks post-genocide settings. This was not the case in Rwanda. Here transitional justice architects have developed the most ambitious prosecution experiment ever: '*mass justice for mass atrocities*'.[3] As articulated by Mamdani, the pursuit of the *génocidaires* has become 'The *raison d'être* of the post-genocide state, the one permanent part of its agenda'.[4] The consequences of such a policy for rule of law principles however, have been problematic, as the United Nations Human Rights Committee has reported:

> While acknowledging the serious problems confronting the State party, the Committee notes with concern that the *gacaca* system of justice does not operate in accordance with the basic rules pertaining to the right to a fair trial, particularly with regard to the impartiality of judges and protection of the rights of the accused. The lack of legal training for judges and reports of corruption continue to be causes of concern to the Committee, as do exercise of the rights of defence and respect for the principle of equality of arms, in

[3] See Waldorf 2006a.

[4] See Mamdani 2002, p. 271.

> particular in cases where sentences of up to 30 years' imprisonment may be handed down (Article 14 of the Covenant).[5]

The particular context in which justice has to be delivered in Rwanda has triggered a wide debate on the application of fair trial guarantees in post-conflict settings. The debate is summarised by Haveman and Muleefu as follows:

> It would be an interesting topic for a dissertation to rethink the concept of fairness within the context of non-traditional penal approaches such as the *gacaca* in post-conflict situations. We see at least two questions, in line of each other, which can lead to some answers. The first question is whether one accepts that a post-conflict society can be so different from ordinary societies that rules and principles that have been written for ordinary societies do not fully apply, that is: in all aspects and unconditionally. Do all ordinary standards apply in a situation in which 10 % of the total population is tried for its involvement in a genocide having killed another 10 % of the population? In a situation where not only the physical infrastructure, including the justice sector, has been destroyed but also the mental infrastructure, the social tissue of the society? Does this extraordinary context influence the way we have to assess a legal system that has been developed to cope with this extraordinary situation and to rebuild the society, not only its buildings and institutions but also its social fabric, because the ordinary system proved to be unfit for the extraordinary situation?[6]

The conclusions I have drawn regarding the scope of the duty to prosecute, stemming from international law, offer room for tempering an uncompromising pursuit of the duty to prosecute in a context like post-genocide Rwanda. This can encourage experimenting with home-grown solutions based on a comprehensive, non-exclusively retributive idea of justice that also focuses on local culture, restoration and reparation. Penology, criminology and victimology of mass atrocities are emerging fields of research that have to be intensively scrutinised in order to address the questions triggered by Haveman. In particular, the paradox of relying for the most part, or exclusively, on criminal punishment, a mechanism elaborated for common crimes and not for mass atrocities, in the post-conflict realm deserves to be addressed by further research. *Gacaca* have offered an interesting alternative especially for property-related offences, where they have displayed their restorative aspects, although the implementation of the property restitution orders was a failure. Moreover, in terms of penological variety, *gacaca* courts offered a broader perspective on international crimes than retributive international institutions.[7]

A scrupulous analysis of the duty to prosecute and punish grave human rights violation imposed on states by international law, however, concedes room for a less radical interpretation of such a duty than the one offered by Rwanda, as Diane Orentlicher has stressed.[8] According to this authoritative interpretation, the duty to

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[5] On this point, see Human Rights Committee 2009.

[6] Haveman and Muleefu 2011, pp. 219–244.

[7] Drumbl 2007, pp. 85–99.

[8] On this point, see Orentlicher 2007, pp. 10–22: 'On the question of what international law required at the time of publication, in brief: 'Settling Accounts' found that States that had adhered to certain human rights treaties were generally required to ensure that criminal proceedings were instituted against those suspected of specified violations of human rights, such as genocide and

prosecute does not oblige states to criminally punish every offence immediately after its commission, especially when it is not possible, due to different constraints, to grant fair trial standards. This would also free resources, which could then be employed to promote a redress policy for victims, which in Rwanda were unfortunately lacking (a further factor that challenges the idea that *gacaca* courts were predominantly based on a restorative rationale). The financial resources necessary to pursue an inflexible policy of full accountability, (with the connected necessity to feed the overwhelming prison population), might have been used to award the victims a comprehensive set of reparation tools consistent with the Van Boven/Bassiouni Principles.

Moreover, Rwanda's prosecution policy has been one-sided, focusing exclusively on crimes against the Tutsi minority, as the UN Human Rights Committee has reported.[9] The matter of the lack of a prosecution of those RPA/RPF members purportedly responsible for 25,000–45,000 deaths, allegedly constituting crimes against humanity and war crimes during and in the immediate aftermath of the genocide, represents a continued problem in Rwanda.

Scholarship has argued that, if implemented impartially and consistently with their constitutional mandate, *gacaca* could attain several merits. As Peter Uvin remarked, 'Given its decentralized nature, its relatively simple and recognizable procedures and the importance attached to local participation, the *gacaca* ought to be much better at involving the entire community, including its victims. As a result, it is potentially more victim-centred, and may thus have a more profound impact in terms of reconciliation. Finally, through the process of local discussion and fact-finding, *gacaca* proceedings may well develop a fuller picture of the nature of the violence that occurred and the responsibilities of different people'.[10] Uvin's quotation summarises very well the hopes initially entrenched in the *gacaca* experiment. The author however slowly became more sceptical about the results of *gacaca* courts.[11]

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torture. As for customary international law—the law that would apply to virtually all States, regardless of which specific treaties they had ratified—I concluded that States' general obligation to ensure the enjoyment of fundamental rights was incompatible with wholesale impunity for atrocious crimes but did not require prosecution of every offense'.

[9] Human Rights Committee 2009: 'The Committee remains concerned at the large number of persons, including women and children, reported to have been killed from 1994 onwards in the course of operations by the Rwandan Patriotic Army, and at the limited number of cases reported to have resulted in prosecution and punishment by the Rwandan courts (Article 6 of the Covenant). The State party should take steps to ensure that such acts are investigated by an independent authority and that those responsible are prosecuted and duly punished'.

[10] See Uvin 2003a, pp. 116–121. *Gacaca* tribunals represent at the same time a possibility and a high risk, because, as Peter Uvin wrote, '*gacaca* is a worthy gamble, but a gamble nonetheless. It is simultaneously one of the best and one of the most dangerous opportunities for justice and reconciliation in Rwanda. But in a country like Rwanda there are no easy, cheap or clean solutions'.

[11] Uvin 2003b.

In fact, *gacaca* justice was also a gamble, if considered under the perspective of human rights protection, not only because it compromised on principles of justice as defined in internationally agreed human rights and criminal law, but also because it lacked control mechanisms granting justice in substantive terms. Moreover, the unfolding of the *gacaca* procedure could set in motion violent social dynamics.[12] Briefly stated, the *gacaca* system seemed unable to guarantee adequate levels of impartiality, defence and equality before the law. The participation in *gacaca* meetings, which was based on a spontaneous individual choice when the courts were shaped, has become mandatory in 2004. This policy change is a revealing insight as regards the development of the *gacaca* process. Originally grounded on the attempt by Rwanda's population to share the responsibility of dealing with the past, the *gacaca* experiment progressively highlighted the government's interest in leading and controlling the transitional justice process.

When discussing *gacaca* however, we have to also consider that the ordinary justice system in Rwanda suffered significant flaws, especially in terms of a speedy trial, reasonable detention times and decent conditions of detention.

Another serious shortcoming of the *gacaca* courts, and in general of the entire transitional justice project in Rwanda, is the lack of reparation. The Rwandans interviewed have confirmed their disappointment and frustration in this regard. Children and sexually abused women were among the first victims of such a choice. More than two decades after the 1996 law envisaging the Compensation Fund for Victims of the Genocide and Crimes against Humanity the fund has yet to be established. The fund was meant to provide for reparations to the genocide victims on the occasion where convicted perpetrators were insolvent, which was frequently the case. A further 2002 project, defining victims very broadly without requiring any actual injury, has also failed to address the issue of reparations.

While recognising the context and constraints in which Rwanda was forced to act, it is possible to highlight the lack of an adequate victim-centred transitional justice policy. To be effective, the reconciliation process, one of the stated and emphasised goals of the post-genocide political leadership, needs to encompass precise victim-centred healing and reparation strategies. In fact, reconciliation cannot be seen as a by-product of other processes and cannot be expected as a spontaneous outcome of a policy of full accountability pursued by *gacaca*. Some pitfalls of the *gacaca* system were due to the internal tension among the goals *inkiko gacaca* aimed at reaching. Doubtless, it is very difficult to achieve simultaneously through a single mechanism objectives such as truth, healing, justice,

[12] See Uvin 2003a: 'On the first point, there is no separation between prosecutor and judge, no legal counsel, no legally reasoned verdict, great encouragement of self-incrimination, and a potential for major divergences in the punishments awarded. In short, the modernized *gacaca* system seems to provide inadequate guarantees for impartiality, defence and equality before the law. Many foreign legal specialists and human rights observers have consequently been highly skeptical about the *gacaca* proposal. However, the alternatives they propose, such as guaranteeing the right to legal counsel, basically end up reinventing the same formal justice system which is clearly not adequate'.

reparations and reconciliation. *Gacaca* have provided Rwandans with a forum to reconstruct and discuss the history of the genocide; in this respect they represented a unique and fascinating experiment. Truth was the main expectation of Rwandans, the alleged cornerstone of the *gacaca* programme and an essential element of the reconciliation process. The capacity of *gacaca* courts to achieve the 'truth' concerning the genocide was however undermined by several factors, including the state's involvement in the process. The exclusion of RPF crimes from the transitional justice agenda and public debate, endorsed in the *gacaca* architecture, acted as an obstacle for the reconciliation process. The Rwandans interviewed, and in broader scholarship, have also questioned the assumption that the truth telling process promoted during *gacaca* hearings might have beneficial effects on the psychological health of the attendees. On the contrary, both exposure to *gacaca* hearings and the mistruths circulated, have proved to be in certain instances traumatising. In line with my conclusion Ingelaere in his 2016 monograph holds that *gacaca* established, at best, forensic truth.[13]

The difference between traditional *gacaca* and *inkiko gacaca* is finally confirmed by the fact that courts resembling the customary *gacaca* are active today and were also active in the aftermath of the genocide. This was reported by a UNHCHR sponsored study[14] in 1996, where a letter of the prefect of Kibuye, dated November 1995, disclosed that local authorities used to encourage the spontaneous meetings of the population. The topic most often addressed during the 'hearings' regarded crimes against property committed during the genocide. The UN report stated that the meetings did not deal with serious crimes like murder, but the authorities urged the participants to collect the names of those involved in the genocide in order to forward them to the prosecutor. The UN experts concluded that *gacaca* could have played a role in post-genocide justice and made some recommendations in this regard. Given the peaks of violence that marked the genocide, *gacaca* were determined not to be a suitable forum for addressing the related crimes. Consequently, it was proposed to use them as a truth-recovering mechanism to debate the events surrounding the genocide and to collect evidence to be forwarded to the regular courts. The report also cautioned against too much state involvement and the temptation to convert them into formal tribunals.[15] A similar approach was suggested by part of the participants in the Urungwiro meetings, where the idea to set up *gacaca* emerged.

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[13] See Ingelaere 2016, p. 5.

[14] See United Nations High Commissioner for Human Rights 1996.

[15] Cautioning against the temptation to combine elements of the conventional justice systems with those of traditional system, Joanna Stevens' study concluded 'the rational for incorporating traditional and informal Justice forums into the formal state system of courts is to 'combine the virtues of traditional legal institutions (accessibility, informality, economy, of time and money, and familiarity of legal norms) with those of state legal system (impartiality, uniformity of law and procedures and state legitimacy.' However, attempts in various countries to achieve this successfully have generally failed. Linking the two systems tends to undermine the positive attributes of the informal system'.

The recommendations formulated by the UNHCHR represented an interesting formula for post-genocide Rwanda that might have deserved more attention.

Gacaca courts provided Rwandans with an unprecedented grassroots forum for dialogue, but they unfortunately compromised on human rights standards, and suffered from the intrusion of the state. This deprived Rwandans of their ownership on the main mechanism to redress the painful consequences of the genocide. Maybe with a lesser degree of state involvement in the process, *inkiko gacaca* could have proved to be a more suitable instrument to redress the genocide legacy. They might be used, for example, as a forum to collect evidence concerning the 1994 massacres, which would then be sent to national prosecutors and courts to judge petty crimes. The lesson to be drawn from the multi-layered approach to transitional justice adopted in Rwanda remains however invaluable.

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