

**JUSTICE AND SOCIAL RECONSTRUCTION IN THE AFTERMATH OF GENOCIDE IN
RWANDA : AN EVALUATION OF THE POSSIBLE ROLE OF THE GACACA
TRIBUNALS**

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INTRODUCTION

Rwanda was largely destroyed in 1994. Among and endless host of problems, highly complex questions and dilemmas of justice, unity, and reconciliation haunt Rwanda to this day. A basic question confronting Rwanda is how to deal with the legacy of the conflict that culminated in the genocide of the Tutsi and in the massacres of Hutu opponents of the genocide. The UN set up an International Criminal Tribunal in Arusha, Tanzania, and Rwanda has its own courts. In both cases, the process of trying accused *genocidaires* is long, laborious, and frustrating. Only height convictions have been handed down in Arusha after five years of work, while in Rwanda only some 3, 000 cases have been disposed of. At least 120,000 detainees are in prisons around the country, the vast majority of whom are accused of participation in the genocide. At the present rate it is estimated it will take anywhere between two and four centuries to try all those in detention. The Rwandese government has developed a new procedure called “*gacaca*,” lower-level tribunals that attempt to blend traditional and contemporary mechanisms to expedite the justice process in a way that promotes reconciliation. The impact of *gacaca* remains to be seen, and as a process, it certainly needs an evaluation or, at least, an attempt to evaluate its possible contribution to the perplexing questions of justice, unity and social reconstruction in the aftermath of genocide.

This paper mainly aims to analyse the draft legislation on the *gacaca* jurisdictions. Further, this essay attempts to examine the impact of criminal trials in the aftermath of mass violence and genocide. Although conventional wisdom holds that criminal trials promote several goals, including uncovering the truth; avoiding collective accountability by individualising guilt; breaking cycle of impunity; deterring future war crimes; providing closure for the victims and fostering democratic institutions, little is known about the role that judicial intervention have in rebuilding societies.¹

The present essay deals only with criminal trials. By definition, these are focused on the perpetrators of abuses and their allies. Although not examined in the essay, a comprehensive and holistic approach to dealing with a legacy of past atrocities should also include range of victim-focused efforts, such as programs for compensation and rehabilitation, the establishment of memorials, and the organisation of appropriate commemorations.

¹ M Osiel (1997) 6-10.

The main sources of this study are textbooks, articles from journals and official documents of national and international bodies. Since this essay aims at evaluating the *gacaca* proposals, a great deal of attention is paid to the terms of the draft legislation.

It is certainly premature to make an in-depth assessment of a draft law and the merits and flaws of the legal institution it is designed to set up. Only gradually and over a period of time can the *gacaca* become effective and credible. Further research aimed at gathering data through interviews, field observations, participant observation, study and analysis of the implementation can also illuminate experience in ways that analysis of published sources do not. A thorough and sound appraisal of this new institution must therefore wait some time. I shall nevertheless attempt in this essay to set out some initial and tentative comments on some of the salient traits of the future *gacaca* tribunals.

This paper makes a preliminary “Human Rights Impact Assessment” of the implementation of the draft law establishing “*gacaca* jurisdictions”. The potential role of the new institution in rebuilding the Rwandese society is also discussed. Considering the many complex issues which still surround the process of justice in Rwanda six years after the genocide, as well as the continuing challenge to the judicial system in terms of the inadequacy of resources for dealing with such an enormous caseload, recommendations to help the process follow the analysis of the *gacaca* proposals (Chapter Three).

To end impunity, it is necessary to respond in accordance with human rights law to the genocide and mass killings. Therefore, the starting point for our evaluation of the *gacaca* proposals will be an analysis of the proposals in human rights law. Does human rights law impose any affirmative duties to punish genocide and other mass killings that occurred in Rwanda? In addition, for the “*gacaca* jurisdictions” to be effective, they should not be viewed in isolation, as their performance will depend to a large extent on whether other judicial mechanisms and institutions are functioning properly. The relationships between the *gacaca* jurisdiction and other mechanisms are thus reviewed. In particular, the process of setting up the *gacaca* jurisdictions should include an evaluation of the genocide trials which have taken place to date both at the International Criminal Tribunal for Rwanda and in the domestic courts and apply the lessons learnt (Chapter Two). An evaluation of the potential contribution of the use of *gacaca* courts needs to be put into the broader context of the conflict in Rwanda. Thus, an analysis of the conflict in Rwanda is necessary to grasp the challenges facing the questions of justice and social reconstruction in the aftermath of genocide in Rwanda (Chapter One).

CHAPTER I: HISTORICAL CONTEXT OF THE GENOCIDE IN RWANDA

1.1. Introduction

To understand how some Rwandese could carry out a genocide it is important to look at the history. In terms of that framework, it is possible to identify the key steps that led from the pre-colonial period to the genocide a full century later. There was nothing inevitable about this process. At its heart, although not the only factor, was the deliberate choice of successive elites to deepen the cleavages between Rwanda's two main "ethnic" groups, to denigrate the group out of power, and to legitimate the use of violence against that group. In the process, a culture of impunity gradually became entrenched. A good historical analysis of the conflict in Rwanda is thus necessary to grasp the challenges facing the questions of justice, unity and social reconstruction in the post-genocide Rwanda. Such a demanding far-reaching goal is, however, more than can be accomplished within the constraints of this paper. Therefore, the emphasis of this chapter is to provide, however briefly, an analysis of the conflict to demonstrate its complexity.

1.2. A brief overview of the history of Rwanda

The analysis of the conflict in Rwanda that culminated in the genocide of the Tutsi in 1994 and in the massacres of Hutu opponents of the genocide is part of a wider debate on the nature of ethnic conflicts in Africa.² There are many views as to the causes of the conflict in Rwanda. Some argue that the root cause is embedded in the pre-colonial social and political structures of Rwandese society.³ Others argue that the starting point was the imposition, by the colonial powers, of a system of ethnic identity and political/administrative structures that created deep division in Rwandese society. This latter situation was perpetuated by the two Hutu regimes since independence and ultimately led to genocide.⁴

² See *Report of the Secretary-General to the United Nations Security Council* (16 April 1998) [hereinafter UN Secretary-General Report 1998] also available at <<http://www.un.org/Doc/sc/reports/1998/s1998318.htm>> [accessed on 13 September 2000]; M Mekenkamp *et al.* (1999) also available at <<http://www.oneworld.org/euconflict/sfp>> [accessed on 10 September 2000]; M E Brown (ed) (1996); K J Holsti (1995) I; International Institute for Strategic Studies (1998/99); *Report of the Carnegie Commission* (1998) also available at <<http://www.ccpdc.org>> [accessed on 14 September 2000]; For a comprehensive analysis of the conflict in Rwanda see E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 141 173.

³ Kangura in JP Chretien *et al.* (1995) 143 ; See also J-J. Maquet (1961).

⁴ F Fundi (1999) *The Times of Hope* 2-11.

It is obvious that the genocide in Rwanda did not happen by accident or without any reason; neither was it a genocide caused by one single factor, e.g., ethnic identity.⁵ There is a growing consensus that acknowledges the existence of a multiplicity of factors that lead to conflict in Africa and proceed with a synthesis of the above schools of thought.⁶ This also appears to be the case in Rwanda.⁷

1.2.1. Pre-independence historical analysis

One of the fundamental historical debate revolves around whether ethnic conflict between Rwandese existed before the colonial era. Rwanda's colonial historiography wholly adopted by the post-independence republican regime gives a hierarchical picture of the population of Rwanda.⁸ This approach indicates that the Rwandese society is made up of three socio-ethnic groups that are highly organised into a hierarchy by the level of the civilisation they emanated from. The ideology of genocide, inspired by this story, rejected and later demonised the other group, alleging that the Tutsi had been foreign conquerors and oppressors.⁹

Certainly, there were Hutu and Tutsi for many centuries.¹⁰ The Hutu had developed as an agricultural people, while the Tutsi were predominantly cattle herders.¹¹ Yet, the two groups had none of the usual differentiating characteristics that are said to separate ethnic groups. They spoke the same language, shared the same religious beliefs, and lived side-by-side; intermarriage was not uncommon.¹² Relations between them were not particularly confrontational; the historical record makes it clear that hostilities were much more frequent among competing dynasties of the same ethnic category than between the Hutu and the

⁵ M Mekenkamp *et al.* (1999) 34.

⁶ The causes of conflicts in Africa reflect the continent's diversity and complexity. See U.N. Secretary-General Report 1998.

⁷ G De Villier (1995) 59 *Politique Africaine* 121-126; S Utterwulghé (August 1999) 2.3 *OJCPR* available at <<http://www.trinstitute.org/ojpcr/>> [Accessed on 15 November 2000].

⁸ It gives, as the first inhabitants of Rwanda, the Twa, who are related to the pygmies. Then came the Hutu, belonging to the Bantu group from Chad and Cameroon. And finally, the Tutsi came from Ethiopia. J-J. Maquet (1961).

⁹ F Fundi (1999) *The Times of Hope* 3.

¹⁰ The Twa, a people clearly differentiated from Hutu and Tutsi, formed the smallest component of the Rwandese population, approximately 1 percent of the total before the genocide. During the genocide, some Twa were killed and others became killers. Because Twa are so few in number and because data concerning them are so limited, this paper does not examine their role.

¹¹ C Newbury (1988) 11.

¹² Hutu and Tutsi are in no sense 'tribes', nor even distinct 'ethnic groups'. See, JP Chrétien in JL Amselle & E M'Bokolo (eds) (1985); See also A de Wall (1994) 10(3) *Anthropology Today* 1.

Tutsi themselves.¹³ Furthermore, the demarcation line was blurred: one could move from one status to another, as one became rich or poor, or even through marriage. Having said that, 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.¹⁴ Thus, quite obviously, “even if Rwanda was not a land of peace and bucolic harmony before the arrival of the Europeans, there is no trace in its pre-colonial of systematic violence between Tutsi and Hutu as such.”¹⁵ In this respect, the theory of “ancient hatreds” cannot really account for Rwanda’s conflict.

In order, therefore, to understand the root causes of the conflict, it appears focus should be placed not on the ancient past, but on recent history. What has been the legacy of colonialism in Rwanda?

From 1895 to 1916, Rwanda was a German colony.¹⁶ In 1916, in the midst of the First World War, Germany was forced to retreat from its east African territories and was replaced in Rwanda and Burundi by Belgium. For the next 45 years, the Belgians controlled the destinies of Rwanda, Burundi, and the Congo.¹⁷ It served the purposes of the colonizers to recognize the King and the Tutsi rulers surrounding him and to assign to them significant political power and administrative duties, partly because it was cheaper, but the choice was also born of racial or even racist considerations. In the minds of the colonizers, the Tutsi looked more like them, because of their height and colour, and were, therefore, more intelligent and better equipped to govern.¹⁸

Through the classic system of indirect rule, a mere handful of Europeans were able to run Rwanda in whatever manner they deemed most beneficial to imperial interests.¹⁹ The

¹³ If anything, conflicts were more evident with Tutsi, particularly certain clans that were closer to the ruling Tutsi families in certain period during power struggles. The cleavage between powerful Tutsi lineages and lineages of lower ranks was also expressed by strong morphological differences. The dominant lineages practiced self-selection through the choice of wives. This selection had given them particular physical features the most dominant of which was a very great height. Those differences between Tutsi lineages which cannot be due to feeding habits reinforce their caste character of dominant Tutsi lineages. JC Desmarais (1978) 2(1) *Anthropologie et Sociétés* 1.

¹⁴ C Newbury (1988) 48.

¹⁵ G Prunier (1995) 39.

¹⁶ Following the signature of the Anglo-German treaty of 1880 disposing of the eastern part of Africa as a possession of Germany, Rwanda fell under the influence of Germany. See generally F Reyntjens (1985).

¹⁷ *Ibid.*

¹⁸ 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. G Prunier (1997) 5-9.

¹⁹ The colonisers and the Tutsi aristocracy were in close collaboration, each party looking after its own interests. E Gasana *et al* “Rwanda” in ACDESS (ed) (1999) 146-47.

intervention of the superior external force on behalf of the royal court and the aristocracy deeply modified the nature of power relations between Rwandese. During that period, it was based on the primordial and almost exclusive use of violence and exaction of various kinds against both Hutu and Tutsi populations in cases where, traditionally, conflicts had been settled by political means.²⁰ Certainly, no Rwandese appreciated the burdens so harshly forced on them. Most Tutsi shared the hardships of the Hutu; both were exploited by a privileged class. But to the Hutu, the oppressor was viewed not as a class, but as an ethnic group.

In the early 1930s, Belgian authorities introduced a permanent distinction by dividing the population into three groups which they called ethnic groups, the Hutu representing about 84% of the population, the Tutsi (about 15%) and Twa (about 1%). Whichever way ethnic identity was assigned,²¹ this distinction became the basis for determining the allocation of many of the prized opportunities the country had to offer: school places, civil service jobs, and the like.²² In line with this division, it became mandatory for every Rwandese to carry an identity card stating his or her ethnicity. 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.²³ Reference to ethnic background on identity cards was maintained, even after Rwanda's independence and was abolished only after the tragic events the country experienced in 1994.

It is not possible to write about the history of the conflict in Rwanda without writing about the role of the Catholic church, which, since the arrival of the Belgians, has functioned virtually as the country's state church.²⁴ Much of the elaborate Hamitic ideology was simply invented by the Catholic White Fathers, missionaries who wrote what later became the established version of Rwandese history to conform to their essentially racist views.²⁵ Because they

²⁰ *Ibid.* 147.

²¹ A version of the facts meant to underline the arbitrariness and foolishness of the identification exercise is repeated in many histories but, as is true of much about the country's past, is disputed by others. It contends that anyone who owned 10 cows was automatically designated a Tutsi, while the rest were deemed to be Hutu. F Fundi (1999) *The Times of Hope* 3. A quite different account holds that the Belgians asked each Rwandese to declare for himself or herself, with 15 per cent identifying themselves as Tutsi, 84 per cent as Hutu, and one per cent as Twa. A DesForges (1999) available at <<http://www.hrw.org/reports/1999/rwanda/>> [accessed on 13 September 2000].

²² A DesForges (1999) available at <<http://www.hrw.org/reports/1999/rwanda/>> [accessed on 13 September 2000]; F Reyntjens (1985) 122 ; R Lemarchand (1970) 131.

²³ African Rights (rev. ed 1995) 6-47 [hereinafter African Rights].

²⁴ R Lemarchand (1970).

²⁵ See R Omaar and A de Waal (1995) 52 *Covert Action Quarterly* 6. See also generally OAU International Panel of Eminent Personalities (2000) [hereinafter "OAU Panel Report (2000)"] also available at <<http://www.oau-oua.org/Document/ipep/rwanda-e/EN.htm>> [accessed on 09 September 2000].

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.²⁶

From the late 1940s, the desire for independence shown by the Tutsi elite²⁷ certainly caused both the Belgians and the church to shift their alliances from the Tutsi to the Hutu. While the Tutsi began the move to end Belgian domination, the Hutu elite, for tactical reasons, favoured the continuation of the domination. In the end, unlike that of most African countries where a single unifying nationalist movement had become predominant, Rwanda's independence was more of a repudiation by the majority of their despotic local overlords than of their harsh but remote European colonial masters.

1.2.2. The revolution and the first republic: introduction of violence

There was to be no Rwandese revolution. It is technically true that within a mere three years a Tutsi-dominated monarchy under colonial rule gave way to a Hutu-led independent republic. But in practice, the changes mostly affected the top echelons of Rwandese society. A small band of Hutus, mainly from the south-centre and, therefore, not representative even of the entire new Hutu elite, replaced the tiny Tutsi elite.²⁸ They were backed with enthusiasm by the Catholic Church and their former Belgian colonial masters. Accepting the racist premises of their former colonial oppressors, the Hutu now treated all Tutsi as untrustworthy foreign invaders who had no rights and deserved no consideration.²⁹

²⁶ See OAU Panel Report (2000). The Panel concludes: "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 Rwandese 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".

²⁷ It should be noted that a very small group of Tutsi drawn mainly from two clans monopolized most of the opportunities provided by indirect rule. It has never been valid to imply that a homogeneous Tutsi or Hutu community existed at any time. Below the small indigenous Tutsi elite were not only virtually all of Rwanda's Hutu population, but the large majority of their fellow Tutsi, as well. Most Tutsi were not much more privileged in social or economic terms than the Hutu. Therefore, the deepening of the Hutu/Tutsi ethnic cleavage was accompanied by social distancing, giving more nuance to the double value of the term Tutsi: Tutsi as a social group with a distant ethnic substrate designating the group of lineages that are mainly pastoralists, and Tutsi as a ruling caste made up of a few lineages which are closest to the monarchy. On the eve of colonisation, it was almost exclusively in the latter sense that the Rwandese used the term Tutsi. E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 145.

²⁸ G Prunier (1997) 53.

²⁹ *Ibid.*

Having established discriminatory policies, the government mounted intensive and omnipresent propaganda claiming that Tutsi were foreigners who had repressed the Hutu people in serfdom for four centuries and the revolution and the republic were the expression of victory of the Hutu majority over the feudal minority Tutsi.³⁰ This propaganda, which amounted almost to conditioning people to violence, led the population to internalise the racist biases of the regime founded on an antagonistic vision of the Tutsi.³¹

The discriminatory regime increased the departure of Tutsi to neighbouring countries³² from where Tutsi exiles made incursions into Rwanda.³³ The word *Inyenzi*, meaning cockroach, came to be used to refer to these assailants. Each attack was followed by reprisals against the Tutsi within the country.³⁴

The dissensions that soon surfaced among the ruling Hutu led the regime to strengthen the authority of President Grégoire Kayibanda as well as the influence of his entourage, most of whom came from the same region as he, that is the Gitarama region in the centre of the country. The drift towards ethnic and regional power became obvious. From then onwards, a rift took root within the Hutu political establishment, between its key figures from the Centre and those from the North and South who showed great frustration.³⁵ Increasingly isolated, President Kayibanda could not control the ethnic and regional dissensions. The disagreements within the regime resulted into anarchy, which enabled General Juvénal Habyarimana, Minister of Defence and Army Chief of Staff, to seize power through a coup on 5 July 1973, thus ending the First Republic.³⁶

³⁰ E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 153.

³¹ As pointed out in the report of the OAU Panel: "Other than the change in the names and faces of the tiny ruling class, independence really produced only one major change for Rwanda: the introduction of violence between the two, increasingly divided, ethnic groups". OAU Panel Report (2000).

³² A Guichaoua (1992) .

³³ Exiled Tutsi became an early example of a new reality that later would convulse the entire Great Lakes Region and many of its neighbouring countries. Conflicts that generate refugees can easily lead to conflicts generated by refugees. H Adelman (Spring 1998) 18 *Journal of Conflict Studies* 1.

³⁴ G Prunier (1997) 56-62. 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.

³⁵ E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 157; J Kakwenzire *et al* in H Adelman & A Suhrke (1999) 19.

³⁶ E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 155-158.

1.2.3. The second republic – the regime of Habyarimana

Following a trend then common in Africa,³⁷ President Habyarimana, in 1975, instituted the one-party system with the creation of the Mouvement révolutionnaire national pour le développement (MRND), of which every Rwandese was a member *ipso facto*, including the newborn. Since the party encompassed everyone, there was no room for political pluralism. The structures of a totalitarian regime were put into place systematically. The party was everywhere, from the very top of the government hierarchy to its very base.³⁸

From 1974 to 1982, significant economic growth occurred whose causes were mainly external. From the beginning of 1980s, however, and especially in the 1984 to 1986 period, the external factors which had encouraged economic development were reversed, with the progressive decrease of external aid and serious deterioration of terms of trade.³⁹ The losses were felt at every level of Rwandese society, causing widespread discontent. Growing inequality between most rural and some urban dwellers exacerbated the frustration of peasant farmers.⁴⁰

The inability to control the rapid demographic increase ended by ending the land-shortage situation, thus leading to potentially explosive social disorders.⁴¹ By the end of the 1980s, the number of peasants who were land-poor (less than half a hectare) and those who were relatively land-rich (more than one hectare) both rose. By 1990, over one-quarter of the entire rural population was entirely landless; in some districts, the figure reached 50 per cent. Not only was poverty on the rise, but so was inequality.⁴²

³⁷ S Decalo (1990).

³⁸ All officials were chosen from party cadres. Article 7 of the 1978 Constitution made Rwanda officially a one-party State with the consequence that the MRND became a "State-party", as it formed one and the same entity with the Government.

³⁹ E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 159.

⁴⁰ OAU Panel Report (2000).

⁴¹ Rwanda population density was 221.9 inhabitant per Km² in 1970, 283.5 in 1978 and 386 in 1986. J C Williams (1995) *Cahiers africains* 14. The economic crisis led to endemic malnutrition in the country which, between 1984 and 1989, transformed itself into food shortage and even into famine in 1989 in Gikongoro. That social crisis proved even more pronounced among the rural youth. Those youth with uncertain futures no longer adhered to the official slogans. Many of them went to try their luck in the informal urban sector. Over the years, there developed a floating mass of unemployed young men and women. These men were there in addition to those enrolled in the militia *Interhamwe* (Those Who Stand Together or Those Who Attack Together) who were the spearhead of genocide. E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 159; See also A Guichaoua (1989).

⁴² A Desforges (1999) available at <<http://www.hrw.org/reports/1999/rwanda/>> [accessed on 13 September 2000].

In addition, although already dependent to an unhealthy extent on international assistance, the Habyarimana government reluctantly concluded that it had little choice but to accept a Structural Adjustment Programme from the International Monetary Fund (IMF) and World Bank⁴³ in return for a loan conditional on the rigid and harsh policies that characterized western economic orthodoxy of the time.⁴⁴

Like his predecessor, Grégoire Kayibanda, Habyarimana strengthened the policy of discrimination against the Tutsi by applying a similar quota system in universities and government services. A policy of systematic discrimination was pursued even among the Hutu themselves, in favour of Hutu from Habyarimana's native region, namely Gisenyi and Ruhengeri in the north-west, to the detriment of Hutu from other regions.⁴⁵ This last aspect of Habyarimana's policy, considerably weakened his power: henceforth, he faced opposition not only from the Tutsi but also from the Hutu, who felt discriminated against and most of whom came from the central and southern regions.

Like Kayibanda, Habyarimana became increasingly isolated and the base of his regime narrowed down to a small intimate circle. Rwandese used to call that group "*akazu*" (a small hut) in reference to the most restrictive or narrow political circle which surrounded the *mwami* (King).⁴⁶ This further radicalized the opposition whose ranks swelled more and more.⁴⁷ On 1 October 1990, an attack was launched from Uganda by the Rwandese Patriotic Army (RPA), military wing of the Rwandese Patriotic Front (RPF), a political organization whose forebear, the Alliance Rwandaise pour l'Unité Nationale ("ARUN"), was formed in 1979 by Tutsi exiles based in neighbouring countries and elsewhere in the world.⁴⁸ With the military assistance of France, the RPA advance was halted.⁴⁹ After that, the RPA installed itself in the north from where it launched a guerilla war.

⁴³ In this regard, a lesson is to be learned in the analysis of the conflict in Rwanda for the international financial institutions. "Even if the adjustment programme did not contribute directly to the tragic events of 1994, such a reckless disregard for social and political sensitivities in such a conspicuously sensitive situation would unquestionably have increased the risk of creating or compounding a potentially explosive situation." See OAU Panel Report (2000).

⁴⁴ D Woodward (1996) 25; see also A Storey (1999/03) 17 *Development Policy Review* 1.

⁴⁵ E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 158.

⁴⁶ *Ibid.* 159.

⁴⁷ *Ibid.*

⁴⁸ The Rwandese Patriotic Front demanded the implementation of the rule of law, the abolition of the policy of ethnic and regional discrimination as well as the right for refugees to return to their motherland. See G Prunier (1997) 74.

⁴⁹ *Ibid* 101-102.

1.2.4. From conflict to genocide 1990-1994

The civil war launched on October 1, 1990, lasted, with long periods of cease-fire, for close to four years. Its final three months coincided with the period of the genocide, which was halted only by the ultimate triumph in July 1994 of the RPA over the “genocidaires”.⁵⁰ Throughout this period, old patterns re-emerged.

Indeed, it was always at least possible, if not probable, that history would repeat itself and an opportunistic and threatened government would again awaken the sleeping dogs of ethnic division. There had been no punishment for those Hutu who had led the massacres of the Tutsi in the early 1960s and 1972-73, and the careers flourished of those who organized cruel repression of opponents throughout the first decade and a half of the Habyarimana regime. Now, in the wake of the October 1, 1990, invasion, impunity flourished for the demagogues who were deliberately fuelling the latent animosity toward those they considered perfidious outsiders, a category including not just the Tutsi of the RPF but every Tutsi still in Rwanda, as well as any Hutu alleged to be their sympathizer. Any question of class or geographical division among Hutu had to be submerged in a common front against the intruders. It was not difficult for the government to exploit its own failures in order to rally the majority behind it. In a country where so many had so little land, it took little ingenuity to convince Hutu peasants that the newcomers would reclaim lands they had left long before and on which Hutu farmers had settled. From October 1, 1990, Rwanda endured three and a half years of violent anti-Tutsi incidents.⁵¹

Despite the official end of the civil war between the RPF and the Government forces resulting from the signing of the Arusha Accords⁵² on 4 August, 1993, extremist elements continued to push for less amicable solutions.⁵³ On 23 October 1993, the President of Burundi, Melchior Ndadaye, a Hutu, was assassinated in the course of an attempted coup by Burundi Tutsi soldiers resulting in one of the worst massacres in Burundi's bloody history.⁵⁴ In Rwanda,

⁵⁰ The French word for perpetrators of genocide.

⁵¹ Massacres of Tutsi were carried out in October 1990, January 1991, February 1991, March 1992, August 1992, January 1993, March 1993, and February 1994 to mention only a few. See, e.g., A Desforges (1999) available at <<http://www.hrw.org/reports/1999/rwanda/>> [accessed on 13 September 2000].

⁵² See Peace Agreement Between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, 4 Aug. 1993 [hereinafter Arusha Peace Agreement].

⁵³ Since the beginning of the war and the democratization process, a constant barrage of virulent anti-Tutsi hate propaganda began to fill the air. Clearly, the media played a prominent role in keeping passions at a fever pitch before and during the genocide. See generally J P Chrétien (1995).

⁵⁴ R Lemarchand (1996) p. xiv.

Hutu extremists exploited this assassination to prove that it was impossible to agree with the Tutsi, since they would always turn against their Hutu partners to kill them.⁵⁵

1.3. Genocide and War

On 6 April 1994, under strong international pressure, President Habyarimana and other heads of State of the region met in Dar-es-Salaam (Tanzania) to discuss the implementation of the peace accords. The aircraft carrying President Habyarimana and the Burundian President, Ntaryamira, who were returning from the meeting, crashed around 8:30 pm near Kigali airport. All aboard were killed. Although the responsibility of the crime has never been established, a small group of his close associates—who may or may not have been involved in killing him—decided to execute the planned extermination. Within hours of the plane crash, the killings in Rwanda began. Roadblocks were thrown up to prevent escape. Leaders viewed as moderate or "pro-Tutsi" were singled out to be killed first, and then the campaign of exterminating all Tutsi began. The events unfolded in what seems clearly to have been a preplanned and organized manner.⁵⁶

The killings continued, day and night, for the next fifteen weeks. The international community did virtually nothing to intervene. Indeed, the UN Assistance Mission in Rwanda (UNAMIR), which on April 6 had 2,500 troops in Rwanda to oversee implementation of the Arusha Accords, within weeks pulled out all but a token force of 450, and gave the remaining troops no mandate to intervene in the killing of civilians.⁵⁷ The killing of Tutsi which henceforth spared neither women nor children, continued up to 18 July 1994, when the RPF triumphantly entered Kigali. The estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more.⁵⁸

⁵⁵ As one analyst put it, "The movement known as "Hutu Power", the coalition that would make the genocide possible, was built upon the corpse of Ndadaye." A Desforges (1999) available at <<http://www.hrw.org/reports/1999/rwanda/>> [accessed on 13 September 2000]; E Gasana *et al* "Rwanda" in ACDESS (ed) (1999) 162.

⁵⁶ Accordingly, the assassination of President Juvénal Habyarimana on April 6, 1994, was simply "the spark to the powder keg which set off the massacre of civilians" and not the root cause of the genocide as some seem to suggest. See, *Report of the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Séqui, Special Rapporteur of the Commission on Human Rights*, U.N. ESCOR Commission on Human Rights, 51st Sess., Prov. Agenda Item 12, para. 19, U.N. Doc. E/CN.4/1995/7 (1994) [hereinafter U.N. Doc. E/CN.4/1995/7 (1994)]; For a detailed description of these events, see African Rights (1995) 35-36; See also OAU Panel Report (2000).

⁵⁷ United Nations Independent Inquiry (1999) December, 21; See also Security Council Resolution adjusting UNAMIR's mandate and authorizing a reduction in its strength S/RES/912 (1994) 21 April 1994; OAU Panel Report (2000).

⁵⁸ U.N. Doc. E/CN.4/1995/7 (1994) para. 24; Establishing a reliable toll of those killed in the genocide and its aftermath is important to counter denials, exaggerations, and lies. The necessary data have not been gathered but speculation about death tolls continues anyway, usually informed more by emotion than by fact.

This historical overview shows the need to avoid over-simplistic analysis and stereotyping in considering the history of conflict in Rwanda, which should not in any way be reduced to a basic conflict between the Hutu and the Tutsi.⁵⁹ Such ingredient, though necessary, is not sufficient.⁶⁰ It was necessary to transform those tensions into systematic mass violence, a feat which could only be achieved through careful planning and execution under the direction of political elites.⁶¹ The role (lack) of the leadership in that process especially during the Belgian colonisation and the first and second republic is primordial. In addition, like in many other African countries,⁶² several distortions, corruption and racialisation were introduced in the history of Rwanda. Accordingly, a lack of an objective authoritative non-controversial history must be regarded as one of the basic causes of the conflict.

In 1994, the United Nations Special Rapporteur on the human rights situation in Rwanda identified three causes of the genocide which were "immediately apparent."⁶³ The first was the "rejection of alternate political power" typical of the region, but which "takes on a special form in Rwanda, where it has strong ethnic overtones."⁶⁴ The Special Rapporteur observed that the mass killings of Tutsi "is not ethnic as such, but rather political, the aim being the seizure of political power, or rather the retention of power, by the representatives of one ethnic group, previously the underdogs, who are using every means, principally the elimination of the opposing ethnic group, but also the elimination of political opponents within their own group."⁶⁵

Whichever might be the case, the overriding reality is that large numbers of innocent people suffered at the hands of their fellow citizens and that the outside world did nothing to stop it. On the other hand, establishing the number of persons killed in the genocide will not help much in assessing the number of people involved in their execution. The circumstances of the crimes varied enormously: there were professional soldiers armed with machine guns or grenade-launchers firing into crowds, each of whom may have killed dozens, if not hundreds, of people, and there were groups of assailants armed with clubs or sharpened pieces of bamboo who jointly killed a single person. There can be no simple formula to assess how many killers murdered one victim or how many victims were slain by one killer. A Desforges (1999) available at <<http://www.hrw.org/reports/1999/rwanda/>> [accessed on 13 September 2000].

⁵⁹ See also M Mekenkamp *et al.* (1999) 34.

⁶⁰ While it is true that ethnicity and conflict do interpenetrate in Africa (e.g. Rwanda, Burundi) as elsewhere (e.g. Bosnia), it must be reiterated that ethnicity and religion do not, of themselves, reveal why people would kill each other over their differences. See *Report of the Carnegie Commission* (1998).

⁶¹ "[I]t is often assumed that mass violence is an inevitable human phenomenon. On the contrary, systematic mass violence and large scale atrocities necessarily require organization, planning and preparation, often accomplished under the authority of government". P Akhavan (1996) 7 *Duke J. of Comp. & Int'l L.* 328.

⁶² African conflicts show a number of crosscutting themes and experiences. See U.N. Secretary-General Report 1998.

⁶³ U.N. Doc. E/CN.4/1995/7 para. 55.

⁶⁴ *Ibid* para 56.

⁶⁵ *Ibid.*

The second identified cause of the genocide was the "incitement to ethnic hatred and violence."⁶⁶ In this respect, the most significant instrument was Radio-Télévision Libre des Mille Collines (RTLM), the propaganda organ of the Hutu extremists: "RTLM does not hesitate to call for the extermination of the Tutsi and it is notorious for the decisive role that it appears to have played in the massacres. It is known as the 'killer radio station', and justifiably so."⁶⁷ This systematic campaign of incitement to ethnic hatred and violence was "made more dangerous by the fact that the generally illiterate Rwandese rural population listens very attentively to broadcasts in Kinyarwanda; they hold their radio sets in one hand and their machetes in the other, ready to go into action."⁶⁸

The third cause was "impunity" which, like incitement, was "a recurrent cause of the massacres."⁶⁹ Impunity is the cumulative effect of the rejection of alternate political power and the incitement to ethnic hatred and violence. Because, at the time of the genocide in 1994, "no legal steps [had] been taken against those responsible for the earlier and present massacres, although they [were] known to the public and the authorities,"⁷⁰ there was no fear of punishment.

I conclude this chapter by stating that the tragedy of 1994 cannot be reduced to an "uncontrollable spontaneous ethnic violence" or just a cold reaction to objective or structural problems. As a matter of facts, the oppressing poverty of the country,⁷¹ fear of domination and threat of war were the proximate causes of the events, yet these factors emerged in a predisposed psycho-cultural context laden with mythico-histories, fears, and misperceptions, indubitably inflamed by extremist propaganda, that account for the intensity of violence. The point is mere that the genocide ideology was the product of a much longer and much more complex process.⁷² The exclusion policy, the lack of leadership, the lack of an objective authoritative non-controversial history, the lack of a constitutional culture, the incitement to ethnic hatred and violence, the culture of impunity, the proliferation of arms,⁷³ the struggle for

⁶⁶ *Ibid.*

⁶⁷ *Ibid* para 59.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* para 60.

⁷⁰ *Ibid* para 61.

⁷¹ Poverty is both a cause and a consequence of conflict. See also U.N. Secretary-General Report (1998).

⁷² See also G Prunier (1995) xi, 40; S Utterwulge (August 1999) 2.3 *OJ CPR* available at <<http://www.trinstitute.org/ojpcr/>> [Accessed on 15 November 2000].

⁷³ See M E Brown (ed) (1996) 247; See also Africa Watch *A Human Rights Watch Short Report* 5 (7) (June 1993) 6-10.

power and resources⁷⁴ among Tutsi factions, among Hutu factions or among Hutu-Tutsi factions, the structural socio-economic situation (e.g., poverty, overpopulation, land pressure) but also psycho-cultural (e.g., related to identity, irrational myths, mistrust and fear) are but some of the factors that explain the conflict in Rwanda. Therefore, it is my contention that for this conflict to be genuinely resolved, both kind of causes must be identified and then fully considered in conflict resolution strategies.

⁷⁴ Competition for resources typically lies at the heart of conflict. The lack of domestic capital ensured that the state would be an important source of resources and would become the subject of intense distributional conflicts. See U.N. Secretary-General Report (1998). Nevertheless, the Rwandese conflict should probably not be interpreted as being triggered by demographic pressure, as some analysts and media have suggested. Research has shown that the relationship between demographic pressure and genocide is much more indirect and complex than outside observers tend to believe. See M Mekenkamp *et al.* (1999); S Utterwulge (August 1999) 2.3 *OJCPR* available at <<http://www.trinstitute.org/ojpcr/>> [Accessed on 15 November 2000].

CHAPTER 2: JUSTICE IN THE AFTERMATH OF GENOCIDE

2.1. Introduction

A basic question confronting Rwanda today is how to deal with the legacy of the conflict that culminated in the genocide of the Tutsi in 1994 and the massacres of Hutu opponents of the genocide. The scale of the genocide and the extent to which it affected the entire country and almost the entire population – whether as victims or as perpetrators – have presented Rwanda with obstacles of a virtually unprecedented magnitude.

How can Rwanda respond to public demands for redress of the legitimate grievances of some without creating new injustices for others? The dilemma of how to deal with crimes committed by officials and agents of a prior regime is not unique to Rwanda.⁷⁵ A wide variety of mechanisms are available for achieving various aspects of accountability for crimes of mass violence.⁷⁶ The crucial questions to be addressed are: which of the available mechanisms of accountability should be used in which circumstances? And how, can the efficacy of those mechanisms be assured?

International standards are evolving which help deal with this question; there is a growing consensus that, at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is impermissible.⁷⁷

This chapter, after briefly reviewing principles of international law, both customary and conventional which require prosecution of crimes of mass violence, examines the approaches to justice that have been employed so far in Rwanda and considers the obstacles to justice that have been confronted despite--or in some instances, because of--the approaches taken. The chapter discusses the role of the International Criminal

⁷⁵ See, e.g., J Dugard (1997) *SAJHR* 259-268; J Sarkin (1996) 12 *SAJHR* 618; J Sarkin (1997) *Commonwealth Law Bulletin* 528; J Sarkin (1998) 20(3) *Human Rights Quarterly* 628; M R Rwelamira in M R Rwelamira & G Werle (eds) (1996) 3-19; K Marxen in M R Rwelamira & G Werle (eds) (1996) 33-39.

⁷⁶ A broad array of thoughtful contributors from more than a decade of debate on "transitional justice" are included in the three volumes edited by Neil J. Kritz for the United States Institute of Peace, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. The term "transitional justice" characterizes the choices made and quality of justice rendered when new leaders replace authoritarian predecessors presumed responsible for criminal acts in the wake of the "third wave of democratisation." See R L Siegel (1998) 20 *Human Rights Quarterly* 433..

⁷⁷ J Malamud-Goti (1990) 12 *Human Rights Quarterly* 1; D F Orentlicher (1991) 100 *Yale Law Journal* 2537; J Paust (1989) *Houst. Journal Int'l Law* 337; N Roht-Arriaza 'States Responsibility to investigate and Prosecute Human Rights Violations in International Law' (1990) 78 *California Law Review* 451.

Tribunal for Rwanda⁷⁸ and the terms of the Rwandese legislation on the handling of genocide-related cases.⁷⁹ This, it is hoped, will provide the necessary background for an evaluation of the recently proposed *gacaca* tribunals.⁸⁰

2.2. The Duty to prosecute in international law

In principle, states have some discretion regarding the actual content of a human rights policy to deal with past abuses. However, while “the national culture, the history of the former regime, and the political realities of the transition process all influence the approach adopted by any society emerging from a period of repression,”⁸¹ while each country’s experience is not only dramatic but unique,⁸² and however relative the mechanisms of accountability and their outcomes may be,⁸³ that in itself does not and cannot exclude the application of existing international norms and standards which represent the threshold of international legality.⁸⁴

Before weighing the policies for and against prosecution in any given case, governments and international organisations officials must first determine whether there exists an international law obligation to prosecute the particular offence.

2.2.1. The Duty to punish in international conventions

While analysts agree that governments confronting a legacy of state violence should comply with established rules of international law, there is a tendency toward vagueness on the question of what precisely the law requires.⁸⁵ Increasingly, however, several

⁷⁸ See S.C. Res. 955, U.N. Doc. S/RES/955 (1994); see also *infra* 2.3.1.

⁷⁹ *Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990*, Organic Law No. 08/96 (August 30, 1996), in (1996) 18 *Official Journal of The Republic Of Rwanda* (Sept. 15, 1996) [hereinafter *Genocide Law*].

⁸⁰ See Draft Organic Law creating “Gacaca Jurisdictions” and *Organizing Prosecutions of Offenses that Constitute the Crime of Genocide or Crimes Against Humanity Committed Between October First, 1990 and December 31, 1994*, Draft Organic Law (on-file with author, also Annex I) [hereinafter *Gacaca Law*]; see also, *infra*, Chapter Three.

⁸¹ RH Solomon in NJ Kritz (ed) (1995) xv.

⁸² CD Smith in NJ Kritz (ed) (1995) xvii.

⁸³ R L Siegel (1998) 20 *Human Rights Quarterly* 440.

⁸⁴ “in a world order based on the rule of law and not on the rule of might, the attainment of peace to end conflicts cannot be totally severed from the pursuit of justice whenever that may be required in the aftermath of violence”. See M C Bassiouni (1996) 59 *Law & Contemp. Probs.* 13.

⁸⁵ This tendency can be readily explained: the implications of the most pertinent areas of international law are not immediately obvious. International human rights law traditionally has allowed governments substantial discretion to determine the means they will use to ensure protected rights (first and foremost

international conventions have clearly provided for a duty to prosecute crimes defined therein.

2.2.1.1. The 1949 Geneva Conventions

While conflicts of an international character are adequately covered by the four Geneva Conventions of 1949⁸⁶ and Protocol I of 1977⁸⁷, conflicts of a non-international character are less adequately covered under common article 3 of the Geneva Conventions but more so under Protocol II of 1977.⁸⁸ Thus, parties to the Geneva Conventions have an obligation to search for, prosecute and punish perpetrators of grave breaches⁸⁹ of the Conventions unless they choose to hand over such persons for trials by another state party.⁹⁰ It has been argued, however, that the duty to prosecute is limited to the context of international conflict.⁹¹

Having determined that the conflict in Rwanda constitutes a non-international armed conflict,⁹² the Independent Commission of Experts on Rwanda asserted that common article 3 and Additional Protocol II are applicable.⁹³ Because Rwanda is a party to both

protection of human rights should be realised at the national levels), while international penal law has often focussed on the power - not the duty - of governments to punish violations committed outside their territorial jurisdictions. See D F Orentlicher (1991) 100 *Yale Law Journal* 2551.

⁸⁶ See the Four Geneva Conventions of Aug. 12, 1949 : Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 75 U.N.T.S. 31 ; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Times of War (Geneva Convention No. IV), Aug. 12, 1949, 75 U.N.T.S. 28.

⁸⁷ Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 [hereinafter Protocol I]. See especially arts. 11, 85, 86.

⁸⁸ Protocol II Additional to the Geneva Convention of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 [hereinafter Protocol II].

⁸⁹ Graves breaches include wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction of property not justified by military necessity, wilfully depriving a civilian of the rights of fair and regular trial, and unlawful confinement of a civilian. See Articles 50, 51, 130 and 147 of the Geneva Conventions I,II, III, and IV respectively.

⁹⁰ See Articles 49, 50, 129 and 146 of the Geneva Conventions I,II, III, and IV respectively, and Article 85 of Protocol I.

⁹¹ See, e.g., M Scharf (1996) 59 *Law & Contemporary Probs.* 41

⁹² See also *Prosecutor v Akayesu* No. ICTR-96-4-T *Judgement and Sentence*, Trial Chamber I (2 September 1998) also available at <<http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>> [accessed on 13 September 2000].

⁹³ UN Doc. S. 1994 1125 annex. paras. 90-93 (1994). Rwanda has been party to Protocol II since 1984.

the Geneva Conventions and the Additional Protocols, the question here is whether these treaty provisions, which prohibit certain enumerated acts, establish a duty to punish those who commit listed offences. Until very recently, the accepted wisdom was that neither common article 3 (which is not among the grave breaches provision of the Geneva Convention) nor Protocol II (which contains no provisions on grave breaches) provided a basis for prosecution.⁹⁴

Just because the Geneva Conventions created the obligation of *aut dedere aut judicare*⁹⁵ only with regard to grave breaches does not, however, mean that any state party to the Geneva Conventions may not punish other breaches.⁹⁶ Indeed, Article 129(3) of the Third Geneva Convention provides that each state party “shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches.” Identical provisions are contained in the other 1949 Geneva Conventions. Even if there is no clear obligation to punish or extradite authors of violations of the Geneva Conventions that are not encompassed by the grave breaches provisions, such as common article 3, all states have the right to punish those guilty of such breaches.⁹⁷ Moreover, in the *Nicaragua*⁹⁸ case, the International Court of Justice recognised the applicability of common article 1 of the Conventions to non-international armed conflicts addressed by common article 3.⁹⁹ The command of article 1 that all contracting parties must respect and ensure respect may, of course, entail resort to penal measures to suppress violations.

⁹⁴ Michael Scharf notes: “[T]here are two reasons why the Geneva Conventions (the duty to prosecute grave breaches) would not, therefore, apply to (some) countries that refused to prosecute persons responsible for atrocities. First, there is a high threshold of violence necessary to constitute a genuine armed conflict, as distinct from lower level of disturbances such as riots or isolated and sporadic acts of fighting. Second, the violence in those countries did not have an international character as recognised by the Geneva Conventions (common article 2)” M Scharf (1996) 59 *Law & Contemporary Probs.* 41.

⁹⁵ The expression *aut dedere aut judicare* is commonly used to refer to the alternative obligation to extradite or prosecute which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conducts. See M C Bassiouni & E M Wise (1995) 3-6.

⁹⁶ T Meron (1995) 89 *Am. J. Int'l L.* 569.

⁹⁷ Indeed, “(...) the true meaning of universal jurisdiction is that international law *permit* any states to apply its laws to certain offenses even in the absence of territorial, nationality and other accepted concept with the offender or the victim”. T Meron (1995) 89 *Am. J. Int'l L.* 568-71.

⁹⁸ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ Rep. 14.

⁹⁹ 1986 ICJ Rep. 114.

2.2.1.2. The Genocide Convention

As regards the massacres which took place in Rwanda between April and July 1994, the question of whether they constitute genocide was dealt with by the International Criminal Tribunal for Rwanda¹⁰⁰ in its groundbreaking decision of September 2, 1998 in *Prosecutor v Akayesu*.¹⁰¹ According to paragraph 2 of Article 2 of the Statute of the International Criminal Tribunal for Rwanda,¹⁰² which reflects verbatim the definition of genocide as contained in the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁰³ genocide means any of the following acts committed with intent to destroy, in whole or in part,¹⁰⁴ a national, ethnical, racial or religious group as such, namely, *inter alia*: killing members of the group; causing serious bodily or mental harm to members of the group.¹⁰⁵

¹⁰⁰ On November 8, 1994, having determined that the "genocide and other systematic, widespread and flagrant violations of international humanitarian law . . . committed in Rwanda . . . constitute a threat to international peace and security," the Security Council adopted Resolution 955 whereby it established the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandese citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., para. 4, U.N. Doc. S/RES/955 (1994). See, *infra*, 2.3.1.

¹⁰¹ No. ICTR-96-4-T also available at <<http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>> [accessed on 13 September 2000].

¹⁰² See Statute of the International Criminal Tribunal for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

¹⁰³ The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, 78 U.N.T.S. 277 [hereinafter the Genocide Convention].

¹⁰⁴ The Genocide Convention definition specifies that genocide must aim at the destruction of the group "in whole or in part". Obviously, there is a quantitative threshold. The term will be trivialised if it were extended to cover isolated hate crimes and racially motivated violence. The quantitative test is more than a mere numbers game. Because genocide is a crime of intent, the real question to be asked is what is the purpose of the offender, not what is the result. Even if only a few were killed or injured, the crime is genocide if the intent is to destroy the group "in whole or in part". Where there are large numbers of victims, the proof of such an intent is relatively easy to make, and is little more than a logical deduction from the facts. Where the numbers are low, some other elements will be necessary such as evidence of genocidal speeches and declarations, destruction of cultural and religious symbols as an accompaniment of acts of violence, and so on. See W A Schabas (July, 9, 1999) *unpublished paper* 6.

¹⁰⁵ In the 1948 convention, then, the crime of genocide has both a physical element – comprising certain enumerated acts, such as killing members of an ethnic group – and a mental element (*mens rea* or *dolus specialis*) – those acts must be committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group "as such". See, e.g., D F Orentlicher in R Gutman & D Reiff (eds) (1999) 153. It was not until September 2, 1998 – a half century after the United Nations General Assembly adopted the Genocide Convention – that the first verdict interpreting the convention was rendered by an international tribunal following the trial of Jean-Paul Akayesu.

Indeed, it was felt in some quarters¹⁰⁶ that the tragic events which took place in Rwanda were only part of the war between the Rwandese Armed Forces (RAF) and the Rwandese Patriotic Front (RPF).¹⁰⁷ In *Akayesu*, Trial Chamber I concludes that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group.¹⁰⁸ In addition, in the opinion of the Chamber, the genocide appears to have been meticulously organized.¹⁰⁹ Finally, as the defendant argued that the massacres in Rwanda were politically motivated and the tragic events that took place in 1994 occurred solely within the context of the conflict between the RAF and the RPF, the Trial Chamber, in response, concluded that, “alongside the conflict...genocide was committed in Rwanda in 1994 against the Tutsi as a group”.¹¹⁰ That the execution of this genocide “was probably facilitated by the conflict” did not negate the fact that genocide occurred.¹¹¹ In the opinion of the Chamber, “it should be stressed that although the genocide against the Tutsi occurred concomitantly with the conflict, it was, evidently, fundamentally different from the conflict”.¹¹²

At the core of the Genocide Convention are the provisions dealing with the obligations to punish the crime. The principal purpose of the Convention was, as its name suggests, to prevent genocide by ensuring punishment of the crime. Virtually the entire Convention is devoted to this purpose. Pursuant to Article 1, Contracting Parties “confirm that genocide...is a crime under international law which they undertake to prevent and to

¹⁰⁶ There has been some propaganda being circulated by the displaced Hutu leadership that denies the genocide and places the blame for all past violence on the genocide victims. The view held among this group is that there was no genocide but rather killings by both sides in the context of a war and there was no extermination of the Tutsi by the Hutu. See African Rights (Nov. 1994) 3-4, see also J Sarkin (1999) 21 *Human Rights Quarterly* 772.

¹⁰⁷ Interestingly, Belgian defence lawyer Luc de Temmerman, in the trial of Georges Rutanganda, the vice president of the interhamwe militia argued before the ICTR that: “[i]t is not the Hutu who are guilty of this so-called genocide. We are convinced there was no genocide. It was a situation of mass killings in a state of war where everyone was killing their enemies....There are a million people dead, but who are they? They are 800,000 Hutu and 200,000 Tutsi. Everyone was killing but the real victims are the Hutu. So, they have got this so-called genocide all wrong” quoted in J Sarkin (1999) 21 *Human Rights Quarterly* 783 fn 114. See also Letter from Agnès Ntamabyaliro to the President of the United Nations Commission on Human Rights (Sept. 27, 1994) in P Akhavan (1996) 7 *Duke J. of Comp. & Int'l L.* 341.

¹⁰⁸ “Clearly therefore, the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. In any case, the Tutsi children and pregnant women would, naturally, not have been among the fighters”. See *Prosecutor v Akayesu* No. ICTR-96-4-T *Judgement and Sentence*, Trial Chamber I (2 September 1998) para 125.

¹⁰⁹ *Ibid* para 126.

¹¹⁰ *Ibid* para 127.

¹¹¹ *Ibid*.

¹¹² *Ibid* para 128. The criminal nature of genocide committed in internal conflict have never been doubted; the customary law character of the peremptory prohibitions stated in the Genocide Convention was affirmed long ago by the International Court of Justice. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) ICJ Rep 15 23 (Advisory Opinion of May 28).

punish,” Article 3 sets forth various forms of participation in genocide that “shall be punishable”. The Genocide Convention provides an absolute obligation to prosecute persons responsible for genocide as defined in the Convention.¹¹³ Article 6 specifies the tribunals that should try cases of genocide: “persons charged with genocide or any other acts enumerated in Article 3 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.” These provisions leave unambiguous Contracting Parties’ duty to punish persons who commit genocide in the states’ territory.¹¹⁴

2.2.1.3. General Human Rights Conventions

Unlike the international criminal conventions discussed above, “general human rights conventions” such as the International Covenant on Civil and Political Rights,¹¹⁵ the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹¹⁶ the American Convention on Human Rights,¹¹⁷ and the African Charter on Human and People’s Rights¹¹⁸ are silent about the duty to punish violations of the rights they were designed to protect. These general human rights conventions do, however, obligate states to “ensure” the rights enumerated therein.¹¹⁹

¹¹³ Article 4 of the The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, 78 U.N.T.S. 277 [hereinafter the Genocide Convention]. states: “Persons committing genocide or any other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Article 5 requires states to “provide effective penalties” for persons guilty of genocide.

¹¹⁴ Rwanda has been a party to the Genocide Convention since 1975, see Décret-loi n° 8/75 February 12, 1975 in (1975) *Official Journal of the Republic of Rwanda (J.O.)* 230. The duty probably would not arise under the Convention unless a state became a party before the acts constituting genocide took place. See Vienna Convention of the Law of Treaties, U.N. Doc. A/Conf. 39/27, May 23, 1969 reprinted in (1969) 8 I.L.M. 679 [hereinafter Vienna Convention], art. 28.

¹¹⁵ *Adopted* 16 Dec. 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Rwanda has been a party to the ICCPR since 1975, see Décret-loi n° 8/75 February 12, 1975 in (1975) *J.O.* 246. [hereinafter ICCPR]

¹¹⁶ *Signed* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention].

¹¹⁷ (Pact of San Jose), *signed* 22 Nov. 1969, O.A.S.T.S. 36, Off. Rec., OEA/ser. L/V/II.23,doc.21, rev.6 (1979) (entered into force July 18, 1978) *reprinted in* (1970) 9 I.L.M. 673 [hereinafter American Convention].

¹¹⁸ *Adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981) (entered into force October 21, 1986) *reprinted in* (1982) 21 I.L.M. 58 [hereinafter African Charter].

¹¹⁹ Note, however, the different wording in article 1 of the African Charter on Human and Peoples’ Rights: “The member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative and other measures *to give effect to them*” (emphasis added). This provision is rather ambiguous, as it does

Some commentators take the position that the duty to *ensure* rights implies a duty to prosecute violators.¹²⁰ The United Nations Human Rights Committee,¹²¹ established to monitor the compliance and implementation of the ICCPR, has repeatedly asserted that states must investigate gross human rights violations, bring perpetrators to justice and provide compensation for victims.¹²² Support for prosecution¹²³ is also found in the decisions of the Inter-American Court and Commission of Human Rights¹²⁴ holding that amnesties granted by Argentina and Uruguay were incompatible with the American Convention on Human Rights; in the judgment of the Inter-American Court of Human Rights in the landmark case of *Velasquez Rodriguez*¹²⁵ holding, in respect of Honduras, that article 1(1) of the Convention requiring states to “ensure the rights set forth in the Convention, obliged states to investigate and punish any violation of the rights recognized by the American Convention of Human Rights”; in the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights¹²⁶ calling on states to prosecute those responsible for grave human rights violations and to abrogate legislation leading to impunity for such crimes.¹²⁷

not require member states to “guarantee” and “ensure” the rights in the Charter. See also C Heyns & F Viljoen (1999) 15 (3) *SAJHR* 434.

¹²⁰ See, e.g., N Roht-Arriaza (1990) 78 *California Law Rev.* 467.

¹²¹ The Committee is empowered *inter alia* to comment on communications received from individuals who are from states that have ratified the Optional Protocol to the Covenant and who claim to have suffered a violation of any of the rights protected by the Covenant. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 A, art. 1, U.N. Doc. A/6316 (1966); See generally D McGoldrick (1994)..

¹²² *Muteba v Zaire*, Comm. No. 124/1982, 39 U.N. GAOR Supp. (No. 40) Annex XIII, U.N. Doc. A/39/40 (1984); *Boaboeram v. Surinam*, Comm. Nos. 146/1983 and 148-154/1983, 40 U.N. GAOR Supp. (No. 40) Annex X, 13.2, U.N. Doc. A/40/40 (1985); *Quinteros v. Uruguay*, Comm. No. 107/1981, 38 U.N. GAOR Supp. (No. 40) Annex XXII, U.N. Doc. A/38/40 (1983); *Baustita de Arellana v. Columbia*, Comm. No. 563/1993; See also General Comment No. 20 (44) (art. 7), UN Doc CCPR/C21/Rev. 1/Add 3, para 15 (April 1992); see also D F Orentlicher (1991) 100 *Yale Law Journal* 2568-76.

¹²³ See also J Dugard (1999) *unpublished paper* (on-file with author).

¹²⁴ Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay) 82nd session OEA/LV/11.82.Doc. 25 (Oct. 2, 1992); *Ibid*, Report No. 24/92 (Argentina) Doc. 24.

¹²⁵ Inter-American Court of Human Rights, *Velasquez Rodriguez* case, Judgment of July 29, 1988 (1988) 9 *Human Rights Journal* 212.

¹²⁶ Part II, para 60, UN Doc. A/Conf/57/24 (October 1993).

¹²⁷ Of particular pertinence to the general principle of law and custom obligating states to combat impunity are the resolutions of the United Nations General Assembly and its Human Rights bodies (so-called “soft law” of the United Nations). Among others, the right to effective remedy is included in article 8 of the Universal Declaration of Human Rights (U.N. GA Res. 217 (III), 10 Dec. 1948) [hereinafter Universal Declaration] ; The Principles of International Cooperation in Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity (U.N. GA Res. 3074 (XXVIII), 3 Dec. 1973, principles 1 and 5; The Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (U.N. GA Res. 40/34, 29 November 1985, U.N. GAOR Supp. (No. 53), U.N. Doc. A/40/53 213. See also Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation And Rehabilitation For Victims of Gross*

2.2.2. Customary International Law: Crimes against Humanity

The definition of crimes against humanity dates back to the Nuremberg trials.¹²⁸ On the 11th of December 1946, the UN General Assembly affirmed the principles of International law recognised by the Charter of the Nuremberg Tribunal and its judgement.¹²⁹ Curiously, however, there has been no specialised international convention since then on crimes against humanity. Still, that category of crimes has been included in Article 3 of the Rwanda Tribunal,¹³⁰ Article 5 of the Yugoslavia Tribunal¹³¹ and Article 7 of the Rome Statute of the International Criminal Court.¹³² In the accompanying report to the Statute of the Yugoslavia Tribunal the Secretary General of the United Nations expressed the view that the Statute is based on “rules of international humanitarian law which are beyond doubt part of international customary law so that the problem of adherence of some but not all States to specific conventions does not arise”.¹³³

Whether international law creates individual criminal responsibility, depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, states, groups or other authorities, and/or all of these.¹³⁴ The very nature of an international crime entails a duty on states to prosecute

Violations of Human Rights And Fundamental Freedoms, Mr Theo Van Boeven, Special Rapporteur, U.N. Doc. E/CN. 4/Sub. 2/1992/8 (interim report); E/CN. 4/Sub. 2/1993/8 (final report); E/CN. 4/sub 2./1996/17 (amended principles).

¹²⁸ See, Charter of the International Military Tribunal of Nuremberg, 82 U.N.T.S. 280. Article 6(c) defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or prosecutions on political, racial or religious grounds in execution for or in connection with any crime within the jurisdiction of the tribunal [...]”. It is now well settled that customary international law does not require the existence of an armed conflict for an act to be a crime against humanity, a position reflected in the ICTR Statute and the Rome Statute. See, *Statute of the International Criminal Tribunal for Rwanda*; U.N. S.C. Res. 955 annex (8 Nov 1994), (1994) 33 I.L.M. 1602 [hereinafter ICTR Statute], art. 4; UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/9 (1998) [hereinafter ICC Statute]; art. 7. See also, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, No. IT-94-1-AR72, para. 78, 140-41 (ICTY, App. Chamber, Oct 2, 1995); *Prosecutor v. Tadic*, No. IT-94-1-A, para. 238-72 (ICTY, App. Chamber, Jul. 15, 1999).

¹²⁹ U.N. G.A. Res. 95(I) 1946.

¹³⁰ See, ICTR Statute.

¹³¹ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. S/25704, annex (1993) 32 ILM (1993) 1192, adopted by U.N. S.C. Res. 827 (25 May 1993) reprinted in (1993) 14 *Hum. Rts. L. J.* 211.

¹³² See, ICC Statute.

¹³³ Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. No. S/25704, para. 34 (1993) 32 ILM (1993) 1192; See also *Prosecutor v Tadic*, Opinion and Judgement, 7 May 1997, para. 609-617, Case No. IT-94-1-T, reprinted in 36 ILM (1997) 908.

¹³⁴ See generally N Q Dinh et al. (eds) (5th ed. 1994) 621.

and punish those who have committed them.¹³⁵ That an obligation is addressed to government is not dispositive of the penal responsibility of individuals, if individuals clearly must carry out that obligation.¹³⁶

Crimes against humanity and the norms that regulate them are part of *ius cogens*.¹³⁷ It flows from there, that all states are not only entitled but are as well obliged to exercise criminal jurisdiction over them.¹³⁸ The principle was recognised by the International Court of Justice in the *Barcelona Traction Case*.¹³⁹ The Court held that the prohibition in international law of acts of aggression, genocide, and rules concerning the basic rights of the human person are of such a nature, that they are obligations *erga omnes*.¹⁴⁰ This means that in the view of the importance of the rights involved, all states have a legal interest in ensuring that they are protected.¹⁴¹

In 1973, the UN General Assembly declared that all states have extensive obligations to co-operate with each other in bringing those responsible for crimes against humanity to justice.¹⁴² Similarly, the ICC Statute affirmed in its preamble that “the most serious crimes of concern to the international community as a whole must not go unpunished” and “that it is the duty of every State to exercise its criminal jurisdiction for international crimes”.

¹³⁵ See also Y Dinstein (1975) 5 *Israel Y'bk on Hum. Rts.* 55.

¹³⁶ As the International Military Tribunal so eloquently stated, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Judgement of the International Military Tribunal at Nuremberg from 1 October 1946, *reprinted in* (1947) 41 *Am. J. Int'l L. Suppl.* 172-333, 221.

¹³⁷ The term *jus cogens* usually is used to refer to a body of overriding or “peremptory” norms of such paramount importance that they cannot be set aside by acquiescence or agreement of the parties to a treaty. The concept of *jus cogens* developed as a doctrine of treaty law and was codified in Article 53 of the 1969 Vienna Convention. See also K Parker & L B Neylon (1989) 12 *Hast. Int'l and Comp L Rev* 411-451.

¹³⁸ M C Bassiouni (1996) 25 *Law & Contemp. Probs.* 63.

¹³⁹ *Barcelona Traction, Light and Power Company Ltd.* Judgement, ICJ Rep. 1970, 32.

¹⁴⁰ *Ibid.*; See also Article 40(3) in conjunction with articles 41-53 of the International Law Commission's (ILC) Draft Articles on State Responsibility (1998) 37 *I.L.M.* 440.

¹⁴¹ As Van Den Wyngaert puts it: “[T]he social and moral interest in dealing with such crimes (war crimes, genocide and crimes against humanity) on a global scale is today perceived as a global, international interest, that transcends the interests of the states where the crimes were committed, the interests of the victims and the interests of any other states that may want to prosecute”. C Van Den Wyngaert in M C Bassiouni (ed) (1996) III (Typescript); see also M C Bassiouni (1992) 499-508.

¹⁴² According to these UN principles “Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subjected to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.” See, UN Principles of International Co-Operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, General Assembly Res. 3074 (XXVIII), 3 Dec. 1973, Principle 5.

States pledge further to be “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.¹⁴³

It is also widely accepted now that crimes against humanity are subject to universal jurisdiction.¹⁴⁴ Several countries, including Spain, France, Canada and Belgium, have passed “enabling”¹⁴⁵ legislation to facilitate the prosecution of crimes against humanity in their courts.¹⁴⁶ Yet, the system in place to assure that perpetrators of crimes that “shock the conscience of mankind”¹⁴⁷ should not go unpunished is universal jurisdiction combined with the rule that states should either extradite or prosecute war criminals.¹⁴⁸

Conventional humanitarian and human rights law, the soft law of the United Nations and customary international law leave no doubt: perpetrators of gross human rights violations must be prosecuted and punished. Support for this principle is overwhelming and has been repeated by nearly all nation states in various UN and regional conventions and resolutions.

2.3. Criminal Trials

The international community, the Rwandese State, and other nations must share the burden of rendering justice for the crimes committed in Rwanda.¹⁴⁹ There are indeed sufficient norms; what is needed is the political will to enforce them.¹⁵⁰

¹⁴³ ICC Statute, Preamble, para. 4, 5, 6.

¹⁴⁴ See, e.g., M C Bassiouni (1992) 510-27; D F Orentlicher (1991) 100 *Yale Law Journal* 2537-55.

¹⁴⁵ An easy answer to the question of retrospective legislation has been to say that statutes extending jurisdiction of the court or the limitation periods are but “enabling” statutes, which do not create new crimes and therefore do not fall under the legality principle. This principle is indeed restricted to substantive rules and does not apply to procedural rules. See C Van Den Wyngaert in M C Bassiouni (ed) (1996) III (Typescript); See also *infra* 2.2.2.1.

¹⁴⁶ On this ground, the highest criminal court in Spain, the Audiencia Nacional, rejected a challenge by state prosecutors to the jurisdiction of the Spanish judiciary to try General Pinochet. See Amnesty International (1998). See also, in Canada, *Regina vs. Finta* (1989) 82 I.L.R. 424. In the *Barbie* Case the French *Cour d'Appel* (Court of Appeal) held that “by reason of their nature crimes against humanity with which Barbie is indicted do not simply fall within the scope of the French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefore are completely foreign”. *Fédération Internationale des Déportés et Internés Résistants et Patriotes & Others v. Barbie* (1985) 78 I.L.R. 128 136.

¹⁴⁷ See P Akhavan (April-June 2000) *Africa Legal Aid* 23.

¹⁴⁸ See C Van Den Wyngaert in M C Bassiouni (ed) (1996) III (Typescript).

¹⁴⁹ See, *supra*, 2.2.

¹⁵⁰ In practice, however, in various parts of the world, it is far more the exception than the rule to prosecute those who have committed serious violations of human rights. See, D Bronkhorst (1995) 91.

2.3.1. The International Criminal Tribunal for Rwanda

In the circumstances of Rwanda, an international tribunal was required because the crime of genocide appealed for a collective response from the international community.¹⁵¹ On November 8, 1994, having determined that the "genocide and other systematic, widespread and flagrant violations of international humanitarian law . . . committed in Rwanda . . . constitute a threat to international peace and security,"¹⁵² the Security Council adopted Resolution 955 whereby it established the "International tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandese citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994".¹⁵³

The tribunal is to judge persons accused of genocide, crimes against humanity, violations of article 3 common to the Geneva Conventions and Protocol II Additional to the Conventions.¹⁵⁴ It is accorded jurisdiction over persons of whatever nationality accused of committing such crimes in Rwanda and over Rwandese charged with such crimes in neighbouring states as well.¹⁵⁵ The mandate of the tribunal extends to crimes committed from January 1, 1994 to December 31, 1994.¹⁵⁶

The challenge of the tribunal is to prove that international justice can contribute to the creation of lasting peace in the aftermath of social breakdown. In other words, the

¹⁵¹ See, Resolution 260 (III) UNGA (December, 9 1948): "Having considered the declaration made by the General Assembly of the United Nations in its resolution 96(1) dated 11 December 1946 that genocide is crime under international law; contrary to the spirit and aims of the United Nations and condemned by the civilised world; Recognising that at all periods of history genocide has inflicted great losses on humanity; and Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required; Hereby agree as hereinafter provided."

¹⁵² S.C. Res. 955, U.N. Doc. S/RES/955 (1994).

¹⁵³ *Ibid.* It is instructive to note that it was not the massive and systematic scale of the human rights violations as such which triggered Security Council action, but rather, the determination that such violations, in the particular circumstances of the former Yugoslavia and Rwanda, constituted a "threat to international peace and security" as required by Chapter VII of the Charter. See, U.N. Charter art. 39. For an overview of the establishment of the Rwanda Tribunal, see P Akhavan (1996) 90 *Am. J. Int'l L.* 501.

¹⁵⁴ ICTR Statute, arts. 2, 3 & 4.

¹⁵⁵ *Ibid.* art. 5.

¹⁵⁶ *Ibid.* art. 7.

question is whether and to what extent an *ad hoc* international criminal tribunal can contribute to the reconciliation process in the wake of genocide.¹⁵⁷

Supporters of the tribunal tend to say that its fundamental contribution to reconciliation lies in the notion of individualizing guilt. As Judge Richard Goldstone explained with respect to the International Military Tribunal at Nuremberg:

“The trials of war criminals ensured that guilt was personalised -- when one looks at the emotive photographs of the accused in the dock at Nuremberg one sees a group of criminals. One does not see a group representative of the German people -- the people who produced Goethe or Heine or Beethoven. The Nuremberg Trials were a meaningful instrument for avoiding the guilt of the Nazis being ascribed to the whole German people. Then, too, the Nuremberg Trials played an important role in enabling the victims of the Holocaust to obtain official acknowledgment of what befell them”.¹⁵⁸

Updated to the context of Rwanda, its relevance is even clearer. If Tutsi and Hutu are to rebuild any sort of common society, they must learn not to judge each other merely by virtue of the group to which they belong; “establishing the responsibility of *individual* Hutu is also the only way to diminish the ascription of *collective* guilt to all Hutu. The unexamined and incorrect assumption that all Hutu killed Tutsi, or at least actively participated in the genocide in some way, has become increasingly common both among Rwandese and outsiders.”¹⁵⁹

As far as this goes, it is an attractive and plausible idea. But the argument is more ambiguous than it may at first appear. Trials inevitably fail to apportion all the guilt to all those responsible.¹⁶⁰ The former Prosecutor of the Tribunal has already indicated that the “essential objective” of his office is “to bring to justice those most responsible both at the national and local level for the mass killings that took place in Rwanda in 1994,” referring in particular to persons in positions of leadership and authority.¹⁶¹ The tiny number of

¹⁵⁷ See also Preamble, ICTR Statute.

¹⁵⁸ R. J. Goldstone “50 Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals” in A. J. Jongman (ed.) (1996) *Contemporary Genocides: Causes, Cases, Consequences* 215, 215-216 cited in P. Akhavan (1997) 7 *Duke J. of Comp. & Int'l L.* 375.

¹⁵⁹ A. DesForges (1999) available at <<http://www.hrw.org/reports/1999/rwanda/>> [accessed on 13 September 2000].

¹⁶⁰ G. J. Bass (1999) 97 *Michigan Law Review* 2103; M. Minow (1998); but see generally M. Osiel (1997).

¹⁶¹ See, Press Statement by the Prosecutor of the International Criminal Tribunal for Rwanda, December 12, 1995, Justice Richard Goldstone. But see Morris, challenging what she calls “anomalies of inversion” in which the international tribunal prosecutes (or strives to prosecute) the leaders, leaving to national governments the rest of the defendants M. Morris (1997) 7(2) *Duke J. of Comp. & Int'l L.* available at <http://www.unc.edu/depts/diplomat/amdipl_6/morrisinfo.html> [Accessed on 20 August 2000].

suspects that the court has processed so far has been a source of concern and distress.¹⁶² Contrary to the expectations of survivors, the ICTR is not expected by any means to address the bulk of Rwanda's staggering volume of genocide-related criminal cases.

Furthermore, according to Resolution 977 of the United Nations Security Council adopted on February 22 1995, the official seat of the Tribunal is established in Arusha, Tanzania.¹⁶³ This was probably an unfortunate decision. Although the tribunal is intended to establish or confirm principles that should inform behaviour worldwide, it was created to "contribute to the process of national reconciliation and to restoration and maintenance of peace."¹⁶⁴ This objective highlights the fact that the tribunal ultimately has a primary audience, namely, the people of Rwanda. They, more than the rest of the world, need to see the tribunal at work, to be reminded on a daily basis that the international community is committed to the establishment of justice and accountability for the heinous crimes of 1994. Particularly for a country like Rwanda, where a substantial percentage of the population cannot benefit from newspaper or television coverage of the trials, the process of justice should be accessible and visible.

Despite this, according to Payam Akhavan, a legal Advisor in the prosecutor's office "the symbolic effect of prosecuting even a limited number of such leaders before an international jurisdiction would have considerable impact on national reconciliation as well as deterrence of such crimes in the future."¹⁶⁵ But to say this is to say that effective reconciliation will inevitably depend on the interaction between international trials and the domestic situation. Isolated from a corresponding effort to foster justice internally, the work of the international tribunal will remain selective and unsatisfactory, its contribution to reconciliation inevitably frustrated.

¹⁶² As of August 2000, there were 42 people detained in the ICTR's detention centre in Arusha. Five defendants have been sentenced to life imprisonment and three others to various years of imprisonment. See ICTR Detainees Status on 8 August 2000 available at <<http://www.ictor.org/ENGLISH/factsheets/detainees.htm>> [Accessed on 20 August 2000].

¹⁶³ S.C. Res. 977, U.N. Doc. S/RES/977 (1995).

¹⁶⁴ Preamble, ICTR Statute.

¹⁶⁵ P Akhavan (1997) 7(2) *Duke J. of Comp. & Int'l L.* 339.

2.3.2. National prosecutions

Rwanda is thus faced with the enormous challenge of trying to deliver justice in relation to the genocide. Justice, important in any orderly society, is arguably even more essential in a society that has suffered the trauma of genocide.¹⁶⁶ Yet delivering justice in the aftermath of genocide is extraordinarily difficult because of the enormous scale of the crime and because of the extent of suffering it has caused.

2.3.2.1. The Normative framework

In determining how to bring the authors of genocide and crimes against humanity to justice, the Rwandese government was faced with deciding how specifically they were to proceed. Ultimately, on September 1, 1996, after prolonged debates, the "Organic Law on the organization of prosecutions for offenses constituting the crime of genocide or crimes against humanity committed since October 1, 1990"¹⁶⁷ came into force as the law that will govern national prosecutions for the genocide in Rwanda. The new legislation was to work within the context of existing rules of criminal practice and procedure, adding thereto where necessary.¹⁶⁸

When prosecution do occur, how widely should the net be cast? If it is accepted that international law does require prosecution for at least the most heinous violations of human rights and international humanitarian law, it does not, however, demand the prosecution of every individual implicated in the atrocities. After extensive deliberation and input from a number of experts in various countries, Rwanda's Transitional National Assembly enacted legislation in 1996 which attempts to respond to this challenge.¹⁶⁹ The law creates four levels of culpability in the genocide: (1) the planners and the leaders of the genocide, those in positions of authority who fostered the crimes, particularly notorious

¹⁶⁶ D F Orentlicher (1991) 100 *Yale Law Journal* 2537; N J. Kritz (1996) 59 *Law & Contemp. Probs.* 127 128.

¹⁶⁷ See *Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990* (August 30, 1996) Organic Law No. 08/96, in (Sept. 1, 1996) *Official Journal of the Republic of Rwanda* [hereinafter Organic Law 08/96].

¹⁶⁸ Article 39 of the Organic Law states that: "Unless otherwise provided in this Organic Law, all laws, including the Penal Code, the Code of Criminal Procedure and the Code of Judicial Organisation and Jurisdiction, shall apply before the specialised chambers."

¹⁶⁹ See W A Schabas (1996) 7 *Crim. L. Forum* 523. (describing the development and substance of the Organic Law); see also J Sarkin (1998) 20(3) *Human Rights Quarterly* 794-796.

killers and sexual torturers; (2) others who killed; (3) those who committed other crimes against persons; and (4) those who committed offenses against property.¹⁷⁰

Despite the fact that the traditional “plea bargain” is relatively foreign to an inquisitorial justice system, in enacting the Organic Law, the Transitional National Assembly saw the need to institute some form of procedure to encourage accused persons to confess to their criminal acts.¹⁷¹ This was done to encourage reconciliation, and equally, to attempt to speed up what was clearly going to be a lengthy if not impossible process.

2.3.2.2. Genocide legislation put into practice

The mere holding of trials will not, by itself, automatically achieve a sense of justice or promote reconciliation. These twin goals need to be consciously incorporated into the strategy of prosecution. Adherence to universal norms regarding fair trials is an essential element in this equation. Some of the procedural problems raised by the first trials for genocide and crimes against humanity in Rwandese specialised chambers are illustrative.¹⁷²

¹⁷⁰ See article 2 of the Organic Law 08/96: Persons accused of genocide, crimes against humanity, and crimes connected thereto, as set out by article 1, committed between 1 October 1990 and 31 December 1994, shall, on the basis of their acts of participation, be classified into one of four categories:

Category I:

- persons whose criminal acts and whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or crime against humanity;
- persons who acted in position of authority at the national, prefectural, communal, sector or cell level, or in a political party, the army, religious organizations or in militia and who perpetrated or fostered such crimes;
- 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;
- persons who committed acts of sexual torture;

Category II:

- persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death;

Category III:

- persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;

Category IV:

- persons who committed offenses against property.

¹⁷¹ See Chapter III of the Organic Law 08/96.

¹⁷² See Amnesty International (1997).

Rwanda is required to act in accordance with obligations it has voluntarily undertaken by ratifying international human rights treaties. Both Rwandese national legislation and the application of such legislation have to be in conformity with international human rights law. The human rights treaties ratified by Rwanda include the ICCPR,¹⁷³ the Convention on the Rights of the Child,¹⁷⁴ and the African Charter.¹⁷⁵

Keeping in mind Rwanda's domestic obligations flowing from the Constitution,¹⁷⁶ the Arusha Accords, the Code of Criminal Procedure, and international obligations deriving from the ICCPR, as well as international guidelines when dealing with crimes punishable by death, such as the Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty,¹⁷⁷ and at the same time the problem of evidence collection,¹⁷⁸ it is clear that adherence to domestic and international obligations is at best, a continual challenge.¹⁷⁹

Given the extent to which war crimes trials are automatically suspected on each side of the conflict as political exercises, prosecution authorities are well advised to conduct prosecutions that uphold international fair trial standards. The Government of Rwanda recognised the need to ensure due process standards. In its reply to the Amnesty International report entitled "Rwanda: Unfair Trials – Justice Denied," the government acknowledges that some of the cases have had shortcomings, and affirms that:

"The Ministry of Justice and the Supreme Court have been seized of this matter. Judges and Prosecutors involved in the jurisdictions concerned have been working together to improve the functioning of a system of justice which is being rebuilt from scratch. Seminars continue to be conducted for judicial service personnel to refine judicial procedures and ensure that each and every suspect receives a fair hearing. By all accounts, the performance of the specialised chambers dealing with

¹⁷³ Ratified on 12 February 1975.

¹⁷⁴ adopted 20 Nov. 1989, entered into force 2 Sept. 1990, G.A. Res. 44/25, U.N. Doc. A/44/49, 166 (1989), reprinted in 28 ILM 1448; ratified on 24 January 1991.

¹⁷⁵ Ratified on 15 July 1983.

¹⁷⁶ Rwandese Const. (1991) *Official Journal of the Republic of Rwanda (J.O.)* 615 art. 12, as amended by Révision du 18 janvier 1996 de la Loi fondamentale (1996) 3 J.O. 3.

¹⁷⁷ U.N. ECOSOC Res. 1984/50 of 25 May 1984.

¹⁷⁸ Though there has been an important focus on the training and deployment of judicial police inspectors, in many instances there are no living witnesses to specific acts of genocide, and at time fear of reprisals fosters a reluctance to testify. See African Rights (April 1997); I Gaparayi (1998).

¹⁷⁹ For an interesting "report from the field", see C J Ferstman (1997) 9(4) *African J. of Int'l & Comp. L.* 869-877.

genocide cases continues to improve as the newly trained magistrates gain more experience”.¹⁸⁰

Genocide suspects are invariably in detention pending trial. The number of detainees held without trial - and often without charge - for several years remains overwhelming. Perhaps, the only way the domestic trial of approximately 100,000 defendants could ultimately succeed is with considerable reliance on the confessions and guilty plea procedure set out in the Organic Law. Unfortunately, very few defendants have availed themselves of this procedure. The reasons for the failure of the procedure to this far attract large numbers of applicants relate as much to the stringent conditions the potential applicant must satisfy, as to the reluctance on the part of the defendants to confess. Some defendants doubt that their confessions will actually lead to sentence reductions, and the failure to have a penitentiary system in place to separate those who confess from those who do not puts the potential confessors at risk for their personal safety.¹⁸¹

Trials of people accused of participation in the genocide began in Rwanda in December 1996. Yet, by January 2000, notwithstanding the mechanisms of the Organic Law, no more than 2,500 people had been tried and no fewer than 120,000 are still detained and awaiting trial, often in deplorable conditions. At the present rate, it is estimated it would take anywhere between two to four centuries to try all those in detention.

Both in Arusha and in Rwanda, the justice process remains a laborious and frustrating one. Despite the significant positive changes and progress both in Rwanda and Arusha, the broad question of justice and reconciliation remains unresolved. Clearly, new changes are required to bring about justice and lasting reconciliation in Rwanda.

It is against this background that I propose to look at the proposed *gacaca* tribunals and see what bearing, if any, they may have on the search for justice and social reconstruction in the aftermath of genocide in Rwanda.

¹⁸⁰ *Reply of the Government of Republic of Rwanda to the Report of Amnesty International (May 8, 1997) 3.*

¹⁸¹ C J Ferstman (1997) 9(4) *African J. of Int'l & Comp. L.* 872.

CHAPTER 3: THE GACACA PROPOSALS: A PRELIMINARY APPRAISAL

3.1. Introduction

The formal justice system, including the new process of plea bargaining and confessions adopted by Rwanda to expedite handling of the genocide caseload, has only begun to work, albeit much too slowly. Because of this painfully slow progress, and in another attempt to address the huge number of outstanding cases, and to increase popular involvement, the government has formulated plans to transfer many genocide cases to new local tribunals inspired by a traditional mechanism for local dispute resolution known as “*gacaca*”. This process is expected to allow communities to establish the facts and decide the fate of the vast majority of those accused of lesser offenses, while at the same time addressing reconciliation objectives and involving the population on a mass scale in the disposition of justice.¹⁸²

It is easy to find fault in any new legal institution. In the case of the *gacaca* tribunals, whose proposals have yet to be formally adopted by the National Assembly, one should, however, be mindful of the fact that, firstly, this is an original institution. In Rwanda as in most African countries, the body of legal prescriptions is made up of two major components. On the one hand, there are indigenous norms and mechanisms, largely based on traditional values, which determine the generally accepted standards of an individual's and a community's behaviour. On the other hand, there are the state laws largely based on the old colonial power's own legislative framework and introduced together with the nation-state and its general principles of separation of powers, rule of law, etcetera.¹⁸³ This situation is known as legal pluralism.¹⁸⁴ The present intention is not to use the traditional *gacaca* process but to create a new process with similarities with the indigenous mechanism but also incorporating contemporary legislative framework in the

¹⁸² See Preamble Draft Organic Law creating “Gacaca Jurisdictions” and *Organizing Prosecutions of Offenses that Constitute the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994*, Draft Organic Law (on-file with author) [hereinafter Draft Gacaca Law].

¹⁸³ See J Prendergast & D Smock (15 September 1999) also available at <<http://www.usip.org/oc/sr/sr990915/sr990915.html>> [accessed on 15 September 2000].

¹⁸⁴ The main reason behind this is Africa's colonial heritage. Without having regard to the existing concept of justice in African society, colonialism decided to apply the European concept of justice in colonial territory thereby neglecting the indigenous concept of justice. See M Hansungule (2000) *unpublished paper 2* (on-file with author).

hope of promoting social reconstruction while greatly expediting the trials of ten of thousands of accused persons.

Secondly, as happened with the criminal trials following the adoption of the Organic Law¹⁸⁵, only gradually and over a period of time can the *gacaca* become effective and credible. A thorough and sound appraisal of this new institution must therefore wait some time.

Subject to this caveat, however, by and large one cannot but welcome the proposals. Of course, the use of *gacaca* tribunals to deal with the genocide cases is still a controversial concept. There are those who argue that it is simply unrealistic in the current situation to introduce a concept like that for genocide trials.¹⁸⁶ Others, however, support it, as it would try to make a better situation out of a bad one.¹⁸⁷ Whatever the case, it is important to recognize that at least, people are beginning to talk about alternatives. Although it is premature to make an in-depth assessment of a draft law and the merits and flaws of the legal institution it is designed to set up, I shall nevertheless attempt in this chapter to set out some initial and tentative comments on some of the salient traits of the future *gacaca* tribunals.

3.2. General remarks

The draft legislation creating the *gacaca* jurisdictions can be examined from various angles. It may be considered from the viewpoint of a dispute resolution mechanism, or it can be viewed from the perspective of its contribution to the criminal justice system both substantive and procedural.

The *gacaca*, a traditional community-based mechanism, has a dispute resolution focus and derives from its meaning “lawn” that is, referring to the fact that members of the *gacaca* sit on the grass when listening to and considering matters before them. Defining *gacaca* is a hard exercise since it is an informal and not permanent judicial or administrative institution. It is a meeting which is convened whenever the need arises in which members of one family or of different families, or all inhabitants of one hill, participate. Traditionally, wise old men who were respected in their communities will seek

¹⁸⁵ Organic Law 08/96.

¹⁸⁶ See, e.g., J Gakwaya (2000) 14 *Revue de Droit Africain* 226 ; J Sarkin (1999)(2) 3 *Law, Democracy and Development* 223.

¹⁸⁷ See, e.g., Amnesty International (2000); OAU Panel Report (2000);

to restore social order¹⁸⁸ by leading the group discussions which, in the end, should result in an arrangement that is acceptable to all participants in the *gacaca*.¹⁸⁹ Generally, the types of conflict dealt with by the *gacaca* are related to land rights, cattle, marriage, inheritance rights, loans, minor attack on personal dignity and physical integrity, damage of properties caused by one of the parties or animals, etcetera.¹⁹⁰

Turning to consider the proposed *gacaca* process from the perspective of its contribution to the criminal justice system, the draft legislation offers an original attempt to blend indigenous Rwandese culture and traditions and a European system of justice. This represents a significant departure from the traditional dichotomy between original system of justice before colonization and colonial law.¹⁹¹ The *gacaca* process is meant to handle genocide related cases except those in the first category.¹⁹² As far as criminal justice is concerned, as long as the new legislation and the norms it contained conform to universally accepted standards in the administration of justice, there should be no problem with judging genocide related cases according to the *gacaca* legislation.

¹⁸⁸ Previously, scholars of African justice have argued that the African concept of justice aims primarily at reconciliation of the parties. According to Hansungule, this is based on gross misunderstanding of African concept of law. "Reconciliation – the restoration of social equilibrium – is of course the aim of every society and not only the African. In Africa, reconciliation of the parties becomes one the main aim of the judges when the parties are in a relationship which is valuable to preserve. However, this concept did not lead to a sacrifice of legal or moral rules. Wrongdoers are upbraided and punished where they are found guilty. In other words, punishment is as much African as it is a universal concept." See M Hansungule (2000) *unpublished paper* 5 (on-file with author). Contrary to the opinion of some commentators, Rwandese customary law distinguished civil and criminal matters. Thus, offences such as murder, theft, and attack on personal integrity were severely punished when established. See, e.g., C Ntampaka (juillet – août 1999) 211 *Dialogue* 13 ; J Gakwaya (2000) 14 *Revue de Droit Africain* 228.

¹⁸⁹ While it is true that in Rwanda as elsewhere in Africa, people attach the highest premium on the unity of the kinsfolk, families, and other groups, this is never done at the expense of justice. Traditional courts tend to be conciliating; they strive to effect a compromise acceptable by all parties. In other words, the main task of the judge, unlike its modern counterpart, is to try to effect a compromise. It must be stressed that this is usually when there is a relationship between the litigants which should supersede justice. However, in the end, the court must pronounce its decision even if it will have undesirable consequences on the group unity. M Hansungule (2000) *unpublished paper* 5 (on-file with author).

¹⁹⁰ See, e.g., F Reyntjens (décembre 1990) 40 *Politique Africaine* 31.

¹⁹¹ Following colonial rule, Rwandese customary law could apply in certain situations provided it did not supersede colonial law. See, Ordonnance-loi n°45 du 30 août 1924 (1924) 4 *B.O.R.U.* (Suppl.) 4-5 ; J Gakwaya (2000) 14 *Revue de Droit Africain* 230. This situation has continued to characterize the post-colonial Rwandese Constitution. This means that even after independence, Rwandese customary law could not be invoked unless consistent with Western notions. In other words, the subordination of Rwandese customary law which started during the colonial period was perpetuated in independent Rwanda.

¹⁹² Draft Gacaca Law, art. 2; See also Organic Law 08/96.

In this chapter I shall endeavour to appraise in some detail how the draft legislation¹⁹³ creating the *gacaca* jurisdictions can provide a framework for both justice and social reconstruction in the post-genocide Rwanda.

3.2. The draft gacaca law: substantive and procedural assessment

3.2.1. General overview

The specialized criminal justice program laid out in the draft *gacaca* law is, in essence, quite simple. In summary, the draft law on *gacaca* proposes a system which would be loosely based on what is described as a traditional system of justice, involving ordinary citizens in trying their peers suspected of participation in the genocide.¹⁹⁴ Local *gacaca* tribunals would be set up throughout the country, from Rwanda's lowest administrative level of the *cellule*, to that of the *secteur*, *commune* and *préfecture*.¹⁹⁵ Each "gacaca jurisdiction" includes a general assembly, a bench, and a coordinating committee.¹⁹⁶ The general assembly¹⁹⁷ of the cell "gacaca jurisdiction" select from within itself honorable persons, nineteen of whom form the bench of the cell "gacaca jurisdiction".¹⁹⁸

¹⁹³ The Draft Gacaca Law is available both in French and English. Given that it is still a draft, some inconsistencies between the two documents can easily be identified. Since there is not, yet, an authoritative rule of interpretation, I have tried as much as possible, while using the two versions, to reflect the intended meaning of a specific provision. As it would appear, however, the French version seems to be the original text.

¹⁹⁴ Art. 13 of the Draft Gacaca Law reads:

"Each 'gacaca jurisdiction' bench is composed of 19 honorables persons.

The honorable persons who form the cell 'gacaca jurisdiction' bench are elected by and from among the residents of that cell.

(...)."

¹⁹⁵ *Ibid.* art. 4. It should be reminded that one of the expected results from the "gacaca jurisdictions" is to make it possible to accelerate the prosecution of genocide since the trials shall be resolved by almost 11,000 "gacaca jurisdictions" while 12 specialized chambers used to take on this task. See, Preamble, Draft Gacaca Law.

¹⁹⁶ *Ibid.* art. 5.

¹⁹⁷ The general assembly of the cell "gacaca jurisdiction" is composed of all the cell's residents at least 18 years of age. *Ibid.* art. 6.

¹⁹⁸ *Ibid.* art. 9; See also discussions *infra*, on independence and impartiality, 3.2.3.1.

All but Category One genocide cases would be tried by the *gacaca* jurisdictions.¹⁹⁹ Individuals tried by the *gacaca* jurisdictions would therefore include those accused of homicide,²⁰⁰ physical assault,²⁰¹ destruction of property²⁰² and other offences committed during the genocide, corresponding to Categories Two, Three and Four. The *gacaca* jurisdictions at the *cellule* level would try Category Four cases;²⁰³ the *gacaca* jurisdictions at the *secteur* level would try Category Three cases;²⁰⁴ and the *gacaca* jurisdictions at the *commune* level would try Category Two cases,²⁰⁵ while the *gacaca* jurisdictions at the *préfecture* level would hear appeals from the Category Two cases tried at the *commune* level.²⁰⁶ Category One defendants would continue to be tried by the ordinary courts.²⁰⁷

Following the pattern established by the Organic Law, the specialized criminal justice program will rely on a system of plea agreements.²⁰⁸ Though all perpetrators will be entitled to confess, persons who fall within Category One are, in principle, not eligible for any reduction in penalty.²⁰⁹ Specifically, however, a pre-set, fixed reduction in the penalty that would otherwise be imposed for their crimes is available to all perpetrators in return for an accurate and complete confession, a plea of guilty to the crimes committed, and an

¹⁹⁹ *Ibid.* art. 2. It is worth noting that the Draft Gacaca Law adopts a very similar classification of offenders as the Organic Law (*see supra* 2.3.2.1.). The new legislation introduces, however, some substantial modifications. For instance, persons who acted in positions of authority at lower levels (sector or cell), previously in Category One, shall be classified in the category corresponding to the offences they committed, “[b]ut their position as leader exposes them to the severest punishment provided for defendants in the same category”. See, art. 53. Also, the formulation “acts of sexual torture” in the Organic Law (Category One in fine) is replaced by “offense of rape” (probably because of definitional difficulties). Interestingly, a new category of criminals is added to Category Two: “(b) a person, who with the intention of killing wounded victims or committed serious violence, but whose victims did not die”. *Ibid.* art. 52. It was probably felt that these offenders should not benefit of the same lenient treatment afforded to Category Three offenders: persons who committed serious attacks “without the intent to cause the death of the victims” (last part added in the new law). It is no doubt meritorious to clearly establish the importance of the mental element (*Mens Rea*) for criminal responsibility to arise. Admittedly, in the case of genocide and crimes against humanity, the extreme gravity of the offence presupposes that it may only be perpetrated when intent and knowledge are present.

²⁰⁰ *Ibid.* art. 52 (Category Two).

²⁰¹ *Ibid.* (Category Three).

²⁰² *Ibid.* (Category Four).

²⁰³ *Ibid.* art. 40.

²⁰⁴ *Ibid.* art. 41.

²⁰⁵ *Ibid.* art. 42.

²⁰⁶ *Ibid.* art. 43.

²⁰⁷ *Ibid.* art. 2.

²⁰⁸ *See supra* 2.3.2.1.

²⁰⁹ Draft Gacaca Law, art. 55 & 56. See, however, article 57 which illustrates an exception in the limited circumstance where an accused, who does not appear on the published list of the first category prescribed by article 52 of the draft legislation. In such cases, persons who confess and plead guilty “shall be classified in the second category, if the confessions are truthful and complete”.

apology to the victims.²¹⁰ A greater penalty reduction is made available to perpetrators who confess and plead guilty prior to prosecution than to perpetrators who come forward only after prosecution has begun.²¹¹

The sentences provided under the draft *gacaca* legislation are as follows.²¹² Category Two perpetrators will receive a sentence of seven to eleven years imprisonment if they plead guilty prior to prosecution, a sentence of twelve to fifteen years imprisonment if they plead guilty after prosecution has begun, or a sentence of twenty-five years to life imprisonment if convicted at trial.²¹³ Category Three perpetrators will receive a penalty of one to three years imprisonment if they plead guilty before prosecution, a sentence of three to five years if they plead guilty after prosecution has begun, and five to seven years if convicted at trial.²¹⁴ All Category Four defendants convicted are sentenced only to civil reparations.²¹⁵

A substantial reduction in sentence is provided where a Category One, Two or Three defendant submits a guilty plea before prosecution. This leniency is extended in order to encourage perpetrators to come forward before prosecution.²¹⁶ A perpetrator who pleads guilty prior to prosecution eliminates the need to conduct a full investigation and prepare a completed dossier for the case in question. Similarly, the penalties imposed pursuant to a guilty plea submitted after prosecution has begun but before conviction at trial are less severe than the penalties imposed pursuant to a conviction at trial. This structure is intended to maintain incentives for perpetrators to plead guilty even after the initiation of prosecution.

²¹⁰ *Ibid.* art. 55. See also art. 69. This is a significant departure from the Organic Law where Category One offenders are not entitled to any reduction in the penalty.

²¹¹ *Ibid.* art. 56.

²¹² As noted above, the ordinary courts will try Category One defendants. However, if these defendants give a complete and accurate confession and, in addition, plead guilty prior to prosecution, they are classified in the second category.

²¹³ *Ibid.* art. 70.

²¹⁴ *Ibid.* art. 71.

²¹⁵ *Ibid.* art. 72.

²¹⁶ Thus, the death penalty is excluded even for those Category Two perpetrators convicted at trial. See *ibid.* This exclusion of the death penalty constitutes a reduction from the severity of sentence that could ordinarily be imposed under the Rwandese penal code, which provides capital punishment for murder. Arguably, this reduction reflects a policy decision regarding the undesirability, for the society generally and for national reconciliation and security, of undertaking the execution of literally thousands of perpetrators.

The value of the proposed system will depend in the end both upon the soundness of the design itself and on the quality of its implementation, which shall unfold after the adoption of the *gacaca* law. Factually, however, in designing the plea agreements mechanism, special attention should be paid to the reasons for the failure of the same procedure under the Organic Law.²¹⁷ In particular, questions of simplicity, credibility and confidence in the system as well as the safety of the accused should be addressed.

In addition, the draft *gacaca* law introduces a significant innovation. All but Category One defendants, if convicted, will have the alternative either to spend half the sentence in prison and the rest in community service or to spend the entire sentence in prison.²¹⁸

Finally, the draft law entrusts the Supreme Court with the task of administering and developing the internal regulations of the “*gacaca* jurisdictions” in accordance with its powers to manage and coordinate the activities of courts and tribunals and to guard the independence of the magistracy.²¹⁹

The *gacaca* criminal justice programme represents a complex compromise. While full and regular criminal prosecution and punishment of every suspected perpetrator might in many respects be the most desirable course of action, the resources demanded by such an approach have quickly overwhelmed national capacities. Therefore, a decision has been made in Rwanda to establish a program which, it is hoped, will accomplish the crucial purposes of criminal justice and contribute to reconciliation while also acknowledging resource limitations.²²⁰

3.2.2. Subject-matter jurisdiction

The jurisdiction of the “*gacaca* jurisdictions” embraces roughly speaking three categories of crimes. First, like the Statute of the ICTR²²¹ and the Organic Law,²²² the draft *gacaca* law grants the courts the power to prosecute persons who have committed genocide.²²³

²¹⁷ See *supra* 2.3.2.2.

²¹⁸ Draft Gacaca Law, arts. 70, 71 and 76.

²¹⁹ *Ibid.* art. 99. See also Preamble, Draft Gacaca Law.

²²⁰ See *generally* Preamble, Draft Gacaca Law.

²²¹ art. 2.

²²² art. 1(a).

²²³ art. 1(a).

Second, the draft law – following the example set by the ICTR Statute²²⁴ and the Organic Law²²⁵ – confers on the courts the power to prosecute persons who have committed crimes against humanity.²²⁶ Clearly, crimes against humanity overlap to a considerable extent with the crime of genocide. But crimes against humanity are distinguishable from genocide in that they do not require an intent to “destroy in whole or in part”, as cited in the 1948 Genocide Convention, but only target a given group and carry out a policy of “widespread or systematic” violations.²²⁷ The crime of genocide requires a particularly heavy burden of proof. There is a distinct advantage in being able to prosecute offenders for the crime of genocide or other crimes against humanity, or even both.

In the circumstances of Rwanda, the crime of genocide and crimes against humanity appear to cover most of the murders that have been committed. Some killings and other offences might, however, fall outside the specific offenses of the crime of genocide and crimes against humanity because of either definitional difficulties or a failure to satisfy the burden of proof. At this point, there is fundamental distinction with regards to the subject-matter jurisdiction of the *gacaca* tribunals.

Under the provisions of both the Organic Law and the draft *gacaca* law, the determination of an offence within the jurisdiction of the specialised chambers or the *gacaca* courts takes place in two stages. First, it must be established that the incriminated act(s) is provided for in the Rwandese Penal Code.²²⁸ Article 1 of the Organic Law declares that while it applies to international crimes, including genocide and crimes against humanity, it does so only to the extent that such offenses are provided for in the Penal Code.²²⁹

²²⁴ art. 3.

²²⁵ art. 1(a).

²²⁶ art. 1(a).

²²⁷ See T Meron (1995) 89 *Am. J. Int'l L.* 558; M C Bassiouni in R Gutman & D Rieff (1999) 108; S Chesterman (2000) 10 *Duke J. of Comp. & Int'l L.* 307.

²²⁸ The preamble to the Draft Gacaca Law notes that although Rwanda ratified the relevant international treaties and published them in the *Journal Officiel* of the Rwandese Republic, it did not provide penalties for any such crimes. As a result, concludes the preamble, prosecutions must be based upon existing Penal Code. See Preamble, Draft Gacaca Law.

²²⁹ Such a disclaimer was inserted because of the concern that the law would be subject to criticism for retroactivity and might even be declared to run afoul of the Constitution. See Rwandese Const. (1991) art. 12, as amended by Révision du 18 janvier 1996 de la Loi fondamentale (1996) 3 *J.O.* 3. This was unnecessary, because neither international human rights norms nor the Rwandese Constitution prohibits “retroactive” offenses, provided they are recognised as criminal under national or international law, or according to the general principles of law recognised by the community of nations. See ICCPR, art. 15; African Charter, art. 6. Arguably, what is required by international human rights law is that the crime and its punishment be “accessible” and “foreseeable”; according to the European Court of Human Rights, these requirements can be met even when there is no black letter legal text. See, e.g., *C.R. v. United*

Once this is done, it is further examined if the act can also be charged as constituent act of another crime: genocide or crime against humanity,²³⁰ or other offences committed either in connection²³¹ with the genocide and massacres²³² or with an intention to exterminate an ethnic group.²³³

Thus, a comparison of paragraphs 1 (b) of the Organic Law and 1(b) of the draft *gacaca* law illustrates a fundamental problem as regards the jurisdiction of the *gacaca* tribunals. While paragraph 1(b) of the Organic Law refers to offences committed “in connection (relation) with the genocide and massacres”, paragraph 1(b) of the draft *gacaca* law intend to cover: “offenses (...) committed with an intention to exterminate an ethnic group”.

The distinction is striking to say the least. The offenses covered in paragraph 1(b) of the draft *gacaca* law are made to appear of a different nature from those listed in paragraph (a) of the same legislation, yet there are similarities between the two. In evaluating the rationale behind such proposal, one must look at the elements of the crime of genocide.

The draft *gacaca* law refers to the definition as contained in the 1948 Genocide Convention. According to article 2 of the Convention, the crime of genocide has both a physical element – comprising certain enumerated acts, such as killing members of an ethnic group – and a mental element (*mens rea* or *dolus specialis*) – those acts must be committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group “as such”.²³⁴ One explanation could be that the drafters of the *gacaca* legislation wanted to include within the jurisdiction of the *gacaca* tribunals certain offenses not listed in article 2 of the Genocide Convention²³⁵ but committed with the intent to destroy in whole or in part an ethnic group as such.

Kingdom 355 C (1995) Eur. Ct. H.R. (ser. A) 33-34; *S.W. v. United Kingdom* 355 B (1995) Eur. Ct. H.R. (ser. A), *reprinted together in* (1996) 21 *Eur. H.R. Rep.* 363. Of course, the European Court’s decisions are not binding on Rwanda, but the Court has offered the most authoritative recent statement in international human rights law on the subject. See also W A. Schabas (1996) 7(3) *Criminal Law Forum* 536-537.

²³⁰ See art. 1(a) Organic Law 08/96; See also D De Beer (1999) 13; *Aff. Rwesero*, Ch. Sp. Gitarama, 28 octobre 1998, RP 33/GIT/C.S./1/98.

²³¹ The French version of the Organic Law use the terms “*en relation avec les évènements entourant le génocide et les massacres.*”

²³² Art. 1(b) Organic Law 08/96.

²³³ Art. 1(b) Draft Gacaca Law.

²³⁴ See *supra* 2.2.1.2.

²³⁵ Article 2 of the Genocide Convention reads in full:

It is difficult to understand the reason behind such proposal since those offenses were already covered in the formulation of the Organic Law.²³⁶ Furthermore, the fact that a number of acts – not enumerated in the Genocide Convention's definition - committed with the intent to destroy a group are incriminated under a specific provision does not mean that they can be charged as genocide. Most probably, however, the drafters wanted to significantly narrow the jurisdiction of the *gacaca* tribunals.

The real effect of paragraph 1(b) of the draft *gacaca* law is that not all offenses covered by the penal code and committed "in relation" with the genocide and massacres are covered by the new legislation.²³⁷ The specific acts incriminated under the Rwandese penal code must fulfil one more requirement to trigger the jurisdiction of the *gacaca* courts: they must have been committed with "an intention to exterminate an ethnic group".

Since it has been established that genocide was committed in Rwanda in 1994 against the Tutsi as a group,²³⁸ and following the principle of restrictive interpretation in criminal matters, it appears that for a set of acts to be incriminated, the author of the offense(s) must have acted with the specific intent to exterminate the Tutsi group. Clearly, therefore, a number of offences for which a nexus with the genocide and massacres could be established and prosecuted under the Organic Law are excluded from the jurisdiction of the *gacaca* courts. The latter are left with the "core crimes" – genocide and crimes against humanity – and offences not listed in the genocide definition committed, however, with the intent to exterminate the Tutsi group as such.

That the scope of jurisdiction of the *gacaca* is deliberately narrowed is quite understandable. This choice is probably guided by the need to restrict to the jurisdiction of the *gacaca* tribunals only to crimes conceived as the most heinous for which prosecution

In the present Convention, genocide means any of the following acts committed with the 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 the 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.

²³⁶ See art. 1(b) Organic Law 08/96.

²³⁷ *Ibid.*

²³⁸ See *Prosecutor v Akayesu* No. ICTR-96-4-T (2 September 1998) para 125.

is required. The side-effect of such decision, however, is that an implicit amnesty is granted for all the offenses committed between October 1, 1990 and December 31, 1994, which do not fall under any of the three very restrictive categories of crimes.

Nevertheless, proof of systematic and deliberate planning is not required to establish the violation of common Article 3 or Additional Protocol II. In this case, Article 4 of the ICTR Statute, unlike the Organic Law and the draft *gacaca* law, provides a safety net that is the Statute's greatest innovation.²³⁹ Under Article 4, the Tribunal may prosecute persons who have committed serious violations of common Article 3 of the Geneva Conventions and of Additional Protocol II.²⁴⁰ The listed violations draw on both Article 4 of Protocol II ("Fundamental guarantees" clause) and common Article 3. Because the list of violations in Article 4 of the Statute is illustrative and not exclusive, the Tribunal is empowered to apply other provisions of Protocol II as well. Perhaps because it was realised that the crime of genocide and crimes against humanity might not adequately cover the field and that, for practical reasons, the safety net of common Article 3 and Protocol II was needed, the protection of these provisions was included in the ICTR Statute.

The lack of a similar provision in the Organic Law or in the draft *gacaca* law is unfortunate.²⁴¹ However, in examining the jurisdiction of Rwandese courts, one must

²³⁹ See also T Meron (1995) 89 *Am. J. Int'l L.* 558.

²⁴⁰ Article 4 of the ICTR Statute reads:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrage upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any indecent assault,
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- (h) Threats to commit any of the following acts.

²⁴¹ Surprisingly, the Organic Law and the draft *gacaca* law refer to the "Geneva Convention relating to the protection of legal entities during war" (probably referring to the fourth Geneva Convention relative to the protection of civilian persons in times of war) and its additional protocols (probably referring to Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts). They do so, however, only to the extent that these instruments define genocide and crimes against humanity. See,

emphasize that common Article 3 and Protocol II are treaty binding on Rwanda, that they clearly prohibit certain acts, that those acts are also prohibited by the Rwandese Penal Code, albeit in different terms. Of course, the language of common Article 3 and the relevant provisions of Protocol II is clearly prohibitory; it addresses fundamental offenses such as murder, torture, which are prohibited in all states. Therefore, their criminality cannot be questioned.

Lastly, it should be noted that the draft *gacaca* law, like the earlier Organic Law, suffers from a major defect. Unlike the provisions of the Rwandese Penal Code, where the principle of *specificity* of criminal law is prevalent, the draft legislation includes provisions that do not determine the essential elements of the crimes in detail. To this extent, the draft *gacaca* law departs from the fundamental principle of specificity, which requires that a criminal rule be detailed and indicate in clear terms the various elements of crime. This principle constitutes a fundamental guarantee for the potential accused and any indicted person, because it lays down in well-defined terms the confines of the prohibited conduct, thus giving him notice of what he stands accused. By the same token, that principle greatly restricts the court's latitude.²⁴²

3.2.3. General principles of procedural law: applicability of fair trial rights

When a government charges a person with having committed or having been implicated in a criminal offence, the individual is confronted with the whole machinery of the state and placed at risk of deprivation of liberty or other sanction. The right to a fair trial is a fundamental safeguard to ensure that individuals are not unjustly punished. It is

common art 1(a) of the two pieces of legislation. This is confusing since the two instruments do not cover *specifically* genocide and/or crimes against humanity. Of course, some prohibited conducts (e.g., grave breaches and other serious violations of international humanitarian law) overlap to some extent with genocide and crimes against humanity. However, as noted above, crimes against humanity are distinguishable from genocide. Crimes against humanity are also distinguishable from war crimes in that they do not only apply in the context of war – they apply in time of war *and* peace. See also M C Bassiouni in R Gutman & D Rieff (1999) 108.

²⁴² This striking feature of the draft *gacaca* law and the Organic Law – lack of specificity – manifests itself in various ways. First, and more generally, their provisions do not prohibit a certain conduct (say murder, rape, etc.) by providing a specific detailed description of such conduct. They instead embrace a broad set of offences (genocide, crimes against humanity), without individual identification by a delineation of the prohibited behaviour. It follows that, when applying these rules, one must first of all identify the general ingredients proper to each category of crime (say, crimes against humanity) and then the specific ingredients of the sub-class one may have to deal with (say, rape, murder) by reference to the penal code. Secondly, some categories of crime are quite loose and do not specify the prohibited conduct (e.g., crimes against humanity). See *generally* D De Beer (1999).

indispensable for the protection of other human rights such as the right to freedom from torture and the right to life.²⁴³

In a context of transitional justice of the type of Rwanda,²⁴⁴ when a decision is made to prosecute, the desire to use criminal sanctions against those who committed massive human rights violations may run directly counter to the development of a democratic legal order.²⁴⁵ The temptation of the victims or rather the survivors of the genocide to make short shrift of the criminal procedural rights of those put in the dock for the evil crime – to pay them back for the abuses they inflicted – is certainly understandable. Providing yesterday's killers and torturers with the judicial guarantees and procedural protections that they never afforded their victims may be a source of short-term frustration during the transition, prompting cynicism of the sort expressed by an East-German activist: "what we wanted was justice; what we got was the rule of law."²⁴⁶ Nonetheless, this question should be viewed in the context of the new regime's commitment to the rule of law.²⁴⁷ If these defendants are not afforded all the same rights granted to common defendants in a democratic order, the rule of law does not exist and the democratic foundation of the new system is arguably weakened.²⁴⁸ Beyond procedural consideration, the rule of law prohibits collective punishment and discrimination on the basis of political opinion or affiliation. In establishing accountability, the burden of proof should be on the authorities or the individual making the accusation, not on the accused to prove his or her innocence.

Rwanda is required to act in consonance with international human rights law and principles.²⁴⁹ On the one hand, international standards impose a duty to prosecute the most heinous violations of human rights and humanitarian law.²⁵⁰ On the other hand, when prosecution is undertaken, international standards related to trials, treatment of offenders and penalties must be respected.²⁵¹ Indeed, when people are subjected to

²⁴³ See, e.g., Amnesty International (1998); W A. Schabas (1997) ; M Nowak (1993); D McGoldrick (1994).

²⁴⁴ See *supra* 2.1.

²⁴⁵ See NJ Kritz in NJ Kritz (ed) (1995) xxiv.

²⁴⁶ *Ibid.*

²⁴⁷ See, e.g., Address to the nation by H.E. Maj. Gen. Paul Kagame on his inauguration as President of the Republic of Rwanda, April 22, 2000 (on-file with author).

²⁴⁸ NJ Kritz in NJ Kritz (ed) (1995) xxiv.

²⁴⁹ See *supra* 2.2.1.3.

²⁵⁰ See *supra* 2.2.

²⁵¹ See also J Zalaquett in NJ Kritz (ed) (1995) 9.

unfair trials, justice cannot be served. When innocent individuals are convicted, or when trials are manifestly unfair or perceived to be unfair, the justice system loses credibility.

An approach such as that proposed in Rwanda of using “*gacaca* jurisdictions” offers the benefit of expediency in handling an enormous volume of cases and may contribute to “national healing” and “reconciliation”.²⁵² Provided that fair trials standards are not compromised, the introduction of the *gacaca* might go some way toward alleviating the huge burden on the courts; it could also represent a positive development in terms of involving the local population in the process of justice.²⁵³ Holding trials at the local, grassroots level encourages people to testify to events they witnessed personally during the genocide. At the same time, however, there is reason for concern about the capacity of the proposed system to operate fairly and efficiently.²⁵⁴

3.2.3.1. The right to trial by a competent, independent and impartial tribunal established by law

Clearly, one of the striking feature and main area of concern when looking at the *gacaca* proposals is the lack of legal training of members of the “*gacaca* jurisdictions”. The individuals who would be asked to try the cases which come before the “*gacaca* jurisdictions” would be elected into this role by the local population.²⁵⁵ They would have no prior legal background or training, and yet will be expected to hand down judgments in extremely complex and sensitive cases, with sentences as heavy as life imprisonment.²⁵⁶ They would also be responsible for determining the categorization of the defendants which sets the framework for sentences - including classifying defendants in Category One,²⁵⁷ subject to the ordinary courts, where those found guilty might face the death penalty.²⁵⁸ Even if these individuals are conscientious and striving to act in good faith, it is likely that

²⁵² See, on the use of terminology, *infra* 3.3. See also M Ignatieff (1996) 5 *Index on Censorship* 110.

²⁵³ See also N Roht-Arriaza (1996) 59 *Law & Contemp. Probs.* 98..

²⁵⁴ See also Amnesty International (2000).

²⁵⁵ Draft Gacaca Law, art. 13. Practically, the draft law provides that the general assembly – composed of all cell’s residents at least 18 years of age – selects within itself 24 “honorable persons” including 6 who are delegated to the sector “*gacaca* jurisdiction” while the 19 who remain form the bench of the cell “*gacaca* jurisdiction”. *Ibid.* art. 9. The law does not, however, specifically address the procedures to be followed for these elections. It is unclear, for instance, if individuals will avail themselves to stand for elections or if the residents of the cell will nominate them as candidates, a pattern recently followed for the election of lower levels administrative authorities throughout the country. It is, of course, critical that election of members of the benches “*gacaca* jurisdictions” be *perceived* to be free and fair.

²⁵⁶ *Ibid.* art. 70(a).

²⁵⁷ *Ibid.* arts. 35(e) & 37(d).

²⁵⁸ *Ibid.* art. 69.

they will be subjected to considerable pressures both from the accused and the complainants.²⁵⁹ The trials which have taken place to date in the ordinary courts in Rwanda have already revealed significant difficulties and controversies; they have illustrated the absolute need for judges to be able to resist political and psychological pressures, to know how to distinguish genuine from false testimonies and to respect at all times the equal rights of the defence and the prosecution.²⁶⁰

Many of the judges in the ordinary courts have only had a few months' training.²⁶¹ The individuals trying the cases in the *gacaca* jurisdictions would not have benefited from any professional training, yet would presumably be expected to immediately exercise independence and impartiality. Government authorities have indicated that they would receive some "basic" training and have appealed for international assistance for this task, but have stressed that the rules governing the *gacaca* trials must be kept simple.²⁶² As it would appear, most international standards do not prohibit *per se* the establishment of specialized courts. What is required, however, is that such courts are competent, independent, and impartial, and that they afford applicable judicial guarantees so as to ensure that the proceedings are fair.²⁶³

The right to fair trial axiomatically necessitates that judges are free from bias or prejudice in order to act impartially and also be institutionally and personally independent from political or administrative control and influence. Thus, the individual's right to trial in court,

²⁵⁹ On the downside, *gacaca* holds the potential for undermining the rule of law and perpetuating the culture of impunity if friends, family, and neighbours refuse to hold people accountable for their crimes. Arguably, in those areas where there is not any single survivor (i.e. individuals targeted by the killings but who managed to escape or survived the wounds), there might be no evidence "for the prosecution" except the testimonies of bystanders. In this scenario, it is also difficult to conceive the election of "honourable persons" in the first place, since there might not be any opposing voice to the election of a less "honourable person" as a member of the "*gacaca* jurisdiction". At the same time, accusations of participation in the genocide can be a powerful and dangerous weapon in Rwanda today as survivor groups can use them as a tool for political and/or economic control.

²⁶⁰ See, e.g., Amnesty International (1997).

²⁶¹ Although the training of magistrates was mainly organised by the Ministry of Justice, some projects were actually set up by nongovernmental organisations (NGOs), such as the Brussels-based Citizens Network, which provided training courses for judicial investigators throughout the first half of 1995. The French NGO Juristes sans Frontières, and the Montreal-based International Centre for Human Rights and Democratic Development, organised intensive courses for Rwandese lawyers, magistrates, and judges on prosecuting genocide. See also W A. Schabas (1996) 7(3) *Criminal Law Forum* 528.

²⁶² In fact, the government's proposal identifies the need for a massive popular education campaign, a large-scale training programme for the many people who would be involved at the various administrative levels, and an extra US\$ 32 million in the first two years. See OAU Panel Report (2000); Amnesty International (2000).

²⁶³ See also Amnesty International (1998) 151.

with guarantees for the accused in criminal proceedings, lies at the heart of due process of law.²⁶⁴

The right to trial by an independent and impartial tribunal is so basic that the Human Rights Committee has stated that it “is an absolute right that may suffer no exception”.²⁶⁵ The factors which influence the independence of the judiciary have been articulated to some extent in the Basic Principles on the Independence of the Judiciary.²⁶⁶ They include the separation of powers which protects the judiciary from undue influence or interference,²⁶⁷ and practical safeguards of independence such as technical competence and security of tenure for judges.²⁶⁸

The right to a hearing before a competent tribunal requires that the tribunal has jurisdiction to hear the case. Since categorisation matters so much for future proceedings and outcomes of the trials, efficient mechanisms should be put in place to ensure that an accused is not improperly categorised. The draft legislation suggests that decisions classifying the defendants into different categories may be appealed before the jurisdiction to which the case was referred.²⁶⁹ It is questionable if this review process is genuine and effective, as the same concern –lack of legal training – would apply to the appeal procedure.

Also important for the purpose of this evaluation, the independence of the tribunal means that decision-makers in a given case are free to decide matters before them impartially, on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere.²⁷⁰ It also means that

²⁶⁴ This is generally reflected in the formulation “everyone facing a criminal trial or a suit at law has the right to trial by an independent and impartial tribunal established by law”. See art. 10 of the Universal Declaration, art. 14(1) of ICCPR, art. 7(1) and 26 of the African Charter, art. 8(1) and 27(2) of the American Convention, art. 6(1) of the European Convention.

²⁶⁵ *González del Río v. Peru* Comm. Nos. 263/1987 (28 October 1992) U.N. Doc A/48/40 (1993) 20.

²⁶⁶ Basic Principles on the Independence of the Judiciary, U.N. GAOR 40/146 of 13 Dec. 1985 [hereinafter Basic Principles on the Independence of the Judiciary]. Though lacking a *per se* legally binding effect (“soft law”), there is a consensus that the principles can play a significant role in the interpretation, application and further development of existing law. See Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, ECOSOC resolution 1989/60 of 24 May 1989.

²⁶⁷ See Basic Principles on the Independence of the Judiciary, Principles 1,2, 3 and 4.

²⁶⁸ *Ibid.* Principle 10.

²⁶⁹ Draft Gacaca Law, art. 87.

²⁷⁰ Principle 2 of the Basic Principles on the Independence of the Judiciary states 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 for any reason”.

the people appointed as judges are selected primarily on the basis of their integrity and ability with appropriate training or qualification in law.²⁷¹ The concept of independence of a tribunal must also be considered in regard to the question of whether the tribunal presents an appearance of independence.²⁷² Appearance of independence relates to the question of whether litigants have a legitimate doubt about the tribunal's independence, thus affecting the confidence which the courts must inspire in a democratic society.²⁷³

The selection's requirements of the members of the *gacaca* tribunals are set forth in the draft *gacaca* law.²⁷⁴ It appears that to be eligible as a member of a bench "*gacaca* jurisdiction" one need to be an "honorable person",²⁷⁵ at least twenty-one years of age,²⁷⁶ and, admittedly, a Rwandese national.²⁷⁷ The requirement that an individual should be an "honorable person" seems to be guided by an effort to ensure the integrity of the elected persons. Once these conditions are fulfilled, the draft legislation further prohibits any other discrimination, in particular, due to gender, origin, religion, convictions, or social position.²⁷⁸ It is interesting to note that the listed grounds of discrimination are illustrative and not exhaustive.

The ability of the elected persons – as lawyers or any general level of education - does not enter into consideration in the selection procedure. More problematic, however, career magistrates are explicitly excluded from election as members of the bench *gacaca*

²⁷¹ Principle 10 of the Basic Principles on the Independence of the Judiciary states "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".

²⁷² "Justice must not only be done, it must also be seen to be done", *Delcourt Case* (1970) Eur. Ct. H.R. 11 Ser. A 17, para. 31.

²⁷³ *Sramek v. Autriche* (1984) Eur. Ct. H.R. 84 Ser. A 17.

²⁷⁴ See, arts. 13, 10 & 11.

²⁷⁵ Article 10 of the draft law states that:

"A Rwandese who meets the following conditions is honorable:

- (a) has good conduct, a good life, and good moral standards;
- (b) always tells the truth;
- (c) is honest;
- (d) is characterised by a spirit of sharing the floor;
- (e) has not received a sentence, which has the authority of *res judicata*, of at least 6 months in prison;
- (f) has not participated in offenses that constitute the crime of genocide or crimes against humanity;
- (g) is exempt from a spirit of sectarianism and discrimination."

²⁷⁶ *Ibid.* art. 10.

²⁷⁷ *Ibid.* arts. 6-10.

²⁷⁸ *Ibid.* art. 10.

jurisdictions at the sector, commune, and prefecture levels.²⁷⁹ It is difficult to understand the intention of the drafters in this regard. One explanation could be the fear of the moral and technical influence that experienced magistrates would exert on other members of the *gacaca* jurisdictions. In addition, the presence of legal professionals in such a popular tribunal could be problematic and defeat the purpose of speedy disposal of cases and simplicity. Surprisingly, though, the draft law further provides for advice to those sitting on the *gacaca* jurisdictions in the form of assistance by *conseillers juridiques* (legal advisers) designated by a special *gacaca* department in the Supreme Court.²⁸⁰ No further information is provided on the criteria for appointing these legal advisers, nor are there any guarantees of their independence. Yet, in cases where they do advise on specific trials, they may be able to exert considerable influence, as the lay judges in the *gacaca* jurisdictions would find it difficult to challenge or reject guidance from advisers in the Supreme Court who have a legal professional background. It submitted, however, that the legal advisers could play a critical role especially in the classification of defendants.

Furthermore, at least on this point, it is clear that the draft *gacaca* legislation is in violation of its own rules. In addition to the career magistrates, politically active persons, members of managing bodies of political parties, religious sects, or nongovernmental organizations cannot be elected as judges of the *gacaca* jurisdictions.²⁸¹ Whatever the arguments behind these proposals, it is submitted that the listed grounds for disqualification are *prima facie* discriminatory²⁸² and, therefore, should not be approved.²⁸³ The main concern is that there seem to be no clearly defined criteria for excluding a specific category of individuals.

“Impartiality”, on the other hand, denotes absence of prejudice or bias. The principle of impartiality, which applies to each individual case, demands that each of the decision-makers, whether they be professional or lay judges, be unbiased.²⁸⁴ The Human Rights Committee has stated that impartiality “implies that judges must not harbour

²⁷⁹ *Ibid.* art. 11.

²⁸⁰ *Ibid.* art. 30.

²⁸¹ *Ibid.* art. 11.

²⁸² Principle 10 of the Basic Principles on the Independence of the Judiciary states that: “(...) In the selection of judges, there shall be no discrimination against a person on the ground of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”

²⁸³ See also African Charter, art. 2.

²⁸⁴ See, *Karttunen v. Finland* Comm. Nos. 387/1989 (23 October 1992) U.N. Doc A/48/40 (1993) 120, relating to lay judges; and *Collins v. Jamaica* Comm. Nos. 240/1987 (1 November 1991) U.N. Doc. A/47/40 (1992) 236, para. 8.4, requiring jurors to be impartial.

preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.²⁸⁵ At present, challenges to the impartiality of a tribunal usually undergo two tests: a subjective one, which aims at ascertaining the personal conviction of a judge in a given case, and an objective one, which has to investigate the existence of sufficient guarantees to exclude any legitimate doubt as to impartiality.²⁸⁶ With regard to the first test, impartiality must be presumed until there is proof to the contrary. In the case of an objective approach the issue of appearance becomes relevant.²⁸⁷ A legitimate reason to fear a lack of impartiality should prompt a judicial officer to withdraw from the case.²⁸⁸ At stake here is “the confidence which the courts must inspire in the public in a democratic society”.²⁸⁹

Finally, international standards refer to “tribunals” rather than courts.²⁹⁰ Some advocates of the new *gacaca* system have argued that it is not appropriate to apply international standards of fair trial in this context, claiming that the *gacaca* jurisdictions are traditional methods of resolving conflicts, not a formal court system bound by international obligations. In practice, however, they would be the equivalent of criminal tribunals, but with few procedural safeguards against error or abuse. In many respects they would mirror the ordinary courts at the local level, with the principal difference that the judges would be lay people, not legal professionals. The *gacaca* tribunals would have many of the same powers as ordinary courts: the power to try defendants for crimes as serious as murder, to sentence them to lengthy prison sentences, including life imprisonment, and to compel witnesses to testify. They would also be applying criminal state legislation - all

²⁸⁵ *Karttunen v. Finland* para. 7.2.

²⁸⁶ *Ibid.*

²⁸⁷ The African Commission on Human and People’s Rights found that the creation of a special tribunal consisting of one judge and four members of the armed forces, with exclusive powers to decide, judge and sentence in cases of civil disturbances violated article 7(1)(d) of the African Charter. The Commission stated that “regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not the actual lack of impartiality”. See, *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria* Comm. Nos. 87/93; *Constitutional Rights Project (in respect of Wahab Akamu, G. Adege and others) v. Nigeria* Comm. Nos. 60/91, in 8th Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1994-1995.

²⁸⁸ Thus, for instance, article 16 of the draft *gacaca* law states that the honorable person member of the bench *gacaca* jurisdiction must disqualify himself if one of the listed circumstances (link with the defendant) is fulfilled.

²⁸⁹ *Piersack v Belgium* (1982) Eur. Ct. H.R. reprinted in (1982) 5 EHRR 169.

²⁹⁰ Different national legal systems and international standards define terms related to fair trials in different ways. Nevertheless, “[p]recisely because there are so many reasons to warrant linguistic and theoretical diversity (...) the existence of strong similarities is more convincing evidence that these rights are contained in “general principles” of law. M. C Bassiouni (1993) 3 *Duke J. of Comp. & Int’l L* 239.

features which require them to conform to minimum international standards.²⁹¹ Furthermore, the *gacaca* proposals have been conceived and promoted - and ultimately will be enforced - by the state. They will be introduced and administered through state legislation, and a special department in the Supreme Court will be created to supervise the activities of the *gacaca* jurisdictions.²⁹²

In any case, the description of the *gacaca* jurisdictions as a traditional system does not mean that international standards of fair trial can be set aside. Rwanda has ratified international human rights treaties which provide for the right to a fair trial. Under international law, it has an obligation to adopt legislative and other measures to give effect to the rights guaranteed in these treaties.²⁹³ According to the Human Rights Committee, the provisions of Article 14 of the ICCPR apply to trials in all courts and tribunals.²⁹⁴ The African Commission on Human and Peoples' Rights interpreted the provisions of Article 7 of the African Charter, dealing with aspects of the right to fair trial, as applying to any institution or body that can hand down decisions which may lead to imprisonment, enabling that body to impact on the liberty and security of the person.²⁹⁵

Furthermore, the declaration of the Seminar on the Right to a Fair Trial in Africa,²⁹⁶ reaffirms that "The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines." It goes on to state: "Traditional courts are not exempt from the provisions of the African Charter relating to fair trial".²⁹⁷

²⁹¹ The European Court has defined a tribunal as a body which exercises judicial functions, established by law to determine matters within competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. See *Sramek v. Autriche* (22 October 1984) 84 Ser. A 17, para. 36; *Le Compte, Van Leuven and De Meyere v. Belgium* (23 June 1981), 43 Ser. A 24, para. 55.

²⁹² As a matter of fact, the "*gacaca* jurisdictions" department of the Supreme Court has already been created, long before the adoption of the draft law.

²⁹³ See art. 2 of the ICCPR; a similar provision can be found in art. 1 of the African Charter which stipulates the all-encompassing obligation of States parties to "recognise the rights, duties and freedoms enshrined in this Charter" and to "adopt legislative and other measures to give effect to them".

²⁹⁴ General Comment 13 (21), U.N. Doc. A/39/40 (adopted on 12 April 1984), para. 4, *also in* U.N. Doc. CCPR/C/21/Add.3.

²⁹⁵ See *Civil Liberties Organisation (in respect of the Nigeria Bar Association) v Nigeria* Comm. Nos. 101/93; *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and Others) v. Nigeria*, 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995.

²⁹⁶ Organized by the African Commission on Human and Peoples' Rights in Dakar, Senegal, on 9-11 September 1999 pursuant to art. 45(1)(a) of the African Charter.

²⁹⁷ *Ibid.*

3.2.3.2. The Right to defence

Unlike the Organic Law,²⁹⁸ the draft law on the *gacaca* jurisdictions does not make any explicit reference to the rights of the accused. In view of existing safeguards in national and international law, the accused should automatically enjoy the right to defence²⁹⁹ in the *gacaca* trials. Among the minimum guarantees for a fair trial, Article 14(3) of the ICCPR includes the right to defend oneself through legal counsel and to be informed of such a right, and the right to examine and call witnesses. Admittedly, however, nothing in the draft *gacaca* law restricts the application of this right.

The right to defence includes the right to defend oneself in person or through a lawyer.³⁰⁰ This right assures the accused of the right to participate in his or her defence, including directing and conducting his or her own defence. The draft *gacaca* law suggests that the accused present at the trial will have the right to defend him or herself against the charges.³⁰¹ Although not explicitly mentioned, it is submitted that the accused may also decide to be assisted by a defence counsel. The further question to be determined is whether, as provided for in the ICCPR, the accused may have counsel assigned if the person does not have a lawyer of her choice to represent her.

Under Article 14(3)(d) of the ICCPR, the right to have counsel assigned is conditional upon the conclusion that the interests of justice so require it. The determination of whether the interests of justice require appointment of counsel is based primarily on the seriousness of the offence, the issue at stake, including the potential sentence, and the complexity of the issues.³⁰² The State is required to provide counsel *free of charge* to the accused under the ICCPR, if two conditions are met. The first is that the interests of justice require that counsel be appointed. The second is that the accused does not have sufficient funds to pay for a lawyer.³⁰³ According to the Human Rights Committee, the interests of justice require that counsel be appointed at all stages of the proceedings for

²⁹⁸ Article 36 of the Organic Law holds that “persons prosecuted under the provisions of this Organic Law enjoy the same rights of defence given to other persons subject to criminal prosecution, including the right to the defence counsel of their choice, but not at government expense”. See, Organic Law 08/96.

²⁹⁹ Art. 11(1) of the Universal Declaration, art. 14(3)(d) of the ICCPR; art. 7(1) of the African Charter; art. 8(2) of the American Convention, art. 6(3)(c) of the European Convention.

³⁰⁰ Art. 14(3)(d) of the ICCPR; art 7(1)(c) of the African Charter.

³⁰¹ Article 66 (7) the draft law states that: “The Chairperson of the session invites the defendant to present his defence”.

³⁰² *Henry v Jamaica* Comm. Nos. 571/1994 (26 July 1996), U.N. Doc. CCPR/C/57/D/571/1994, para. 9.2

³⁰³ Art. 14(3)(d) of the ICCPR.

people charged with crimes punishable by death, if the accused does not have the assistance of counsel of his choice.³⁰⁴ Arguably, therefore, the right does not apply in the *gacaca* trials since they would not apply the death penalty. Nevertheless, it could also be argued that, in the interests of justice, counsel be appointed for accused charged with crimes punishable by sentences as heavy as life imprisonment.

In Rwanda as elsewhere in Africa, two main obstacles to the procurement of legal counsel continue to be finances and availability of counsel.³⁰⁵ Rwanda has never had an independent defence bar and the recent promulgation of a law creating a Rwandese Bar Association is a positive step towards assuring representation, and could be utilized a mechanism to pool local and international resources for optimal results. Although the formal establishment of a defence bar was a step forward, two primary concerns of significance to Rwanda readily come to mind: the fact that the majority are unable to hire a lawyer due to poverty, and the unpopularity of defendants - Rwandese lawyers have been unwilling to defend individuals accused of genocide. Similar concerns could be raised in the framework of the *gacaca* jurisdictions, especially as the majority are likely to have little or no formal education, limited awareness of their rights or knowledge of how to defend themselves in a formal or semi-formal context.

3.2.3.3. Fair trials guarantees during appeal procedures

To err is human; thus protection against error is necessary. The right to appeal judicial rulings, including a criminal conviction, to a higher court or tribunal fulfills this need. The draft *gacaca* law provides a right to appeal for defendants tried by the *gacaca* jurisdictions and the same limited guarantees of fair trial at the appeal stage. Defendants tried at the level of the *cellule* can appeal to the *gacaca* jurisdiction at the *secteur* level - the next level up.³⁰⁶ Likewise, those tried at the *secteur* level can appeal to the level of the *commune*,³⁰⁷ and those tried at the *commune* level can appeal to the level of the *préfecture*.³⁰⁸

An appeal is considered a continuation of the criminal justice process and as such implicates rights previously discussed, including the right to an impartial, and independent

³⁰⁴ *Henry v Jamaica* Comm. Nos. 571/1994 (26 July 1996).

³⁰⁵ See E A Ankhuma (1991) 3 *RADIC* 573.

³⁰⁶ Draft Gacaca Law, art. 84.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

tribunal, procedures established by law.³⁰⁹ Therefore, the same fair trial concerns could be expressed in relation to the appeal level as in relation to the trials in the first instance by the *gacaca* jurisdictions.³¹⁰ Concerns about competence, independence, impartiality and the right to legal defence all also apply to the appeal procedures. Furthermore, verdicts returned after a confession and guilty plea cannot be appealed.³¹¹ Notwithstanding the plea agreement, it is submitted that this provision violates the right to appeal, especially when taking into consideration the seriousness of the offences and sanctions in issue.

If the *gacaca* jurisdictions are set up as outlined in the draft law, the trials would hardly meet basic international standards for fair trial. To be fair, many of the defects in Rwandese justice are attributable to the country's low level of economic development. Although the right to fair trial is identified in international law as civil and political rights, the artificiality of the distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, becomes apparent when the problem of justice in a poor country is considered.³¹² Realizing judicial guarantees depends on resources. These rights cannot be guaranteed in the same way in poor country as in a rich country, despite the admonition in relevant international instrument to the contrary. They are "positive" rights, not "negative" rights, in that they require the state to act, and not to abstain from acting.³¹³ Consequently, a state such as Rwanda must make agonizing

³⁰⁹ Art. 14(5) of the ICCPR.

³¹⁰ See, *supra*, 3.2.3.1.; 3.2.3.2.

³¹¹ Draft Gacaca Law, art. 87.

³¹² See, e.g., P De Vos (1997) 15 *SAJHR* 52. This author argues that there is no conceptual difference between civil and political rights and economic and social rights. According to him, it must, however, be conceded that there are, at least, some differences. Realisation of economic and social rights requires relatively greater or are more dependent for their realisation on positive state action than are civil political rights. However, "this difference separate the two sets of rights more in terms of degree than in kind". *Ibid* 70-71. See also a similar argument by Judge O'Regan concluding that: "distinctions between socio-economic and civil and political rights are not inherent in the rights themselves. However, if we envisage a 'continuum of obligation' with negatives obligations at the one end and positive obligations at the other, socio-economic rights will tend to cluster at the positive end of the continuum and the civil and political at the negative end". K O'Regan (1999) 1(4) *ESR Review* 3.; See also W A. Schabas (1996) 7(3) *Criminal Law Forum* 532.

³¹³ It is generally accepted that all human rights imposes, at least, three different types of obligations on the States: the obligations to respect, protect and fulfil. H Shue (1980) 5. The Human Rights Committee made clear that the ICCPR does place active obligations on States: "The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdictions. This aspect calls for *specific activities* by the States parties to enable individuals to enjoy their rights. (...) in principle, this undertaking applies to all rights set forth in the Covenant". See General Comment 3(13), U.N. Doc. A/36/40, para. 1.

choices³¹⁴ between investing in its judicial system in order to meet the norms set out in the International Covenant on Civil and Political Rights, or to invest in education, health care, and housing, so as to meet the pressing needs of the people of Rwanda and respect the claims of the International Covenant on Economic, Social and Cultural Rights,³¹⁵ not to mention the African Charter on Human and Peoples' Rights, with its own prerogatives.

Admittedly, fair trial rights are neither subject to the "progressive realization", nor to "available resources".³¹⁶ Clearly, however, the obligation imposed on the State does not require the State to do more than its available resources permit.³¹⁷ Thus, the stress on immediate nature of the obligation to implement fair trial rights should be accompanied by the clear acknowledgement that there are many obstacles to the full achievement of the recognized rights. In the case of Rwanda, a number of specific challenges should be considered, including the complete devastation of the judicial structure as a result of the civil war, genocide and other crimes. The poor economic conditions and under-development serve only to exacerbate the already bad situation. Rarely has a country anywhere had to face so many seemingly insuperable obstacles with so few resources.

There are however, other aspects of the trial process which are more feasibly within Rwanda's control. Given Rwanda's domestic obligations flowing from the Constitution,³¹⁸ the Arusha Accords³¹⁹ and international obligations deriving from the ICCPR and the African Charter, it is clear that a number of provisions of the draft *gacaca* legislation should be amended to conform to basic international standards for fair trials.

3.3. Social reconstruction and reconciliation

Classical criminal law theory proposes several objectives for punishment: prevention, deterrence, retribution, protection of the public, rehabilitation and social reconstruction in a

³¹⁴ See also *Soobramaney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) (South Africa).

³¹⁵ Adopted 16 Dec. 1996, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976) [hereinafter ICESCR].

³¹⁶ See art. 2(1) of the ICESCR; See also General Comment No 3 (1990); *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986); *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997).

³¹⁷ See art. 2(2) of the ICCPR whereby a State undertakes "to take the necessary steps" to adopt such legislative or other measures to give effect to the rights recognised in the Covenant.

³¹⁸ Rwanda Const. (1991).

³¹⁹ The Arusha Accords, which have constitutional force in Rwanda, declare that the Universal Declaration of Human Rights shall overrule any incompatible Rwandese legislation. See Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions, Aug. 3, 1993, art. 16, (1993) 16 J.O. 1265.

large sense.³²⁰ Some of these are echoed in the Preamble of the draft *gacaca* law. For example, referring implicitly to the notion of deterrence, the Preamble of the draft law affirms the government's conviction that the legal system is "an indispensable way to make an example of those who participated in the genocidal acts by prosecuting and convicting them so that the atrocities committed shall never be replicated".³²¹ The effective prosecutions and punishment of offenders is therefore intended to deter others from committing the same crimes, and perhaps to convince those already engaged in such behavior that they should stop. This argument is based on the assumption that if potential wrongdoers believe that they are likely to face punishment for their misdeeds, they may be persuaded not to initiate such activity. The punishment aspect of prosecution is therefore linked to prevention and deterrence.³²²

The concept of reconciliation, on the other hand, remains elusive in countries trying to get over conflict and mass violence. A question often asked is: can there be reconciliation without justice? The majority of people do not need to read the philosophers in order to hold some basic ideas about justice. Nearly all would argue that crime deserves to be punished, whatever the nature of the offence. Further, it is contended that the punishment of the perpetrators will ultimately bring reconciliation.³²³ However, the positive contribution of criminal trials to the process of reconciliation, while widely accepted, remains an empirical question: "justice in itself is not a problematic objective, but whether the attainment of justice always contributes to reconciliation is anything but evident".³²⁴

Generally, reconciliation refers to a process by which peoples who were formerly enemies put aside their memories of past wrongs, forego vengeance and give up their prior group

³²⁰ W M Reisman (1996) 59 *Law & Contemp. Probs.* 75.

³²¹ See, Preamble of the Draft Gacaca Law; See also, in a similar vein, the resolutions setting up the two international *ad hoc* tribunals where the Security Council affirmed its conviction that the work of the two tribunals "will contribute to ensuring that such violations are halted". See, S.C. Res. 827 (1993); S.C. Res. 955 (1994).

³²² Bassiouni notes that the weakness in the argument is that it is after the fact, but its strength is that it has crucial role to play in the formulation and strengthening of values and future prevention of victimization in the society. See M. C Bassiouni (1996) 59 *Law & Contemp. Probs.* 27. See, *contra*, M Minow (1998) 146. Minow refuses to use deterrence as an argument for international war crimes trials. She admits that we do not know how to deter someone like Radovan Karadžić. See also J Malamud-Goti in NJ Kritz (ed) (1995) 189 196: "the threat of a hypothetical conviction does not discourage criminal behaviour within a military body".

³²³ Preamble, Draft Gacaca Law.

³²⁴ See M Ignatieff (1996) 5 *Index on Censorship* 110. Ignatieff describes the "articles of faith" that underlie the commitment of the world community to international trials for war crimes. He asks: "What does it mean for a nation to come to terms with its past?". See also J Sarkin (2000) 2(2) *International Law Forum* ? (on-file with author).

aspirations in a favor of a commitment to a communitarian ideal. Reconciliation is a subject which is integral to all major religious and philosophical traditions. More specifically, the majority of traditions apparently place reconciliation above “justice”.³²⁵ Since “reconciliation” has religious overtones that suggest a reliance almost on faith, I have chosen to use the term “social reconstruction” which implies a task that individuals have to work on politically – it is something that people have to build and does not just happen. But it is easier to say how the term “reconciliation” is flawed than it is to say why “social reconstruction” or specify what it means. The term merely describes the evolution of social institutions, economic development, community-building and person-to-person connection that may underlie the commitment of people to live together. According to Reisman, “*social reconstructing* involves identifying social situations that generate or provide fertile ground for violations of public order, and introducing resources and institutions that can obviate such situations”.³²⁶ Unfortunately, even this does not offer a very clear definition of “social reconstruction”. For our purposes, however, what is important is not so much the ability to reach a definition of “reconciliation” or “social reconstruction”, but rather to determine whether the *gacaca* model can be regarded as a worthwhile endeavour in the building of a peaceful society in the aftermath of genocide.³²⁷

It is submitted that the decision to reconcile, like the power to forgive, forget, or overlook in the cases of genocide, crimes against humanity, war crimes, and torture is not that of the government but of the victims.³²⁸ Reconciliation, however, also demands a positive action from the perpetrators. Therefore, reconciliation is the result of an interaction victim-perpetrator. Groups (whether ethnic or racial), properly speaking, cannot be reconciled to other groups, only individuals can be reconciled to other individuals. Nonetheless, individuals can be helped to reconcile by the process of justice and the acknowledgement of the truth.

³²⁵ See D Bronkhorst (1995) 38.

³²⁶ W M Reisman (1996) 59 *Law & Contemp. Probs.* 76.

³²⁷ As far as I am aware, the objective of conflict prevention/resolution strategies is not much of suppressing conflicts within specific communities since there will always be conflicts in societies. It has even been argued that conflicts can have a positive impact in the dynamic of a society. See, e.g., K J Holsti (1995). Efforts, therefore, should aim at mitigating the negative impact/development of conflicts – especially violence – by means of developing peaceful mechanisms of conflicts prevention/resolution. See also Reisman who argues that the common denominators of the various goals of punishment “should be to protect, re-establish, or create a public order characterised by low expectations of violence and a heightened respect for human rights”. W M Reisman (1996) 59 *Law & Contemp. Probs.* 76.

³²⁸ See also M C Bassiouni (1996) 59 *Law & Contemp. Probs.* 19.

Reconstruction in a context of transitional justice is a contested notion. Social reconstruction may not occur when people are faced with judicial decisions that do not correspond to their perception about what happened, i.e., their “truth”. From their perspectives, some survivor groups have expressed fears that the current proposals amount to some form of amnesty.³²⁹ They are concerned that a Category Two suspect (a person guilty of intentional homicide or of a serious assault causing death) might confess and, as a consequence, be released after a short prison term.³³⁰ Fears have also been expressed that the proposed system may be used to settle personal scores through some form of collusion between defendants and local inhabitants, especially in rural areas with few or no survivors.³³¹ Thus, although the draft *gacaca* legislation affirms that within the framework of the *gacaca* jurisdictions the population shall achieve a justice based on evidence and not on passion,³³² evidence that is sufficient to produce a verdict in a court of law may not be sufficient to override solidified interest group perspectives among the ranks of legal professionals, let alone lay judges.

It has been argued that much of the struggle for justice, and the battle against impunity is the search for truth.³³³ In fact, it has been further suggested that the time period which will be investigated by the *gacaca* jurisdictions (crimes committed between October 1990 and December 1994) is likely to make large segments of society consider the process illegitimate because, it is said, “the process would focus on the Hutu as perpetrators and fail to take into account the long history of human rights abuses in Rwanda (both before and after the civil war and genocide) in which both Hutus and Tutsis have been perpetrators and victims”.³³⁴ In a similar vein, it could also be argued that the *gacaca* tribunals would not address the losses that the refugees had suffered since the onset of the civil war in 1990 and, therefore, makes reconciliation difficult to contemplate. Indeed, “recognizing the losses suffered by all Rwandese promises to advance the reconciliation process by reducing levels of defensiveness among returnees”.³³⁵

³²⁹ See OAU Panel Report (2000); see also Ligue Rwandaise pour la Promotion des Droits de l’Homme (LIPRODHOR) (2000).

³³⁰ See, *supra*, 3.2.1.

³³¹ See OAU Panel Report (2000); LIPRODHOR (2000).

³³² Preamble, Draft Gacaca Law.

³³³ W A. Schabas (1997) 7 *Duke J. of Comp. & Int’l L.* 499.

³³⁴ J Sarkin (2000) 2(2) *International Law Forum* ? (on-file with author).

³³⁵ M Summers (1996) *Working paper in African Studies* (Boston University) No. 207 (on-file with author) 14.

It should be kept in mind that no judicial system, anywhere in the world, has been designed to cope with the requirements of prosecuting crimes committed by tens of thousands, and directed against hundreds of thousands. Even a prosperous country, with a sophisticated judicial system, would be required to seek special and innovative solutions to criminal law and prosecution on such a scale. This is not to say that historical accountability should be neglected. Respect for the rule of law in today's Rwanda is also critical in the search for a lasting peace and social reconstruction. At the same time, in its current fragile state, the judicial system, or rather the accountability mechanism proposed will be at best distorted and at worst crushed by the demands of investigating past and present human rights abuses in addition to prosecuting ten of thousands people for genocide. Indeed, prosecuting the perpetrators of genocide is a most urgent priority. It is essential for the restoration of Rwandese society that the wheels of justice begin to turn with respect to the crimes committed during 1994. Therefore, it seems imperative to deal with the prosecution for genocide as a problem that is separate from the equally important acknowledgement of past abuses as well the building of a human rights culture in the present Rwanda.

The idea that social reconstruction depends on shared truth presumes that shared truth about the past is possible. As Ignatieff argues, however, truth is related to identity: "what you believe to be true depends, in some measure, on who you believe yourself to be. And who you believe yourself to be is mostly defined in terms of who you are not".³³⁶ This does not mean that there cannot be agreement on, for instance, a shared chronology of events though even this would be contentious; but it is difficult and almost impossible to imagine communities with a long history of antagonisms which culminated in a violent conflict and genocide ever agreeing on how to apportion responsibility and moral blame. In other words, in the aftermath of mass violence, there may be no consensus about who were the victims and who were the perpetrators.

In dealing with crimes of mass violence, the only option is to try to establish the most objective truth by means of witness testimony and other evidence.³³⁷ Whether it should be a "judicial truth" or one that is reached in a different manner depends on each country's experience and choices.³³⁸ Whatever the case, it is not realistic to expect that when

³³⁶ M Ignatieff (1996) 5 *Index on Censorship* 114; see also A McDonald (1999)(2) 3 *Law, Democracy and Development* 139 144.

³³⁷ See also A McDonald (1999)(2) 3 *Law, Democracy and Development* 146.

³³⁸ *Ibid.* ; see also CD Smith in NJ Kritz (ed) (1995) xvii.

“truth” is proclaimed by an official body, it is likely to be accepted by those against whom it is directed. The point is merely that it is best to be modest about what criminal trials can accomplish. Justice can serve the interests of truth. But the truth will not necessarily be believed and hence a path from truth to reconciliation is barred. All one can say is that leaving genocide perpetrators unpunished is worse: it leaves the cycle of impunity unbroken and permits societies to indulge their fantasies of denial.³³⁹

Attending to the competing claims, needs and goals of various groups, whether they are victims or aggressors, is critical for the efforts of rebuilding the society in Rwanda. It is critical to re-examine the assumption that criminal trials alone will uncover the truth, individualise the guilt, and ultimately reconcile the Rwandese and strengthen their unity. Additional interventions that are different from, but complementary to trials, should be considered to address the question of justice and social reconstruction in the post-genocide Rwanda.

³³⁹ See also M Ignatieff (1996) 5 *Index on Censorship* 118; see also, *supra*, 1.3.

CONCLUSIONS AND RECOMMANDATIONS

Rwanda's experience in prosecuting genocide will form a new chapter in the emerging practice in the area of transitional justice. In deciding to prosecute, Rwanda is complying with international standards addressing the question of accountability in the aftermath of massive violations of human rights and humanitarian law. Yet, the existing judicial system is incapable, if only for practical reasons, of responding to the challenge. To expedite the procedures, to reduce the vast caseload, and to increase popular involvement in the justice system, the government has developed a new law that introduces local tribunals inspired by a traditional mechanism for local dispute resolution called the *gacaca*. The ambition of this paper was to make a preliminary evaluation of the potential role of the *gacaca* tribunals. Focusing on the draft legislation, the question asked was: what role the *gacaca* model could possibly play in the search for justice and social reconstruction in the aftermath of genocide in Rwanda?

The process of setting up the *gacaca* jurisdictions should not be viewed in isolation but in context, as their performance will depend to a certain extent on whether other judicial mechanisms and institutions are functioning properly. A primary theme emerging from our discussions concerns the need to tailor international legal response to the specific needs of the people it is intended to serve in the first place. No doubt, the International Criminal Tribunal for Rwanda serves several important functions, especially the indictment, apprehension, and eventual trial of several key leaders of the genocide who likely would not have been apprehended in their countries of refuge and returned for trial in Rwanda. That said, the international tribunal has not and will probably not succeed to individualise the guilt. Despite the claim in the resolution establishing the tribunal and its impressive budget, it has so far concluded only a small number of cases. The location of the Tribunal, far away from the people who need to participate or, at least, to see the process of justice, serves only to exacerbate the already limited impact.

To be helpful, the international community also needs to act responsibly with respect to the domestic trials process. This entails not only the donation of resources, but also requires a realistic and informed appraisal of the domestic situation in the country in question. Ironically, many who insisted that the trials begin without delay soon after the genocide then complained that the procedures were unfair because judicial personnel were inadequately trained and essential resources were not in place. Nevertheless, Adhesion to domestic and international standards related to fair trial is crucial. The great

virtue of legal proceedings is that its evidentiary rules confer legitimacy on otherwise contestable facts. To attain this result, however, justice must be perceived to be fair.

Prosecutions at the international and national level, though important, remain unsatisfactory. It is commendable that the newly proposed system of using *gacaca* tribunals brings the justice process at the local (cell, secteur, commune) level which is where most people, especially in the rural society of Rwanda, experienced the violence and its aftermath. In general, the involvement of local people in the process of collecting and processing information, rather than simply the involvement of professional staff, may set in motion a more sustained process for coming to terms with the past.³⁴⁰ The process of gathering information of survivors telling their stories in local hearings, of having people taking testimonies and participating in the process as the need arises³⁴¹ further correspond to the African concept of justice. How many times have Rwandese doubted the justice they get from the western style courtrooms and from an environment and language they can hardly comprehend? Since justice like culture is not supposed to be static concept, it should be developed consistent with conditions and experiences in given situations. Rwanda should learn from its rich past to nourish its concept of justice and ultimately human rights. Certainly, the *gacaca* process will “prove the capacity of the Rwandese society to settle its own problems through a legal system based on Rwandese customs”.³⁴² Furthermore, for the lessons of an accountability process to be integrated into the life and culture of Rwanda, the nation should feel a sense of ownership and investment in the process.³⁴³

The draft *gacaca* legislation appears to be less commendable as far as *substantive* criminal law is concerned. Crimes have been defined without the required degree of specificity and the legislation restricts considerably the jurisdiction of the *gacaca* courts over the crimes committed during the time period considered. The draft law does not specifically cover many serious violations of common Article 3 and Geneva Protocol II. Although not explicitly listed as grave breaches, these are crimes of universal concern and subject to universal condemnation as embodied in the Statute of the ICTR.

³⁴⁰ See also N Roht-Arriaza (1996) 59 *Law & Contemp. Probs.* 98.

³⁴¹ At the hearing, any person who so desires, speak. See, art. 66 of the Draft Gacaca Law.

³⁴² See, Preamble, Draft Gacaca Law.

³⁴³ See also N J. Kritz (1996) 59 *Law & Contemp. Probs.* 149.

Turning to the *procedural* criminal law aspect, it is, in principle, up to each particular nation facing the problem to decide the specific content of a policy to deal with past massive human rights abuses. However, Rwanda must also act in consonance with international human rights law and principles. In particular, international standards related to trials, treatment of offenders and punishment should be respected. The draft law on *gacaca* jurisdictions should be amended to ensure that these trials conform to international standards for fair trials. In particular, defendants should have, at least, access to legal advice. Also, measures should be taken to ensure the competence, independence and impartiality of those elected to the *gacaca* jurisdictions, at all levels. Finally, before the *gacaca* jurisdictions begin considering cases of genocide, significant resources should be devoted to ensuring training of those elected for the *gacaca* jurisdictions, including training in international standards for fair trials. Since legal training appears to be crucial, the disqualification of career magistrates as members of the *gacaca* jurisdictions is perplexing. Measures should also be taken to ensure that legal advisers of the *gacaca* jurisdictions are independent and impartial in providing their “advisory opinions”. In this respect, the Supreme Court, in its supervisory and monitoring function, will have a critical role to play to ensure that the *gacaca* jurisdictions fulfil their tasks and are seen to be competent, independent and impartial.

The ultimate goal of justice should be the building or rebuilding of a peaceful society. As Bassiouni notes: “whichever mechanism or combination of mechanisms is chosen, it is chosen to achieve a particular outcome which is, in part, justice, and, whenever possible reconciliation, and ultimately, peace”.³⁴⁴ As argued above, reconciliation results from individuals’ interactions. The attainment of justice or the acknowledgement of the truth certainly serves to help the process of reconciliation. It is doubtful, however, if the process of justice necessarily leads to reconciliation. What should be achieved is not only a sense of justice but also the elimination of a sense of injustice for both the victims and the perpetrators.

The conflict in Rwanda is complex because it has multiple underlying causes. Only when all the sources are identified, can there be development of comprehensive management strategies that can result in a genuine resolution of conflict. The dilemma of justice and social reconstruction in Rwanda is how to respond to past gross abuses in a manner that allows communities with varied experiences, needs and goals to learn to live together

³⁴⁴ M. C Bassiouni (1996) 59 *Law & Contemp. Probs.* 23.

again. Ultimately, while justice and accountability may be significant contributors to the process of social reconstruction, criminal trials should be conceptualized as but one aspect of a larger series of possible interventions.

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