JUSTICE, TRUTH AND RECONCILIATION UNDER RWANDAN DOMESTIC COURTS:

SPECIFIC REFERENCE TO THE TRADITIONAL GACACA COURTS

A dissertation submitted in partial fulfillment of the requirements for the degree

LLM (Human Rights and Democratization in Africa)

By

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DECLARATION

I, Justine B Katushabe, hereby declare that this dissertation is my own original work and that it has not been submitted for examination for the award of a degree at any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signed:

DEDICATION

I dedicate this dissertation to my Mum, my husband and my uncle, Dr Ben.

ACKNOWLEDGMENTS

I am indebted to a number of people who have made it possible for me to do this research.

- Professor L Fernandez, for his meticulous thoroughgoing comments, criticisms and support aimed at making the best out of this research.

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ABBREVIATIONS

(EDS)	Editor
CELL	The lowest decentralized unit of administration
COMMUNE	The second biggest decentralized unit
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Form Yugoslavia
OAU	Organization of the African Unity
PARA	Paragraph
PREFECTURE	The biggest decentralized unit
SC Res	Security Council Resolution
SC	Security Council
SECTOR	The second lowest unit of administration

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CHAPTER 1: INTRODUCTION TO THE STUDY

Immediately after the 1994 genocide in Rwanda, the government of national unity faced the onerous task of reconstructing a country laid desolate by the forces of genocide. The infrastructure was destroyed, and human resources decimated. The Government also had the difficult task of bringing the perpetrators of genocide to justice, thus breaking the culture of impunity that has characterized Rwanda for over 30 years. At the same time, the new Government had to build the foundations for a stable, inclusive society, based on tolerance, respect for fundamental human rights, and dedicate itself to promoting national unity and reconciliation.

In response to the Rwandan atrocities, the United Nations (hereafter UN) immediately set up the International Criminal Tribunal based in Arusha, Tanzania. Within a year of its creation, domestic courts were set up in Rwanda. The Tribunal was to try only the key ringleaders of the genocide, commonly referred to "the big fish". They constituted only a very small percentage compared to the number of all other perpetrators of the genocide. The Rwandan government enacted a law to try most of the perpetrators.

It enacted Organic Law in addition to the code of criminal procedure, to try genocide suspects. One of the objectives of the new law was to speed up genocide trials and to bring about truth and reconciliation through plea procedures. Since then, the process of trying the genocide perpetrators in both Arusha and in Rwanda has been disappointingly sluggish and frustrating. The achievement of justice and reconciliation in Rwanda remain very distant; yet this shattered society cannot grow in unity without justice and reconciliation.

More than 110,100 detainees are still in prisons around the country. They stand accused of participation in genocide. It is estimated that at the present rate, it would take at least 200 years to try all suspects in detention. In response to this disappointing situation and strong desire for justice, truth and reconciliation, Rwanda has started to implement its traditional participatory justice system, called Gacaca, with the strong

belief that this is the only way to bring justice to Rwanda in an estimated period of five years.

This paper examines the failures of the organic law (genocide code) to achieve justice truth and reconciliation, and looks to see whether the Gacaca courts are a viable medium to achieve similar goals in a shorter period of time, having regard to fairness, openness and community participation. The paper will also focus on aspects of the Gacaca Courts since the start of their coming into being.

1.1 Objective of the Study

This dissertation will attempt to show how international human rights law has failed to some extent to respond effectively to the demands for justice following the genocide. The dissertation further aims to make African people aware that traditional methods of conflict resolution should be encouraged and supported.

1.2 Justifications

The most important reason for this research is to contribute to the existing literature on the Rwandan justice system in the aftermath of Genocide. Academic research on this topic has, in part, questioned the effectiveness of the Gacaca system in restoring justice, truth and reconciliation. This dissertation attempts to respond to these reservations by way of first-hand experience of the practices of the Gacaca courts since their inception, even though it might seem too early to draw final conclusion. The author gained first-hand experience of the situation in Rwanda during the period from December 1998 to December 2001 when she worked for the Ministry of Justice as a State Attorney in the Court of Appeals in Kigali. Part of her work consisted in the training of the Gacaca court judges who were elected by the people.

1.3 Scope of the Study

The ambit of this study is to point out not only the shortcomings of international law in providing quick and appropriate justice in the case of the Rwandan genocide, but also to study the Rwandan justice system after the Genocide and to show up its failures in reconstructing the Rwandan society. Which itself has opted Rwanda to resort to the traditional Gacaca courts. The study shows the merits of the Gacaca as opposed to the other systems when it comes to giving effects to quick and appropriate justice, and to the achievement of truth and reconciliation in Rwandan.

The issue in present Rwandan society is not punishment but reconciliation. This can only be achieved through Gacaca courts, where both victims and perpetrators participate in truth revelation and reconciliation, and where both perpetrators and victims of genocide are referred to as the victims of the old regime for the purposes of achieving reconstruction.

1.4 Methods adopted.

This study relies on both primary and secondary sources. The secondary sources human rights journals, books, other law journals articles, media reports, documentaries, and Internet sources. Personal first hand knowledge will also be referred to where appropriate. The primary sources are UN Resolutions and conventions, statutes and Rwandan national legislation.

1.5 Literature review

At present there exists no journal publication dealing specifically with justice, truth, and reconciliation in relation to the organic law and the Gacaca courts. The publication that comes closest to dealing with this subject is the one by Idi *Tuzinde Gaparayi*,[1] who,

[1] IG Tuzinde " Justice and social reconstruction in the aftermath of Genocide in Rwanda: an evaluation of the possible role of the Gacaca Tribunals" (2000) *African Human Rights Law Journal 78.*

from a human rights perspective, appraises the implementation of the Draft Law establishing *Gacaca jurisdictions?*

Amnesty international has questioned the legality of Gacaca courts in the social reconstruction of Rwanda.[2] Sarkin, on the other hand, writes on what he considers to be preconditions for the establishing of truth and reconciliation in Rwanda. He discusses the possible role of the Gacaca community courts in this regard, but at the same time raises the question as to their acceptability under international law and their effectiveness in Rwanda.[3]

1.6 Scope of the research

Chapter Two of this dissertation deals with the Organic Law. No. 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1990. It examines the extent to which this piece of legislation has brought about reconciliation amongst the Rwandan people. It focuses mainly on the guilty plea procedure under the Organic Law.

Chapter Three focuses on how the Rwandan government, as a response to the failure of the existing Organic Law to overcome these problems, decided to adopt a law providing for Gacaca courts. The chapter analyses how Gacaca courts serve a potential role in rebuilding the Rwandan society.

Chapter Four concludes the study and contains recommendations.

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[2] Amnesty International Report (2000) Rwanda: *The Troubled Course of Justice*. And Amnesty international (1998) The *Unfair Trials Manual* London.

[3] J Sarkin (1999) "Pre Conditions and Processes of establishing a Truth and Reconciliation Commission in Rwanda- the possible interim role of the Gacaca community courts" (2) 3 Law, Democracy and Development.

CHAPTER 2: THE ORGANIC LAW NO. 08/96 OF 30 AUGUST 1996.

2.1 Introduction

The genocide and massacres committed in Rwanda between 1 October 1990 and 31 December 1994 left the country faced with major challenges, in particular, the eradication of the culture of impunity.[4] It therefore became urgently necessary to prevent similar tragedies from re-occurring, so that the social fabric could be reconstructed.

The impunity that was long enjoyed by the authors of the previous social dramas had resulted through the years in the trivialization of violations by Rwandan authorities and population groups. This process partly explains the overwhelming number of victims and individuals involved in the events of 1994.[5] More than a million Rwandans lost their lives during these events, and many of those who were not killed were maimed, and many were traumatized for life.

There were 110,100 people detained in Rwanda immediately after the Genocide in 1994-1995. This number increased with time. Eradicating this impunity was a prerequisite for peaceful co-existence and social cohesion. But it also meant the systematic arrests, trials, convictions, and sentencing of those involved in the tragic events regardless of their number, and the limited capacity of the country's justice system.[6]

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[4] C Villa-Vicencio and T Savage (eds) 2002: *Addressing the legacies of Genocide and crimes against Humanity*, 49.

[5] Ibid.

[6] Ibid. 49-54.

Eradicating impunity also means adopting harsh penal measures created for normal periods, during which criminality is a marginal phenomenon, for the situation after the Genocide[7] There can be no durable reconciliation as long as those who are responsible for massacres are not properly brought to responsible account and to pay for their crimes.[8] The culture of impunity can only be countered if the masterminds of atrocities and their henchmen are brought to justice.

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- presented Rwanda with obstacles of an unprecedented magnitude.[9]

The Rwandan Government set in motion a process aimed at ensuring individual criminal responsibility for the perpetrators. Immediately after the war, the UN set up the International Criminal Tribunal for Rwanda (hereafter ICTR), with its seat in Arusha, Tanzania.[10]

This chapter examines how the Organic Law (Genocide Code) was implemented, partly to try suspects outside of the Tribunal's jurisdiction, and partly in reaction to the tardy

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[7] See J Dugard (1999) 1001,1002; "Dealing with crimes of a past regime. Is Amnesty still an option"? Unpublished paper. GW Mugwanya (1999) "*Expunging the Ghost of Impunity for Severe Human Rights Violations and the Commission of Deliciti Jus Gentium:* A case for the Domestication of International Criminal Law and the Creation of a Strong Permanent International Criminal Court," *Michigan State University Journal of International Law 700-779.*

[8] Gerald Prunier (1995), *The Rwandan Crisis: History of Genocide*, 342.

[9] Tuzinde op cit. (2000) 78.

[10] K Kindiki " Prosecuting the perpetrators of the 1994 Genocide in Rwanda: its basis in international law and the implications for the protection of human rights in Africa" (2001) *African Human Rights Law Journal* 64.

procedure of the Tribunals and the Rwandan government Disappointment in its manner of going about its business.[11] A chief grievance on the side of Rwanda has been the tiny number of genocide cases disposed of by the court in contrast to the multitude of *genocidaires.*[12] The Organic Law was amended to respond to these challenges[13]. However, despite all high hopes by the Rwandan society, the Organic Law has met with obstacles, which hindered its work.

[11] The tribunal's seat in Arusha was not going to attract the presence of those most closely affected by the genocide, 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 processes of justice should be accessible and visible. The tribunal, in response, has set up an office in Kigali (*Umusanzu mubwiyunge*), which records all decided cases. However, it has proved to be of little help.

[12] See press statement by the prosecutor of the International Criminal Tribunal for Rwanda, Dec 12, 1995, Justice R Golstone, where he mentioned that the essential objective of the tribunal is to bring to justice those most responsible both at the national and the local levels for the mass killings. This refers to in particular to persons in positions of leadership and authority. But see also Morris, challenging what she calls "*anomalies of inversion*" in which the international tribunal prosecutes (or strives to prosecute) the leaders, leaving the national governments the rest of the defendants. See M Morris (1997) 7(2) *Duke Journal of Comparative and InternationalLaw.* Available at http://www.unc.edu/depts/diplomat/amdipl6/morrisinfo.html accessed on 16/09/2002.

[13] See WA Schabas (1996) 7 *Criminal Law Forum* 523. "Describing the development and substance of the organic law". See also J Sarkin (1998) 20(3) "The development of a Human Rights Culture in South Africa" *Human Rights Quarterly* 794-796.

2.2 The International Criminal Tribunal for Rwanda

In September 1994, sixteen months after the establishment of the International Criminal Tribunal for the former Yugoslavia (hereafter ICTY),[14] the new government of Rwanda requested that the United Nations establish an International Criminal Tribunal for Rwanda (hereafter ICTR) to adjudicate the crimes of genocide, war crimes, and crimes against humanity that had been committed in the country.[15]

As negotiations over the terms for establishing an ICTR proceeded, Rwanda objected to a number of its substantive provisions.[16] Some of these original points of difference remain and continue to undermine the effectiveness of the ICTR, from the point of view of the Rwandan government.

First, Rwanda took exception to the time period over which the ICTR would have jurisdiction. According to the ICTR Statute, only crimes committed between 1 January and 31 December 1994 would come within the jurisdiction of the ICTR.[17] Rwandan authorities argued that such limited temporal jurisdiction would prevent the ICTR from fully encompassing within its prosecutorial scope the criminal activities that culminated in the genocide of 1994.[18] Those activities, according to the authorities, began with the

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[14] The Security Council established the International Criminal Tribunal for the former Yugoslavia in Security Council Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Session., 3217th meeting. U.N. Doc. S/Res/827 (1993).

[15] See statement dated 28 September 1994 on the *Question of Refugees and Security in Rwanda*, U.N. SCOR, 49th Sess., Annex, at 2, U.N. Doc. S/1994/1115 (1994) [hereafter Refugees Statement].

[16] For an analysis of the politics of establishing the ICTR, See P Akhavan "The International Criminal Tribunal For Rwanda: The Politics and Pragmatics of Punishment" (1996) 90 *American Journal of International Law*. 501.

[17] Art. 1 of the statute establishing the ICTR www.ictr.org (accessed on 20 September 2002.)

[18] See U.N. SCOR, 49th Session.

planning and sporadic carrying out of massacres - "pilot projects for extermination" dating back to 1990.[19]

The Rwandans also question why ICTR Statute provided for so few personnel, both judicial and prosecutorial. They argue that the ICTR could not possibly be expected to meet the monumental task at hand with such a skeleton workforce.[20] Not only was the total number of judges very small (six trial judges and five appellate judges), but also the appellate judges were to be shared with the ICTY.[21] Moreover, the ICTR and ICTY were to share one Prosecutor.[22]

Another major objection raised by the Rwandans concerned the death penalty.[23] The Statute of the ICTR provided for imprisonment as the most severe sentence, precluding imposition of capital punishment by the ICTR.[24] The Rwandan Penal Code, by contrast, *does* provide for the death penalty.[25]

Since the ICTR was expected to try the leaders and organizers of the genocide, the spectre of unevenness in sentencing was raised: The leaders of the genocide, tried before the ICTR, would escape the death penalty while lower-level perpetrators, tried in

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[19] Ibid.

[20] Ibid. U.N. Doc. S/PV.3453; supra note 11, at 15.

[21] Ibid. U.N. Doc. S/PV.3453; *supra* note 11, at 15. *See,* Statute of the ICTR, *supra* note 13, art. 12(2), 12(3)(d).

[22] Ibid. Art. 15(3)

[23] See U.N. Doc. S/PV.3453; *supra* note 11, at 16.

[24] See *Statute* of the ICTR *supra* notes 13, art. 23(1).

[25] See République du Rwanda Décret-Loi No. 21/77, Code Pénal art. 26, 1 Codes et Lois du Rwanda 391 (1995), Université Nationale du Rwanda Faculté de Droit (Fr.).

Rwandan national courts, might be executed. This situation is not conducive to national reconciliation in Rwanda.[26]

When the Rwandan officials argued that the death penalty be included under the ICTR's statute in respect of Rwandan laws, the UN countered that Rwanda should rather abolish the death penalty from its domestic penal code.[27] One wonders whether the same advice would have been proffered to the governments of the United States, China, and Russia. Had any one of these states have found itself in the situation in which Rwanda finds. Rwanda was also concerned that countries, which had supported the genocidal regime, would participate in the process of nominating judges.[28]

Also Rwanda could not accept that persons sentenced by the Tribunal should be imprisoned in third countries or that those countries should have powers of decision over the prisoners.[29]

Here it must be pointed out that the national law of the host country fully applies only to the prison regulations. The application of national law for any pardon or commutation of sentence is a matter to be decided by the President of the Tribunal. The President in case of any application for pardon or commutation of sentence, informs the Rwandan Government, but no genuine consultation takes place.

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26 U.N. Doc. S/PV.3453, *supra* note 11, at 16.

27 A des Forges (1999) *Leave Non-to Tell the Story*: Genocide in Rwanda http://www.hrw.org/reports/1999/rwanda/ (accessed on 23 October 2002)

28 Ibid.

29 See generally V Morris & MP Scharf (1995) *The International Criminal Tribunal for Rwanda.*

These, then, were some of Rwanda's objections to the Statute that established the ICTR.[30] When the ICTR statute was eventually promulgated some Rwandans involved in the proceeding negotiations were convinced that the United Nations had no real commitment to contributing to justice and reconciliation in Rwanda.

They believed instead that the attributed motives for establishing the ICTR were, first, to provide a smokescreen to conceal the shameful failure of the international community to intervene in the genocide and, second, to establish an additional precedent contributing to the momentum towards establishing the International Criminal Court (hereafter ICC).[31]

By a strange coincidence, Rwanda held a seat on the UN Security Council at the time when the ICTR was being established. Ironically, because of its objections to the ICTR Statute as it was finally drafted, Rwanda cast the sole vote opposing adoption of the Security Council resolution establishing the ICTR. [32] Nevertheless, the ICTR was established and, notwithstanding its vote against the ICTR Statute, Rwanda expressed its intention to support the ICTR and cooperate with its work.[33]

Erasmus[34] has argued that the ICTR was in effect born out of the efforts of the international community to respond to the Rwandan Genocide. While this may be true,

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30 The Rwandan delegation to the Security Council also voiced certain other objections to the ICTR Statute. These can be found at *id.* At 14-16.

31 See Discussions with Rwandan Officials, in Geneva, Switzerland (June 19-21, 1996) Discussions with Rwandan Officials in Cape Town, South Africa (Jan. 20-26, 1997).

32 See U.N. Doc. S/PV.3453; *supra* note 11, at 16.

33 See Richard D. Lyons, *U.N.* "Approves Tribunal on Rwandan Atrocities," *New. York Times*. 9,Nov 1994.

34 See G Erasmus & N Fourie The International Criminal Tribunal for Rwanda: are all issues addressed? How does it compare to South Africa's truth and reconciliation commission? (1997) 321 *International Review of Red Cross* 705 7089,

one must not underestimate the role played by the Rwandan authorities in pressing the international community to establish the ICTR. Security Council Resolution 955 of 1994, which established the ICTR, pertinently refers to the request of the government of Rwanda[35], making it clear that the co-operation and consent of Rwanda had been obtained.[36]

But the ICTR was not expected by any means to address the bulk of Rwanda's staggering volume of genocide-related criminal cases. By January 1997, Rwanda's awaiting -trial prison population had grown to over 110,100, virtually all-awaiting prosecution for genocide-related crimes.[37] Rwandan authorities decided to supplement the work of the ICTR by prosecuting those implicated in the 1994 in the domestic courts of Rwanda. To this end the Rwandan Transitional National Assembly enacted the Organic Law.

2.3 The enactment of the Organic Law

On 1 September 1996, the "Organic Law" on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990" [38] came into force as the law that would forthwith govern the national prosecutions for the genocide in Rwanda.

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[35] See Res 955 (1994) 2.

[36] F Viljoen "The role of the law in post- traumatized societies: addressing gross human rights violations in Rwanda" (1997) 30 *De jure 18.*

[37] S Rwagasore, (1997) seminar delivered in Cape Town, South Africa 22 January. unpublished paper.

[38] *Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990*, Organic Law No. 08/96 (August 30, 1996), *in official journal of the republic of Rwanda* (1996) [hereafter *Genocide Law*].

The Rwandan criminal justice system had never been equipped to handle a large volume of cases, and it had been entirely disabled during the violence. It tried no cases in 1995. This, then, was the justice system that was now required to process tens of thousands of the most serious criminal cases. This criminal justice system hardly had any resources, and the personnel were barely trained. Added to this was the highly volatile political environment.

2.3.1 Categorization of criminals under the Organic Law

The specialized criminal justice program laid out in the law that was passed to respond to this situation was categorized as follows. Suspects were classified into four categories according to their degree of culpability in the genocide.

Category *One* includes leaders and organizers of the genocide and perpetrators of particularly heinous murders or sexual torture. All others who committed homicides come within Category *Two. Category three* includes perpetrators of grave assaults against the person not resulting in death. Category Four encompasses all those who committed crimes against property.[39]

2.3.2 Justice truth and reconciliation under the organic law

The confession and guilty-plea procedure was the cornerstone of the Organic Law and was designed to encourage confessions and to elicit apologies to victims, thus contributing to a process of truth, justice and reconciliation. A complete confession included a detailed description of the acts committed, the names of all accomplices, and apologies to the victims.

This criminal justice system relied heavily on a process of plea agreements. All perpetrators other than those in Category *One* (who would be subject to the death

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[39] Ibid.. art. 2.

penalty)[40] were entitled to receive a reduced sentence as part of a guilty-plea agreement.[41]

Specifically, a pre-set, fixed reduction in the penalty that would otherwise be imposed for their crimes was available to all non-Category One perpetrators in return for an accurate and complete confession, a plea of guilty to the crimes committed, and an apology to the victims.[42] Perpetrators who confessed and pleaded guilty prior to prosecution would receive a lesser penalty than those perpetrators who came forward only after prosecution had begun.[43]

2.3.2.1 Sentencing of Victims

The sentences provided under the specialized legislation were as follows: Category *Two* perpetrators received a sentence of 7 to 11 years imprisonment if they pleaded guilty before prosecution; a sentence of 12 to 15 years imprisonment if they pleaded guilty after prosecution has begun; or a sentence of life imprisonment if convicted at trial.[44]

Category Three perpetrators would receive a penalty of one-third the prison sentence normally applicable for their crimes if they pleaded guilty before prosecution, a

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[40] Ibid. Art .14.

[41] Ibid. Articles. 5, 15, 16.

[42] Ibid. Art. 6.

[43] Ibid.. Arts. 15, 16.

[44] Ibid.. Thus, the death penalty is excluded even for those Category *Two* perpetrators convicted at trial. *See id.* This exclusion of the death penalty constitutes a reduction from the severity of sentence that could ordinarily be imposed under the Rwandan Penal Code, which prescribes capital punishment for murder. This reduction reflects a policy decision regarding national reconciliation and truth in such a traumatized society.

sentence of half the term of years normally applicable if they pleaded guilty after prosecution has begun, and the sentence ordinarily applicable if convicted at trial.[45] All *Category Four* defendants convicted received suspended sentences.[46]

A substantial reduction in sentence was thus provided where a Category *Two* or *Three* accused submitted a guilty plea before prosecution. This leniency was extended in order to encourage perpetrators to come forward before prosecution and reveal the whole truth.

A perpetrator who pleaded guilty prior to prosecution eliminated the need for the prosecutor to conduct a full investigation and prepare a complete dossier for the case in question. Similarly, the penalties that were imposed pursuant to a guilty plea submitted after prosecution had begun but before conviction at trial, were less severe than the penalties imposed pursuant to a conviction at trial. This structure was intended to maintain incentives for perpetrators to plead guilty even after the initiation of prosecution.

The Rwandan specialized criminal justice program, as noted earlier, requires that the accused, as part of the plea agreement, disclose accurately and fully the nature of crimes committed, including the role of accomplices.[47] This requirement was considered important for establishing a truthful historical record of the Rwandan genocide; in addition, it also provides that the suspect to pay damages to the victim, hence promoting reconciliation.

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45 See Genocide Law, supra note 38, arts. 15, 16.

46 See id. Art. 14(d).

47 See Genocide Law, supra note 38, art. 6(b).

The extra requirement that a perpetrator participating in the confession and guilty-plea bargain make an apology to the victims of his or her crimes [48] was intended to contribute to the process of national healing and reconciliation. The Rwandan specialized criminal justice machinery represents a complex compromise in this regard.

2:3.2.2 Compensation fund for the victims of genocide.

The post-genocide situation in Rwanda is unique. This is possibly the first time in recent history that the victims of genocide have to live side by side with their erstwhile persecutors.

Also, the imperatives of national stability have meant that the majority of the perpetrators of genocide have received or will receive punishment not commensurate with the seriousness of the crime they committed. No amount of money would adequately compensate the victims of genocide, despite their entitlement to it.

The Organic Law (Genocide Code) includes provisions for the creation of a Victims Fund. The underlying idea was that genocide is a crime against humanity and occurred as a result of the moral failure on the part of international community, hence the need for the community of nations to help to reintegrate the victims and survivors of genocide into normal civic life.

Regrettably, no contributions have flowed into the Fund, mainly because governments around the world are reluctant to commit money for this purpose. The ICTR does not address compensation by the victims of genocide, leaving this question to the domestic courts to handle.

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[48] See Genocide Law, supra note 31, art. 6(c).

2.3.3 Failures of the Organic Law

The first trials based on the Organic Law opened on 27 December 1996.Yet by 1998, no more than 1,500 people had been tried, and a year later, no fewer than 110,100 were still detained and awaiting trial, often in the most deplorable conditions.[49] The Rwandan government acknowledged that several thousand detainees died of AIDS, malnutrition, dysentery or typhoid fever.[50]

At the present rate of case disposal, it is estimated that it would take at least 200 years to try all those in detention. Yet the Genocide Code was intended to try all suspects within five years, starting from 1996.[51] Since 1996, however, most pre-trial detainees have not had their detentions reviewed judicially. This is because of their huge number compared to the handful of judicial personnel and inadequate court infrastructure. By January 2000, only 2,500 accused had been tried and more than 110,100 were still detained, awaiting trial.[52]

Genocide survivors and other Tutsi extremists became so biased against those accused of participating in the genocide that witnesses for these suspects were seen as collaborators.[53] Those acquitted were at times re-arrested or kidnapped and killed.

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49 Report prepared for IPEP by the Rwandan national reconciliation commission, "some efforts made by the government to build a new society based on national unity and reconciliation" February 2000. (On file with the author)

50 Des Forges,(op cit 27above) 753: also see Reyntjens (1998-1999) 21 "Talking or Fighting: Political evaluation in Rwanda and Burundi", 10-20"

51 See generally Amnesty International Rwandan report (2000): *the troubled cause of justice*, 26 April.

52 J Gakwaya (2000) "*Utilisation Erronée de L'institution du Gacaca dans la recherche d'un solution au génocide rwandaise*" 14 Revue de Droit Africain 226.

53 See generally CJ Ferstman (1997) (9) (4) *African Journal of International and Comparative Law.*

The result was that some of the people, who were acquitted, chose and still choose to remain in prison for fear of their lives.

From the Tutsi point of view, the Organic Law has been seen as favouring genocide suspects. Consequently, a very few Rwandans accord it any degree of legitimacy.[54] Organizations such asl *Ibuka, Avega*, and *Tumurere*, which consist predominantly of Tutsi genocide survivors, have held public demonstrations on several occasions following the acquittals of the accused or what they regard as the mild sentences imposed. This, in turn, has created tensions between Tutsi extremists and the Government.

Prosecutorial staff often prepared cases extremely slowly, a circumstance that is only partly explainable by the difficult conditions under which they work. Many judicial police inspectors responsible for on-the-spot investigations have suffered a chronic lack of transport required taking them to the inspection sites promptly. They have sometimes not appeared at court or, if present, have been often unprepared, requesting that the hearing be postponed.[55]

Judges, too, have often been absent from court, resulting in postponements. According to one evaluation by the Ministry of Justice, about 80 per cent of the cases on the roll in 1998-1999 were postponed; in about half of them for valid reasons, such as allowing the accused an opportunity to obtain defence counsel or to prepare his or her defence, and the rest because of sheer absenteeism, poor trial preparation by court personnel, or because of logistical problems.[56] Judicial staffs have been poorly paid, with judges

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54 M Drumbl "Rule of law amid lawlessness: counseling the accused in Rwandan domestic genocide trials" (1998) *29 Columbia HumanL Rights Law Review* 545.

55 C Sekabaraga, (1998)"*Jugement Juste et Rapide des Présumés Coupables de Génocide*," *Rwanda Libération, 33.*

56 Fondation Hirondelle (1998) "Libérations de Suspects du Génocide: Controverses et Vengeances"; 26 August: 26.

earning only about U.S.$70 (about 700 South African Rands) a month. Inadequate compensation, the overwhelming nature and scale of the work, and the risks involved in prosecuting the genocide help to explain why judicial personnel failed to perform optimally.[57]

The impossibility of prosecuting all those on remand became evident immediately. The slowness meant that as at January 1998, given the disposal rate of cases (300 trials per year), it would take very many decades to process the now estimated 110,100 cases.

The international community suggested that one way out of this conundrum would be to borrow foreign judges, who could help handle the caseload. But Rwandan law contained no provision permitting foreign judges to decide domestic cases. Apart from this, the
Rwandan government was not in favour of doing so, although it tolerated their presence as advisors.

All court have been conducted in Kinyarwanda, the indigenous local language for which reliable interpreters and translators have been in short supply. People were also worried about the effects that remuneration disparities between local and foreign judges would have on the attempt to build the Rwandan judiciary.[58]

By the end of 1999, very few suspects had confessed. Most refused to do so, citing mistrust of governmental authorities or fear of reprisals against themselves or members of their families. Some feared reprisals from fellow prisoners because in most prisons

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[57] Lawyers Committee for Human rights (1997) "*Prosecuting genocide in Rwanda*: the ICTR& National trials". http://Www.ictr.org (Accessed on 15 October 2002).

[58] See generally L Neher, A M Linares Rose, & P Mathiew (1995). *Rwandan Rule of Law Design*: USAID Report.

those who confessed were not separated from the rest of the prison population.[59] Any one of the suspects who confessed was attacked by fellow inmates in the prison and tortured or killed. Sometimes their families were attacked as well.

On top of this, any use of international defence counsel was bound to arouse the suspicion that high-powered lawyers from rich countries had come to the rescue of the perpetrators of genocide against the interests of the victims. The international defence counsel acknowledged this concern when they said:

"We would not wish to be perceived by citizens of Rwanda as experienced lawyers from a developed country defending those against whom accusations of the participation in genocide have been made. This is particularly true given the world's failure to act to stop the genocide when it started, and given the additional fact that prosecution is operating under the severe handicap of having few lawyers, little experience, and extremely scarce material resources." [60]

Indeed, the justice process remained tedious, bureaucratic, and frustrating. Despite the progress both in Arusha and Rwanda, there was no movement as regards the attainment of justice and reconciliation. The genocide caseload remained onerous and burdensome, and the court functionaries lost their keenness to attend conscientiously to to their tasks.

Since 1998, the year courts started hearing cases under the Organic Law, Rwanda Courts have sentenced 660 people to death and almost 1,800 to imprisonment for life. Altogether 2,566 accused have been acquitted.[61] Executions were carried out on just one occasion, in April 1988.

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[59] See generally Report by Neil Boisen, (1997) "Knowledge, Attitudes and Practices Among Inmates of Rwandan Detention Facilities Accused of Crimes of Genocide," The United States Institute of Peace.

[60] See R F Van Lierop (1997) 31*Rwanda evaluation report and recommendations*, 887.

[61] Le Verdict No. 34 Janvier 2002.

The worrisome, sluggish, and opaque course of court proceedings enkindled the search for a quicker, more open and a more credible consultative legal process – one which would arrive at the truth whilst at the same time bringing reconciliation within realizable reach. It is against this criminal procedural background that the home-grown Gacaca court practice lent itself as the most reliable and trusted option available.

CHAPTER 3: THE RESTORATIVE GACACA COURTS

3.1 General introduction

After a conflict, it might not be practical for an international tribunal or for a domestic court to try all those accused of the war crimes or gross human rights violations.[62] Deep social and political rifts can also render courts ineffective in the wake of such a severe conflict.[63] People may be unwilling to accept judgments handled down by such courts, which they believe are not composed of a demographically representative judiciary.[64] Many post-conflict settings are marked by additional concerns, such as the lack of resources, including a credible judiciary.[65]

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[62] See J Mendez, "Accountability for Past Abuses", Human Rights Quarterly Vol.19, 1997, p 255; A Neier, What should be done about the Guilty? New York Review of Books, 1 February 1990, p 32; L Huyse, Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past, Law & Social Inquiry Vol.1, 1995, p 20. See also Art 1, ICTR Statute www.ictr.org (accessed 27/09/2002). See the press statement by the prosecutor of the ICTR December 12, 1995; Justice Richard Goldstone where he pointed to the "big fish" suspects as ones to be tried by the tribunal irrespective of the majority others who participated in the genocide. But see Morris, challenging what she calls "anomalies of inversion" in which the international criminal tribunal prosecutes (or strives to prosecute) the leaders, leaving to national governments the rest of the defenders M Morris (1997) 7(2) *Duke Journal of. Comparative and international law*
. http://www.unc/edu/depts/diplomat/amdipl6/morrisinfo.html (accessed on 25/09/2002).

[63] Quoted from The American Journal of international law vol.*95: 64- 65.*

[64] M Hansungule Gacaca in international law: *A critical evaluation of indigenous or tree-based justice systems in Rwanda with relevant examples from Africa'* unpublished article presented to the national University of Rwanda, center for conflict resolution (article on file with the author).

[65] See M R.Ganzglass(1997) "The Restoration of the Somali justice system, in learning from Somalia: the lessons of the armed humanitarian intervention" 20.

In view of this, the notion that traditional customary courts would be a practical and usable alternative became more acceptable.[66]

Supporting a community in identifying and realizing its needs is the foundation for community regeneration.[67] Therefore authorities should devote more attention and thought towards enabling local communities to develop and implement procedures aimed at repairing a sate of social dislocation.[68] In addition, community participation in the process of rebuilding in itself strengthens and promotes quick and effective justice, truth, and reconciliation.[69]

Reconciliation is an individual act that represents a choice made, based on one's ability to forgive.[70] It is not an action that the state or the international community can mandate.[71] For it to receive widespread acceptance, both parties should be actively involved in reaching out to each other in a spirit of genuine repentance. .[72] The perpetrators need to demonstrate positively that they want to make amends.

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66 See J Widner (1995-1996) *Public attitudes surveys*, Botswana and Uganda on file with the author. *American Journal of iInternational Law* 95: 64. 67-30.

67 P Freire, (1970) *Pedagogy of the oppressed*, see M Bergman Ramos trans., continuum (2000).

68 B B. Lockwood (2002): "A comparative and International Journal of the Social Sciences, Humanities, and Law " 634. See also NJ Kritz (ed) *Transitional Justice*: confronting human rights violations committed by the former governments: principles applicable and constraints (1995) PG 3.

69 R Rwelamira and G Werle (eds) (1996), *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparations, and Restitution in South Africa and Germany* vii-xii.

70 E. Diane and C. Rittner, Eds (1996). *Beyond hate: living with our differences* 46-47. Derry: Yes! Publications.

71 See M C Bassiouni (1996) 59 *Law and Contemporary Problems*.

72 Ibid, 46.

From the viewpoint of the average person, the administration of criminal justice in many African jurisdictions has been a let-down, with courts and police services usually poorly equipped. [73]

Also, for the majority of Africans, the post-colonial court procedure is an enigma; it is something that makes no sense in their everyday lives.[74] Courts are viewed as institutions for the elite. Justice meted out by the formal courts has little meaning in the everyday lives of ordinary people.

Similarly, Rwandans regard the ICTR as a foreign machination that does not bother with matters such as reconciliation.[75] It is hard for ordinary people to comprehend that what they are told and what they see is justice. Reconciliation cannot occur when people are faced with judicial decisions that do not correspond to their understanding of justice. [76] To reiterate, for genuine reconciliation to take place, there must be visible interaction between victims and perpetrators.

[73] M Hansungule op cit n 64.

[74] Ibid.

[75] Most suspects in foreign countries have been identified and reported by the Rwandan government to the ICTR authorities but nothing has been done to arrest them these includes among the others Seraphin Rwabukumba. The Rwanda Government, NGO's and civil society, has raised complaints about him. The Belgian authorities and ICTR are fully aware of this and of the serious allegations against him. How he manages to remain at large in comfort raises a lot of questions and negative reactions towards the effectiveness of the ICTR's work by the Rwandans who see ICTR as a UN initiative to protect and support genocide suspects. The impression is that some of those who were responsible for the Genocide are receiving cover or protection from some quarters that have power or authority of some kind. There are other suspects in different parts of the world, in France, Italy and elsewhere.

[76] See Gaparayi op cit 59.

Besides, most ordinary Africans cannot gain access to the expensive formal justice process, let alone take part in its administration. Justice, as dispensed by the formal courts, is seen as a luxury commodity for the rich and the prominent. The majority of Africans feel totally alienated from "their" justice systems. Judges are regarded as reclusive functionaries who are not in touch with the real world. [77]

According to Hansungule, Gacaca is what Africans need. It is justice brewed in an African pot. One thing that is clear is that through Gacaca, Rwandans have demonstrated their capacity to forgive.[78] What happened in Rwanda in 1994 is certainly not something easy to come to terms with due to the enormous scale of the crime and because of the extent of suffering it has caused. No judicial system, anywhere in the world for that matter, has been designed to cope with the requirements of prosecuting crimes committed by tens of thousands, and directed against hundreds of thousands.

Even a state with a sound economic base and a sophisticated judicial system would be at sixes and sevens in coming up with an innovative solution to such a one-off legal crisis. This is all the more so when those charged with the task of devising a solution have in their lifetimes themselves witnessed and experienced the massacre of their own people

But Rwandans have opened themselves through Gacaca, to reconcile.[79] Through the Gacaca process, however, Rwandans are proclaiming that they are ready to deal with and to process the deep pain of genocide inflicted on them in order to move forward in their lives, and ahead as a society.

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[77] M Hansungule (-n 64 above).

[78] See, e.g., Address to the nation by his H.E. Maj. Paul Kagame President of the republic of Rwanda on the official opening of the Gacaca courts, June 27, 2002 (on –file with the author).

[79] See note 71 above.

Being a system rooted in Rwanda's traditions, Gacaca takes advantage of Rwandan culture and it capitalizes on the unity of Rwandans. It also gives the Rwandan peoples the opportunity to take part in shaping their country. Indeed, it is restorative in the sense that it seeks to facilitate a process of community reintegration, something seen as key to addressing the fundamental consequences of the genocide.[80]

3.2 The historical origins of the Gacaca courts in Rwanda

Gacaca is as old as Rwandan history. It existed during pre-colonial and post colonial periods in Rwanda as the most recognized system of conflict resolution with the aim to achieve justice and reconciliation.[81] Rwandan society was cemented together through a complex system of clans, language, culture, religion, kinship, governmental organization and housing.[82]

All Rwandans, which means the Hutu, Tutsi and Twa shared 18 clans: the *Abasinga; Abasindi; Abazigaba; Abagesera; Ababanda; Abanyiginya; Abega; Abacyaba; Abungura; Abashambo; Abatsobe; Abakono; Abaha; Abashingo; Abanyakarama; Abasita; Abongera; and the Abenengwe.* These 18 clans were common to all Rwandans and were not based on any distinctions. The fact that Hutu, Tutsi and Twa belonged to the same clans created a sense of national identity, irrespective of one's occupational status.[83]

Being a Hutu, Tutsi or Twa did not involve an ethnic connotation; rather, it reflected an occupational identity. While Tutsis lived by pasturing their herds, Hutus were

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[80] Inger Inger (2001) *Psychosocial Assistance During Ethno political Warfare in Former Yugoslavia, in Ethno political Warfare* 305-308 (Daniel chi rot and MARTIN E. P. Seligman (eds) cited from *Human Rights Quarterly* 24.

[81] L R Merven (2000) *A People Betrayed: The Role of the West in Rwanda's Genocide* 264.

[82] See F Fundi " The genesis of a genocide in Rwanda" (1999) *The Times of Hope* 1-12.

[83] See C Newbury (1988) 5-16.

agriculturalists, The Twa on the other hand, lived from making pottery, hunting and gathering.[84]

Historical accounts suggest that a Tutsi who lost his cattle due to disease (or any other reason) was counted among the Hutu, while a Hutu who gained cattle for any reason was counted as a Tutsi.[85] Consequently, there was a system of social mobility between these occupational strata. Historians also mention that Rwandans identified more with their clans than with their occupational status.[86]

In addition to sharing clans, all Rwandans shared common rites, crafts, dances, taboos, divinations and medicines. They worshipped the same ancestors, consulted the same spirit mediums and were drawn into the mysteries of *Ryangombe* (loosely translated as God) together, without distinction. In matters of politics, the king (known as *Sebantu or the father of all people*) symbolised a sense of unity and belonging, and symbolically held all of Rwanda's offerings on behalf of all people (known in *Kinyarwanda as Nyamugirubutangwa*).

Below him were three main tiers of governmental organization: the chieftaincy of war, which oversaw defence affairs; the chieftaincy of pasture, which handled pastoral, grazing and cattle-breeding activities; and the chieftaincy of land, which kept an eye on matters concerning farmers and their land.

True to their occupational nature, the chiefs of pasture and land were predominantly Tutsi and Hutu, respectively. However, historical accounts show that in northern

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84 A Des Forges (n-27 above).

85 See generally Ntampaka (1999) "Droit et croyance populaire dans la société rwandaise traditionnelle".

86 See P E Nantulya (2001): "The practical reasons which have created a need for the re- establishment of Gacaca courts in Rwanda" *Conflict Trends* No 4.

Rwanda, 80 per cent of the chiefs were Hutu. Rwandans lived together in all regions of the country, and intermarriages took place without discrimination.[87]

Every adult participated in the Gacaca system.[88] Traditionally Gacaca courts were used to solve disputes concerning family and property, and the judgments of these courts were highly recognised by the community because they represented their views. Judges were selected from amongst the community. These courts aimed more at reconciliation than punishment. The most common punishments under traditional Gacaca courts were rehabilitation through community work as part of punishment and payment of damages. This would be determined after acknowledgment of the crime and asking for forgiveness from both the victim and the community at large.

There were no zones specifically reserved for any community. In fact, in *Kinyarwanda*, there is a saying that *"neighbours give birth to children who look like each other"*. As in other African societies, the Rwandans practised blood vows, which also cut across their occupational status. A blood vow was taken when two people drank each other's blood to demonstrate their commitment to each other. This act committed them to a lifetime bond as family members, irrespective of whether or not they were in fact related. The acts of friendship and solidarity which, expressed through rites, are known in Kinyarwanda as *Ubuse*.

The foundations of Gacaca courts in Rwanda were facilitated by a sense of unity that had prevailed among Rwandans. It constituted the basic customary code and was applied throughout the territory via a system of chiefs and chieftaincies.[89] It was composed of courts which settled conflicts arising between families or communities,

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87 Ibid.

88 The word "Gacaca" in *Kinyarwanda* means "grass" or "lawns". It implies a patch of grass usually under a tree where people meet to discuss disputes between community members.

89 Nanturya (- n 86).

and which may have been based on domestic concerns such as violence, theft, destruction of property and separation between a man and his wife, as well as other smaller matters.

The community participated in the courts and punishments were collectively imposed on persons found guilty of any offence.[90] In addition to collective punishments, the community also performed welcoming rites for persons who had fulfilled their punishments.[91] This was done to create a sense of reconciliation within the community.

Serious offences were brought before the chief of the village, and the most serious ones were brought before the king. During the colonial period, Gacaca constituted the basic code for customary law in Rwanda.[92] The colonizers later introduced formal procedures based on European jurisprudence. However, in several cases, modern courts reverted to the Gacaca system when investigating certain offences.

3.3.The present rationale for re-establishing Gacaca courts to deal with genocide

The delay in deciding Genocide cases has been ascribed to lack of resources, political will, capacity to handle so many accused, and the scarcity of legal personnel.[93] The Special UN Representative on the Situation of Human Rights in Rwanda estimated the

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[90] See "Rwanda turns to its Past for Injustices" (2002) . Also available at <http://www.csmonitor.com/2002/0130/p09s01-woaf.html> (accessed on 25 September 09/2002).

[91] F Reyntjens (1990) 40"Le gacaca ou la justice du gazon au Rwanda," in Politique africaine*": 31–41.*

[92] Ibid.

[93] P J Magnarella, The International Criminal Tribunal for Rwanda and the Rwandan genocide courts. http://web.africa.ufl.edu/asq/v1/1/2.htm> (accessed on 30/09/2002).

number of persons in detention at just under 110,100 at the end of 1998,[94] with the number of persons in the communal detention centres (*cachets*) at around 36,000 and the number of detainees in the prisons at 85,000.[95]

Even optimistic figures estimate a prison population of 550,500 by the year 2005 – a figure, which the Special Representative adds, "would still be the highest compared to almost every other country in the world".[96] The conditions of detention have been described as 'deplorable', 'terribly overcrowded', with the sanitary conditions 'dreadful'.[97] The sheer scale and complexity of the challenge to the justice system is therefore immense.[98] The overwhelming caseload that the Rwandan judicial system has been required to deal with is well beyond its ability, and leads to an all too obvious "detention-justice challenge".[99]

Reflections on the Gacaca system of justice and its incorporation into the draft constitution are based on the need to address these practical limitations.[100] The central unifying concern is that beyond the formal westernised justice system there is a need to

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[94] United nations document A/54/359, General assembly, 17 September 1999, fifth-fourth session, report on *the situation of human rights in Rwanda* submitted by the special representative of the commission on human rights, para. 138

[95] Ibid.

[96] Ibid.e.

[97] United Nations Document E/CN.4/1999/33 8, Para. 30.

[98] See the report of the international panel of eminent personalities to investigate the 1994 genocide in Rwanda and the surrounding events: T*he Preventable Genocide* pg 198-207, see W A Schabas "Justice democracy and impunity in post genocide Rwanda"(1996) 7 *Criminal Law Forum* 523-551.

[99] United Nations document A/54/359 Para.148.

[100] See generally Preamble, (n 95 above).

facilitate a process of community reconciliation and healing, which could form the basis for long-term social harmony and stability within Rwanda.[101]

Furthermore, it is widely believed that ordinary Rwandan people need to be involved in bringing about this unity through a system of customary laws, principles and procedures, which is part of their ancient heritage.[102]

Rwandans hope that this traditional justice system is the only possible way towards justice, the truth and reconciliation,[103] which will move the Rwandan people forward, while being assured, at the same time, that the past has finally been laid to rest.

In addition, they believe this system will "dig out the truth" about what happened, through a process of bringing together victims and perpetrators with the common goal of combining an acknowledgement of wrongdoing with the rehabilitation of the offender in the community.[104]

Such a community-based process is believed to have considerable benefits as a complementary mechanism in present-day Rwanda, with its dual role of addressing justice needs and promoting community reconciliation.[105] As justice needs a foundation

101 Ibid.

102 See, e.g., Address to the nation by H.E. Maj Gen. Paul Kagame at the official opening of the Gacaca courts 27 June 2002 (on file with author).

103 R Sezibera (2002) 'The only way to bring justice to Rwanda" *Washington Post.* <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2002/0407sezibera.htm> (Accessed On 30 September 2002).

104 See Gacaca law, arts 71-76.

105 See Des Forges (op cit 27 above), 750.

to rest on, the basing of law on indigenous culture provides one way forward.[106] This indigenous approach will assist in creating an environment conducive to addressing the psycho-social and reconciliatory needs of individuals, communities and the society as a whole.[107]

3.3.1 The legality of Gacaca courts

The reintroduction of Gacaca in Rwanda has been supported by modifications to the following legal instruments:

> Organic Law No 8 of 30/08/1996, which provides for prosecutions for the crime of genocide, as well as other crimes against humanity; the Fundamental Law of the Republic: the Arusha Peace Agreement of 1993; Law Decree No 09/90 of 07/07/1980, which refers to the organization and jurisdictional competence of the courts; Law Decree No21/77 of 18/08/1977, which relates to the establishment of the Penal Code; a new organic law governing Gacaca courts, as well as the law that established the Supreme Court.[108]

In brief, Gacaca does not seek to replace the existing judicial system.[109] Rather, it aims to support it in order to compensate for its weaknesses.[110] For the moment, the legal instruments, which provide for the functioning of Gacaca courts limit themselves to instituting the system at different administrative levels within the country.

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106 J D Lange (2000) "The Historical Context , Legal Origins and Philosophical Foundation of the South African Truth and Reconciliation Commission in Looking back, Reaching Forward " in Charles Villa-Vicencio and Wilhelm Verwoerd (eds)14.

107 Charles Villa-Vincencio and Tyrone Savage op cit 75.

108 See generally Preamble, of Organic Law.

109 Ibid.

110 Ibid.

However, it goes without saying that a natural relationship already exists between these institutions. For one, they have all participated in discussions on the Gacaca system; for another, it is likely that the Gacaca courts will draw from the capacity of these institutions from time to time.[111]

3.3.2 Functioning of the Gacaca jurisdictions

The Draft Gacaca law adopted a very similar classification of offenders as the Organic Law.[112] Apart from a few modifications, for example, persons who acted in positions of authority at lower levels previously in Category One, are classified in the category corresponding to the offences they committed, but their position as leaders exposes them to the severest punishment provided for accused in the same category.[113]

The Gacaca system operates from the cell to prefecture levels, and it functions

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[111] Ibid (n 108 above)

[112] *Category* 1:Offenders in this category are tried according to the organic law. Any confessions within this category do not reduce their penalty. This category mainly deals with organizers of the genocide.

Category 2:This category mainly deals with those who may not have been involved in the planning of the genocide, but who participated in it. Confessions in this category reduce the sentence from life imprisonment to between 12 and 15 years, eight of which are spent in prison. The remaining years are then spent among the general population, where involvement in community service is a requirement.

Category 3:Under this category, offenders serve a sentence provided for under the organic law. However, they complete one half of the sentence in prison, and the other half among the general population, performing community service.

Category 4:Category four mainly deals with crimes such as banditry, theft, looting and pillaging which were committed during the genocide, but which do not fall within the definition of crimes against humanity, as spelt out in the organic law. Offenders are fined and integrated back into the community.

[113] See art 53.

throughout the country.[114] At each tier, the Gacaca jurisdiction is composed of a general assembly, which is made up of 50 inhabitants;[115] a Gacaca jurisdiction, which is made up of 20 people elected by the general assembly; and the co-ordinating committee, which is made up of five people elected by the members of the Gacaca jurisdictions.[116] Each co-ordinating committee, in turn, elects a chairperson and a secretary for a one-year renewable mandate.

The general assembly administers and oversees the activities of the Gacaca courts, which are convened at least twice a week. The three core institutions - the general assembly, the Gacaca jurisdiction and the coordinating committee - replicate themselves at the four levels of administration throughout Rwanda - namely the cell, sector, commune and prefecture levels.[117]

The duties of the responsible Gacaca courts are described under Articles 40, 41, 42, and 43(cell, sector, communal, and prefecture levels, respectively.[118]

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[114] Ibid art 4.

[115] Ibid art 7.

[116] Ibid., Chapter 1 generally on the creation and organization of the Gacaca jurisdictions.

[117] Ibid art 5.

[118] Cell Jurisdictions:

- Drawing up lists of victims and perpetrators of violations at the cell level;
- Receiving accusations and testimonies;
- Carrying out investigations;
- The carrying out of trials and sentencing for persons accused of offences in the fourth category;
- Forwarding files to the sector jurisdiction for those accused of offences in the first, second and third categories.

Sector Jurisdictions:

- Receiving case files from the cell level;
- Placing the accused persons into categories;

3.3.3 Election and training of the Gacaca judges

The elections of Gacaca judges were held on 27 June 2001 in the country's 9,189 administrative cells. In compliance with official guidelines, men and women aged 18 or over, assembled in groups made up of ten neighbouring households (called "*nyumbakumi*)[119] to designate those persons in the group believed to be honest or wise ("*inyangamugayo*).[120]

There were no urns, no ballots or lists of candidates.[121] A man or woman simply stood up and affirmed: "In my opinion, he is honest", locally known as "*Inyanga Mugayo*",[122]

• Forwarding case files to the cell level for persons accused in the fourth category;

• Carrying out of trials and sentencing for persons accused of offences in the third category.

Commune Jurisdictions:

• The carrying out of trials and sentencing for persons accused of offences in the second category;

• Forwarding case files to the Office of the Public Prosecutor for persons accused of offences in the first category;

• Forwarding case appeal to the prefecture level.

Prefecture Jurisdictions:

• Receiving appeals from the commune level;

[119] *Nyumbakumi means* the lowest decentralized political leader, who heads 10 house holds. This was made to bring justice to the lowest level of administration.

[120] Only Rwandans who meet criteria as prescribed under Articles 10-11 of the draft Gacaca law were elected as judges.

[121] See Judicial Diplomacy: Chronicles and Reports on International court of justice. http://www.diplomatiejudiciaire.com/UK/RwandaUK5.htm (accessed on 28 September 2002).

[122] An "honest Rwandan" or Inyanga Mugayo is one who meets the following conditions:

while the heads of the ten households, noted down the list of names on a piece of paper.[123]

The lists were then submitted to the head of the administrative cell, which called out the names of each person in turn. The men and women selected stood before the residents of the cell and briefly identified themselves. It sufficed to give their age, marital status and level of schooling. There were no campaign speeches. Next, the local population had to speak up to confirm or challenge the honesty of each designated person. If no one in the crowd shouted out a grievance against a candidate, he or she would be duly elected.

A total of 260,000 *Gacaca* judges were elected. They had to undergo some elementary training as most of them had had no formal education or were simply illiterate.[124] They were given the basic training in principles of law; group management, conflict resolution, judicial ethics, and financial management.[125]

There is no legal representation in Gacaca courts. This is due to the fact that judges, being not jurists themselves, should not be ensnared in the complicated principles of

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a) Has good behavior and morals

b) Always says the truth

c) Is trustworthy

d) Is characterized by a spirit of speech sharing

e) Has no previous criminal conviction for an offence subjecting him to a sentence of six (6) months

f) Not having perpetrated or connived in committing genocide or crimes against humanity; and

Does not propagate sectarianism (see articles 9 and 10 of the gacaca law)

[123] Ibid.

[124] Requirements of the Gacaca judges excluded educational literacy since this is a traditional justice system which does not need qualified lawyers or judges, all is needed is summarized in the words of "honesty".

[125] UN Integrated regional information networks Training of Gacaca judges
< http://allafrica.com/stories/200204100523.html>(accessed on 30 September 2002).

procedure. The accused, judge and the witness are on an equal footing; Recourse to professional lawyers would therefore upset this balance.[126]Judges are unpaid.

3.3.4. Sentences imposed by the Gacaca courts

The sentences provided under the draft Gacaca law are as follows.[127]Category *Two* perpetrators receive a sentence of 7 to 11 years' imprisonment if they plead guilty prior to prosecution, a sentence of 12 to 15 years imprisonment if they plead guilty after the prosecution has begun, or a sentence of 25 years to life imprisonment if convicted at a trial.[128]

Category *Three* perpetrators receive a penalty of between 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.[129] All Category *Four* defendants convicted are sentenced only to civil reparations[130] for damages caused to the property of others. This option created to punish any violation also allow prisoners to return to the society after a certain period, provided the prisoner demonstrates that he or she has been rehabilitated.[131]

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[126] Rwandan Roman Catholic Bishops *(1998)* The Role of Community in Restoration of Justice (Conference held at the National University of Rwanda, 10 December 1998).

[127] The ordinary courts will try Category *One* accused. However, if these accused give a complete and accurate confession and, in addition, plead guilty prior to prosecution, they are classified under the second Category.

[128] See art. 70.

[129] See art. 71.

[130] See art. 72.

[131] See art. 76.

The Gacaca system focuses on confession and contrition, which leads to reconciliation.[132] Prisoners face trial in a public forum by locally appointed judges in the places where they allegedly committed their crimes.[133] Local residents both accuse and defend each prisoner.[134] Moreover, many prisoners who have already spent eight years in prison since the genocide, some without being formally charged, could be freed after the trials.[135]

3.3.4.1 Gacaca courts and the reparations for the harm done

The victims of genocide have the right to have their property returned and to be compensated, as far as is possible, for other losses, whether material or immaterial. Hundreds of thousands have been left destitute by the genocide, including many of the 300,000 children who now live without adult protection in households headed by minors, and many of the women now solely responsible for the well being of their households.[136]

To establish social harmony, it is not enough to try the alleged authors of the genocide.[137] It is also necessary to compensate victims.[138] But if the guilty individuals

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132 United Nations Document E/CN.4/1999/33, P.12, and Para.51.

133 See articles. 65-67.

134 See the Gacaca law.

135 See arts.70, 71,76.

136 Human rights watch Rwanda: < http://www.rnw.nl/humanrights/html/householdsrwanda.html> (Accessed on 29/09/2002).

137 See generally Preamble of Gacaca law.

138 Ibid.

have to compensate victims personally, many victims would never be compensated.[139] The guilty individuals do not have sufficient assets to match the damage suffered.[140].

A compensation fund in this context works as one pillar of reconciliation. However, as mentioned above, at present there are still insufficient funds to run it, since all the funding is expected from donors, who are reluctant to contribute.

3.3.5 Beginning of the Gacaca Trials

Gacaca courts began on 18 June 2002.[141] When the trials started, large numbers of suspects throughout the country pleaded guilty to their crimes. This shows how the traditional system is widely accepted by the society. It would take months for such a number to confess under the Organic Law. [142] Since then, an estimation of over 22,300

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[139] C Villa-Vicencio and T Savage op cit 52.

[140] See speech by G Gahima on the Gacaca courts in Rwanda. Cited in C Villa Vincentia and Tyrone Savage pg 52.

[141] See generally Rwanda National Electoral Commission report 2002 handbook.

[142] The following are numbers of suspects who pleaded guilty through the country:

- Nyarugunga sector, Kanombe district, Kigali-urban province (5 cellules) – 6 confessed;
- Kindama sector, Ngenda district, Kigali-rural province (10 cellules) – 114 confessed;
- Nkomero sector, Kabagari district, Gitarama province (11 cellules) – 147 confessed;
- Gishamvu sector, Nyakizu district, Butare province (3 cellules) – 26 confessed;
- Nkumbure sector, Mudasomwa district, Gikongoro province (9 cellules) – 11 confessed;
- Nzahaha sector, Bugarama district, Cyangugu province (6 cellules) – 10 confessed;
- Nyange sector, Budaha district, Kibuye province (8 cellules) – 20 confessed;
- Murama sector, Kayove district, Gisenyi province (6 cellules) – 40 confessed;
- Mataba sector, Bukonya district, Ruhengeri province (5 cellules) – 8 confessed;
- Mutete sector, Kisaro district, Byumba province (5 cellules) – 47 confessed;

more perpetrators have confessed,[143] with *Kibungo, Ruhengeri and Gisenyi* leading the list of prefectures with the most confessions. If one considers this percentage just for a period of three months, there is high hope that the estimated period of 5 years will be adequate time in which to try the current 110,100 detainees.

3.3.6 Justice truth and reconciliation under Gacaca courts

Gacaca courts are an alternative to the courts operating under the Organic Law, whose shortcomings the Gacaca courts are intended to remedy.[144] In the Gacaca procedure, the community takes a lead in a process aimed at restoring social harmony rather than merely punishing the offender.[145] Such a community-based process will have considerable benefits, as a complementary mechanism, in present-day Rwanda, with its dual role of addressing justice needs and promoting community reconciliation.[146]

Many have concluded that the dramatic difference between post-genocide and pre-genocide Rwanda is that, "the social trust that binds people together"[147] has been

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. Birenga sector, Kigarama district, Kibungo province (5 cellules) – 65 confessed;

- Gahini sector, Rukara district, Umutara province (7 cellules) – 50 confessed.

143 Ibid 141 above.

144 Gacaca courts are alternative to organic law (1996) where by all the causes for its failures have been addressed by the new Gacaca courts. Including community involvements leading to lower costs, aims at reconciliation than punishment, dig out the truth and widely accepted and chosen by the population. See also Des forges, 750. `

145 United Nations Document A/54/359,para. 18.

146 Europa Regional Surveys of the world, Africa south of the Sahara, Rwanda, (2001) Europa publications PG 813.

147 K Kumar et al,(1996) *Joint Evaluation of Emergency Assistance to Rwanda, The International Response to Conflict and Genocide* 17.

undermined, leaving, "a profound impact on the psyches of both Tutsi and Hutu".[148] The Gacaca process brings a social engagement in the process of healing from below, which will contribute to social cohesion, bringing into play an indigenous healing mechanism and encouraging a shift towards reconstruction.[149]

The idea behind Gacaca is not only to decide the genocide cases, but also to promote truth and reconciliation, much like the process initiated in South Africa following the end of its violent apartheid regime. This is known as Inkundla, which is still used, a system that dates back to pre-colonial times, where chiefs presided and still preside over both civil and petty criminal cases.[150]

Part of the reconciliation process is to have victims confront their assailants in a context that will promote confession and forgiveness. " 'Gacaca' is a traditional community justice system where people of integrity in the community meet to hear and pass judgment on cases and resolve disputes.[151]

The Gacaca court system is believed to encourage inhabitants of the same cell and the same sector to collaborate in trying those who participated in the genocide, restoring the rights of the innocent people.[152]

This system will thus serve as a basis for collaboration and unity, especially since, once the truth is known, there will be no more suspicion, and the author of the crime

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148 Ibid 17-18.

149 Ibid (n-146 above).

150 See Gacaca, Inkundla, traditional systems of justice being looked at in the US as "Restorative Justice" <ttp://www.marekinc.com/GovernanceINT100901.html> (accessed on 29 September2002).

151 See generally the Gacaca law.

152 See the United Nations Regional Centre for Peace and Disarmament in Africa 2001-2002.

will have been identified and punished.[153] Justice will have been done for the victim as well as for the innocent detainees who will be reinstated in Rwandan society.[154] Reintegration of this kind into the Rwandan family is not only sought for innocent detainees but also for people who are sentenced but who are likely to be rehabilitated.[155]

Gacaca courts aim to reconstruct the past events,[156] seeking to promote the unity and reconciliation of Rwandans through the principle of justice for all.[157] This is possible through the establishment of the truth. The way in which Gacaca system is created enables truth to be discovered in that one appeals to citizens who were eyewitnesses.[158] The list of the victims and the list of the authors of the crime will be drawn up, as well as an inventory of the damages caused. The accounts of the events will allow one to understand what happened.[159]

The trials of 110,100 current pending cases, to which other pending cases will perhaps be added, should be greatly accelerated because 11000 Gacaca courts hold genocide trials, a task that was previously done by 12 specialized courts.[160] This contrasts with the situation in the ordinary courts under the Organic Law.

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153 S Gasibirege, and S.Babalola. (2001). *Perceptions about the Gacaca law in Rwanda: evidence from a multimethod study:* (Special Publication). 19

154 ibid.

155 Report on Reflection Meetings organized by the Government of Rwanda, (2000). (On file with the author) .

156 S Gasibirege, (2001). *Gacaca faced up to psychosocial problems caused by the genocide: which debate?* Butare: University of Rwanda.

157 See the Preamble Gacaca law.

158 Ibid.

159 Ibid.

160 International Court of Justice Report. (1999) Rwanda: *Five years after the genocide in Rwanda: justice in question.* Brussels.

There were cases in ordinary courts that resulted in acquittals for lack of evidence or other reasons. These acquittals attracted public criticism that the courts are not impartial. There was a perception that judgments had been made on the basis of different criteria.

Most people also felt excluded because a few sat and heard the cases, with little contribution from them. With Gacaca, the ordinary people are being involved in the process. Information and facts are presented and debated. This makes the outcomes acceptable and legitimate to the public in general through exposure, discussions and speaking out. This contributes to a healing process where people are able to confront those who committed the crimes, and find out the truth about what happened.

On the other hand, the traditional Gacaca courts have given rise to other concerns. These are whether this model will aid the process of reconciliation in Rwanda; and whether the process will help reconcile one of the world's most divided societies. An answer is still anyone's guess.[161]

The major concern is not whether these judges will completely interpret legal concepts, but whether they will deliver fair judgments in a strongly ethnically divided country where legal methods have failed so far.[162] These judges are human beings with relatives either among the victims or the accused; they are vulnerable to biased opinion.

They are unsalaried volunteers with no career to risk in case of misconduct.[163] In the event that the judges manage to transcend their ethnic identities, it also remains to be seen, to put it bluntly, whether on the one hand, Hutus can honestly testify against their

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[161] *Report of the situation of human rights in Rwanda* (1999) prepared by the Special Representative of the Commission on Human Rights pursuant to Economic and Social Council Decision 288.

[162] See Amnesty International, Rwanda *UnfairTrials*.

[163] See Amnesty International, ***The*** *Troubled Course of Justice.*

own relatives or themselves and on the other hand, whether Tutsis will accept the verdicts.[164]

Victims of genocide have expressed negative support towards Gacaca courts. Some expressed fears that Gacaca jurisdictions will result in excessive light sentence for those who committed heinous crimes. Some of the accused on the other hand view the jurisdictions as a way of ending the Hutu tribe. The latter regard Gacaca as a systematic political and ethnic oppression, since tens of thousands of their families are directly affected by the detentions. Both groups see Gacaca as a way of settling personal scores, rather than extracting the truth or delivering justice.[165]

Most negative criticisms have however come from some extremist groups of Tutsi genocide survivors who are against reconciliation. To them all genocide perpetrators are supposed to receive the death penalty. The other group of Hutus who are against Gacaca are rebels in the Democratic Republic of the Congo (DRC) and elsewhere who are opposed to the Rwandan government from a political point of view, but also because their fear reprisals as a result of the genocide. Gacaca courts, however, remain the best possible solution for the justice problems in Rwanda.

3.3.7 Conclusion

Whereas newspapers have reported a great deal about the Gacaca court, hardly any have emphasized the vital role these courts are meant to play in repairing the torn social fabric. This dissertation underlines the contribution of the Gacaca courts in this regard.

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[164] Moussali, Report 8.

[165] Ibid (n 160)

CHAPTER 4: CONCLUSIONS AND RECCOMENDATIONS

Since the end of the Genocide in 1994 and the inception of the new justice system, Rwanda has been faced with numerous challenges in its quest for justice, truth, and reconciliation. The International Criminal Tribunal for Rwanda despite some indictments, and eventual trials of several key leaders of the genocide, has been a major disappointment for Rwandans.[166]

The ICTR is not only expected to render justice by determining the guilt for the horrific crimes committed, but also, in accordance with one of the preamble paragraphs in the ICTR Statute, to "*contribute to the process of national reconciliation and to the restoration and maintenance of peace*".[167] It has failed to achieve this objective because it is widely held by Rwandans to be too aloof and dismissive of the need to promote reconciliation.

"Justice delayed is justice denied": for justice to be seen to be done the trials should be held within a reasonable period of time. And the procedures need to be transparent and decipherable. Victims' organizations in Rwanda have been complaining that the ICTR proceedings simply take too long and that this in itself undermines the objective of justice.

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166 For a recent overview (as of 2001) of all ICTR detainees and their current status, see <http://www.ictr.org/english.factsheet/detainees.htm> (accessed on 05 October 2002).

167 See the Statute of the ICTR.

Despite the claim in the resolution establishing the tribunal and its impressive budget, it has so far disposed of 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 its image as a foreign institution alien to the needs of the people who matter most – the Rwandans.[168]

The Organic Law, an addition to the ICTR, has been another disappointment. Despite 6 454[169] cases that were prosecuted since 1996 to 2001, more than 110,100 estimated cases are still pending, awaiting trial. The implementation of the Organic Law procedures remains so slow". The prosecution procedures have been slow and this has been mainly attributable to the difficulties under which court personnel have had to work. There has also been a lack of capacity within the judiciary as well as a lack of qualified judicial personnel, lack of logistics, and a lack of adequate remuneration.

The prosecution of perpetrators of mass human rights violations was one of the major stated objectives of the new Rwandan Government that came to power in July 1994. Fighting impunity is seen as the key instrument of rendering justice and is considered an essential pre-condition for reconciliation in Rwanda. Rendering justice to victims is one of the major stated objectives of the Government's justice policy.

It should be noted that probably no other criminal justice system in the world would be able to deal with such a large number of cases in a satisfactory manner, i.e. within a reasonable period of time and with due respect for all human rights norms[170]. As a

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168 See Tuzinde op cit (n-1 above) 63.

169 Le Verdict No. 34 Javier 2002, p. 8-10

170 Expectations that justice be rendered timely and correctly are nonetheless extremely justified, and should not necessarily be perceived as "Western arrogance" as some observers seem to indicate (JPChretien, "Impunité ET réconciliation au Rwanda ET au Burundi" in A Destexhe, and M Foret. (Eds.), *De Nuremberg à La Haye et Arusha*, Brussel, Bruylant, 1997, pp.73-74.

consequence, the whole process was generally perceived as being extremely slow. As Attorneys without Borders, in their report, state. "There is no clear progress with justice at work, justice is non convincing *(la justice ne convainc pas)*"[171].

This situation called for an immediate solution. One scholar observed:

"*Unless an independent institution is developed that provides the opportunity for victims to tell their stories and for those who are guilty of human rights violations to confess, Rwandan society will continue to live under the shadow of division, tension and violence. (...) This body need not replace criminal prosecutions or grant amnesties. In fact, international law prohibits the granting of amnesty for the gross violations of human rights that have occurred in Rwanda. The Commission should instead complement other activities already under way in Rwanda, serving as a forum in which victims can tell of their suffering and be heard and acknowledged, and so regain their dignity*"[172].

Rwanda set up the National Truth and Reconciliation Commission hoping it will contribute to the in social reconciliation of the society. However, it has yielded little if anything persuasive. It immediately got a negative response from the society after it was set up. The population view the Commission as nothing else but a promoter of the culture of impunity among Rwandans. It has limited legal powers, unlike the South African Truth and Reconciliation commission. All it does is to organise seminars and rehabilitation camps for reconciliatory purposes.

Gacaca traditional courts are a response to these challenges. Rwandans have demonstrated that the traditional justice system, which was used in pre-colonial Rwanda, is the only possible alternative for social reconstruction after the failures of western-driven processes.

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[171] Avocat sans frontière, *Justice pour Tous au Rwanda. Rapport Semestriel. 1 ers semestre 1999*, Bruxelles, Kigali, septembre 1999, p.14 *to*, p.38.

[172] J Sarkin op cit n 3 above, 822-823.

Justice, unity, and reconciliation under Gacaca are possible because the victims and perpetrators identify themselves as one. In Rwanda, the real perpetrators still loom large and very defiantly. During the trial of the former Prime Minister Jean *Kambanda*, he confessed to all charges in spite of their heinous nature.[173] It is important to note that he did not confess to the Rwandans. It was just a legal confession in the hope to escape legal punishment. This is why, when the trial chamber rejected his confession, and sentenced him to life imprisonment, he protested. [174]

There is no way how truth and reconciliation will be achieved in Rwanda without the genocide planners confronting their actions. Unless this happens, the victims will not forgive. This is because the authors of genocide still deny that what they did amounted to genocide. Most Hutus in prisons say there was no genocide but a situation of mass killings in a state of war where everyone was killing his or her enemy. If *kambanda* was really remorseful, he would by now have appeared and appealed before the Rwandans, which would have done a lot for reconciliation.[175]

Gacaca allows genocide planners to confront their past before the genocide victims and the Rwandan community as whole. Gacaca treats both perpetrators and victims of Genocide as survivors of the previous murderous regime. This reconciles the suspect with the community and the victims, which has been the main element lacking under the present criminal justice system since 1996.[176]

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[173] See the Prosecutor *v* Akayezu No ICTR-96-4-T Judgment and Sentence, Trial Chamber 1 (2) September 1998.

[174] See Hansungule op cit n 64 above.

[175] ibid.

[176] The Gacaca differs from western ideas of justice because the objective is not to find and punish the criminal, but to find an appropriate and fair solution and thereby restore the balance of the community. Both the ICTR and the Rwandan domestic courts lacked this notion. Their aim is to punish, which is far from what the Rwandan community's needs.

Gacaca is no doubt the most important tool for unity and reconciliation in Rwanda. According to *Hansungule*, it brings fresh air to a troubled country. Cobban went further and concluded that it restores health to a society smashed by devastating violence.[177]

Rwanda's justice challenges after the genocide should serve as an example to Africans that justice, as it is traditionally administered in the west, is not readily transferable to an African setting. When international law fails in a situation like Rwanda, alternatives should be sought. When one judges Gacaca courts under international law, one should also consider the contribution of international law in the social reconstruction of Rwandan society after the genocide.

The Rwandan government did not think of traditional Gacaca courts until it became evident that existing processes were inadequate. Even any western country of Rwanda's size faced with a caseload of these proportions would have enormous problems as well.[178]

Gacaca courts have been "modernized" through the introduction of formal procedural modalities, the new location (a municipality building), the fixed timing (every week on Tuesday and Thursday), the "distance" between the families involved and the Gacaca jury, and the behaviour of "arbitrators" as if they were civil servants.[179].

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177 Penal reform International (1999) *Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean* 75.

178 Moussalli, Report of 4 August.

179 J W Karega, (.ed.) (1996): *Gacaca. Le droit coutumier au Rwanda. Rapport final de la première phase d'enquête sur le terrain*, Haut Commissaire aux Droits de l'Homme des Nations Unies, .29-30.

In addition, state law establishes Gacaca tribunals, and it is state institutions that exercise overall control (both judicial and executive power), and penalties are executed in state prisons. What else is needed to comply international human rights norms?[180]

Furthermore, the Dakar Declaration, adopted on 11 September 1999, following the Seminar on the Right to Fair Trial in Africa, organized by the African Commission on Human and Peoples' Rights, interestingly states that "*It is recognized that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population of African countries".*[181]

Whereas it may be true that Gacaca conflicts to some extent with the international human rights norms with regard to the right to defence and appeal,[182] one should also bear in mind that Rwanda sets an example in Africa where international criminal law has to some extent failed to settle conflict. Since 1995, when the genocide cases began at the ICTR and 1998, when domestic courts began hearing cases, only an insignificant

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[180] République Rwandaise, *Juridictions Gacaca dans les procès de génocide et des massacres qui ont eu lieu au Rwanda du 1er octobre 1990 au 31 décembre 1994*, Kigali, 8 juin 1999.

[181] See the All-Africa Conference on African Principles of Conflict Resolution and Reconciliation United Nations Conference Centre, Addis Ababa, 8-12 November 1999.

[182] See Mousalli, Report of 4 August, see the *Basic Principles of the Independence of the Judiciary*, UN GAOR 40/146 of the 13 DEC. 1985. See Drumbl MA, Sclerosis: "Restorative Justice and collective *responsibility*: lessons for and from the Rwandan Genocide" (20002) 5 *Contemporary Justice Reviews* 5. Amnesty international, *The troubled Course of Justice,* Sarkin *the development of the human rights culture*; Sarkin *the necessity challenges*; Sarkin. *Promoting justice, truth and Reconciliation*, Sarkin *Dealing with past Human Rights abuses*. See also C V Vincencio and T Savage: *addressing the legacies of genocide and crimes against humanity* PG 76-84. See IG Tuzinde (2000) Justice and social reconstruction in the aftermaths of genocide in Rwanda: *an evaluation of the possible role of Gacaca tribunal Africa human rights law journal* 78 and M Hansungule op cit.

[182] For a recent overview (as of 3 September 1999) of all ICTR detainees and their current status, see www.ictr.org/english.factsheet/detainees.htm

number of cases, both at Arusha and in Rwanda, have been tried. Rwanda has opted for its traditional justice system as a last resort.

Admittedly, Gacaca may not be perfect, but perfection is hardly realizable under such circumstances. Rwandans hope Gacaca is the nearest-to-perfect alternative. It is however, too early to judge its negative achievements. One could say that a figure of 4,500 plus[183] confessions for a period of three months is an achievement. This would have taken a year or two under the Organic Law of 1996. If one weighs the negative side of the Gacaca courts against the positive within the context of Rwanda, the positive outweigh the negative ones.

Gacaca offers the best alternative for the country's current situation where tens of thousands of genocide suspects risk being in jail without trial for centuries. The situation in Rwanda should be "weighed against a different scale altogether because Rwanda is dealing with all sorts of things of unimaginable proportions".[184]

For justice to be rendered, especially through the proposed Gacaca tribunals, and for it to have the desired restorative and reconciliatory effect, people need to buy into the process: this in itself requires a high degree of freedom of speech and expression. Truth should be a cornerstone of all procedures for it is a necessary element for healing to take place.[185]

In addition, justice does not operate in isolation. Democracy is one of the pillar cornerstones for a fair and acceptable way of dispensing justice. Social reconstruction in Rwanda will never be achieved without some degree of democracy in which people

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183 See 42 and 43 above.

184 See e.g. The President of the Republic interview with the BBC 5/10 2001 http://news.bbc.co.uk/1/hi/world/africa/1581236.stm. Accessed on 24 October 2002.

185 L Fernandez (1996) "Possibilities and Limitations of Reparations for the Victims of Human Rights Violations in South Africa in M Rwelamira and G Werle (eds) *Confronting Past Injustices* 78.

feel that they participate in their own system, and that they are governed by their own principles.

According to Mahmood Mamdani

"*After 1994, the Tutsi want justice above all else, and the Hutu democracy above all else. The minority fears democracy. The majority fears justice. The minority fears that democracy is a mask for finishing an unfinished genocide. The majority fears the demand for justice is a minority ploy to usurp power forever*[186].

One of the ways forward is to overcome the apparent dichotomy between both concepts (justice and democracy) and to facilitate ways of combining these seemingly opposite directions.

For justice to be accepted as an instrument of reconciliation, it should meet certain conditions that go even beyond criteria of independence and impartiality of the judiciary. These conditions include it being embedded in an overall process of transparency, political participation and inclusiveness.

At the same time, history has shown that, in the context of Rwanda's plural society, political participation can by no means equal majority democracy, but requires a balanced system of power-sharing, including the protection of the rights of minorities and guarantees for their security.

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[186] M Mamdani, *When does a Settler become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa*, Inaugural Lecture, University of Cape Town, New Series, N°208, May 1998, p.11

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