

# **JUSTICE FOR RWANDA, TEN YEARS AFTER: SOME LESSONS LEARNED FOR TRANSITIONAL JUSTICE**

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## **Résumé**

Dans ce chapitre, nous essayons, sur base de l'expérience rwandaise de la dernière décennie, de tirer des leçons pour la théorie et la pratique de la justice transitionnelle. Le texte est sous-divisé en cinq chapitres, tous introduits par une thèse qui, plutôt que de formuler une conclusion définitive, a l'intention de provoquer le débat et d'inciter à des recherches plus fouillées.

Les thèses suivantes sont formulées:

1. En cas de justice transitionnelle, le choix qui s'impose n'est souvent pas entre des options qui respectent scrupuleusement les droits de l'homme et celles qui ne le font pas, le vrai défi étant de trouver une approche qui est le moins inacceptable au regards des droits de l'homme.
2. Les objectifs de responsabilité, réconciliation, vérité et réparation doivent tous être poursuivis par la justice transitionnelle, mais les instruments utilisés pour les atteindre, ainsi que l'ordre dans lequel ils sont poursuivis peuvent varier.
3. Le droit de la justice transitionnelle est de plus en plus déterminé par un concept universel de justice. Or, ceci ne réduit nullement l'impact du contexte politique sur la pratique de justice transitionnelle.
4. Quand les responsables de violations sont nombreux et les bénéficiaires peu nombreux, les instruments en matière de justice transitionnelle sont plus limités que quand les responsables sont peu nombreux et les bénéficiaires nombreux.
5. L'échec de la part de la communauté internationale à prévenir et arrêter des violations massives des droits de l'homme avant la transition ne devrait pas aller de pair avec un esprit trop peu critique en période post-transitionnelle.

## **1. INTRODUCTION**

This chapter is a modest attempt to draw some lessons for the theory and practice of transitional justice on the basis of the experience of Rwanda. Two introductory comments should clarify the approach adopted in this article.

First of all, in the literature of the past decade numerous recommendations have been formulated for Rwanda on the basis of international human rights law and practice, in the light of theories of conflict prevention and peace-building, etc. In this chapter, we will take a different approach and look at some lessons the Rwandan experience teaches us concerning the future of transitional justice. By no means should this be interpreted as a questioning of the validity of the more 'traditional' approach, it is no more than a complementary exercise in order to draft some lessons for the discipline of transitional justice. For the sake of this chapter, we will define transitional justice as follows: the legal approaches, norms and institutions, through which societies in transition respond to a legacy of

repression<sup>1</sup>. General objectives of transitional justice are accountability, reconciliation, truth and reparation.

Secondly, this chapter will be further subdivided in five sections, each of them introduced by a statement. It is important to note that these statements should be read as propositions intended to provoke further discussion and generate further research, rather than as final conclusions.

## 2. PROPOSITIONS

### 2.1. **In transitional situations, the choice is very often not between ideal options that fully respect human rights and other options that violate human rights, the challenge is to work out an approach that least violates human rights.**

International human rights law regulates the behaviour of States dealing with a legacy of repression. It requires investigations, prosecutions and trials of all those suspected of committing serious violations of human rights such as genocide<sup>2</sup>, torture<sup>3</sup>, extra-judicial killings of civilians, etcetera. Under the UN set of principles for the protection and promotion of human rights through action to combat impunity<sup>4</sup>, victims of human rights violations must have *«the opportunity to assert their rights and receive a fair and effective remedy, ensuring that their oppressors stand trial and that they obtain reparations. (...) there can be no just and lasting reconciliation without an effective response to the need for justice»* (Principle 26). At the same time, any person suspected of having committed a human rights violation shall be entitled, without undue delay and with legal counsel of his choice, to a fair and public hearing before a competent, independent and impartial court; no one shall be subjected to arbitrary arrest and detention, no one shall be tortured or inhumanly treated during detention and anyone

<sup>1</sup> See also TEITEL, R., *Transitional Justice*, Oxford, Oxford University Press, 2000, p.213.

<sup>2</sup> Rwanda acceded to the UN Convention on the prevention and punishment of the crime of genocide in 1975, but did not include the crime of genocide in its national criminal law until after the 1994 genocide.

<sup>3</sup> Rwanda is not a party to the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment, but this obligation in any case applies to Rwanda under customary international law.

<sup>4</sup> Better known as the "Joinet Principles", prepared by the Special Rapporteur Mr. Louis Joinet for the UN Sub-Commission on the Promotion and Protection of Human Rights (UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997). As a follow-up to the adoption of the Principles, an independent study of best practices was undertaken by Prof. D. Orentlicher and submitted to the U.N. Commission on Human Rights in 2004 (see UN Doc E/CN.4/2004/88 of 27 February 2004).

arrested shall have the right to a judicial review of the legality of his detention<sup>5</sup>. In light of the magnitude and the nature of the human rights violations committed in Rwanda in 1994, one easily understands that scrupulously observing all of these requirements in a State which has lost the majority of its human and material resources in the police and justice sector is practically impossible. It has led privileged observers to the following conclusion: «*The scale of the crimes simultaneously dictates the overwhelming need for justice and the impossibility of justice: the number of direct participants in crimes against humanity is beyond the capacity or any justice system to arraign and judge*»<sup>6</sup>. In these typical transitional situations – Rwanda being an acute example because of the scale of the impossibility – the question becomes what actions can lead to «*the least unacceptable compromises of objectives that are simultaneously unachievable*»<sup>7</sup>.

This deadlock situation might lead – as, indeed, it has done at several moments in Rwanda’s post-genocide history – to a sterile discussion between international human rights watchdogs and the transitional regime in power.

On the one hand, it is perfectly possible to evaluate each and every genocide trial and find that a chain of human rights violations has led to the conviction of an individual suspect, starting from a very often illegal and arbitrary arrest by military officers without the legal capacity to do so, continuing with grossly insufficient facilities for the preparation of a defence, and, following a series of other violations, ending with the lack of appeal possibilities for a full judicial review before a competent, independent and impartial court. Doing so in an isolated, case-by-case fashion, without looking at the broader picture, is legitimate and it is probably the role that should be taken up by some (national and/or international) actors. But, at the same time, another perspective and therefore probably also other actors are needed, taking into account the realities on the ground and trying to design the least unacceptable compromise.

On the other hand, it is extremely easy and tempting for the State to hide behind the excuse that ‘a genocide has taken place’ in order to justify almost any kind of human rights violation, even where there is no connection whatsoever with the above-sketched practical impossibility. There can be no excuse for – as continues to be the case in Rwanda – ‘disappearing’ political

<sup>5</sup> See the relevant provisions under the International Covenant on Civil and Political Rights, ratified by Rwanda in 1976, and the African Charter on Human and Peoples’ Rights, ratified by Rwanda in 1983.

<sup>6</sup> MARTIN, I., “Hard Choices after Genocide. Human Rights and Political Failures in Rwanda”, in MOORE, J. (ed.), *Hard Choices. Moral Dilemmas in Humanitarian Intervention*, Lanham, Rowman and Littlefield, 1998, p.159.

<sup>7</sup> MARTIN, I., *op. cit.*, p.171. We disagree with the author that there are «*conflicting principles*» that need to be reconciled. The principles are not at all mutually exclusive or conflicting; however, putting them into practice simultaneously indeed is.

opponents and civil society workers, there can be no excuse for torturing detainees, etcetera. There can be very good reasons though why judicial review of pre-trial detentions takes longer than normally provided for under the national code of criminal procedure, why the competence of judges is not up to international standards, why full compensation payments to all individual victims are impossible, etcetera. Not all human rights violations are explainable, let alone justifiable by referring to the context, but some deficiencies are understandable.

The debate about human rights in Rwanda has largely been paralysed by the impossibility of a true communication between actors with these widely divergent views, the one firmly sticking to the ideal standard, the other questioning almost any standard by referring to the devastating nature of the past repression. Assuming that there is a genuine interest in a debate on these human rights issues on behalf of the State, an important role can be taken up by actors who search for common ground between the two views and assist in designing the least unacceptable compromises, in ensuring that international financial support is available to fund their practical implementation and in monitoring and evaluating whether the benchmarks are met. These actors at the same time have the moral and political obligation to use their credibility to draw the line and indicate what is absolutely unacceptable in terms of human rights protection.

Applied to Rwanda's gacaca justice, Peter Uvin rightly observed that *«when discussing gacaca, we are not comparing a system that violates key provisions of criminal and human rights law with one that does not, but rather comparing various practices that are weak and incomplete in the real world»*<sup>8</sup>. More specifically applied to one particular aspect, this means, for instance, that the choice is not between a criminal justice system in which all defendants are assisted by qualified defense lawyers and a system in which this is not the case. Rather, the challenge is to design (Rwandan government) and support (donor community) a system which reflects the values and principles underlying the standard that cannot be met. One of the principles underlying basic fair trial standards is the principle of 'equality of arms', which means that the parties in a case have a procedurally equal position during the trial and have an equal opportunity to make their case<sup>9</sup>. One can argue that, at least in theory, during gacaca hearings *«the play of argument and counter-argument, of witness and counter-witness by the community*

<sup>8</sup> UVIN, P., *The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and the Massacres of 1994 in Rwanda. A Discussion Paper*, Brussels, June 2000, p.5.

<sup>9</sup> See also TULLY, L. D., "Human Rights Compliance and the Gacaca Jurisdictions in Rwanda", *Boston College International and Comparative Law Review*, Vol. 26, no. 2, 2003, p.410.

*basically amounts to the same as a fair defense*<sup>10</sup>. So, rather than limiting oneself to the finding – however correct – that no «legal defense of one's own choosing» (Article 14 of the International Covenant on Civil and Political Rights) is available under the gacaca system, it seems equally important to focus on the question whether the conditions are such that the underlying principle of equality of arms can be respected. Looking at the larger objective of justice, the absence of professional legal defense counsel in fact seems a lot less important than the overall human rights environment of disappearances, arrests and forced exile of political opponents, civil society leaders and journalists, attacks on genocide survivors, acts of repression by local defense forces, etcetera. While the former may be acceptable to international donors, the latter elements can not be condoned as they render a fair trial highly unlikely, if not impossible, in practice. Fear and distrust (may) have the effect that either genocide survivors<sup>11</sup> or 'defense' witnesses, or even both categories, do no longer take to risk of fully and openly participating in the gacaca process. This fundamentally undermines the principle of equality of arms.

With regard to this first proposition, it should be recalled, finally, that international law itself provides for some flexibility in light of the exceptional circumstances in which human rights norms are to be applied. Two examples may illustrate this. First, reference can be made to the public emergency clause under the International Covenant on Civil and Political Rights: «*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation*». In 1997, the Special Rapporteur on Rwanda of the UN Commission on Human Rights, René Degni-Ségui, reported that this provision did not justify the excessive derogations from the normal legal guarantees on the judicial review of pre-trial detention<sup>12</sup>.

A second example relates to the obligation of the State to provide full reparation to the victims of those human rights violations that are attributable to the State. In the case of Rwanda, this is obviously an enormous amount<sup>13</sup>. Do the scale of the violations and, correspondingly, the magnitude of the reparations needed affect the legal obligation of the State to provide full

<sup>10</sup> UVIN, P., *op. cit.*, p.5.

<sup>11</sup> In December 2003, following reports of murder and intimidation of genocide survivors testifying under the gacaca justice system, a commission of investigation of the Rwandan senate was established (United Nations, Integrated Regional Information Network, 19 December 2003).

<sup>12</sup> UN Doc. E/CN.4/1997/61, 20 January 1997, 112.

<sup>13</sup> Those genocide trials in which the State has been held civilly liable have not resulted in any actual compensation payment to the victims.

reparation (*restitutio in integrum*)? The International Law Commission of the UN recognized that, in some extreme cases, the burden of full reparation may be such as to endanger the whole social system of the State. Accordingly, a provision was included in the 1996 version of the draft Articles on State Responsibility to the effect that «*In no case shall reparation result in depriving the population of a State of its own means of subsistence*» (Article 42, para.3). Despite the fact that this provision is no longer included in the final version, one may consider this to reflect a legal principle of general application, which is, amongst others, laid down in the wording of Article 1, para.2 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

Some might argue that these two examples are indicative of the fact that international law is not flexible enough and should better take into account the possibly exceptional circumstances in which human rights norms are to be applied.

## **2.2. Objectives of accountability, reconciliation, truth and reparation necessarily need to go hand in hand, though the instruments used for attaining them as well as the order and timing may differ.**

This proposition argues that the four above-mentioned objectives are essential ambitions which any transitional justice process must have. Before and parallel to the Rwandan case, other experiences have also shown that it is impossible to organise a trade-off between one or more of these objectives. Offering reparation instead of accountability, as happened in, for instance, Argentina, leads to unfinished business coming back on the political agenda sooner or later. Offering truth and reconciliation, and, to some extent, accountability, does not take reparation off the agenda, as the South African experience tells. Telling the truth does not keep accountability off the agenda, as the Guatemalan experience tells.

It would lead us too far to go into the details of the precise definitions and scope of the above-mentioned objectives<sup>14</sup>. We would however like to make the following observations before turning to the Rwandan case.

The objective of accountability is very often, including in the Rwandan context, reduced to the establishment of criminal responsibility of individual perpetrators (and to imposing criminal sentences), which in turn is qualified as 'justice'. For human rights abuses amounting to international crimes, this is obviously not surprising. But as an objective of transitional justice, accountability may also result from processes that reveal other forms

<sup>14</sup> For more conceptual analyses as well as policy recommendations, see BLOOMFIELD, D. et al. (eds.), *Reconciliation After Violent Conflict. A Handbook*, Stockholm, International IDEA, 2003, <http://www.idea.int/conflict/reconciliation/index.cfm>.

of legal (but not necessarily criminal), political, moral or historical responsibility and from sentences that are not criminal, but, for instance, of an administrative or restorative nature. As we will indicate below, the debate on accountability in the Rwandan context was initially too narrowly and too exclusively reduced to criminal responsibility. Other objectives and alternative forms of sentencing were considered at policy level at a later stage.

The objective of reconciliation (*«a process through which a society moves from a divided past to a shared future»*<sup>15</sup>) should ideally take root at three different levels. First, at the micro-level, between citizens, victims and perpetrators and their relatives. Secondly, at an intermediate level, between groups in society, which can be of an ethnic, religious, regional or other nature, but which are in any case politically relevant. And thirdly, at the macro-level, in national politics, where notions of pluralism, (consociational) democracy, power-sharing, rule of law, etcetera, should find their way in the constitutional and institutional arrangements.

In the case of Rwanda, reconciliation was, in the early years after the 1994 genocide, certainly not a stated objective of the successor government. In fact, as noted in a UNHCR memorandum, *«the attitude of the government in the years that followed the genocide was to insist on the need for justice. The word ‘reconciliation’ was taboo for those who had survived genocide, and was never publicly used...»*<sup>16</sup>. Speaking about reconciliation was in fact simply not done for several years after the genocide. For the new Rwandan government of national unity – which is in reality a euphemism for a government strongly dominated by the former Rwandan Patriotic Front (RPF) rebellion – the stated objectives in terms of how to deal with the past were accountability, justice for victims and the struggle against impunity<sup>17</sup>. Contrary to the South African approach, where transitional justice was, in the first place, oriented towards truth and reconciliation, the Rwandan approach favoured the use of retributive justice mechanisms. There are two apparent reasons why reconciliation was taboo; they can be situated at micro and at macro-level. First, for many genocide survivors, reconciliation was seen as synonymous to forgiving<sup>18</sup> and forgetting, to amnesty and impunity and

<sup>15</sup> BLOOMFIELD, D., “Chapter 1. Reconciliation: An Introduction”, in BLOOMFIELD, D. et al. (eds.), *op. cit.*, p.12.

<sup>16</sup> Quoted in HUYSE, L., “Chapter 2. The process of reconciliation”, in BLOOMFIELD, D. et al. (eds.), *op. cit.*, p.25.

<sup>17</sup> “On their visits to South Africa, the Rwandan commented that reconciliation would be nice, but that they preferred justice, and reconciliation could wait” (SARKIN, J., “The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the gacaca courts in dealing with the genocide”, *Journal of African Law*, Vol. 45, no. 2, 2001, p.154).

<sup>18</sup> See also the ‘thicker’ conception of reconciliation as defined by CROCKER, D. (“Truth Commissions, Transitional Justice and Civil Society”, in ROTBERG, R.I. and THOMPSON,

therefore directly opposed to the very notion of justice<sup>19</sup>. In the early years, the political influence of genocide survivors' organisations on the political decision-makers in Rwanda was considerable. Gradually, genocide survivors felt less represented at the political level and occasionally publicly questioned certain policy measures. As time went by, their objection against reconciliation as an objective of transitional governance was therefore politically less taken into consideration. Secondly, and more importantly, at the national political level, reconciliation was understood as power-sharing, democratisation and even (Hutu) majority rule. Reconciliation and justice were therefore seen as mutually exclusive rather than mutually reinforcing objectives of transitional governance. Mamdani summarized – and, admittedly, over-simplified – this divisive dichotomy as follows: «*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*»<sup>20</sup>. The mere use of the term reconciliation was gradually no longer taboo towards the end of the year 1998. The UN Commission on Human Rights Special Representative for Rwanda, Michel Moussali, reported that «*After five years of refusing to talk of reconciliation until justice is seen to be done, Rwandans now accept that reconciliation must be a national goal in its own right*»<sup>21</sup>. This coincided with two developments. There was a clear and publicly voiced opposition by the organisations of genocide victims against the announcement by the government, in October 1998, that some 10,000 genocide suspects held in pre-trial detention would soon be provisionally released. Although this measure was only very partially implemented<sup>22</sup>, this tension between the

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D.F., *Truth v. Justice: The Morality of Truth Commissions*, Princeton N.J., Princeton U.P., 2000, p.108).

<sup>19</sup> In 1995, Ibuka, the main survivors' organisation, denounced national reconciliation as a negation of justice: «*Il est indécent et scandaleux d'imposer aux Rwandais, avant toute aide à la reconstruction, le préalable d'une 'réconciliation nationale' qui réunirait les bourreaux et leurs victimes, comme si de rien n'était. Ce préalable n'a qu'un seul but: gommer les responsabilités nationales et internationales du génocide et des crimes contre l'humanité commis au Rwanda. Il ne règle pas les problèmes du pays, dans la mesure où il est impossible de construire un Etat de droit sur la négation de la Justice*» (IBUKA, *L'intégrale des actes (1995 à 2000) de commémoration du génocide des Tutsi et des crimes commis au Rwanda en 1994*, Brussels, CD-rom version).

<sup>20</sup> MAMDANI, M., *When does a settler become a native? Reflections on the colonial roots of citizenship in Equatorial and South Africa*, Cape Town, University of Cape Town, 1998, p.11.

<sup>21</sup> UN Commission on Human Rights, *Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to Commission resolution 1999/20*, 25 February 2000, E/CN.4/2000/41, para. 180.

<sup>22</sup> By June 1999, only 3,365 persons against whom there was no or hardly any evidence had been released («*Les 'sans dossier' accusés de génocide continuent d'être libérés*», *Le Verdict*,



government and the survivors' movement was politically most relevant. Also, at the macro-political level, it had become increasingly clear that the political threat of an organized Hutu opposition was virtually non-existent. The external, military threat of remnants of the former government army and genocide militia, based in Eastern Congo, was eliminated during the second armed invasion by Rwanda in the Congo in August 1998. Any possible internal organised opposition was gradually and increasingly eliminated, political parties banned, their leaders forced into exile or imprisoned. In this context of political elimination of opponents, it is obviously much more 'comfortable' for the regime in power to declare that reconciliation is a policy objective.

The lesson to learn from Rwanda (and other cases) is that the prioritisation and sequence (both logical and chronological) of the above-mentioned objectives of transitional justice is probably not so important and may very much depend on the specific characteristics of the local setting. On the other hand, it is clear that those objectives that have not been addressed will sooner or later appear on the political agenda. The reasons why reparation<sup>23</sup> – for genocide victims but also for those thousands of persons who have been arbitrarily arrested and illegally detained for several years – and truth<sup>24</sup> as a collective endeavour of Rwandan society to try and find a common reading of its violent past, including the genocide, but also the war – have not been addressed are probably above all linked to power politics and to the absence of a strong and sufficiently independent civil society. But the issues are not off the agenda, and, furthermore, as long as they have not been addressed, the other objectives of reconciliation and accountability can never be fully attained.

**2.3. The law of transitional justice is increasingly shaped by a universal concept of justice, but this does not reduce the impact of the political context on the actual practice of transitional justice.**

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July 1999, p.14).

<sup>23</sup> Already in 1996, in the Organic Law on the organization of genocide trials, the establishment of a Victims Compensation Fund was announced (Article 32). As of early 2004, this has not yet been accomplished.

<sup>24</sup> The Organization of African Unity (through its International Panel of Eminent Personalities) as well as the French and Belgian Parliament have produced lengthy reports about the background, the antecedents, the responsibilities, etcetera, of the Rwandan genocide and massacres. No such cathartic exercise, establishing a truth which is incorporated in a nation's historical memory, has yet taken place at the national Rwandan level.

Under international human rights law, an isolated case of torture or an isolated political killing generally gives rise to an identical legal qualification and to identical legal consequences as do cases of torture and killings that are committed as part of a systematic pattern. Exceptions to this rule are, for instance, the procedure under ECOSOC Resolution 1503 (confidential procedure before the UN Commission on Human Rights in the case of a «*consistent pattern of gross and reliably attested violations*» of human rights), the specific procedure under the Inter-American Convention on Human Rights<sup>25</sup> and under the African Charter on Human and Peoples' Rights (article 58)<sup>26</sup> as well as the qualification of torture as an international crime under the Statute of the International Criminal Court (torture as an underlying offence, constitutive of a crime against humanity)<sup>27</sup>.

Similarly, international law provisions on torture and political killings – to take the same two examples – leave increasingly little room for the design of an *ad hoc* national transitional justice scheme that is in line with the political parameters<sup>28</sup> that shape the transition. For instance, blanket amnesty legislation adopted in a number of Latin American countries as an instrument of transitional justice (or, as some would argue, transitional injustice) in the recent past is now clearly contrary to customary international law. This seems a quite positive trend: irrespective of the political compromise that shapes a transition, victims of torture and political killings should ideally have the same rights. This idealist perspective of law («*conceived as following idealist conceptions largely unaffected by political context*») however «*misses what is distinctive about justice in times of transition*»<sup>29</sup>. The Rwandan case-study shows the important impact of political elements on the nature of transitional justice, despite the increasingly universal concept of justice after human rights violations. This should certainly not lead to the conclusion that the number of universally applicable norms should decrease or that a universal concept of justice is inappropriate. But it should be a strong reminder of the weight of the political context and of the inherent limitations of a purely legal approach to an importantly political challenge.

<sup>25</sup> See MEDINA QUIROGA, C., *The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System*, Dordrecht, Martinus Nijhoff, 1988.

<sup>26</sup> See MURRAY, R., "Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms", *Netherlands Quarterly of Human Rights*, Vol.17, no. 2, 1999, p.109-133.

<sup>27</sup> See also the Judgment of the ICTR in the Akayesu case, Trial Chamber, 2 September 1998, para.681.

<sup>28</sup> On how circumstances shape the available options for transitional justice, see HUYSE, L., "Justice after transitions: On the choices successor elites make in dealing with the past", in KRITZ, N. (Ed.), *Transitional Justice. How emerging democracies reckon with former regimes*, Washington D.C., USIP, Vol. I, 1995, p.104-115.

<sup>29</sup> TEITEL, R., *op. cit.*, p.4.

A first highly relevant political characteristic is the nature of the political transition. Zalaquett rightly notes that «*the particular mode of the eventual peace agreement or political transition determines to a great extent the nature and degree of the restrictions new governments or the international community will face in their efforts to deal with past abuses*»<sup>30</sup>. The post-genocide political context in Rwanda is not the result of a negotiated peace agreement, but of a military victory. Despite the fact that, initially, the Arusha Peace Accords of 1993 continued to be part of the Fundamental Law of Rwanda, the tripolar power structure reflected in the Accords clearly no longer corresponded to the political reality. The latter was in fact not shaped by the negotiated Accords, but by the military victory of the RPF. Two features of the Rwandan case-study may further illustrate this.

First, reference can be made to the International Commission of Inquiry, provided for under Article 16 of the Protocol of Agreement on the Rule of Law of the Arusha Accords. Although, as early as 1996, Prime Minister Rwigema announced that «*The Rwandan Government intends to set up shortly, the different commissions foreseen under the Arusha Peace Agreement, beginning with the National Commission on Human Rights and the International Commission of Inquiry to investigate human rights violations committed during the war, the massacres and the genocide. Both commissions will mainly examine the various human rights violations committed by anyone on Rwandan territory and in countries hosting refugees, particularly by state organs or organisations under state control or other organisations*»<sup>31</sup>, it was clear that a process of truth-telling or thorough investigations into the war crimes committed by the former RPF rebellion was extremely unlikely. The International Commission of Inquiry was never established.

Secondly, the investigative powers of the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR) are, legally speaking, totally independent of the specific political setting in Rwanda. In fact, in accordance with Article 28 of the ICTR Statute, all States are required to cooperate with the Tribunal. In Rwanda practice has shown, however, to what extent the ICTR is dependent on the cooperation of the Rwandan successor authorities and to what extent the Rwandan government can undermine all activities, for instance by preventing witnesses from travelling to Arusha<sup>32</sup>.

<sup>30</sup> ZALAQUETT, J., "Moral Reconstruction in the Wake of Human Rights Violations and War Crimes", in MOORE, J. (ed.), *op. cit.*, p.216. The author offers of tentative typology of political transitions, based on contemporary examples.

<sup>31</sup> (Emphasis added, my translation) "Déclaration de S.E.M. Pierre Célestin Rwigema, Premier Ministre de la République rwandaise" in PNUD, *Conférence de la Table Ronde pour la République rwandaise. Rapport de la Conférence*, Geneva, June 1996, p.66.

<sup>32</sup> Human Rights Watch, *Rwanda: deliver justice for victims of both sides*, Press Release, 12 August 2002.

This striking lack of cooperation is obviously<sup>33</sup> linked to the Rwandan refusal to allow investigations and indictments for war crimes committed by the former RPF rebellion. Observers agree that this was even the direct occasion for the replacement of Prosecutor Del Ponte in 2003.<sup>34</sup> For any believer in the universal concept of justice – including in times of political transition –, the establishment of the ICTR, together with the ad hoc Tribunal for the former Yugoslavia, was a historical achievement; for those same believers, the success of Rwanda (supported by the United States) in imposing the replacement of Del Ponte as Prosecutor constitutes an enormous blow. Unfortunately, this development received remarkably little media and political attention.

A second relevant factor is the stage of the political transition at which the transitional justice effort is taking place. The question of how to deal with a repressive past of genocide, crimes against humanity and war crimes did, in the case of Rwanda, not come up after a consolidated transition. Quite on the contrary, while national courts and an international tribunal were being established and started their operations, Rwanda was involved in a military conflict, waging a war, including against its own nationals, on the territory of a neighbouring country. Three elements of the Rwandan case-study may further illustrate the impact of this politico-military context.

First, as long as military cross-border operations destabilized (in particular the North-Western) part of the country (as was the case in 1995 and 1996) and as long as Rwandans were sent across the border to fight their fellow nationals, it was obviously unlikely to promote a policy of reconciliation (in its three above-mentioned dimensions) as an objective of transitional justice.

Secondly, while transitional justice instruments are addressing human rights violations committed in 1994 (mandate *ratione temporis* of the International Criminal Tribunal) or committed between October 1990 and December 1994 (mandate *ratione temporis* of the specialised chambers of the tribunals of first instance and of the gacaca courts), new rounds of large-scale gross and systematic human rights violations have been committed, for which additional transitional justice efforts are equally necessary. Otherwise, the credibility of the stated policy objective of 'fighting impunity' is inevitably questionable.

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<sup>33</sup> Officially, Rwanda accused the Prosecutor of «policitising» her office. Prosecutor Del Ponte reacted to this by saying that it is an «unjustified and baseless accusation. It was ridiculous and petty. They should give the real reasons since everyone knows them. What's more, they did share them with me privately during our meetings» (Fondation Hironnelle, *Exclusive interview with Carla Del Ponte*, Arusha, 19 December 2002).

<sup>34</sup> See International Crisis Group, *Tribunal Pénal International pour le Rwanda: Pragmatisme de Rigueur*, Nairobi, Brussels, September 2003; Fondation Hironnelle, *Interview avec Carla Del Ponte*. 'Si j'avais eu le choix, je serai restée procureur au TPIR', 15 September 2003.

Thirdly, social capital (existing and functioning civil society networks, trust among communities, etc.) is an essential prerequisite to successfully adopt out-of-court approaches (cf. South Africa vs. Rwanda): how could this be available<sup>35</sup> in the case of an ongoing violent conflict?

A third relevant factor obviously is the resulting power balance. Two features of the Rwandan case-study may further illustrate this.

Although in national criminal law victims of acts of genocide, of crimes against humanity and of war crimes are all recognized, irrespective of whether they fell victim of the former regime or of the former rebellion and successor regime, reality is very different. For the latter group, even the mere recognition of their victim status is highly problematic, let alone the enforcement of their reparation rights.<sup>36</sup>

At the level of the ICTR, the above-mentioned successful effort to counter any investigation that may lead to an indictment of an RPF military will inevitably feed the criticism and create a lasting impression that the ICTR is rendering victors' justice. For an institution that is supposed to contribute to the process of national reconciliation<sup>37</sup> this is obviously an important deficiency. As a more general conclusion, it is worth noting that the phenomenon of victors' justice and how to respond to it in international law and international relations certainly requires further research.

**2.4. When perpetrators are many and beneficiaries are few, differentiating between various degrees of responsibility is more difficult than when perpetrators are few and beneficiaries are many.**

Mahmood Mamdani rightly pointed at a striking difference between the Rwandan and the South African situations: *«I have already commented on the difference between South Africa and Rwanda on this score: one is struck by how few were the perpetrators of apartheid, and how many its beneficiaries, and conversely, how many were the perpetrators in Rwanda's genocide and how few its beneficiaries»*<sup>38</sup>. From the perspective of (criminal) accountability, the only relevant element appears to be the number of perpetrators and their responsibility or – in criminal terms – their guilt. From

<sup>35</sup> The degree of social capital obviously also depends on other aspects, for instance, the repressive nature of the pre-transition regime in dealing with civil society.

<sup>36</sup> See, in more detail, ROMBOUTS, H., "Importance and Difficulties of Victim-Based Research in Post-Conflict Societies", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol.10, N°2-3, 2002, p.216-232.

<sup>37</sup> See the preambular paragraphs of UN Security Council Resolution S/RES/955 of 8 November 1994 on the establishment of the ICTR.

<sup>38</sup> MAMDANI, M., *When victims become killers. Colonialism, Nativism and the Genocide in Rwanda*, Kampala, Fountain Publishers, 2001, p.273.

a broader transitional justice perspective, the number, the role and the treatment of beneficiaries seem almost equally important.

One possible legal perspective to look into this issue is to try and open up the category of legally responsible persons or entities in order to include not only direct perpetrators but also accomplices. In recent human rights literature, a lot of attention has been paid to the legal accountability of corporations as so-called «indirect perpetrators» or beneficiaries (and their either criminal or civil responsibility). Clapham, for instance, distinguishes between direct, indirect and silent complicity of corporations and concludes that «*it seems safe to assert that international law considers that intentional participation in an internationally wrongful act constitutes complicity in the breach of international human rights law*»<sup>39</sup>. One could try and apply these findings to other accomplices and beneficiaries than corporations, for instance non-governmental or inter-governmental bodies, the Church, or other. In fact, the latter examples seem more relevant for the Rwandan case-study than the corporate sector.

Another perspective, however, is for the transitional justice process to establish different kinds of responsibility for the entire spectrum of perpetrators, beneficiaries, bystanders and onlookers<sup>40</sup>: legal (either criminal and/or civil), political, historical, moral responsibility; individual and collective responsibility. But the options for doing so are limited when primarily dealing with perpetrators. Indeed, where (in particular direct) perpetrators are many and beneficiaries are few, differentiating between grades of responsibility necessarily becomes a matter of criminal (and, possibly, civil) law. This is also what the categorisation under national Rwandan law introduces: the range of applicable criminal sentences, as well as the impact of a confession and guilty plea, depend on the degree of criminal responsibility. The number of indirect perpetrators and beneficiaries (other than those who were at the same time masterminds and, thus, top responsible) was very limited. Where, as in South Africa, the number of indirect perpetrators (including corporations), beneficiaries and bystanders is much larger than the number of direct perpetrators, a wider range of transitional justice instruments is available to establish various kinds of responsibility: acknowledgement, apologies, civil compensation proceedings, restitution programmes, reparation funds, voluntary contribution schemes, campaigns of positive discrimination towards discriminated groups. In this context, the South African Truth and Reconciliation Commission suggested

<sup>39</sup> (Emphasis added) CLAPHAM, A. and JERBI, S., «Categories of Corporate Complicity in Human Rights Abuses», *Hastings International and Comparative Law Review*, Vol.24, 2001, p.349.

<sup>40</sup> The terminology is from HUYSE, L., «Chapter 5. Offenders» in BLOOMFIELD, D. et al. (eds.), *op. cit.*, p.68.

the introduction of a wealth tax, enabling those who benefited from apartheid to contribute to the alleviation of poverty of structurally disadvantaged groups.<sup>41</sup> The latter aspect corresponds to another proposition by Mamdani: «Where beneficiaries are many, reconciliation has to be social to be durable, which is the same thing as saying there can be no durable reconciliation without some form of social justice. But where beneficiaries are few, the key to reconciliation is political reconciliation. The prime requirement of political reconciliation is neither criminal justice nor social justice, but political justice»<sup>42</sup>.

**2.5. The failure, on behalf of the international community, to prevent and stop large-scale human rights violations should not go hand in hand with a failure to critically assess the aftermath: compensating one failure by another twice victimizes the population.**

The failure of the international community, before and during the genocide, is well documented<sup>43</sup>. The United Nations in general and, in particular, Belgium, France and the United States knowingly and willingly remained silent and inactive or even withdrew those forces that had the capacity of stopping the genocide or, at least, reducing the human losses. Not the international community but the RPF stopped the genocide and the ‘final solution’ that was so carefully planned.

As a result, the successor regime in Rwanda was awarded an enormous ‘genocide credit’, importantly based on the collective guilt of the international community. The credit was much more political than financial, whereas, in fact, the people of Rwanda were much more in need of financial credit than of political credit for a successor regime with a very poor human rights record. Ian Martin, former head of the UN Human Rights Field Operation in Rwanda, summarizes the situation as follows: «The new Rwanda needed more assistance and more criticism than it received, and only a willingness to deliver the former would have made the latter morally and politically acceptable. It needed the Marshall Plan its new leaders sought, but, even if donor states has been ready to deliver this, such a commitment of resources could be the basis of future stability only if those leaders had embarked on a genuinely inclusive political strategy»<sup>44</sup>.

<sup>41</sup> Truth and Reconciliation Commission of South Africa Report, Vol.5, 1998, p.319.

<sup>42</sup> MAMDANI, M., *op. cit.*, p.273.

<sup>43</sup> See, inter alia, the section “Genocide and the international community” in Human Rights Watch and FIDH, *Leave none to tell the story. Genocide in Rwanda*, New York, Paris, 1999.

<sup>44</sup> MARTIN, I., *op. cit.*, p.173.

Applied to transitional justice, this would have meant providing more financial resources to the rehabilitation of the justice sector, and, at the same time, imposing a political bottom-line, namely the recognition by the regime that *«justice required non-Rwandan participation, as well as appropriate representation of both Hutu and Tutsi among the judges and the judged»*<sup>45</sup>. It would have implied providing more resources to increase the capacity of the detention system and to improve detention conditions, but, at the same time, categorically and firmly rejecting and condemning the inhuman detention conditions in communal lock-ups, the secret detention and disappearances in military camps, the continued detention without judicial review of those many detainees against whom there was no evidence at all. It would have meant recognizing the political, if not legal, responsibility of international actors and (literally) paying the price for it, while at the same time insisting on the RPF's acknowledgement that not only revenge killings but war crimes and crimes against humanity have been committed by its forces and that *«the pursuit of justice for their victims, too, would be the foundation of true reconciliation»*<sup>46</sup>.

Antwerp, March 2004

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<sup>45</sup> *Ibid.*, p.172.

<sup>46</sup> *Ibid.*, p.173.