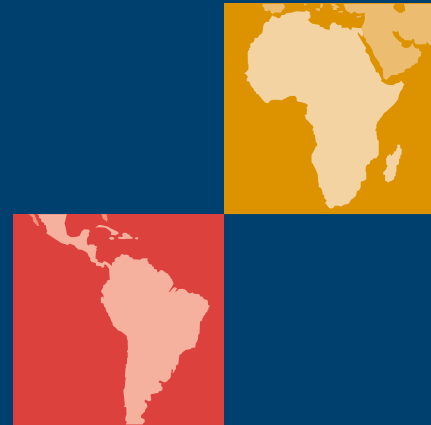


DISCUSSION PAPER / 2008.01



# Rwanda's Experiment in People's Courts (gacaca) and the Tragedy of Unexamined Humanitarianism: A Normative/Ethical Perspective

Dadimos **Haile**



University  
of Antwerp



INSTITUTE OF DEVELOPMENT  
POLICY AND MANAGEMENT

Comments on this Discussion Paper are invited.  
Please contact the author at <dadimos@gmail.com>

Instituut voor Ontwikkelingsbeleid en -Beheer  
Institute of Development Policy and Management  
Institut de Politique et de Gestion du Développement  
Instituto de Política y Gestión del Desarrollo

Postal address:  
Prinsstraat 13  
B-2000 Antwerpen  
Belgium

Visiting address:  
Lange Sint-Annastraat 7  
B-2000 Antwerpen  
Belgium

Tel: +32 (0)3 275 57 70  
Fax: +32 (0)3 275 57 71  
e-mail: [dev@ua.ac.be](mailto:dev@ua.ac.be)  
**<http://www.ua.ac.be/dev>**

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Dadimos **Haile**<sup>[1]</sup>

January 2008

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[1] LL.B, (Addis Ababa University), LL.M, (K.U. Leuven) S.J.D (Duke University School of Law, 2006)

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## ABSTRACT

The Article explores Rwanda's ongoing social experiment in people's courts (gacaca) from the perspectives of international fair trial standards and normative ethics and seeks to challenge some of the major intuitive and counter-intuitive assumptions regarding the necessity and utility of the experiment that tend to shield it from objective analysis.

These assumptions consist in: First, contemporary gacaca is based on traditional Rwandan/African justice system, thus implying, inter alia, that it does not have to fully conform to international standards. Second, although, the gacaca process does not strictly conform to fair trial standards, it has some countervailing advantages over the standard criminal justice system, such as speedy trial, enhanced popular participation and reconciliation. Three, gacaca is a necessary evil because there simply is no better solution given the particularities of the Rwandan context.

In conclusion, the article highlights the persistent need in Rwanda for the establishment of durable peace and reconciliation based on inclusion, respect for the rule of law and human rights. The key to the attainment of those objectives, however, lies mainly in politics, and not in criminal justice, whether the latter is pursued through the regular courts or gacaca jurisdictions. More specifically, Rwandan political elites need to resolve the problem of legitimation of political power. In the latter respects, it will be argued, the gacaca process is very much part of the problem rather than the solution.

## RÉSUMÉ

Cet article examine l'expérience sociale en cours au Rwanda dans les tribunaux populaires (gacaca) dans la perspective des normes internationales pour un procès équitable et de l'éthique normative. Cet article cherche aussi à mettre en question certaines réflexions intuitives et contre-intuitives concernant la nécessité et l'utilité de l'expérience qui tendent à soustraire cette dernière à une analyse objective.

Ces réflexions consistent à dire :

premièrement, la gacaca contemporaine est basée sur un système juridique rwandais/africain traditionnel, impliquant ainsi, entre autres, qu'elle n'a pas à se conformer strictement aux normes internationales.

Deuxièmement, bien que le processus de la gacaca ne soit pas strictement conforme aux normes d'un procès équitable, il possède quelques avantages compensatoires sur le système judiciaire criminel courant tels que la rapidité du procès, la participation populaire élargie et la réconciliation.

Troisièmement la gacaca est un mal nécessaire parce qu'il n'y a tout simplement pas de meilleure solution étant donné les particularités du contexte rwandais.

En conclusion, cet article souligne le besoin persistant au Rwanda d'établir une paix durable et une réconciliation basées sur la participation collective, le respect de la loi et des droits de l'homme. La clé pour atteindre ces objectifs repose, cependant, principalement sur la politique et non sur la justice criminelle, alors que cette dernière est pratiquée dans les tribunaux réguliers ou dans le cadre de la gacaca. Plus spécifiquement, l'élite politique rwandaise a besoin de résoudre le problème de la légitimation du pouvoir politique. En ce qui concerne ces dernières considérations, on argumentera sur le fait que le processus de la gacaca constitue une grande partie du problème plutôt que la solution.

## INTRODUCTION

There is a considerable amount of literature on the Rwandan genocide and its aftermath. Much of this focuses on the gruesome facts and figures regarding the atrocities, the presumed causes- the most commonly cited ones being primordial ethnic hatred between Hutus and Tutsis and the colonial manipulation of ethnicity - the failure of the international community, and the enormity of the challenges facing the government. This article does not seek to introduce new facts along those lines or restate the ones that have already been covered by others in overwhelming detail. While mindful of the foregoing themes, including the need for historical and local explanations, the discussion seeks to avoid the pitfalls of relegating contemporary problems to the legacies of the distant past or readily treating them as extraordinary and outside the existing body of knowledge. It is, therefore, informed by two major assumptions.

First, whatever the antecedent causes of the genocide, its legacy constitutes a current problem whose resolution is primarily the responsibility of contemporary Rwandans and their leaders. Accordingly, the ongoing Rwandan process must be evaluated not only in reference to the historic causes of the genocide and the magnitude of the problems that the current government faces but also on the basis of the judiciousness of its policies in view of those problems.

Second, every atrocity has unique features and leaves complex moral, social, political and legal problems in its aftermath. However, political theory, sociology, history and the human rights discourse supported by an informed ethical inquiry can provide useful explanatory insights into the causes of mass atrocities and the role of social and political institutions in preventing or facilitating their recurrence.

Accordingly, the historical analysis below focuses mainly on the events immediately preceding the Rwandan genocide. This is meant to provide a background to the discussion on the current Rwandan politics and the political factors that continue to shape the policy preferences of the leadership elite and account for most of the problems and irregularities faced in the tortuous process of dealing with the country's recent past. That analysis will be followed by a more detailed evaluation of the ongoing social experiment with the *gacaca* tribunals, which were supposedly introduced to make up for the inadequacies of the modern criminal justice system.

## 1. BACKGROUND

### 1.1. The Onset of the Civil War and the 1994 Genocide

In 1990, Rwanda appeared to be more stable than most other countries in the region and a likely candidate for the “third wave” of democratization despite its history of inter-ethnic conflicts and economic problems.<sup>[1]</sup> Consequently, it would have been difficult to predict that the country would descend into chaos and genocide four years down the road. Since the violent years between the 1959 revolution and the early 1960’s, during which many thousands of Tutsis were killed or forced to seek refugee in neighboring countries, there has been relative peace and security in the country.<sup>[2]</sup> One exception to this was the 1973 riots during which many Tutsis were attacked by a Hutu crowd, precipitating the successful military coup led by Habyarimana.

Until the late 1980’s, Habyarimana’s rule saw the strengthening of his one party system combined with relative economic progress and improved inter-ethnic relations.<sup>[3]</sup> In the late 80s, however, growing economic and social crisis combined<sup>[4]</sup> with the developments then taking place in the former communist bloc forced the regime to yield to international and domestic pressure for the initiation of democratic reforms. Accordingly, it began to take tangible, albeit reluctant, steps, which produced some degree of political liberalization including the emergence of independent press and opposition groups.<sup>[5]</sup>

Hence, it was amidst growing optimism about the prospects for peaceful transition that the Rwandan Patriotic Front (RPF) launched its invasion from Uganda on October 1, 1990. What is also remarkable is that the immediate causes behind the creation of RPF and its invasion had more to do with developments in neighboring Uganda than in Rwanda itself. The RPF was founded in Uganda in 1987 by mainly Rwandan Tutsis (known as Banyarwanda a reference to people of Rwandan ancestry), most of whom were born and raised in Uganda. The second-class treatment and stigma that they were subjected to in Uganda was reported to be the main reason behind the formation of the Rwandese Alliance for National Unity (RANU), RPF’s predecessor, with the aim of facilitating their repatriation to Rwanda.<sup>[6]</sup> The same factors are said to have led the Banyarwanda to join the Ugandan Resistance Army in large numbers.<sup>[7]</sup> In fact, many of those who have come to constitute RPF’s military leadership and its rank and file members were the same people who have fought in, or led the guerrilla war alongside the NRA and helped Yuweri Museveni seize power in 1986.<sup>[8]</sup>

[1] Mamdani observes, “on the eve of the RPF invasion of October 1990, the Rwandan polity was healthier than many others in the region. It had a better record of dealing with the political opposition than did most countries in the region of the Great Lakes, Tanzania being the notable exception.” See Mahmood Mamdani, (2001) *When Victims become killers: Colonialism, Nativism and the Genocide in Rwanda*, Princeton University Press, p. 155.

[2] Kimonyo, J.P. (2001) “The Rwandan Experience” in: Villa-Vicencio Ch. and Savage T. (eds.) *Rwanda and South Africa in Dialogue: Addressing the legacies of Genocide and Crimes against Humanity*, Capetown, IJR, p. 30-37.

[3] Ibid. See also “Rwanda: The Preventable Genocide”, (2000) *International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*, Addis Ababa, OAU, (hereinafter, “The Preventible Genocide”), Executive Summary (E.S.), para. 13.

[4] Kimonyo, supra, note 2.

[5] See Sibomana, A. (1999) *Hope for Rwanda, Conversation with Laure Guilbert and Herve Degune*, (trans. and with a postscript by Carina Tertsakian), London, Pluto Press, p. 28.

[6] Mamdani, p. 175.

[7] Ibid.

[8] The list included the first Commander of the RPF, Fred Rwigyema, who was second in command to Museveni in the Ugandan Army and the current president of Rwanda, Major General Paul Kagame, who was acting chief of military intelligence. Human Rights Watch further reported, “about half of Rwigyema’s initial invasion force of some



Although Museveni appeared more accommodating to the Banyarwanda than his predecessors, some of his policies seem to have later given rise to discontent among Ugandans over issues of citizenship and entitlements. Museveni opted to resolve the crisis by reversing his government's position on the Banyarwanda, a factor that is considered to be a significant catalyst for the RPF invasion.<sup>[9]</sup> Mamdani writes, "true, the raw material for the refugee crisis that led to the 1990 invasion was the outcome of post-1959 developments in Rwanda, but the crisis itself is very much Ugandan in the making."<sup>[10]</sup> Ugandan officials, including President Museveni, acknowledge the connection between the internal dynamics in Uganda and the commencement of armed struggle by the RPF.<sup>[11]</sup>

Indeed, no one knows or will ever know for certain what would have been the outcome of the political process in Rwanda had it not been for the onset of the war. However, the International Panel of Eminent Personalities concludes that "the impact of the RPF raid was devastating in every way."<sup>[12]</sup> The immediate impact of the invasion seems to have been to speed up the process of political liberalization.<sup>[13]</sup> However, its most enduring and fateful consequence was the radicalization of politics in Rwanda.<sup>[14]</sup> Each perceived or actual military and diplomatic victory by the RPF began to strengthen the position of the extremist Hutu elites within both the government and the opposition while weakening the moderates. A propaganda campaign was launched calling for the elimination of the Tutsis, who were collectively considered as RPF sympathizers.<sup>[15]</sup>

Feeding into the propaganda campaign were also the displacement of thousands of Hutus from RPF occupied territories and the stories of abuses by the RPF that they brought to the rest of the country.<sup>[16]</sup> Another factor that played into the hands of the Hutu power extremists is the 1993 assassination of the democratically elected Hutu President of Burundi in a military coup d'état and the subsequent massacre of many thousands of Hutus.<sup>[17]</sup>

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7,000 troops were NRA soldiers. Hundreds of mid-ranking RPF officers were also officers in the NRA. Dozens of senior and top NRA intelligence, logistics and operations commanders now hold top command positions in the RPF." The said members of the Ugandan army have also, reportedly, joined the RPF with their personal weapons as well as other heavier armaments. Human Rights Watch Arms Project (January 1994) *Arming Rwanda: The Arms Trade and Human Rights Abuses in the Rwandan War* (hereafter, *Arming Rwanda*), , p. 8 and 19

[9] Mamdani, at 181-182. He goes even further to say that, in effect, "the Museveni government exported Uganda's internal crisis to Rwanda." *Id.*, p. 183.

[10] Mamdani adds, "The dynamic that led to the 1990 invasion was born of the first crisis of the NRA leadership in Power. But it was also a crisis that the NRA leadership, both those who stayed within Uganda and those who crossed the border into Rwanda with the RPF, tried to turn into an opportunity. It was a gamble whose cost would be difficult to tell, even with hindsight." Mamdani, *supra* note 1, p. 184

[11] *Ibid*, quoting President Museveni as saying that his government had "decided to help the Rwandese Patriotic Front (RPF), materially, so that they are not defeated because that would not have been good for Uganda's stability". See also Letter of S.T.K Katenta-Apuli, Ambassador of Uganda to the U.S., 26 August 1993, stating that members of the RPF had no choice but to fight on because they were officially declared to be deserters, an offence that entails capital punishment under Ugandan Law. *Arming Rwanda*, *supra*, note 8, Appendix B and Mamdani, *Ibid*.

[12] For more on this see, *The Preventable Genocide*, E.S. para. 20

[13] See Sibomana, *supra*, note 5, p. 43.

[14] *Fin de transition au Rwanda: Une libéralisation Politique nécessaire*, International Crisis Group, (13 November 2002), p. 4.

[15] The most notorious propaganda instrument was the *Radio Télévision Libre de Milles Collines (RTLM)*, which began broadcasting in July 1993.

[16] See *Arming Rwanda*, *supra*, note 8, at 13. One journalist's report suggests that the RPF had asked civilians in territories they have occupied to leave hoping, in part, that "as the number of displaced people swells, pressure will grow on Habyarimana to reach a settlement in the war." Charles Onyango-Obo (26 April 1993) *Inside Rebel-Controlled Rwanda*, Africa News Service.

[17] See *The Preventable Genocide*, E.S. para. 29. Mamdani observes "[t]he Rwandan genocide was carried out by two different groups. The first were actual victims of the RPF war and of the massacres that followed Ndadaye's assassination in Burundi, the former displaced from territories RPF captured in the North east of Rwanda and the latter refugees from Burundi. The second were those who were convinced that they would surely, even if potentially,

Habyarimana pursued negotiations with the RPF under international and domestic pressure amid RPF's continued offensive.<sup>[18]</sup> The most significant of these negotiations led to the series of agreements that have come to constitute the Arusha Accord. The Arusha Accord contained significant concessions towards RPF that were disproportionate to its constituency base in Rwanda.<sup>[19]</sup> These served the Hutu Power advocates well in popularizing violence as the only viable alternative, by accusing those who were in favor of the concessions as sellouts.<sup>[20]</sup>

Eventually, it took the mysterious attack on Habyarimana's plane for the full-fledged terror to be unleashed.<sup>[21]</sup> During the first two days of the killing, many moderate politicians, most opposition leaders, dissidents, journalist and people of influence in the society were killed. Once these groups were virtually eliminated the army and militias began the hunt for Tutsis in earnest and in about three months, between 500,000 and 800,000 people were killed and thousands others were maimed and displaced.

## 1.2. The Dilemma of Conquest: The Problem of Legitimacy

### 1.2.1. The Promised Transition to Democracy

The RPF emerged victorious and assumed political power in July 1994. Like most successor regimes that come to power through armed struggle, the RPF needed to translate its military victory into a legitimate political authority. Its initial claim for political legitimacy centered on its pledge to set up an inclusive provisional government that would be governed by preexisting rules, notably the 1991 constitution and the Arusha Accords. The latter called for, inter alia, the establishment of a broad-based government or a government of national unity that would prepare the country for multi-party elections in 22 months. However, the provisions of the Accords that envisaged the inclusion of the defunct ruling party (MRND) and the establishment of an international commission of inquiry that was meant to investigate human rights abuses committed by all sides to the conflict were abandoned.<sup>[22]</sup> Instead of the latter, the new government requested the UN Security Council to establish an international criminal tribunal while, at the same time, preparing to prosecute over a hundred thousand of detainees and other suspects before Rwandan domestic courts.

Nonetheless, RPF's inability to satisfy the legitimacy tests that it had set out for itself were apparent from the outset. Understandably, the new regime had to deal with numerous

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be victims if Tutsi power wins." See Mamdani, p. 217.

[18] *The Preventible Genocide*, E.S. para. 28

[19] The concessions included, the status of "a virtual parity" for the RPF with the government "in military matters", which according to the Panel's findings, "the government representatives accepted only under great pressure." Id. Para. 11:30. Moreover, the extremist party, the CDR, was excluded from the power sharing arrangement envisaged under the Accords. See "The Protocol of Agreement Between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Power-Sharing within the Framework of a Broad-based Transitional Government" (30 October 1992) reprinted in William A. Schabas, and Martin Imbleau (1997) *Introduction to Rwandan Law*, Quebec, Les Editions Yvon Blais Inc., Annex.

[20] Mamdani notes that this outcome was not "unforeseen" for those who observed the talks. He says that "all of the major third parties involved in the Arusha process" had warned the RPF against winning pyrrhic victories at the negotiating table," and particularly against excluding the CDR from power and splitting the Army disproportionately in its favor." See Mamdani, p. 211.

[21] As the report of the International Panel put it, "the rockets that brought down President Habyarimana's plane on April 6, 1994, became the Catalyst for one of the greatest Calamities of our age". See *The Preventible Genocide*, supra at E.S., and para. 37. It is difficult to tell if the suggestion by the French Judge, Jean-Louis Brugiere, that the RPF may have been responsible for the rocket attack and his investigation could help solve the mystery. See Nick McKenzie, *Uncovering Rwanda's Secrets*, The Age, February 10, 2007, available at <http://www.theage.com.au/articles/2007/02/09/1170524298439.html>, last visited on 24/06/2007

[22] RPF's Declaration of May 17, 1994 qualifies the Protocol of Agreement on Power Sharing cited supra, note 19. "See Declaration of The Rwandan Patriotic Front" (17 May 1994) reprinted in Schabas and Imbleau, supra.

problems that had complicated its governance. The civil war and genocide had left the economy in ruins. The government institutions were left without adequate trained and experienced professionals and civil servants.<sup>[23]</sup> A substantial part of the population of working age has either been massacred or displaced both internally and outside Rwanda. Over a hundred thousand Rwandans were incarcerated on suspicions of participating in the genocide, creating a huge burden on the country's shattered economy, infrastructure and legal system. Most importantly, the turmoil had left Rwandan society deeply polarized, mainly along Tutsi-Hutu lines and the remnants of the old army and militia continued to pose significant security threats for the regime from neighboring countries.

However, the main dilemma and challenges facing the RPF in translating its pledge into practice can be better explained in terms of the origin and character of the new elite, their political priorities and the nature of the transfer of power. These factors, as we shall see below, continue to have a significant impact on the course of the political process in Rwanda, the human rights environment and the government's handling of the legacy of the genocide.

The ideological background of the movement, its limited social base and political priorities have made it unlikely for the RPF's to honor its pledge to facilitate a transition to democracy. First, RPF's leadership, like the leaders of similar movements in Africa that were once collectively referred to as "the new brand", shared a Marxist past and was not keen on multiparty democracy.<sup>[24]</sup> On the issue of multi-party politics, at least, President Kagame has left no doubt about his misgivings.<sup>[25]</sup>

Second, perhaps, more important than ideology when it comes to the new Rwandan elite's questionable commitment to democracy is the incompatibility of its political objectives and priorities with the exigencies of democratic norms and procedures. The RPF was founded in Uganda and its main goal was to repatriate Tutsi's that were forced to leave their country during the previous decades, a goal that was justifiable but difficult to swiftly accomplish for a minority based movement through a democratic process.

Finally, the centrality of ethnic identity in Rwandan politics and the numerical superiority of Hutu's had made it difficult for the RPF to counter the government's propaganda and expand its support base.<sup>[26]</sup>

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

On the domestic front, RPF's military successes and the failure of the Accords had led to the violence that completely altered the balance of power and left the civic groups and

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[23] *The Preventible Genocide*, supra, para. 17.7

[24] See Dan Connell and Frank Smyth, *Africa's New Bloc*, <http://www.franksmyth.com/FrankS2.nsf/0/06d2ab46f093e2a885256b00790665?OpenDocument>, last visited on 25/08/05. Dan Connell has spent considerable time with Isaias Afewerki's Eritrean Liberation Front during the independence struggle and authored, among others, *Against All Odds: A Chronicle of the Eritrean Revolution* (1997) Lawrenceville, NJ, Red Sea Press.

[25] In an interview in 1995 the then vice president has stated that 'mutipartism' is undesirable in African societies because it is divisive, an assertion that reflects the governing ideology as it is convenient. See "Interview du Vice-Président Kagame en 1995" in: François Messier (1995) *vers un nouveau Rwanda?*, Karthala, Quoted in *Fin de Transition*, supra, note 14, p. 4.

[26] See generally, Gérard Prunier (1995) *The Rwanda Crisis: History of a Genocide*, London, Hurst & Co., pp. 135-136. Mamdani, p. 186.

democratic opposition in tatters. On the other hand, the new leaders had faced little international pressure to follow the democratization trajectory.<sup>[27]</sup> This may, in part, be explained by the guilt that some important international actors felt about their failure or lack of political will to prevent the disaster, a factor that the Rwandese government has been keen to exploit at every opportunity.<sup>[28]</sup>

Consequently, the RPF-led Government of National Unity increasingly assumed the character of most provisional revolutionary governments in that it began to undertake radical reforms and establish its dominance without electoral mandate.<sup>[29]</sup> The RPA, the military wing of the victorious Front was transformed into a national army, the Rwandan Defense Forces. The RPF had moved to reconstitute law enforcement agencies, the judiciary and the civil service by sympathizers and create friendly civic organizations.<sup>[30]</sup> The mandate of the National Unity Government, which was extended from 22 months to five years. In the meantime, the image of inclusiveness that the RPF sought to create with the formation of the GNU began to fade within months when many of the Hutu appointees, including the president, resigned or were dismissed and imprisoned.<sup>[31]</sup>

In 1999, the “transition” period was again extended by four years - until 2003. Local elections held in 1999 and 2001 were criticized as unfair and falling far short of minimum democratic standards.<sup>[32]</sup> International observers who monitored the 2003 presidential and parliamentary elections have concluded that there was less rather than more political pluralism compared to the “transition” period, citing serious irregularities in the electoral process.<sup>[33]</sup>

Finally, Rwanda was ruled without a democratically adopted constitution until

[27] In fact, the most influential international actors, including the UN, not only failed to pressure the RPF to respect democratic principles and human rights but also seem to have chosen to be willing accessories to some of its excesses. A case in point is the famously missing report of UNHCR’s Robert Gersony, alleging the massacre of close to 45,000 civilians by RPF forces during and shortly after the genocide. According to Alison Des Forges, Gersony had submitted his report to the UN High Commissioner for Refugees but he was later told that he and his team should refrain from writing a report and not communicate their findings to anyone. A subsequent attempt by a representative of the Special Rapporteur of the UN High Commission on Human Rights was turned down with a short reply: ‘the said report does not exist’ or “[un]Rapport Gersony’ n’existe pas”. See Alison Des Forges (1999) *Leave None to Tell the Story: Genocide in Rwanda*, New York, Human Rights Watch, p. 37 including a reprint of the above letter at 726-727. The OAU International Panel, which also sought to obtain the report, recounts its frustration stating their repeated requests have been ignored despite promises of cooperation by the UN secretary-general. See *The Preventible Genocide*, para. 22.13.

[28] Responding to a critique, Joseph Karemara, Ambassador of Rwanda to South Africa and Other Southern African Countries, once retorted “...Where was the OAU, the UN, Human Rights Organizations and Professor Sarkin himself when people were being mercilessly hacked to death?” See *Rwanda and South Africa in Dialogue*, supra, note 2, at 92.

[29] For a thoughtful treatment of nature of revolutionary provisional governments see Yossi Shain and Juan Linz (eds.) (1995) *Between States: Interim Governments and Democratic Transitions* 127, Cambridge, Cambridge University Press, .

[30] *The Preventible Genocide*, para. 17:18.

[31] See also, UNHCR, *Background paper on the Human Rights Situation in Rwanda* (January 2000) Geneva, UNHCR Centre for documentation and research. The resignation of many of the high profile appointees were accompanied with public declarations stating that there was no real power sharing and that their inclusion was a mere public relations exercise See *The Preventible Genocide*, para. 17.15 and 17.16

[32] See *Report on the Situation of Human Rights in Rwanda submitted by the Special Representative, Mr. Michel Mousali*, Fifty-fifth session Item 116(c), Report (4 August 2000) Paragraph 14. See also, International Crisis Group, (9 October 2001) “Consensual Democracy” in: *Post-Genocide Rwanda: Evaluating the March 2001 District Elections*, 34 ICG Africa Report. ICG predicted that “there was a more important goal in holding the March elections, which was to begin to develop a new RPF ‘cadre’ in the countryside and to build the party’s political base ahead of presidential elections in 2003.” See the Executive Summary.

[33] Mission d’Observation Electorale de l’UE Rwanda (2003) *Rapport Final sur l’élection présidentielle et les élections législatives*. The report confirms the predictions made by the International Crisis Group prior to the 2003 national elections. See *Fin de Transition*, supra, note 14, at 1. See also Filip Reyntjens (2004 *Rwanda, Ten Years: From Genocide to Dictatorship*, 103 African Affairs 177.

2003.<sup>[34]</sup> Further, the drafting and ratification processes leading to the enactment of the new Constitution were considered not to have been democratic and genuinely participatory.<sup>[35]</sup> The failure of the RPF to form and maintain a government that can muster the loyalty of the majority also meant that it had to resort to force in order to quell actual and potential threats to its power with little or no constitutional restraints. A related consequence of the above failure is a growing reliance on the legacy of the genocide and the “pursuit of the *genocidaires*” in order to make up for the shortfalls in democratic legitimacy.

### 1.2.2. The “pursuit of the *genocidaires*”

Rwandan authorities attribute the lack of progress in the areas of democratization and human rights to factors such as continued security problems, ethnic division, lack of adequate resources and the need to “educate” Rwandan’s first. None of these, however, seem to have distracted the regime from the extraordinarily demanding task of prosecuting everyone suspected of crimes during the genocide, ranging from property crimes to genocide. Indeed, the latter was the one promise that the Rwanda government pursued with extra-ordinary conviction and against all odds, not least because of an apparent desire to capitalize on the genocide and its culmination as a politically defining moment. Increasingly, the memory of the genocide and the pursuit of the perpetrators have come to constitute RPF’s principal justifications for the maintenance of political power. Thus, as Mamdani aptly puts it, “the pursuit of the *genocidaires*” has become “the *raison d’être* of the post-genocide state, the one permanent part of its agenda.”<sup>[36]</sup>

However, although RPF’s reliance on the legacy of the genocide and has initially been effective in discrediting the old regime and potential challengers and mobilizing international support, it did little to enhance its political authority in the long term. In fact, the strategy proved counterproductive owing to factors that are specific to the Rwandan context. These include the existence deep societal division over the significance of the events surrounding the genocide and RPF assumption of political power and the alienating effects of the official narrative regarding the genocide and its aftermath and the anomalous prosecution program.

First, the reality of post-genocide Rwanda was such that almost everything about the genocide and its aftermath has different significance to the minority Tutsi, particularly those supportive of the RPF, and the majority Hutu.<sup>[37]</sup>

Second, the narrative chosen by the new regime regarding the genocide and its aftermath has an alienating effect on the majority because it depicts them as either perpetrators or bystanders, both of which imply moral if not criminal responsibility.<sup>[38]</sup>

[34] Up until then Rwandan Constitutional law was a curious amalgam of various instruments permitting the selective application of favorable provisions. These instruments include: The 1991 CONSTITUTION OF RWANDA (AS AMENDED), THE ARUSHA PEACE ACCORD OF AUGUST 4, 1993 - which is, in turn, made up of 7 agreements and protocols adopted at different stages of the negotiation process - RPF’S DECLARATION OF JULY 17, 1994 and THE PROTOCOL OF AGREEMENT BETWEEN THE DIFFERENT POLITICAL PARTIES OF NOVEMBER 24, 1994, THE FUNDAMENTAL LAW OF RWANDA of 5 May 1995 (entered into force on July 17, 1995). See Schabas and Imbeau, *supra*, note 19 for reprints of all the instruments. Article 2 of the Fundamental Law states that RPF’s unilateral declaration of July 1994 takes precedence over all the other constitutional instruments in the event of conflict.

[35] Mission d’Observation Electorale de l’UE Rwanda, (26 mai 2003) *Référendum constitutionnel*, Rapport Final.

[36] Mamdani, p. 271.

[37] Even if the latter may condemn the genocide against the Tutsi, for most of them, RPF’s invasion and subsequent victory also meant the killing, displacement and massive detention of Hutus by a predominantly Tutsi army. Gerard Prunier observed, “contrary to the expectations of the RPF, local Hutu peasants showed no enthusiasm for being ‘liberated’ by them – they had run away from the area of guerrilla operations.” Prunier, *supra*, note 26, p. 135-136. See also Mamdani, p. 189.

[38] Mamdani makes the following observation on this subject: “The state language in Rwanda, the language one hears from all officials, and also from many who are not, divides the population into five categories: returnees,

Third, and further complicating the above, is the government's unwillingness to reconcile its determination to detain and prosecute suspects of crimes ranging from property offences to genocide, with the need to avoid perceptions of partisanship and guarantee due process and fair trial standards. Consequently, it had insisted on a large-scale prosecution program that would be extremely challenging for any legal system let alone for the institutions of a developing country such as Rwanda, which have further been weakened by the genocide. As a result, over one hundred suspects were held in prolonged pretrial detention, often in appalling conditions that, according to Amnesty International, resulted in a reported 11,000 deaths between the end of 1994 and end of 2001.<sup>[39]</sup> There have also been reports of deaths in custody resulting from the physical abuse of detainees by prison officials."<sup>[40]</sup>

The majority of the detainees arrested by RPF soldiers and political operatives on the basis of mere denunciations, which officials admit were often misused to settle personal scores, have spent years in prison without any judicial supervision.<sup>[41]</sup> The Transitional National Assembly had passed a series of amendments to the Criminal Procedure Code suspending the due process rights of the detainees. Although the first such amendment was declared to be unconstitutional by the country's Constitutional Court<sup>[42]</sup>, the ruling was rendered meaningless after the government successfully moved for a constitutional amendment and the subsequent enactments went unchallenged.<sup>[43]</sup> Accordingly, and by 1999, almost 5 years after their detention, "an estimated 40,000 detainees had no case files and had never appeared before a judge."<sup>[44]</sup>

The courts were overwhelmed by the staggering number of detainees awaiting trial and the proceedings were characterized by serious violations of due process and fair trial stand-

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refugees, victims, survivors, and perpetrators. ...The victims are said to be both Tutsi and Hutu-the latter victims of the massacres of the internal political opposition....survivor is a term applied only to Tutsi, I was told. From this point of view, the "survivor" is a Tutsi who had been in the country at the time of the genocide and who is alive today. The word is not applied for any Hutu then in the country. The assumption is that every living Hutu was either an active participant or passive onlooker." *Id.*, p. 267

[39] Amnesty International citing "preventable diseases, malnutrition and the debilitating effects of overcrowding." Amnesty International (2002) *Rwanda, gacaca: A question of Justice* (herein after, Amnesty, "A Question of Justice"). According to Peter Uvin, "[m]ore people accused of participation in the genocide die in Rwanda's prisons each year than are judged." Peter Uvin (2003) "The Gacaca Tribunals in Rwanda" in: David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation after Violent Conflict*, Stockholm, IDEA, p. 116.

[40] Amnesty, *A Question of Justice*

[41] *Ibid.* The vice president of the Supreme Court of Rwanda at one point suggested that "as many as 20 percent of the prisoners are innocent." The estimate was provided by Judge Tharcise Karugarama, who was quoted as saying, "It is a nightmare of work...after the war, people pointed figures." See *Justice on Trial, Rwanda's Revolutionary Justice*, American Radioworks, <http://americanradioworks.publicradio.org/features/justiceontrial/rwanda3.html> last accessed on 09/05/07

[42] In 1995, the Transitional National Assembly adopted an amendment to the Code of Criminal Procedure suspending the rules relating to preventive detention and provisional release of persons suspected of genocide, crimes against humanity and war crimes. The Constitutional Court held that the amendment was unconstitutional on the ground that it violates the principle of presumption of innocence and denies detained suspects of any remedy. THE CONSTITUTIONAL COURT OF THE REPUBLIC OF RWANDA, (Judgment of 009 of July 26, 1995).

[43] See Art. 6 of THE CONSTITUTIONAL AMENDMENT I, January 18, 1996, authorizing derogation from article 12(2) of the 1991 Constitution in cases of "exceptional danger threatening the existence of the nation" and ORGANIC LAW RELATING TO PROVISIONAL MODIFICATIONS TO THE CRIMINAL PROCEDURE CODE, ORGANIC LAW NO. 9/96 of 15 September 1996. It is worth noting that that the latter entered into force retroactively on April 6, 1994. On the due process problems associated with this law see Stef Vandeginste, *Justice, Reconciliation and Reparation after Genocide and Crimes Against Humanity: The Proposed Establishment of Popular Gacaca Tribunals In Rwanda*, paper presented at the All-Africa Conference on African Principles of Conflict Resolution and Reconciliation United Nations Conference Centre, Addis Ababa, 8-12 November 1999, p. 10ff.

[44] Many among the detainees are in fact collectively referred to as 'sans dossier' or without files, referring to the fact that no official records of the reasons for their arrest are available. According to Amnesty, "[t]he case files of most detainees either did not exist or did not contain *prima facie* evidence regarding their alleged offence(s)." Amnesty, *A Question of Justice*.

ards. According to data quoted in an Amnesty International report, by 2002, only 7181 defendants have been tried out of the more than 100,000 detainees awaiting trial.<sup>[45]</sup> On the fair trial issue, Amnesty International further observes,

“court proceedings continue to reflect the hostile socio-political environment existing outside the courtroom. This climate of fear affects judicial personnel, defendants and witnesses. Defense counsel and witnesses are intimidated causing the former to withdraw from trials and the latter to refuse to testify... Conviction, sometimes, rests more on public acclaim than on the incontrovertible evidence of guilt.”<sup>[46]</sup>

There were also numerous cases of miscarriage of justice due to the absence of adequate legal representation and the disregard of fair trial standards by judges and prosecutors.<sup>[47]</sup> According to Amnesty International, all but two of the 44 members of the Rwandese Bar holding university degrees in law by 1997 have refused to represent genocide suspects.<sup>[48]</sup> One of the two lawyers, who accepted to take such cases, Innocent Murengezi, had “disappeared” while the second lawyer was subsequently detained on accusations of participation in the genocide.<sup>[49]</sup>

Although Rwandan authorities frequently cite lack of legal professionals and resources as the major factors impeding speedy and fair adjudication, that claim is contradicted by, among others, the abandonment of the initial plan to recruit foreign judges.<sup>[50]</sup> Critics also challenge such claims citing other measures taken by the authorities that have undermined the efficiency and independence of the judicial process. According to Sibomana, “[o]bstacles have been deliberately put in the way of the justice system, straight after the genocide and still today...”<sup>[51]</sup> Sibomana further suggests that some magistrates, prosecutors and their family members were murdered after ordering the release of unlawfully detained individuals, as were other local officials who refused orders or defended alleged suspects.<sup>[52]</sup> What is more, extensive purges and resignations, and executive control and interference continue to have an impact on the capacity and independence of the judiciary.<sup>[53]</sup>

In short, the serious due process and fair trial violations such as those mentioned above coupled with the absence of a meaningful effort to prosecute crimes allegedly committed

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[45] Ibid

[46] Ibid.

[47] In one case, for example, defendants were denied an adjournment to be able study the case, an opportunity to summon witnesses in their defence and to cross-examine prosecution witnesses. The trial was concluded within four hours, the defendants were found guilty and sentenced to death. In another case, a defendant who requested for a lawyer was asked by the judge and the prosecutor why he needs one. He was tried without legal representation. Amnesty International (1997) *Rwanda: Unfair trials: Justice denied* (hereinafter Amnesty, *Unfair Trials*).

[48] Vandeginste, supra, note 43.

[49] Amnesty, *A Question of Justice*

[50] Amnesty, *A Question of Justice*

[51] The author further notes the following : “A Belgian human rights organization, Citizen’s Network trained more than 200 judicial inspectors in a few months. ...their task was to carry out field investigations into crimes committed during the genocide...According to the information I have received, a third of them have been killed or imprisoned. ...Their crime was to have done their work properly and to have refused to tolerate the rule of revenge and arbitrary decision.” Sibomana, supra, note 5, p. 106.

[52] Sibomana observes, “[a] screening committee composed of representatives of various ministries was set up to examine the cases of detainees. As soon as they were set up, it was apparent that dozens of detainees should be released. Hardly, had they been released than all of them were rearrested. When I say ‘all’, that is not strictly correct: a few had been killed in the meantime.” Ibid. See also Amnesty, *A Question of Justice*.

[53] See Amnesty, *Unfair Trials and The Preventible Genocide*, para. 18.38

by the RPF, have further complicated the tasks of reconciliation by alienating the majority Hutu, who see themselves as being the sole targets of the whole process. What is more, the scope of the fight against the genocidaire and genocidal ideology has been considerably expanded beyond the suspected perpetrators, adding dissidents, including former allies, scholars, human rights defenders and journalists to the category of new targets. Civic and political freedoms are further restricted on the basis of ill-defined offences that are incorporated in the new Constitution as part of the aforementioned fight.<sup>[54]</sup> In the end, therefore, the morally and emotionally compelling reasons for tackling the legacy of the genocide such as prevention, reconciliation, etc. have become confused with considerations of expediency and self-preservation.

The factors reviewed above have contributed to the credibility problem that continues to undermine the significance of not only the domestic prosecution efforts but also that of the International Criminal Tribunal for Rwanda (ICTR). Much of the criticism against the ICTR focuses on problems of inefficiency in terms of completing investigations and proceedings within a reasonable period of time and the competence of the tribunal's administrative, judicial and prosecution staff. More troubling than those, however, is the fact that the Tribunal's founding objectives and the rationales cited in the Tribunals judgments seem to have little relevance to the current Rwandan reality.

The inability of the ICTR to prosecute RPF affiliated suspects has the effect of undermining the Tribunal's image of neutrality among the majority and reinforcing the perception that it is either an institution that has objectives other than those articulated or is part of an international conspiracy against them.<sup>[55]</sup> Consequently, the Tribunal itself has become part of the controversy surrounding the legacy of the genocide and the real or perceived uses of that legacy for partisan political ends. Makau Mutua, for example argued that "the tribunal serves to deflect responsibility, to assuage the conscience of states which were unwilling to stop the genocide, or to legitimize the Tutsi regime of Paul Kagame, Rwanda's strongman."<sup>[56]</sup>

What is remarkable about the prosecution process in Rwanda is that the serious irregularities and obstacles discussed above have failed to produce a dramatic shift in policy both on the part of the Rwandan government and the "international community", which has largely been uncritically supportive of the policy.<sup>[57]</sup> The above observation remained largely true despite the policy reconsideration that was supposed to have taken place towards 1999 as a result of a growing realization of the problems associated with the existing prosecution program. One would expect that any such policy reconsideration would aim at simultaneously tackling the three chronic and interrelated problems that bedeviled the judicial process. These were the prolonged pretrial detention of a huge population of suspects, the denial of due process and fair trial guarantees and the perceptions of partisanship shared by members of the majority

[54] Such offences include 'divisionism', revisionism, negation of the genocide and trivialization of the genocide, sectarianism and spreading genocidal ideology, etc. See for example Arts. 13, 33, 34, 52 and 54 of *The Constitution of the Republic of Rwanda, Official Gazette of the Republic of Rwanda*, Year 42, (4 June 2003).

[55] The mandate of the Tribunal is restricted in practice to crimes committed between 1990 and 1994 as parts of the genocide against the minority Tutsi to the exclusion of crimes allegedly committed during the same period by the RPF against the members of the majority ethnic group. As one of the ironies of the Rwandan reality and of international relations, the Rwandan government has thus far not only prevailed in disputes concerning the investigation of crimes committed by its members but also succeeded in having ICTR prosecutors barred or removed from their posts. For more on this, See Eric Husketh (2005) *Pole Pole: Hastening Justice at UNICTR*, 3 Nw. U. J. Int'l Hum. Rts. 8, 72 ff.

[56] Makau Mutua (2000) *From Nuremberg to the Rwanda Tribunal: Justice or Retribution*, 6 Buff. Hum. Rts. Rev. 77, 78.

[57] Peter Uvin, observes, "the international community has by and large closed its eyes to human rights abuses [by the Rwandan government], or attempted to justify them." Peter Uvin (2001) "Ethics and the New Conflict Agenda: The International Community in Rwanda after the Genocide", *Third World Quarterly* 22.



ethnic group. As it turned out, however, the government has chosen to introduce a mechanism that is ostensibly aimed at addressing the first problem at the expense of the rest in the form of a bold experiment in popular courts known as *gacaca*.<sup>[58]</sup>

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[58] In 1999, a government appointed Commission came up with a detailed proposal for the establishment of *gacaca* tribunals, which became law in October 2000. *Gacaca* is a term used to describe the traditional system of dispute settlement that existed in Rwanda. In Kenyarwanda, *Gacaca* literally means grass or lawn, referring to the place where community members sit and settle disputes. See Charles Ntampaka, *Le gacaca: une juridiction pénale populaire*, <http://droit.francophonie.org/acct/rfj/actu/13Ntampa.htm>, Last accessed on 27/09/02.

## 2. THE *Gacaca* INITIATIVE: FROM THE FRYING PAN TO THE FIRE?

The *gacaca* initiative was welcomed with enthusiasm by many observers, including some in the human rights community, as an improvement over the anomalous judicial process in the regular courts. Consequently, the government had gained critical political and financial support from donors for its “innovative” solution to an extraordinary problem.<sup>[59]</sup>

Some 255,000 lay judges were elected in October 2001 who went through brief training sessions between April and May 2002 with a maximum of 36 hrs devoted per judge.<sup>[60]</sup> The government decided to launch the *gacaca* experiment on selected pilot areas. Accordingly, the first phase, which consisted of collecting population statistics relevant to the genocide, the identification of suspects and consolidation of the charges against them, started on the 19th of June 2002 in selected areas in each of the 12 sectors or districts of the Capital, Kigali. In November, 2002, the pilot phase was expanded nation-wide bringing the total number of *gacaca* courts in districts selected from each of the provinces of Rwanda to 751.

It is hard to tell, what, if anything, has been learnt from the pilot program although the law establishing the *Gacaca* courts has been subsequently amended many times since.<sup>[61]</sup> The experiment still raises serious questions of principle from the human rights perspective while most of the rationales for its introduction have proved unfounded. The process did not turn out to be as expeditious as originally claimed.

The following section begins with a brief introduction of the structure and jurisdiction of the *gacaca* tribunals with a view to facilitating the subsequent discussion on some of the troubling features of the *gacaca* experiment and its incompatibility with international fair trial standards.

[59] Belgium is one of the principal donors having provided 10,000,000 euros for the year 2001-2002 alone. See Dimension-3 (Aout-October, 2003) *Periodique trimestriel de la Direction general de la Coopération au Développement* (DGCD), Belgique, p. 11.

[60] Klaas de Jonge (April - June 2002) *The gacaca research project in Rwanda. An in-depth field Study Concerning gacaca jurisdictions and Community Service*, Report III, Kigali, Penal Reform.

[61] ORGANIC LAW N° 40/2000 OF 26/01/2001 SETTING UP “GACACA JURISDICTIONS” AND ORGANIZING PROSECUTIONS FOR OFFENCES CONSTITUTING THE CRIME OF GENOCIDE OR CRIMES AGAINST HUMANITY COMMITTED BETWEEN OCTOBER 1, 1990 AND DECEMBER 31, 1994, *Official Gazette of the Republic of Rwanda*, n°6 (15 March 2001). ORGANIC LAW N° 33/2001 OF 22 JUNE 2001 MODIFYING AND SUPPLEMENTING THE ORGANIC LAW N° 40/2000 OF 26 JANUARY 2001, *Official Gazette of the Republic of Rwanda*, n°14 (15 July 2001); ORGANIC LAW No. 16/2004 of 19 June 2004 ESTABLISHING THE ORGANIZATION, COMPETENCE AND FUNCTIONING OF GACACA COURTS CHARGED WITH PROSECUTING AND TRYING THE PERPETRATORS OF THE CRIME OF GENOCIDE AND OTHER CRIMES AGAINST HUMANITY, COMMITTED BETWEEN 1 OCTOBER 1990 AND 31 DECEMBER 1994, *Official Gazette of the Republic of Rwanda*, Special Edition (19 June 2004), ORGANIC LAW N° 28/2006 OF 27/06/2006 MODIFYING AND COMPLEMENTING ORGANIC LAW N° 16/2004 OF 19/06/2004; ORGANIC LAW N° 10/2007 OF 01/03/2007 MODIFYING AND COMPLEMENTING ORGANIC LAW N°16/2004 OF 19/6/2004, *Official Gazette of the Republic of Rwanda* No 5 (1 March 2007).

## 2.1. Structure, Composition and Jurisdiction of the *gacaca* jurisdictions

The *gacaca* jurisdictions are organized hierarchically along the administrative structure of the country from the Cell to the Sector levels.<sup>[62]</sup> Accordingly, some 9,013 *gacaca* tribunals are set up at the cell level.<sup>[63]</sup> The structure in each of the 1,545 Sectors in the country consists of two *Gacaca* tribunals, one with a first instance jurisdiction and another with appellate jurisdiction.<sup>[64]</sup>

The Seats or the tribunal at the Cell level is composed of five judges and two substitute judges elected by residents of the cell.<sup>[65]</sup> The Seats of the *gacaca* structure at the Sector level are also made up of the same number of judges and substitutes who are to be elected by an assembly of all the judges from the cells that are within the particular Sector.<sup>[66]</sup> Only five of the judges at any level of the hierarchy are required to be literate.<sup>[67]</sup>

The tribunals have jurisdiction over crimes against humanity and genocide committed in Rwanda between October 1, 1990 and December 31, 1994 or other offenses proscribed by the penal code provided they were committed during the said period and with the ‘intention’ of committing crimes against humanity and genocide.<sup>[68]</sup> It is, however, important to note that, the President and Minister of Justice have made it clear that the *gacaca* Tribunals can only try ‘genocide’ and therefore, crimes allegedly committed by RPF forces will not be subject to *gacaca* trials.<sup>[69]</sup>

The amended *gacaca* organic law provides a significantly modified version of the categories of offenders established under the 1996 Organic Law. The former moves rape from Category Two to Category One, which formerly covered acts of sexual torture and carries more serious penalties.<sup>[70]</sup> The first category also comprises planners of the genocide and crimes against humanity, perpetrators who held positions of authority in the government, army, militia, political parties or religious denominations, at the time of the commission. Category Two includes notorious murderers and those who committed “dehumanizing” acts against dead bodies, intentional homicide and manslaughter, assault with the intention to kill (presumably attempted homicide) and all other offences against persons not included in the first category. Category 3 only consists of property-related crimes.<sup>[71]</sup>

The tribunals at the Cell level are tasked with the compilation of population data relevant to the genocide and consolidation of the indictments with the participation of mem-

[62] Articles 3 and 4 of Organic Law No. 16/2004 of 19 June 2004. The Cells are just above the lowest administrative unit while Sectors are the units that are a level higher than the Cells.

[63] NATIONAL SERVICE OF GACACA Jurisdictions, *Report on data Collection*, available at <http://www.inkiko-gacaca.gov.rw/pdf/ikusanya%20english.pdf>, last visited on 15/06/07

[64] *Supra*, note 62.

[65] *Id.*, Article 8 and 13 as Amended by Organic Law No. 10/2007, Arts. 1 and 2.

[66] *Ibid* and Art. 7 of Organic Law No. 16/2004.

[67] See Article 11 of Organic Law No 16/2004. The provision is apparently in force since it has not been amended.

[68] See *Id.* Art. 1.

[69] Speech by President Kagame on the occasion of the inauguration of *gacaca*. See *Discours de Paul Kagame à l'occasion du lancement officiel des travaux des juridictions gacaca*, le 18 juin 2002. (Translation from Kinyarwanda to French by RCN), Klaas de Jonge, *supra*, note 60.

[70] Article 51 of ORGANIC LAW NO 16/2004 as amended by Article 11 of Organic Law No. 10/2007. Compare both with article 1(d) of ORGANIC LAW NO. 08/96 of 30 August 1996, *On The Organization of Prosecution for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990*, O.J (1996) Year 35, No. 17.

[71] *Ibid.*

bers of the respective General Assemblies.<sup>[72]</sup> They are also empowered to make a preliminary determination as to whether the charges against an accused person place him or her within the first, second, or third categories.<sup>[73]</sup> In addition, they have exclusive jurisdiction over Category 3 suspects.<sup>[74]</sup> Suspects falling under the 2nd category shall be tried before the *gacaca* tribunals of the Sector.<sup>[75]</sup>

The tribunals can impose up to thirty year prison sentences.<sup>[76]</sup> Conviction by the tribunals may also entail automatic deprivation of civic rights.<sup>[77]</sup> The gravity of the penalty varies depending on the category of the offences and on whether or not the accused has entered a plea agreement or confession.<sup>[78]</sup> There are no sentencing guidelines or a comprehensive list of aggravating or extenuating circumstances. Moreover, they have the power to summon any person to appear before them and impose sentences ranging from three months to one year in case of ‘perjury’ and obstruction of justice.<sup>[79]</sup>

Only one appeal is allowed as of right except in the case of decisions concerning property-related crimes against which no appeal lies.<sup>[80]</sup> The Sector *gacaca* hears appeals against judgments by the tribunals at the sector level whereas appeals against the decisions of the Sector *gacaca* can be filed before the *gacaca* appeals court of the Sector.<sup>[81]</sup> The Sector *gacaca* also hears appeals against judgments of the Cell on cases involving contempt and obstruction of justice as construed in the *Gacaca* law.<sup>[82]</sup> Appeals regarding the classification of suspects, on the other hand, may be filed before the particular tribunal, to which the case is referred, and the latter tribunal decides both on the categorization and the merits of the case and no further appeal is allowed against either decision.<sup>[83]</sup> The overall activities of the *gacaca jurisdictions* is coordinated and organized by the ‘National Service charged with the Follow-up, Supervision and Coordination of *Gacaca* Courts.’<sup>[84]</sup>

## 2.2. An Experiment in Violation of Minimum Fair Trial Standards

In addition to the fact that Rwanda is party to the major international and regional human rights instruments, the legal instruments that served as the country’s basic law at the time of the introduction of the *gacaca* experiment and the 2003 Constitution contain explicit fair trial and due process guarantees.<sup>[85]</sup> As noted earlier, however, these guarantees have rarely

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[72] The data includes statistical information including identities of all the residents of the *Cell* prior and after the genocide, the whereabouts of people who are no longer residents, the identity of victims, the identity and whereabouts of the offenders, and an account of property damages. See Art. 34, Id.

[73] Ibid and Art. 13 of Organic Law No 14/2001

[74] Arts. 34(7) and 41 of Organic Law No 16/2004.

[75] Id., Art. 42.

[76] See Arts. 72 thru 81 of Organic Law No 16/2004.

[77] Defendants who are found guilty of offences falling under the first category face permanent loss of civil rights. Those in the second category permanently lose their right to vote, to be elected, to testify, to possess and carry arms and to serve in the armed forces. See Id., Article 76.

[78] Supra note 76.

[79] See Arts. 29 thru 32 of Organic Law No 16/2004.

[80] Arts. 85 and 89 thru 93, Id.

[81] Art. 89, Id.

[82] Id. Art., 31.

[83] Art. 92.

[84] See Id., Arts 40 and 50.

[85] Very importantly, the provisions of the relevant instruments that constituted Rwandan constitutional law until 2003 refer to the Universal Declaration of Human Rights, whose direct application has been confirmed by the

been observed in the prosecutions before the regular courts. What is more disturbing about the *gacaca* process, however, is that while violations of fair trial standards in regular courts occur in spite of the law, the *gacaca* law institutionalizes such violations in contravention of the Rwandan Constitution, the African [Banjul] Charter on Human and Peoples' Rights (ACHPR) and other relevant international human rights instruments.

As shall be shown below, the incompatibility of *gacaca* with international fair trials standards is not seriously disputed, the question being whether these standards should apply to the Rwandan context. Even so one needs to explore the standards that are at stake in the *gacaca* experiment and their significance before making any assumptions on whether any or all such standards ought to be dispensed with and why. The following appraisal of the experiment, therefore, employs the due process and fair trial guarantees enshrined in the Rwandan Constitution, the international and regional conventions to which Rwanda is a party and authoritative interpretations of those standards by the relevant institutions. Among the latter, the practices of the African Commission on Human and People's Rights will be reviewed in some detail, in part, with a view to countering the relativist challenge that is often mounted against the application of universal norms and standards to the African context.

### 2.2.1. The *Gacaca* Law and the Principle of Non-retroactivity

The internationally recognized principle of criminal law, *nullum crimen, nulla poena sine lege* is enshrined under Article 20 of the new Rwandan Constitution. While aspects of the *Gacaca* Law run afoul of the above principle more clearly, the problem of retroactivity also arises in connection with the 1996 Organic law that provided for the punishment of genocide and crimes against humanity committed between 1990 and 1994. Although Rwanda has been party to the Genocide Convention since 1975<sup>[86]</sup>, that convention does not provide for penalties whereas there is no conventional international criminal law proscription concerning crimes against humanity that is applicable by Rwandan Courts.<sup>[87]</sup> The drafters of the 1996 Organic law had sought to side-step the problem of retroactivity by introducing a clause requiring that the proscribed acts be prohibited under provisions of the Rwandan Penal code that was in force at the time of the commission.<sup>[88]</sup> The Organic law also provided for the application of the penalties provided for under the Penal Code for specific acts such as murder to genocide and crimes against humanity, while at the same time setting new rules that establish mandatory maximum and minimum sentences for certain acts.<sup>[89]</sup> The same approach has been followed in the original *Gacaca* law except that the penalties are fixed without a reference to the Penal Code in the latter case.<sup>[90]</sup>

While the legislative efforts mentioned above could hardly adequately address the problem of retroactivity, the current *Gacaca* law goes further and inexplicably drops any pre-

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Constitutional Court, and to the African Charter on Peoples and Human Rights. Moreover, it was stated that the international community is entitled to monitor the respect of human rights in Rwanda. See Arts. 1 and 6 of *The Protocol of Agreement between the Government of Rwanda and the RPF on the rule of law of 18 August 1992*, and Arts. 14 and 17 of *The Protocol of Agreement on Miscellaneous Issues and Final Provisions of 3 August 1993*, both reprinted in Schabas and Imbeau, *supra*, note 19, and *The Constitutional Court*, (Judgment of 09 of July 26, 1995), *supra*, note 42.

[86] Decree-Law approving and ratifying various international treaties on human rights, disarmament, prevention and repression of certain acts likely to endanger peace among human beings and nations, no. 08/75 (12 February 1975).

[87] For more on this, see Jaques Fierens, *Gacaca Courts: Between Fantasy and Reality*, 3 JICJ 896 (2005).

[88] Art. 1 of Organic law no. 08/96.

[89] *Id.*, Arts. 14 thru 18

[90] Article 1 states that "the purpose of this organic law is to organize the putting in trial of persons prosecuted for having, between October 1, 1990 and December 31, 1994, committed acts qualified and punished by the penal code..." See, on the other hand, Arts. 1 and 3 of the *Gacaca* Organic Law No. 16/2004.

tence at non-retroactivity. The law authorizes the punishment of crimes against humanity and genocide committed prior to its enactment in accordance with the provisions of the new law containing a vague reference to the Genocide Convention and the Convention on the Non-Applicability of Statutory period of Limitation to War Crimes and Crimes against Humanity.<sup>[91]</sup> The reference to the Penal Code apparently concerns those acts that are qualified under the new law as having been “carried out with the intention of committing genocide or crimes against humanity” but, otherwise, do not constitute those crimes.<sup>[92]</sup>

It is unclear what type of acts can be carried out “with the intention of committing genocide and crimes against humanity” but are not covered by the laws applicable to the latter categories of crimes. What is clear is that the new law is partly designed to allow the punishment of acts that are proscribed under the Penal Code but on the basis of modifications and penalties introduced after the fact; which is a clear violation of the principle of the non-retroactivity of criminal law. Indeed, the ease with which the Rwandan legislature moved offences from a category of lesser offences to that of more serious ones, as in the case of rape,<sup>[93]</sup> or inserted new or liberally modified offences, such as “dehumanizing acts on dead bodies”<sup>[94]</sup>, reveal a complete disregard for the principle of non-retroactivity.<sup>[95]</sup>

### 2.2.2. The Prohibition against Trial by Special Tribunals

The 1991 Rwandan Constitution recognized the right of the defendant to be tried before regular courts and under standard rules and procedures and expressly prohibited the establishment of Special Courts<sup>[96]</sup> Because special tribunals are often established for the enforcement of extraordinary procedures, they threaten the right to a fair trial and all the rights that only such trials can guarantee. That concern is behind Principle 5 of the UN body of principles, which states

“[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”<sup>[97]</sup>

Similarly, the *travaux préparatoires* of the fair trial provisions of the International Covenant on Civil and Political Rights (ICCPR) indicates that article 14(1) of the Covenant was intended to prohibit the establishment of ‘exceptional courts’ in criminal cases. Accordingly, the term ‘competent’ was used instead of the proposed reference to ‘regular’ and ‘pre-established’ because of concerns that this may be interpreted to exclude the establishment of special courts in civil cases.<sup>[98]</sup>

[91] Organic Law No. 16/2004 Id., Preamble

[92] Compare Art. 1 of Organic Law No. 40, 2000 and Art. 1 of Organic Law No. 16/2004

[93] *Supra*, note 70.

[94] This is an offence that is newly added to the category of most serious offences (First category) in the 2004 Gacaca Law. See Art 51(6).

[95] It must be noted that aspects of the Gacaca law that are in violation of the prohibition of Non-retroactivity are binding not just on the gacaca tribunals but also on the regular courts that try the first category of defendants.

[96] See Arts. 25 and 26 of the 1991 Rwandan Constitution

[97] *The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173 9 December 1988.*

[98] See the Chilean Proposal and the response of Professor René Cassin, in the *Travaux préparatoire of the International Covenant on Civil and Political Rights (ICCPR)*, U.N. Doc. E/CN.4/SR.110.at 3-4.

The African Charter also guarantees “the right to be presumed innocent until proved guilty before a competent court or tribunal.”<sup>[99]</sup> Accordingly, the African Commission has held that the Mauritanian government has failed in its obligation to guarantee the independence of the courts by creating a special tribunal with exclusive competence on matters relating to state security.<sup>[100]</sup>

The *gacaca* tribunals are special tribunals set up to handle specific categories of suspects, displace the jurisdiction of the ordinary courts and apply exceptional procedures. Although an attempt was made under the new Constitution to retroactively “constitutionalize” the *gacaca* tribunals by treating them as “specialized” tribunals, such a reference does not alter their substance. Further, even if one is to argue, on the basis of the new Constitution or other grounds, that the establishment, per se, of special criminal tribunals is not prohibited, the *gacaca* tribunals can still be challenged as both unconstitutional and contrary to international human rights law. First, the law establishing *gacaca* jurisdictions contradicts every provision of the new Constitution guaranteeing due process and fair trial, as shall be shown below. To the extent this is the case, the recognition of the *gacaca* courts under articles 143 and 152 of the new Constitution does not make them immune to the unconstitutionality challenges based on those other provisions of the Constitution.

Secondly, the *gacaca* law contravenes Rwanda’s international treaty obligations because it does not afford the minimum fair trial guarantees that must be observed in any trial. Authoritative interpretations of international fair trial standards hold that, in states where the trial of civilians before special tribunals is authorized, such tribunals must apply the same standards as are applicable to ordinary courts. In General Comment Number 13, the UN Human Rights Committee declared that, “the trying of civilians by such [special or military] courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14 of the ICCPR”<sup>[101]</sup>.

The African Commission has also held, on a number of occasions, that special tribunals violate the African Charter because they do not afford the fair trial guarantees provided for in the Charter. In *International PEN, et al (on behalf of Ken Saro-Wiwa Jr. et al) v. Nigeria*, the Commission declared that the special tribunal that convicted and sentenced the defendants does not satisfy the requirements of the Charter as a matter of principle.<sup>[102]</sup> Similarly, in a case that has

[99] Article 7(1)(b) of ACHPR, emphasis added. The Charter further requires that state-parties must “guarantee the independence of the courts.”

[100] *Malawi African Association et al v. Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97-196/97, 210/98, 11 May 2000, Paras. 99-100, *INSTITUT POUR LES DROITS HUMAIN ET LE DEVELOPPEMENT, COMPILATION DES DECISIONS SUR LES COMMUNICATIONS DE LA COMMISSION AFRICAINE DES DROITS DE L’HOMME ET DES PEUPLE, EXTRAITS DES RAPPORTS D’ACTIVITES, 1994-2001*, (Banjul : Institut pour les Droits Human et le Developement, 2002) (hereinafter, *COMPILATION DES DECISIONS*). The Inter-American Convention on Human Rights is more elaborate than its African equivalent on the issue of special tribunals *previously established by law*. THE AMERICAN CONVENTION ON HUMAN RIGHTS, 22 NOVEMBER 1969 Article 8(1), emphasis added.

[101] HUMAN RIGHTS COMMITTEE, GENERAL COMMENT 13, ARTICLE 14 (TWENTY-FIRST SESSION, 1984), *COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES*, U.N. DOC. HRI/GEN/1/REV.1 AT 14 (1994), para. 4. However, based on a review of the practice before special tribunals world wide, the UN Working Group on Arbitrary detention stated that it has “found by experience that none of them respects the guarantees of the right to fair trial enshrined in the Universal Declaration of Human Rights and the said Covenant [the ICCPR].” *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/1996/40, p. 26. Also, see Amnesty International, *Fair Trials Manual*, (1998) p. 151.

[102] The Commission stated: “Removing cases from the jurisdiction of ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality, which is required by the African Charter. This violation of the impartiality of tribunals occurs in principle, regardless of the qualifications of the individuals chosen for a particular tribunal” See *International PEN, Constitutional Rights Project, and Civil Liberties Organization Interights (on behalf of Ken Saro-Wiwa Jr. et al) v. Nigeria*, Comm. Nos. 137/94, 139/94, 154/96 and 161/97, para. 86, *COMPILATION DES DECISIONS*, at 247. See also *Forum of Conscience v. Sierra Leone*, 223/98 (6 November 2000), where the commission held the execution of twenty-four members of the army pursuant to a conviction by

more specific relevance to the *gacaca* experiment, the Commission has underscored the application of the Charter's fair trial guarantees in trials before traditional courts. Accordingly, it held that a trial before a traditional court in Malawi violated the African charter because the defendants' right to counsel has not been respected. The commission has confirmed the above position in its Dakar declaration of September 1, 1999, stating, "traditional courts are not exempt from the provisions of the African Charter on Human and Peoples' Rights to a fair trial."<sup>[103]</sup>

## 2.2.3. The Right to be Tried by a Competent, Impartial and Independent Tribunal

### 2.2.3.1. Composition, Qualification and Independence of the *gacaca* Judges

The composition of the *gacaca* tribunals and the lack of basic training on the part of the judges raise serious questions about the competence, impartiality and independence of the tribunals as per the provisions of the 2003 Constitution, the ACPHR the ICCPR, and the Universal Declaration of Human Rights (UDHR).<sup>[104]</sup> The UN Basic Principles on the Independence of the Judiciary states that "persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law."<sup>[105]</sup> That position has been endorsed by the African Commission when it held that the term "competent" in Article 7(1)(a) of the Charter contains elements such as the 'expertise' of judges.<sup>[106]</sup> In a case involving the Nigerian Military Government, the Commission similarly stated that the Special Tribunal established under the Robbery and Firearms Act, was essentially composed of persons who, in addition to being part of the executive branch of the government, *lacked legal expertise*. Accordingly, it found a violation of Article 7(1)(d) of the African Charter.<sup>[107]</sup>

Like the African Commission, the Inter-American Commission has established a link between the qualification of judges and their impartiality and independence.<sup>[108]</sup> It held, in respect of the Revolutionary Courts set up by the Sandinista in Nicaragua, the establishment of the special tribunals that would subject the accused, "to the legal judgment of people, some of whom at least, were not lawyers; to the judicial decision of people who were not judges; to the verdict of political enemies and to the judgment of people, influenced by the psychology of their victory, who were more inclined to be severe rather than fair" violated the fair trial guarantees under Article 8 (1) of IACHR.<sup>[109]</sup>

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a military tribunal without recourse to competent tribunal amounts to an arbitrary deprivation of the rights of the defendants under Article 4 of the Charter. *Id.*, at 344 Paras. 18-20.

[103] *Dakar Resolution on Fair Trial and Judicial Assistance in Africa*, African Commission on Human and Peoples' Rights, (1 September 1999) available at [http://www.chr.up.ac.za/hr\\_docs/african/docs/achpr/achpr2.doc](http://www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr2.doc), last visited on 25/02/06

[104] Article 140 of the 2003 Constitution declares that "[t]he Judiciary is independent, and separate from the legislative and executive branches of government." See also Arts. 7 (1) & 26 of the AFRICAN [BANJUL] CHARTER ON HUMAN AND PEOPLES' RIGHTS, OAU DOC. CAB/LEG/67/3 rev. 5, entered into force Oct. 21, 1986, Articles 14 (1) & 5 of the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. RES. 2200A (XXI), 1966 and Article 10 of the UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. RES. 217A (III), (1948).

[105] Article 10 of the BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

[106] See *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association des membres de la Conférence épiscopale de l'Afrique de l'Est, v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93, Compilation des décisions, p. 358-59, paras. 61 and 62.

[107] See *Constitutional Rights Project (on behalf of Wahab Akamu, Gbolahan Adeaga and others) v. Nigeria*, Comm. no. 60/91, *Id.*, Compilation des décisions, p. 198, para. 14.

[108] It has particularly emphasized the importance of the training and qualification of judges in law stating that replacing the jurisdiction of civilian courts with military jurisdiction undermined fair trial guarantees because military judges generally do not have appropriate legal training, as do civilian judges. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION, 1973, OEA/SER.L/V/II.32 doc.3 rev.2, (1974) p. 34.

[109] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *Reports on the situation of Human Rights in the Re-*



It must be noted that the conclusions in some of the above cases are arrived at in relation to military or quasi-military tribunals and focus on the question of the independence of such tribunals from the executive. However, the findings on the significance of appropriate legal training to the independence and impartiality of judges is highly relevant to the *gacaca* tribunals, where those who are empowered to try serious criminal cases are not even required to be literate let alone to have legal training. By contrast the criminal files that are presented to such judges, which, when available, comprise the results of the prosecution's investigations and the charges, are usually prepared by the Prosecution.<sup>[110]</sup> The judges, whose functions are also 'supervised and coordinated' by an executive organ,<sup>[111]</sup> do not have the necessary background to challenge or make an independent evaluation of the legal and factual issues formulated by learned civil servants.

Therefore, the issue here is not just that the judges may lack independence because of their membership in, or affiliation, with the executive branch or any direct interference by the latter.<sup>[112]</sup> Rather, the lack of training by itself deprives those judges of the necessary autonomy and makes them totally dependent on the relevant government office.

Incidents that took place during the categorization sessions before some of the *gacaca* tribunals included in the pilot phase illustrate the reality of the problem. In a case involving a person who was said to have revealed the whereabouts of certain refugees to their alleged killers, the judges reportedly confided to the researchers that they were told by their trainer that the informer should be treated as the killer.<sup>[113]</sup> In another case, the president of one of the *gacaca* tribunals was reported to have instructed the public that all officials that were in office during the genocide fall under the first category of suspects, i.e. the planners of the genocide.<sup>[114]</sup>

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*public of Nicaragua*, (1981) OEA/Ser.L/V/II.53 doc. 25, (30 June 1981) and (1982-1983), OEA/Ser.L/V/II.61, Doc. 22 rev. 1, 27 September 1983. Similarly, the commission has questioned the independence and impartiality of judges in military courts in Chile given that they lacked legal training and tenure. See *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.66, doc 17 at p. 185, (27 September 1985).

[110] Arts. 34(3), 46, 47 and 59 thru 61 of GACACA ORGANIC LAW NO. 16/2004.

[111] The law grants a special authority to local government officials to exercise "a steady monitoring of the functioning of *gacaca* courts" and to the National Service, the power to follow up and coordinate the activities of the courts. See *Id.*, Arts. 49 and 50.

[112] These are not mere theoretical problems but have already been encountered during the pilot *gacaca* trials. In one district, government officials have instructed participants of a *gacaca* session that crimes committed by RPF members couldn't be categorized unless they can prove the elements of genocide, although this is not stated in the Organic Law. See Amnesty, *A question of Justice. A report by Fondation Hirondelle* provides a summary of the scenario created during one of the sessions following a request by a woman to have 18 deceased members of her family counted and the RPF commander that were allegedly responsible identified. The commotion that followed was controlled after the government representatives told the meeting that complainant must "prove that these crimes are part of a deliberate plan to exterminate one ethnicity", although the explanation did not change many minds. See *Gacaca takes of slowly* (14 October 2002) Fondation Hirondelle, Kigali, available at <http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/192d793b82d9b481c1256cb800591075?OpenDocument> (last consulted: 2 July 2005)

[113] The researchers also observe that the judges did not have a clear idea and could not reach a consensus as to how to categorize the conduct in question. The report concludes, "it was not only the variety of answers that was cause for concern, but the general chaos in which their opinions were asserted – everyone was speaking at once, presenting very little justification for their answers and essentially simply repeatedly stating an answer without attempting to discuss and resolve the difference of opinion. Catherine Honeyman (June 10 – August 8, 2002) *Gacaca Jurisdictions: Transitional Justice in Rwanda*, Interim Report of Observations, at <http://www.fas.harvard.edu/~socstud/rwanda/components.html#est> (last consulted: 12 January 2003)

[114] See de Jonge, *supra*, note 60, at 9.

### 2.2.3.2. Public and Political Pressure

The principle of judicial independence implies not only that judges ought to be independent from the executive and legislature but also that they must be insulated from any outside public and political pressure to the extent possible.<sup>[115]</sup> Former U.S. Supreme Court Justice, O. W. Holmes, once famously stated:

“If the case is that the whole proceeding is a mask – that counsel, jury, and judges were swept to the fatal end by an irresistible wave of public passion, and that the state Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights.”<sup>[116]</sup>

The structure of the *gacaca* process, the absence of any procedural and evidentiary rules, and the fact that the judges lack basic training, tenure or official standing makes the entire process particularly susceptible to mob pressure. Indeed, the hope behind the *gacaca* initiative, according to the official in charge of the program, is not that the tribunals will be immune to public pressure but that such pressure would lead to the establishment of the truth.<sup>[117]</sup> However, it is precisely because mob pressure does not always work in favor of the truth that formal procedures and safeguards have been developed in criminal justice systems. In the case of Rwanda, it has been noted that the general political and human rights environment in the country is such that even the regular courts cannot operate with the necessary independence and impartiality.

It is also important to note that mob trials may be detrimental to victims and their relatives as they are to the accused. One observer of the pre-*gacaca* trials noted “...some of the witnesses are jeered and laughed at, including a woman who everyone says is crazy from grief because of her dead children.”<sup>[118]</sup>

### 2.2.3.3. Denial of the right to Appeal before a Competent Tribunal

The Rwandan government has both a constitutional and treaty obligation to provide defendants with an avenue of appeal to a higher and competent tribunal.<sup>[119]</sup> Although the Rwandan Constitution uses the phrase “competent by law”, the mere fact that the qualification of judges matches the legal requirement does not make them competent. Hence, the relevant provision of the constitution needs to be interpreted in a manner that is consistent with the country’s treaty obligations and widely accepted practices under international law.

The African Commission has on numerous occasions held that denial of appeal constitutes a violation of the above provision of the Charter. In *Constitutional Rights Project (on behalf of Zamani Lakwot et al.) v. Nigeria*, the commission held that the provision of a contested Civil Disturbances Act, which precluded an appeal to any court of justice against the decision, sentence

[115] “The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or any reason.” See *Basic Principles*, supra note 105.

[116] *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

[117] *AMERICAN RADIOWORKS*, supra, note 41, at <http://www.americanradionetworks.org/features/justiceontrial/rwanda4.html>

[118] *Id.*, at <http://www.americanradionetworks.org/features/justiceontrial/rwanda5.html> (last consulted: 27 September 2002)

[119] Article 14(5) of the ICCPR the 7(1)(a) African Charter. See also, Article 8 of the UDHR .

or judgment of the Special Tribunal, violated article 7 (1)(a) of the Charter. <sup>[120]</sup>

The *gacaca* law allows an appeal from one *gacaca* jurisdiction to another, except for the third category offenders who cannot appeal against their conviction.<sup>[121]</sup> There is nothing in the training and composition of the hierarchically superior *gacaca* tribunals or in the rules and procedures they apply that makes them more competent to deal with the appeals than the tribunals that rendered the original judgment. Accordingly, an appeal before tribunals that suffer from the same structural and substantive deficiencies cannot be expected to cure the irregularities in the original trial. In the above connection, the African Commission had the occasion to emphasize that a mere review of the case by a superior body does not satisfy the requirements of the Charter in *Constitutional Rights Project (on behalf of Wahab Akamu, Gbolahan Adeaga and others) v. Nigeria*. The Commission declared that the discretionary power given to governors to confirm or reject the decisions of the Special Tribunals is neither adequate nor effective and does not ensure impartiality or a ruling that is in conformity with principles of law.<sup>[122]</sup>

## 2.2.4. The Right of Defendants to Adequately Prepare their Defense

### 2.2.4.1. The Right to Counsel

Article 18 of the Rwandan Constitution provides that the “the right to defense” is an absolute right at all levels and in any type of proceedings. Also in line with the above, article 19 stipulates that the principle of presumption of innocence applies to any accused unless proven guilty in a fair and public hearing where “all the necessary guarantees for defense have been made available.” Similarly, the defendant’s right to defend himself by counsel of his own choosing is protected under the ACHPR, the ICCPR and UDHR.<sup>[123]</sup> The African commission has upheld the right to legal representation in the *Zamani Lakwot v. Nigeria* case discussed above where petitioners complained that the defense counsel was forced to withdraw on account of serious harassment and threats by the authorities.<sup>[124]</sup> In *Amnesty International (on behalf of Orton and Vera Chirwa v Malawi)*, the fact that the applicants were tried and convicted by a “Traditional Court”, did not prevent the commission from upholding the right to counsel.<sup>[125]</sup>

[120] See Communication No. 87/93. COMPILATION DES DECISIONS, pp. 200-202, paras. 6-14. The defendants were sentenced to death by a Special Tribunal for homicide, unlawful assembly and breach of the peace. See also *Forum of Conscience v. Sierra Leone*, supra, note 102.

[121] There is also no appellate review where an interlocutory appeal has been lodged against a lower *gacaca* court ruling on the classification of defendants. See Art. 92.

[122] Accordingly, the Commission held that “a denial of the right to appeal before competent national organs, which, given the seriousness of the penalties imposed, “is a flagrant violation of Article 7(1)(a) of the African Charter”. Comm no. 60/91, COMPILATION DES DECISIONS: 197-198, para. 13. Similarly, in the *Ken Saro-Wiwa* case cited above, the Commission dismissed the Nigerian government’s claim that the confirmation of the Tribunals’ sentence by the Council of the Provisional government constitutes an adequate appeal stating that the Council couldn’t be accepted as competent. See *International PEN, Constitutional Rights Project, and Civil Liberties Organization Interights (on behalf of Ken Saro-Wiwa Jr. et al) v. Nigeria*, supra, note 102: 247-248, paras. 88 and 91-93.

[123] Art. 7(1)(c), of the ACPHR, Arts. 14 (3)(a)(d) of the UDHR and Art. 11(1) of the ICCPR.

[124] See Communication No. 87/93. COMPILATION DES DECISIONS: 201, para. 12. Similarly, in *Amnesty International, et al v. Soudan*, cited above, the exercise of veto power by the special tribunals over the defendant’s choice of Counsel constitutes an unacceptable violation the respective right of the defendant. See *Amnesty International, et al v. Soudan*, supra, not 106: 360, para. 64.

[125] The two were abducted from Zambia in 1991 where they lived in exile. They were tried and sentenced to death by the Southern Regional Traditional Court and the National Traditional Appeals Court upheld the sentence. The Commission found that the fact that the applicants were tried without being assisted by counsel constitutes a violation of article 7(1)(c). See *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* 69/2 and 78/92, COMPILATION DES DECISIONS: 158, para. 10.

According to Amnesty International, the Rwandan government's understanding of the right to defense counsel was that "legal assistance is required only where the death penalty was possible punishment."<sup>[126]</sup> However, that understanding is not in tune with the relevant provisions of the Constitution, since the said qualification makes the right to counsel anything but absolute. What is worse about the *gacaca* law is that it does not allow any form of legal representation and at any level for the accused, which is clearly a violation of the country's Constitution and its international obligations.

#### 2.2.4.2. The right to adequate time and facilities

The right to be afforded adequate time and facilities to defend oneself is one of the corollaries of the principle of equality under the law, which requires that both the prosecution and the defense must be given equal opportunity to prepare and present their case. The *gacaca* law does not require that defendants be promptly and adequately notified of the charges and evidence against them.<sup>[127]</sup> The lack of such notification in practice combined with the fact that many of the defendants have been detained for more than 11 years and that they will not be assisted by counsel greatly impairs their ability to prepare for their defense and constitutes a violation of article 14(3)(b) of the ICCPR.<sup>[128]</sup> In principle, defendants may be able to call witnesses to appear before the *gacaca* sessions in their defense through their relatives or friends, although the law does not clearly provide any formal procedure. Yet, they will have no way of securing the attendance of such witnesses or knowing how they will testify.

#### 2.2.5. Equality before the law

Equality before the law implies equal access to courts and equality of arms between the parties in a case.<sup>[129]</sup> The *gacaca* experiment has been run in such a way that it violates these fundamental aspects of the principle. First, even though the law empowers the *gacaca* tribunals to try genocide and crimes against humanity, the government pursues a discriminatory application of the law. Accordingly, the authorities have restricted the jurisdiction of *gacaca* tribunals only to 'genocide' crimes. Further, and more important, the term "genocide" covers any offence committed by Hutu's during the violence against the Tutsis, including property related crimes that do not constitute genocide proper in the legal sense. By contrast crimes allegedly committed by members of the Tutsi dominated RPF army during the same period are excluded from the jurisdiction of the *gacaca* tribunals whatever their gravity, because they do not strictly fall within the definition of genocide. The latter, according to officials will be tried by the military or the regular courts

The maintenance of two separate systems of justice on the basis of a rather arbitrary classification violates the first aspect of the principle.<sup>[130]</sup> In effect, the above classification

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[126] Amnesty, *A Question of Justice*.

[127] In interpreting the "promptness" requirement of Article 14 (3)(a) of the ICCPR the Human Rights Committee has stated "[i]n the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such." See Human Rights Committee, *General Comment*, supra, note 101, para. 8

[128] The right "to have adequate time and facilities for the preparation of the defence and to communicate with counsel of his own choosing" is one of the minimum guarantees of fair trial as provided under Article 14(3)(b).

[129] Article 10 of the Universal Declaration: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him." See also Articles 2 and 3 of the ACPHR, and Article 7 of the UDHR

[130] The same applies to the application of double standards at the classification level which was evidenced during one of the sessions where officials asked villagers who accused RPF members to prove genocidal intent at the classification level, which is not required in other cases and should have been left for the trial stage. See Fondation Hirondelle, supra, note 112.

leads to an illogical situation where a person who is accused of stealing a cow from a Tutsi or a Hutu moderate during the genocide will be tried before *gacaca* tribunals, whereas a member of the Tutsi-dominated RPF who had killed any number of people will not. This has significant discriminatory effect because as discussed earlier, those who stand accused before *gacaca* tribunals do not have any recourse to regular courts and are denied many of the fair trial guarantees reviewed in this section. They are required, in certain cases, to respond to criminal files or “dossiers” prepared by trained prosecutors. Defendants do not have sufficient time and resources to prepare their defense whereas the prosecution and the accusers can rely on the exculpatory information compiled by government-supported institutions, including the tribunals themselves and the technical advice of the National Service. Moreover, *gacaca* tribunals are susceptible to highly organized pressure groups whose intervention puts defendants at a disadvantage in comparison to those defendants that stand accused before regular courts<sup>[131]</sup>

In sum, there are two main points that make the above practice deeply problematic. In the first place, even if all those who are to be tried before the *gacaca* tribunals are said to have committed genocide pursuant to the internationally accepted definition of the term, there is no valid rationale for selectively denying them access to the regular courts. Second, the official distinction between “genocide” and “revenge crimes”, does not justify the discrimination in respect of access to the regular courts because it is not based on any objective determination of the conducts constituting such crimes.

### 2.2.6. Presumption of Innocence

The Rwandan Constitution and international and regional human rights instruments guarantee the right of the accused in criminal proceedings to be presumed innocent.<sup>[132]</sup> The principle has two main applications. The most common application of the principle relates to the burden and standards of proof. Accordingly, the prosecution must prove its case and must generally do so beyond reasonable doubt. The right to silence and its concomitant, the right not to be compelled to testify against oneself, flow from the foregoing aspect of the principle of presumption of innocence. Another application of the principle is that everyone charged with criminal offence has the right to be presumed innocent and treated as such by all concerned officials until found guilty. The latter dimension of the principle thus prohibits authorities from engaging in conduct that prejudges the outcome of the trial. The *gacaca* trials raise serious concerns on all of the above fronts.

#### 2.2.6.1. The burden and standards of proof

The law governing *gacaca* jurisdictions says little about evidence and it is not clear if judges have received guidelines regarding the principles at stake based on the country’s Criminal Procedure Code. There are no procedures governing what evidence is admissible or inadmissible, and the examination and cross-examination of witnesses. In any case, the possibility of effective cross-examination of witnesses and proper assessment of evidence is severely undermined because defendants do not have legal representation and the judges’ lack professional training. In practice, evidence by co-defendants are highly encouraged and admitted in evidence without any safeguards whatsoever against testimonies given by detainees in anticipation of a real or

[131] Amnesty international observes, “these groups’ capacity to ensure that their voice is heard played a preponderant role in some of the *Entraide judiciaire* exercises, including blocking the release of detainees. Amnesty, *A Question of Justice*.

[132] See Article 19 of the Constitution and Article 11(1) of the UDHR. The African charter guarantees “the right to be presumed innocent until proved guilty by a competent court tribunal”. 7(1)(b) The ICCPR 14(2)

perceived opportunity of being released from detention or receiving lighter sentences.<sup>[133]</sup>

Further, if the pre-gacaca sessions conducted in the presence of Rwandese officials are any indication, there is a risk that the principle may be applied in the reverse. The following excerpt on some community sessions during which detainees were presented to the public in search of incriminating evidence provides a very good picture of the dangers involved.

“Assembled community members with evidence against the defendant spoke first. Their testimony was not cross-examined by the OMP [Officier du ministère public or Public Prosecutor] representatives. If no one stepped forward, OMP representatives, assisted by the LDF [Local Defense Forces], required all community members from the detainee’s sector to step forward. One-by-one, they were harangued to provide evidence. In some cases, there were no community members from the detainee’s sector, including the individual(s) who had initially accused the detainee. In a number of cases, the same group of individuals stepped forward to accuse the assembled detainees and no one else corroborated their accusations. On the defense side, detainees were not allowed to speak on their behalf, challenge the allegations made against them or cross-examine witnesses. They were repeatedly told that only those wanting to confess could speak. Family members were generally not allowed to speak unless they provided evidence against the detainee. Witnesses for the defense were only allowed to speak after all accusations had been made. Moreover, they were cross-examined in an intimidating manner that implied they shared in the detainees’ alleged guilt.<sup>[134]</sup>

The report further notes that Amnesty International delegates observed a session where a detainee was transferred from one district session to another because no one gave evidence against him in the first district.<sup>[135]</sup> A number of other related incidents are reported by observers. A journalist working for Internews notes that in one of the sessions she observed a detainee was taken back to prison despite the fact that only exculpatory information was obtained from the public.<sup>[136]</sup> The insistence by the authorities on finding incriminating evidence on people who have been in detention for years and the pressure applied on reluctant villagers to speak only against the detainees suggests an underlying presumption of guilt.

Further the Amnesty report and reports by other observers indicate that much of the evidence given during the sessions were of purely circumstantial and hearsay nature.<sup>[137]</sup>

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[133] Amnesty, *A Question of Justice*.

[134] The report cites an instance, where “the Public Prosecutor’s office told community members that any one providing information for the defense would either have to name the individual responsible for the crime(s) allegedly committed by the detainee or take his or her place in prison.”Ibid.

[135] Ibid.

[136] According to the report, the official who was responsible for his initial arrest admitted that he took him to jail “for being drunk and causing a breach of the peace” but failed to “follow up the case”. The prosecution said that Habimana is accused of murder and asked if anyone knows about the case, to which only a prison official responded saying that another detainee has confessed to the particular crime. The prosecutor then explained Habimana would be released once the detainee who was said to have confessed to the crime confirms the same. Mary Kimani, Internews, 20 November 2002. Making an accused person’s innocence dependent on whether or not the prosecutor establishes a better case against another suspect is a flagrant violation of the defendants right to presumed innocent.

[137] The Amnesty report, for example, states: “Nearly half of the evidence gleaned from community members was hearsay, ‘I heard that she or he did this or that’. Most of the rest was circumstantial. Detainees were either known to associate with people who had committed an offence, had been seen in the vicinity of where an offence had been committed, were seen with an implement that could be used to commit an offence or were seen with an item that could have been the victim’s property. Individuals making allegations or providing information regarding

Another worrying feature of the *gacaca* program is its reliance on the defendants' confessions or guilty pleas. A number of incidents during the pre-*gacaca* sessions suggest that defendants were made to believe that they would be acquitted if they confess their crime and ask for forgiveness. Many of them were seen asking forgiveness from the victims and sometimes being forgiven. Whether this is a result of lack of information or misinformation, it is clear that the confession of detainees cannot be relied upon without further corroboration. This is so because there is a real possibility that people who have been detained for years without trial may have chosen to confess for crimes that they have not committed rather than risking continued detention.

Similarly, the *gacaca* law does not provide that the defendant has the right to be silent and that judges are not permitted to take adverse inference from his conduct during the trial including from his unwillingness to speak. Again, the lessons from the pre-*gacaca* sessions, where suspects were required to prove their innocence by being asked to tell who committed the offences they are suspected of, the whereabouts of the victims or why they carried certain implements, like machetes etc., are not encouraging.<sup>[138]</sup> In fact observations made in 2005 confirm that defendants are forced to incriminate themselves under a threat of punishment of perjury or lack of cooperation, which the judges feel empowered to impose if they thought the defendant were not telling the "truth" or hiding the "truth". The line of questioning and the penalties are based on presumption guilt on the part of the judges contrary to basic due process and fair trial standards.<sup>[139]</sup>

#### 2.2.6.2. Official Presumption of Guilt

The term genocide is employed in a broader sense than its strict juridical meaning allows. Accordingly, a genocidaire or a perpetrator of genocide is anyone (mainly a Hutu) suspected of committing any crime against mainly Tutsis during the genocide. The expression, 'during the genocide', refers to the entire period covering 1990-1994. However crimes committed by RPF members during the same period are generally referred to as "revenge crimes". The 'ideology of genocide' refers to views opposed to the government's interpretation of and responses to the events of 1994. Some of these classifications are so frequent and forcefully defended in the official discourse that ordinary people – those who are not cynical or skeptical about the government's response towards the atrocities – may genuinely confuse the political with the legal.<sup>[140]</sup> It is the same ordinary people that are the judges in the *gacaca* proceedings.

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detainees were neither asked to take an oath nor sign their statements (normal procedure in Rwandese judicial investigations)." See Amnesty, *A Question of Justice*, See also Mary Kimani, *Community Frees Four Genocide Suspects during Pilot gacaca Justice Process*, Internews (May 30, 2001). The reporter observes that, in one of the sessions she witnessed, a suspect was returned to jail because some of the attendees spoke against her saying '[h]er behaviour during the genocide was not good, she helped kill people'.

[138] Amnesty, *A Question of Justice*.

[139] Avocat Sans Frontières, *Monitoring Des Juridictions Gacaca, Phase De Jugement, Rapport Analytique*, (Mars-Septembre 2005): 15.

[140] President Paul Kagame, for example has sternly stated the sanctity of the above classification in the following terms. "We have to analyse meticulously what has happened in our country. Establish the difference between genocide and other crimes committed during or after the war. We should not confuse those crimes. ...There are individuals- Rwandans as well as foreigners-who do not want the Rwandans to go forward and abandon their old cleavages. They call the crimes of vengeance, genocide, which is absolutely false." See *Discours de Paul Kagame*, supra, note 69. The Rwandan Justice Minister reiterated the same view when asked why crimes committed by RPF are not subject to *gacaca*. Rwandan Minister of justice, Jean de Dieu Mucyo, in *Exclusive Interview: Rwanda Pushes Ahead with Gacaca Tribunals*, Fondation Hirondelle (6 December 2002) available at <http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/192d793b82d9b481c1256cb800591075?OpenDocument> (last consulted 08 September 20)07

Accordingly, the *gacaca* tribunals do not deal with crimes allegedly committed by individuals associated with the RPF on the basis of a classification that prejudices the crimes allegedly committed by the latter. No doubt that acts of genocide are very reprehensible and must be distinguished from other crimes whenever relevant. However, the distinction is not relevant when it comes to the principle of presumption of innocence. The seriousness of the crime of genocide does not warrant the assignment of criminal responsibility across the board by administrative fiat just as it should not be used to banalize other serious crimes such as crimes against humanity.<sup>[141]</sup> In this respect, the question whether a given criminal conduct constitutes genocide, crimes against humanity or manslaughter (revenge or otherwise) should have been left to the courts, which should make a determination based on all the facts before them.

A similar presumption seems to underlie the frequent amendments made, in spite of a negative Constitutional Court ruling, to the Criminal Procedure Code exempting suspected *genocidaires* from the general rules that were designed to restrict prolonged pretrial detention<sup>[142]</sup> and the absence of fair trial guarantees in the *Gacaca* Law.<sup>[143]</sup> The fact that the defendants have been in detention for so long and the government's reluctance to release detainees is also likely to have a negative impact on their rights to be presumed innocent. The *gacaca* judges and community member may either fear that acquittal amounts to a criticism against the government or believe that the government must have reason for the detention. Ironically, the presumption of guilt is not limited to the authorities. A group known as African Rights, for example have attacked the government's move to release on bail detainees who have already served the maximum prison term that they would be sentenced to if they were to be tried.<sup>[144]</sup>

The above evaluation is intended to highlight some of the major infringements of the minimum fair trial standards. It is, however, important to underscore that one does not need to rely on a case-by-case analysis of irregularities or miscarriages of justice to prove the non-conformity of the *gacaca* initiative with international fair trial standards. The *gacaca* law violates international human rights instruments, the African Charter and the country's Constitution as a matter of principle because it puts in place a system that, by its very design, denies individuals accused of serious crimes minimum due process and fair trial guarantees.

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[141] The authorities exclude the possibility that some of the detainees may not only be innocent but also that they may have committed murder, rape, robbery, assault, theft and other crimes out of other inappropriate motives such as vengeance, greed or lust, without necessarily having a genocidal intent.

[142] See supra, note 42 and accompanying text.

[143] Amnesty International observes: "The presumption of guilt on the part of the Rwandese authorities is as much the cause of prolonged detention without trial of tens of thousands of Rwandese as their repeated claim that it is due to the government's lack of resources. Likewise, the lack of fair trial guarantees in the legislation establishing the *gacaca* tribunals refers as much to the government's presumption of detainees' guilt as it does to the lack of resources to provide a fair trial." Amnesty, *A Question of Justice*

[144] On 1 January 2003, soon after the *gacaca* process began at the national scale, President Kagame issued a communiqué ordering the conditional release within one month of all detainees who may have already served the prison term that they may be sentenced for. See *Communiqué Émanant de la Présidence de la République, Kigali 01 janvier 2003*. African Rights expressed its opposition to the above stating there are no guarantees that the released suspects will respect the conditions for bail and that they will not intimidate residents upon their return to their villages. See *Rwanda: Prisoner Releases - A Risk for the Gacaca System* (16 January 2003), African Rights.



### 3. JUSTIFICATIONS FOR *Gacaca* AND SOME COMMON MISCONCEPTIONS

Rwandan authorities and supporters of the *gacaca* initiative acknowledge most of the anomalies of the system discussed above, particularly its incompatibility with international fair trial standards. Nevertheless, they offer a number of justifications or make exceptions in favor of the pursuit of such an extraordinary experiment at the expense of minimum human rights guarantees and regardless of its economic and political costs. The most common among these can be summarized into three justifications. First, contemporary *gacaca* is based on the traditional Rwandan/African justice system. Second, *gacaca* has advantages over the regular criminal justice system. Three, *gacaca* is the best alternative given the particularities of the Rwandan context. In what follows, we will assay and challenge each of those claims and intuitive assumptions.

#### 3.1. The Newly Introduced *Gacaca* is a Revalorized, Traditional Justice System.

The purported traditional foundation of *gacaca* is relied upon to advance the relativist claim that traditional courts are not subject to universal human rights standards. It is also sometimes employed to make the subtle point that the newly established tribunals are not really the special or revolutionary tribunals towards which the human rights community has historically been very critical. However, these and related arguments in favor of *gacaca* can be challenged on two grounds. First, the contemporary *gacaca* jurisdictions are fundamentally different from the traditional institutions, and, in the relevant sense, have a lot more in common with the modern criminal justice system. The *gacaca* courts have almost all the coercive features of modern criminal courts but none of the restrictions that go along with them. Secondly, even if the new *gacaca* jurisdictions were firmly founded on tradition, that does not exempt them from the application of minimum fair trial standards.

##### 3.1.1. More Revolutionary than Traditional

Like most traditional dispute settlement or arbitration systems, the traditional *gacaca* system in Rwanda developed out of custom and was not imposed by a legislative act. The system operated with tribunals composed of village or family elders, usually chosen by the parties among the male members of the community.<sup>[145]</sup> The composition of the judges, therefore, often varied from case to case depending on the choices of the parties. Similarly, the consent of the parties concerned was a prerequisite for a *gacaca* court to have jurisdiction over a given case. Moreover, the traditional *gacaca* tribunals applied customary norms and wisdom, and as such legal training on the part of the judges and legal assistance for the accused were not necessary.

Equally importantly, the jurisdiction of traditional *gacaca* courts was limited to disputes of a civil nature, such as family and property disputes, succession, and minor criminal cases such as theft.<sup>[146]</sup> Further, even in the case of petty criminal offences, the elders could only impose restitution and have no power to impose prison sentence or other forms of punishment. As such the traditional courts do not rely on the law enforcement agencies of the state. Gener-

[145] Charles Ntampaka (Juillet-Août 1999) *Droit et croyances populaires dans la société rwandaise traditionnelle*, Dialogue: 13.

[146] A field inquiry sponsored by the UN High Commission on Human Rights concluded, “[m]ajor conflicts involving, for instance, thefts of cows and assassination of several people were not dealt with by the *gacaca*, but put directly before the *mwami* (or king), the traditional political authority.” Summary of the inquiry by Smaragde Mbonyingete, in JYONI WA KAREGA, J. (ed.), *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, Kigali (1996): 29-30.

ally, the tribunals aimed at reconciliation and the maintenance of community peace.<sup>[147]</sup>

By contrast, the current *gacaca* tribunals are conceived and established by the government to try not minor civil disputes or petty offences, but serious crimes. These crimes are the appalling consequences of a conflict managed by competing elites for the rewards of political power in a modern state, to which traditional courts can hardly provide a resolution. Further, the new *gacaca* courts apply and are bound by formally enacted and sanctioned laws. The consent of the accused is irrelevant and appearance is mandatory not only for the accused but also for potential witnesses, judges and other members of the community. The tribunals have the power to issue prison sentence not only on those convicted of the crimes under the jurisdiction of the tribunals but also on anyone who failed to comply with their orders or deemed to have made false statements. They are primarily designed to expedite the prosecution of defendants, and reconciliation is an objective only to the extent that this can be achieved through the trial and punishment of the guilty.<sup>[148]</sup>

In the light of the above, arguments based on the premise that the newly established *gacaca* courts are traditional courts are untenable simply because the premise is wrong.<sup>[149]</sup> In reality, the new *gacaca* tribunals have all the powers of conventional courts but almost none of the fair trial guarantees associated with the latter.<sup>[150]</sup> At best, therefore, they combine the worst features of the two different systems: the arbitrariness of some of the traditional justice systems and the coercive features of the modern criminal justice system.<sup>[151]</sup>

The structure of the *gacaca* tribunals, in fact, resembles that of the Resistance Councils and Resistance Committee Courts established by Uganda's Resistance Army.<sup>[152]</sup> Similar systems were in place in Malawi, Mozambique, Eritrea and Ethiopia<sup>[153]</sup>, at different times just to cite few African examples from the second half of the last century.<sup>[154]</sup> Despite the relevant

[147] Ntampaka, *supra*, notes 58 and 145

[148] See Minister of Justice Jean De Dieu Mucyo's stating that one of the government's expectations in launching *gacaca* is that "not a single person who was involved should escape prosecution." in *Dialogue Between South Africa and Rwanda*, *supra*, note 2, at 53.

[149] A village blacksmith interviewed by a PRI researcher reportedly said, "as everybody knows, the *gacaca* is designed to reconcile families and I hope that the people who planned the *gacaca* also had this vision. The *gacaca* does not intend to inflict very harsh sentences. If *gacaca* is now intended to punish, it does not deserve to be called *gacaca*. It should be called by another name." See Klaas de Jonge, *Report III*, *supra*, note 60, at 31.

[150] A Comparative study of traditional and informal justice systems in Asia and Sub-Saharan Africa characterizes the contemporary *gacaca* as "formal courts based on Traditional/popular Justice." Joanna Stevens (2000) *Traditional and Informal Justice Systems & Access to Justice in Sub-Saharan Africa*, PRI. Presumably the only elements that earned the new Rwandan people's courts the partial characterization as traditional are the fact that the tribunals are named *gacaca*, composed of lay judges and are not bound by formal rules and procedures.

[151] Cautioning against the temptation to combine elements of the conventional justice systems with those of traditional system, Joanna Stevens' study concluded "[ideally], the rationale for incorporating traditional and informal Justice forums into the formal state system of courts is to 'combine the virtues of traditional legal institutions (accessibility, informality, economy, of time and money, and familiarity of legal norms [etc]) with those of state legal system (impartiality, uniformity of law and procedures and state legitimacy.' However, attempts in various countries to achieve this successfully have generally failed. Linking the two systems tends to undermine the positive attributes of the informal system." *Ibid*.

[152] Incidentally, President Museveni of Uganda and some of the founders of Rwandan Patriotic Front have been trained with Mozambique's liberation movement (FRELIMO), which also had similar court structures. Stevens states that Museveni received his ideological orientation from Frelimo. *Ibid*.

[153] The People's Council's used in Northern Ethiopia by the Tigray People's Liberation Front (TPLF) and the Eritrean People's Liberation front during the armed struggle were also conveniently referred to as *baito*, a reference to the traditional dispute settlement forums that existed in the region. See Ethiopia, *Waiting for Justice, Shortcomings In Establishing The Rule Of Law*, 7 *News from Africa Watch* 4, (1992), and Kjetil Tronvoll (1998) *The process of nation-building in, post-war Eritrea: created from, below or directed from above?* 36 *J. of Mod. Afr. Studies*, 461.

[154] Some of these tribunals, the ones in Uganda, Mozambique, Eritrea and Ethiopia, for example, provided forums for dispute settlement in areas liberated from the governments while also serving as instruments for political mobilization and plucking out infiltrators or political opponents. Yet, except for Malawi and, perhaps Eritrea, those liberation movements did not empower their respective popular courts to try serious crimes upon assuming state

parallels between the new *gacaca* tribunals and the revolutionary tribunals set up by revolutionary or liberation movements in Africa and elsewhere, however, few dared to call the *gacaca* by that name.<sup>[155]</sup> Elsewhere, the establishment of such tribunals has been a subject of criticism by human rights groups and the ‘international community’. In Nicaragua, for example, condemnation by amnesty, the Inter-American commission and others has led to the abandonment of the revolutionary courts shortly after their establishment.<sup>[156]</sup> The *gacaca* initiative, by contrast, is funded by various western governments and supported by intergovernmental and non-governmental organizations despite the far-reaching powers that the initiative envisages for the tribunals and the corresponding risks.<sup>[157]</sup>

### 3.1.2. “Everything old is not gold”

Even if the newly established tribunals were reconstituted traditional courts, which they are not, we should ask and answer the question, so what? There were and are many traditional or customary systems in Africa and elsewhere whose resurrection should rather be a cause for apprehension to any one concerned with the advancement of human rights. The (re)introduction of the practice of stoning convicted adulteresses to death in Nigeria is one extreme example but not the only one.<sup>[158]</sup> What makes such a practice undesirable is not or should not be just the nature of the offence being punished but also the inhumane nature of the punishment.

Moreover, there are other less extreme but significant problems associated with traditional mechanisms of adjudication, even when the latter’s role is restricted to amicable resolution of disputes. There is always a significant risk in such mechanisms that the outcome may reflect the unequal bargaining position of the parties and the judges may take into account “factors such as the past conduct of the accused, or even that of the accused’s family”.<sup>[159]</sup> In this respect, the declaration by the African Commission on Peoples and Human Rights emphasizing the application of fair trial standards to traditional courts suggests recognition of the abusive potential of traditional justice systems.<sup>[160]</sup>

In the light of the above, it is not surprising that independent studies of the traditional *gacaca* system conducted prior to the introduction of the *gacaca* law advised that *gacaca* tribunals are not appropriate forums for ‘the genocide trials’.<sup>[161]</sup> A UN sponsored study, likewise concluded that *gacaca* tribunals are not competent to try genocide suspects or even other criminal cases. Instead, the study recommended that such tribunals can conduct a preliminary

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power as did the RPF. In Malawi, the courts were granted almost exclusive jurisdiction over offences against the state, such as treason. Stevens, *supra*, note 150, at 8-9.

[155] American RadioWorks is among the exceptions. See *supra*, note 41. Much has been written about courts established following revolutions or regime changes to try officials of former regimes and class enemies and there is no need to say more here.

[156] *Supra*, note 109.

[157] The special representative of the United Nations High Commission on Human Rights for example, lauded the initiative, albeit in a statement coached in a diplomatic language. His February 2000 report reads, in relevant part, “[t]he Special Representative wishes to state clearly that he supports the principle of *gacaca*, and applauds the government’s determination to engage ordinary Rwandans in this bold endeavor.” Michel Moussalli (25 February 2000) *Report on the Situation of human rights in Rwanda submitted by the Special Representative*, E/CN.4/2000/41. This is despite an earlier study sponsored by the Commission, which recommended that genocide related cases should not be tried by *gacaca* tribunals. See JYONI WA KAREGA, *supra*, note 146.

[158] See Human Rights Watch (August 20, 2002) *Sharia Stoning Sentence for Nigerian Woman*, New York, available at <http://hrw.org/english/docs/2002/08/20/nigeri4225.htm>, (last consulted: 16 April 2006)

[159] Stevens, *supra*, note 152.

[160] *Dakar Resolution*, *supra*, note 131.

[161] This was also said to be the belief of the majority of Rwandans. JYONI WA KAREGA, *supra*, note 146.

screening of suspects and forward those against whom there is sufficient evidence to the regular courts, resolve property related disputes and questions of inheritance for survivors, orphans and widows, to promote reconciliation and resurrect traditional values.<sup>[162]</sup> Similarly, a comparative study sponsored by Penal Reform International recommended that “formal state courts are, by far, the most appropriate forums to provide the legal and procedural certainty required where serious penalties such as imprisonment are involved.”<sup>[163]</sup>

At the theoretical level, support for the “traditional” Rwandan *gacaca* may be linked to a relativist bias against the universality of human rights principles or the tendency to reject the latter as impositions of Western values.<sup>[164]</sup> Both approaches put disproportionate emphasis on the historical origin of human rights at the expense of the circumstances that gave rise to their emergence. Consequently, they ignore not only the fact that practices such as trials by ordeal, mob trials and the administration of corporal punishments have all been features of what is now referred to as the Western world but they also take for granted continued protection of those rights in the ‘West’.

The fair trial guarantees associated with the modern criminal justice system developed out of the basic human need and struggle to curb the abuses that were inherent in those traditional practices. There is nothing intrinsically Western about the basic human need for freedom from abuses, pain and arbitrary deprivation of rights. Neither is it correct to assume human rights are inviolable in the West lest one forgets that there are times when human rights concerns become secondary to other interests or do not apply to certain people, under certain circumstances.

The relativist argument is also often invoked by governing elites in the Third World and their supporters when it is convenient to do so and ignored when it is otherwise. It is ironic, for instance, that advocates of relativism do not object to ‘non-western’ governments having such attributes as a modern and powerful army and security structures with sophisticated weaponry, but they raise qualms about the limitations that should go along with the exercise of state power. Arguments against the application of international standards to *gacaca* tribunals follow a similar logic in that they reject not the coercive aspects of the modern criminal justice system, but the limitations to it.

The above is not to deny that traditional dispute resolution mechanisms have a very important role to play. In much of Africa informal or formally recognized traditional systems of adjudication operate side by side with the regular courts. But their role is limited to civil cases or petty offences. It may be that, the re-introduction of the traditional *gacaca* tribunals is desirable in those areas.

### 3.2. *Gacaca* has advantages over the Modern Criminal Justice System

*Gacaca* tribunals are said to have advantages over the Rwandan courts and the ICTR, or at least, that they are not any worse than the latter two. Peter Uvin, for example, curiously presents a defense of *gacaca* from a “human rights perspective” as follows:

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[162] Id.

[163] The study further provided general guidelines applicable in respect of traditional and informal justice systems. These include, inter alia, that such systems “should not be incorporated into the formal state system”, they “should remain entirely voluntary and their decisions non-binding”, “physically coercive measure should be prohibited” and that “people should be allowed to shop for justice.” Stevens, *supra*, note 150.

[164] Helena Cobban (April/May 2000) *The Legacies of Collective Violence, The Rwandan Genocide and the limits of the law*, Boston Review.

“[t]he practice of formal justice, which has been maintained for years with massive international assistance, also violates human rights...Hence, when discussing *gacaca*, we are not comparing a “clean” system that respects criminal and human rights law with one that violates it, but rather two practices that are both weak and incomplete.”<sup>[165]</sup>

It is important to emphasize the fact that the domestic trials do not adhere to the requirements of criminal law and human rights. However, it is difficult to see how the establishment of a system that is designed to preclude the application of those requirements altogether, is defensible from the human rights perspective.<sup>[166]</sup> Other authors have mistakenly assumed *gacaca* to be a form of restorative justice, comparing it to the South African Truth and Reconciliation Commission, and wrote in congratulatory terms about the government’s to the ideals of restorative justice. Helena Cobban, for example writes,

“the final passage of the *gacaca* Law, in early 2001, signaled not only a government consensus that the previous stress on prosecutions was no longer desirable for Rwanda, but also a willingness to try to incorporate elements of a very different, ‘restorative’ approach to issues of justice and wrongdoing into its policy.”<sup>[167]</sup>

The above claims will not be treated here, except in connection with the discussion of related arguments, for they are either based on erroneous assumption or are not substantiated with serious arguments. Rather, we will focus on some of the concrete advantages that *gacaca* tribunals are said to offer. These are: the *gacaca* initiative ensures speedy trial, encourages public participation, and facilitates the discovery of the truth.

### 3.2.1. Speedy Trial

It has taken several years to just set up the tribunals and complete the pre-trial phase of the pilot program alone. The tribunals involved in the pilot program moved to the trial phase in March 2005, that is four years after the introduction of *gacaca*, while the *gacaca* courts in the remaining parts of the country became operational and began the pre-trial phase only in January 2005.<sup>[168]</sup> The actual trials before 90 percent of the tribunals have not begun until July 2006. What is also remarkable is that the *gacaca* process has dramatically increased the population of suspects and detainees awaiting trial instead of reducing it as originally promised. As per recent predictions, around three quarters of a million Rwandans – close to one-eighth of the total population - face trial.<sup>[169]</sup>

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[165] *Supra*, note 39.

[166] The author also suggested that *gacaca* tribunals have certain advantages over the modern criminal justice system in general or have similar values, albeit framed in nebulous terms. He states, for example, that “the *gacaca* proposal respects the spirit of justice, if not the letter of criminal and human rights law” or that it can produce “fair trials but in a locally appropriate form”.*Id.*, at 119.

[167] Helena Cobban, for example, promotes the noble idea of truth and reconciliation in the fashion of South Africa and rightly criticizes those who insist that criminal justice system is the only appropriate response. When it comes to Rwanda, however, she seems to have confused her wishes with what is actually at stake- a summary retributive justice with possibilities of reduced sentences to those who confess. Accordingly, she directs her attack at those whom she, apparently derisively, refers to as ‘Western rights activists’ for advocating the tempering of the punitive aspects of *gacaca* using the safeguards that have been developed in connection with criminal trials. See Cobban, *supra*, note 164, at 11.

[168] Avocat Sans Frontiers, *supra*, note 139.

[169] *Gacaca Process: A Justice Leading to Unity and Reconciliation in Rwanda* (December 2005) At [www.inkiko-gacaca.gov.rw](http://www.inkiko-gacaca.gov.rw), last consulted: 06 July 2007). See also *Gacaca courts begin operations*, Integrated Regional Informa-

Overall, the assumption that the *gacaca* courts will ensure the speedy processing of the files of the more than one hundred thousand detainees mainly rests on the understanding that these courts mobilize a large number of manpower from the village up to the provincial level. In reality, however, the advantages of the program are more modest than it is often assumed. The numerical advantage of the *gacaca* jurisdictions at the Cell level, the ones that involve the largest number of judges (over 170,000 judges), is limited to the circumscribed functions of the classification of offenders and adjudication of property crimes. When it comes to the trials, the great majority of the detainees are likely to be brought to the 1,545 tribunals of the Sectors, which may still appear to offer enormous advantages in comparison to the fewer number of specialized regular courts engaged in the genocide trials. Such a comparison, however, does not take into account the fact that the continued functioning and efficiency of *gacaca* tribunals depends on the willingness of unpaid magistrates to regularly convene for trial.

It must be noted that although the tribunals may be required to convene more than one day per week according to the *gacaca* law, the *gacaca* judges are not expected to devote five days a week like judges in regular courts. As has become evident during the pilot session, initial expectations that the *gacaca* tribunals will produce quick results have been undermined by delays in convening meetings, the informal and unstructured deliberations during the sessions, etc. According to a report by Amnesty, the activities of the Cell jurisdictions during the pilot programs “frequently took twice as long as anticipated”.<sup>[170]</sup> A recent report by *Avocats Sans Frontières*, notes that judges increasingly complain and frequently arrive late citing their day-to-day obligations and that in some cases district coordinators have to personally look out for missing judges.<sup>[171]</sup>

The most fundamental question, however, is what if the tribunals had the said advantage?

A recurrent problem in discussions about the advantages or disadvantages of *gacaca* tribunals is the tendency to evaluate them mainly in terms of their efficiency and not in reference to the normative considerations that should govern the whole enterprise. Accordingly, observations made by authorities as well as analysts frequently refer to the small number of cases handled by the ICTR and the Rwanda courts in the past and argue that the *gacaca* trials are preferable because they promise an expedited process.

As we shall see later, if the problem were approached with the help of elementary ethical inquiry, it would be obvious that the functions of ICTR or the Rwandan domestic courts cannot be measured solely in reference to the speed in which they dispose of cases.<sup>[172]</sup> As discussed earlier, the domestic trials suffer from various anomalies, such as the violations of fair trial guarantees, and the slow pace of the trials is only one of them, albeit a significant one. A policy that seeks to provide a speedy trial through a mechanism that infringes on basic human rights, as does the *gacaca* experiment, is not compatible with the claim that the prosecutions are motivated by the respectable moral arguments that are sometimes invoked in support of such undertakings.

The solution to whatever problems the regular courts or the ICTR are facing primarily lies in seeking ways to improve their capacities and making appropriate adjustments to

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tion Network (IRIN), Kigali (10 March 2005)

[170] Amnesty, *A Question of Justice*.

[171] *Avocats Sans Frontières*, *supra*, note 139, at 8 (based on observations made in April and August 2005).

[172] As the International Panel of Eminent Personalities rightly observes “...speed and efficiency, important as they are, must also be accompanied by fairness. Basic human rights must not be sacrificed either to productivity or local participation.” *The Preventible Genocide*, para. 18.49.

the prosecution policy. In this respect, there is hardly any criminal justice system in the world that can accommodate the kind of wholesale and expansive prosecution that the government of Rwanda is determined to conduct. Further, the claim that the *gacaca* tribunals were necessitated by the incapacity of the regular courts sounds unconvincing given that measures taken by the government have further weakened the capacity of the domestic courts in particular rather than strengthening them.<sup>[173]</sup>

### 3.2.2. Popular participation

As with the issue of speed, there is a similar discrepancy between initial expectations and the reality of popular participation. To begin with, the *gacaca* law does not support the exaggerated claims about the grassroots or local participation of overwhelming number of Rwandans throughout the process. According to the *gacaca* law, it is only at the Cell level that all adult members of the community are required to participate.<sup>[174]</sup> Mandatory participation at the sector level is limited to members of the seats of all the *Gacaca* tribunals within the sector. That leaves relatives of victims and others who may participate in the sessions either on their own initiative or because they are summoned by the tribunals. Such forms of participation, however, are recognized in different legal systems and are hardly innovations of the *gacaca* system. What is new about *gacaca* in this respect is the fact that anybody from the audience can speak and that there are no formal rules and procedures to regulate participation. It is very difficult to see how this aspect alone makes the system desirable.

In practice, on the other hand, the level of participation during pilot experiments was reported to be increasingly below the minimum requirement even at the cell level.<sup>[175]</sup> The PRI report notes that the participation was encouraging during the first meeting, although some people don't seem to know what the *gacaca* is about or they came forward believing that the actual trials would start.<sup>[176]</sup> However, many observers were alarmed by the waning participation rates in subsequent sessions. "Participation", according to one report, "has emerged during [the] pilot phase as one of the greatest challenges facing *gacaca*."<sup>[177]</sup> The report notes "even in Cellules [cells] with a population well over 300 or 400 adults, the general assembly convened for the meeting seems to stay close to the 100 person minimum."<sup>[178]</sup> During sessions in different communities, people fail to come or come very late and few of those who come participate in the discussions. As one of the reports put it,

"within every community there is usually a group of several people who are more outspoken than the rest. Because their contributions maintain the appearance of participation from the General Assembly, the meetings can go forward even if inaccurate or missing information has been passed over due to the silence of others."<sup>[179]</sup>

[173] These measures include the frequent purges within the judiciary and the disbandment of the various bodies set up to reduce the workload on the courts by conducting pre-trial screening of the files of the detainees and the abandonment of the idea of requesting for temporary foreign judges. See *supra*, note 52 and accompanying text.

[174] See Article 6 of *Gacaca Organic Law No. 16/2004*

[175] See Amnesty, *A Question of Justice*, de Jonge, *supra*, note 60 and Honeyman, *supra*, note 113.

[176] See de Jonge, *Id.*, at 8.

[177] Honeyman, *Id.*

[178] *Ibid.*

[179] *Ibid.*

The above observation was confirmed by ASF's 2005 report underscoring the distinction between attendance and participation. To be of any value, popular participation has to be voluntary and involve the free exchange of views and debate regarding the society's painful past, however controversial this may be. The report, however, notes that even when sessions are attended by a large number of people, they tend to be reluctant to express their views and that discussions do not proceed freely and with ease.<sup>[180]</sup>

Observers in the field cite a number of explanations for the dwindling number of participants. One of the explanations is the general lack of ownership of the process by the community, which is caused by widespread distrust towards the authorities, skepticism regarding the goals or potential of the process, and lack of awareness. In some communities people were said to have lost interest upon learning that *gacaca* tribunals would not deal with crimes committed by RPF members.<sup>[181]</sup> The judges and other members of the community were concerned that the sessions will make them unable to carry out their other economic and social activities, including farming, going to the markets, attending weddings and funerals.<sup>[182]</sup> As a result, authorities were reported to have resorted to coercion and threats of sanctions in order to ensure participation.<sup>[183]</sup>

Finally, one has to underscore the fact that to the extent that the *gacaca* experiment can produce expedited trials and enhanced popular participation, both of these cannot be achieved except at a huge cost to other important values. The costs in respect of human rights and fair trial values of the society have been outlined earlier. One has to also add, however, the staggering economic and social costs that the process can entail. The deployment of over 250,000 people of working age in an economically unprofitable activity and the costs of maintaining over a hundred thousand detainees amount to a significant burden to the country's economy.<sup>[184]</sup>

### 3.2.3. Truth and Reconciliation

Martha Minow distinguishes between two different aspects of 'truth' in connection with the question of dealing with the legacy of past injustices.<sup>[185]</sup> The first one is "forensic truth", which seeks to answer questions such as what happened, where and to whom based on factual evidence. The second aspect, on the other hand, is the "explanatory truth", which according to Minow, comprises "explanations, emerging from dialogue, and connecting with larger social and

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[180] Avocats Sans Frontières, *supra* note 139, at 9.

[181] de Jonge notes that among the question raised from the outset were: "why are some deaths more important than others? Why is *gacaca* only concerned with one ethnic group? Why can't we discuss the Hutu who were killed in 1994 [by the FPR] at the same time as all the others?" de Jonge, *supra*, note 60, at 6 and 10-11. What is striking is that the above observations were made in communities selected on the basis that, among others, the population is generally well-disposed.

[182] Other explanations gathered by the observers include, fear of arrest, the inconvenience of sitting for several hours in the sun, fear of retaliation, and failure to see the benefits of participation. See generally *Ibid.*, and Honeyman, *supra*, note 113. Additional explanations provided by Avocats Sans Frontières include, fear of punishment for perjury, which in certain jurisdictions is imposed without serious deliberation and procedural guarantees. *Supra*, note 180.

[183] de Jonge notes that "the use or threat of force [bringing the 'local defense force' into action or imposing fines]) increased rapidly when people stopped showing up or arrived hours late. The author adds complaints made by the population in certain areas revealed lack of ownership. In one area, he observes that, people complained 'Let us hold the *gacaca* meeting at the same day as the '*umuganda*' [a mandatory community service that takes place once per week]; two days' work for the Government in one week is too much', showing that some people do not perceive these jurisdictions as their own, but as something they are obliged to do." See *supra*, note 60, at 8.

[184] Some villagers have aired their views saying that *gacaca* will bring famine to the country *Id.*, at 12.

[185] Martha Minow (1998) *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston, Beacon Press: 85-86.



economic contexts of both past and future.”<sup>[186]</sup> Political violence poses significant problems to efforts aimed at the establishment of both the evidentiary and the contextual truth because of the unavailability or insufficiency of evidence and the complex and competing explanations that often accompany such violence.

While Rwanda is no exception in the above respects, the official understanding of the need for establishing the truth through both the regular courts and *gacaca* trials seems to be limited to the forensic truth.<sup>[187]</sup> The trouble is that the effectiveness of *gacaca* tribunals even in the establishment of facts of evidentiary value is questionable.

First of all, there is the difficulty of finding people who have witnessed the killings or other direct evidence. Commenting on the pre-*gacaca* sessions, a BBC reporter, for example, observes that “[m]any doubt to what extent the truth will actually emerge in the *gacaca* trials.”<sup>[188]</sup> Statements made by those who speak during the pilot phase consisted in mere denunciations and provide little direct or circumstantial evidence. There is no mechanism for screening and confirming the veracity of testimonies. Further, there is limited enthusiasm among the population to attend the sessions and only few of those who attend are able and willing to speak or speak freely.<sup>[189]</sup> While much evidence seems to have come out by way of confessions, the truthfulness of some of these is doubtful because it is given by people who have been detained and may have remained in detention for years to come but for their confession. Some, according to Amnesty International have also cited torture and other pressure on the part of the authorities being applied to secure confession.<sup>[190]</sup>

The contextual or explanatory truth, on the other hand, is quite straightforward and is not subject to further investigation or rebuttal as far as the Rwandan authorities are concerned. Accordingly, there was genocide against Tutsis that resulted in the deaths of about a million people. It was the result of ethnic distrust created and nurtured by colonialists and successive Rwandan governments, and was ultimately manipulated by Hutu extremists with the intention to exterminate the Tutsis. While Hutus have also been killed, they were only victims of ‘revenge killings’ by RPF members or were killed by extremists among themselves. This extra-judicially established dichotomy is held sacred and defines the jurisdictional boundaries of not only the *gacaca* tribunals but also in practice, those of the regular courts and the ICTR.<sup>[191]</sup>

[186] Ibid. Ignatieff also makes a distinction that is somewhat similar to the above. “At the very least”, Ignatieff argues, “it [truth] consists of factual truth and moral truth, of narratives that tell what happened and narratives that attempt to explain why it happened and who is responsible.” Michael Ignatieff (1995) *The Warrior’s Honor: Ethnic War and The Modern Conscience*, New York, Metropolitan Books: 171.

[187] Some authors also share this understanding. Writing about the advantages of *gacaca* Uvin, for example, observes “...if one accepts that people in the community by and large know the truth about who did and did not kill, and how, why, and with what degree of ruthlessness people killed others, *gacaca* may be a superior tool for collecting evidence than that which the formal justice system has produced.” See *Supra*, note 39, at 119.

[188] One of the individuals interviewed was a person who was reportedly in hiding in Kigali during the slaughter was quoted as saying: “I heard the shooting, I heard the gangs with the machetes, I could recognize some people by their voices and when I looked out in the street I could see all the corpses...But I would be unable to testify that I actually saw such and such person hack anyone to death.” Helen Vesperini *Rwanda Speeds Up Genocide Trials*, BBC (4 October 2001).

[189] A member of a human rights organization in Rwanda was quoted in the Report by the International Panel, as saying “But who in today’s Rwanda, would dare to say no? Those who protest are soon indirectly threatened. During commune assembly meetings, for instance, a burgomaster sometimes denounces the behavior of someone who disagree, by saying that ‘he thinks like the previous regime’. This comes close to an accusation of complicity in genocide. Therefore, people prefer to remain silent.” *The Preventible Genocide*, *supra*, para.18:48.

[190] See Amnesty, *A question of Justice*.

[191] The ICTR, has never tried crimes involving members of the government, although its statute does not exclude the possibility, and investigation efforts in that direction were met with stiff resistance. See *Rwanda: Deliver Justice for Victims of Both Sides*, Letter to the U.S. Ambassador John Negroponte, President of the UN Security Council, Human Rights Watch (9 August 2002).

The most troublesome fact in Rwanda today is that not everybody shares the official version of the truth and that those who disagree with important aspects of the explanation happen to be in the majority.<sup>[192]</sup> Consequently, a number of alternative theories are advanced. According to observations conducted by the International Panel, the most extreme versions hold that genocide was committed against the Hutus and not against the Tutsis or that there was a civil war during which people from all sides were killed but there was no genocide. A second account holds that there were two genocides, one against the Tutsis and the other against Hutus. What these different views have in common is the “denial of one-sided genocide”, which, according to the Panel, “remains an unshakable article of faith.”<sup>[193]</sup>

Admittedly, it is impossible in contexts such as Rwanda to produce a society-wide consensus over all the issues surrounding the painful legacies of the past. The Rwandan tragedy is, thus, likely to continue to be a subject of divisive debate and reinterpretation into the foreseeable future. Yet, actual or perceived attempts on the part of the government to impose a single and one-sided interpretation of events on the majority of the population can be counterproductive. The Rwandan government’s insistence that only two categories of crimes, genocide and ‘revenge killings’, were committed in Rwanda during the conflict, for example, has been identified as a major source of popular skepticism.<sup>[194]</sup> Even assuming that all crimes committed by the RPF constitute “revenge killings”, there is no moral or legal rationale why regular courts or military courts are preferable to try such cases, given that *gacaca* is considered superior to those other mechanisms for establishing the truth.

The exclusion of certain categories of cases from the scope of *gacaca* investigations coupled with the government’s intolerance of differing views may, therefore, reinforce the belief that the entire process is designed to validate the official truth. It follows that, the “truth” coming from the *gacaca* experiment is unlikely to foster reconciliation since it is perceived to exclude the deeply held beliefs of the majority Hutu and imposed by an institution that is even more arbitrary than the other punitive institutions targeting members of their ethnic group. Referring to the potentially negative implications of the foregoing limitations of the process, observers note:

“One of *gacaca*’s strengths lies in its open space – the space it offers for people to express suffering that have been left unresolved all these years, and the opportunity to closely follow the process of justice as each one is acknowledged and redressed. But as the pilot phase has brought to the fore many of these tensions that still permeate Rwandan society, it has become apparent that unless all the grievance still outstanding are given a public forum, *gacaca* may cause more divisions than it heals.”<sup>[195]</sup>

[192] Mamdani recounts the following telling story. “In a 1996 visit to Kigali, I requested to be taken to a school so I could talk to a history teacher. My host, an aide to the vice-president, said this would be difficult since history teaching in schools had stopped. I asked why. Because there is no agreement on what should be taught as history.” Mamdani, at 267-268.

[193] *The Preventible Genocide*, supra, para. 23. 61.

[194] The following observation illustrates the confusion and skepticism among community members regarding the above distinction: “To many, the rationale for the distinction seems to one of two things: either the difference is the *time period* each event occurred – an explanation that does not hold in all the circumstances, since some retaliation crimes were carried out in the midst of the genocide. Or – and most dangerously – they appear to be concluding that any crime committed by a Hutu will be punished, while any offence committed against a Hutu is not worth mentioning. ...the attempt to explain the reasons for the distinction, without using the ethnic labels that have largely become taboo, produces such confusion that many appear to have concluded that either *gacaca* is being conducted based entirely on arbitrary divisions, or it is meant to conceal systematic favouritism of one group over another. Needless to say, when perceptions such as these face a system that must carry out justice, the effect could be nearly crippling.” Honeyman, supra, note 113.

[195] *Ibid.*

Broadly speaking, the proposition that the *gacaca* process or retrospective justice in general can bring about reconciliation presumes that the single most important source of societal division is the legacy of human rights atrocities. Yet, the atrocities in Rwanda, like most other atrocities are consequences of the means used to resolve conflicts rooted elsewhere, mainly in the struggle for political power and resources. Therefore, reconciliation presupposes a political process and institutional design that addresses the underlying causes of the conflict which are still in place in Rwanda. The politicization of Hutu and Tutsi identities and perceptions that one group is dominating the other are still prevalent features of Rwandan society, although the dominant and subordinate groups have changed positions. To the extent that the problem is not addressed through an appropriate political design, mechanisms focusing on the injustices of the past can be sources of renewed injustice, suspicion and conflict rather than reconciliation, particularly when the mechanisms themselves are perceived to be unjust.

### 3.3. A Necessary Evil? The Problem of False Dichotomies

More challenging, at least in the emotional sense, than the claims that the newly introduced *gacaca* system is traditional or has some superior advantages over the regular courts is the pervasive sense that one gleans from discussions on the subject, namely; that nothing else works in the Rwandan context.

Obviously, one's understanding of what works is influenced by what she or he considers to be the problem. Most observers tend to take the incapacity of the local courts to try the hundreds of thousands detainees that are languishing in prison as a point of departure and a permanent variable. Having thus excluded the question what was the justification for the policy that led to such outcomes in the first place, they find themselves in a situation where they have to choose between the different courses of action prescribed by the policy. Consequently, as we shall see in the following section, much of the debate concentrates on weighing different experiments against one another without any perspective on the overall justification for the undertaking.

In the context at hand, the large number of detainees awaiting trials and the sense of inability to come up with an alternative that is sensitive to the emotionally and politically charged legacy of the genocide have led most observers to conclude that *gacaca* is not just an option but a necessity.<sup>[196]</sup> The presumption, therefore, is that the Rwandan government finds itself in the unenviable position where it has to make a choice between two evils – the prosecution before regular courts or the *gacaca* tribunals – and the latter is the better of the two.<sup>[197]</sup>

#### 3.3.1. Thinking Past Ostensible Moral Quandaries: A Normative/Ethical Inquiry

As argued in the previous section, the main problem with debate concerning the *gacaca* process is that it revolves around an unarticulated moral conviction that tends to restrict the search for a solution to Rwanda's predicament to just two ways of doing the same thing,

[196] Uvin, for example, observes that *gacaca* "is simultaneously one of the best and one of the most dangerous opportunities for justice and reconciliation in Rwanda. But in a country like Rwanda there are no easy, cheap or clean solutions." *Supra*, note 39, at 121. The International Crisis Group similarly notes that, "there can be no miracle solution to what appears to be an irresolvable contradiction between rigorous respect for procedures and the reality of 125,000 people waiting for trial". See International Crisis Group (7 April 1999) *Five Years after the Genocide in Rwanda: Justice in Question*, Brussels.

[197] Uvin rejects the call for the conformity of *gacaca* with fair trial guarantees, such as the right to counsel, saying that such recommendations would "end up reinventing the formal justice system, which is clearly inadequate," as if conformity with fair trial requirements is the major reason for the inadequacy of the formal justice system. Uvin, *Ibid*.

namely, the prosecution of past abuses. Were the emotional humanitarian impulses that account for the foregoing dilemma subjected to rationale re-examination it would be possible to analyze the Rwandan process using objective standards, including the human rights standards outlined earlier.

It would seem, therefore, that the apparent situation of moral quandary may be sidestepped by reverting to the original question and asking: why deal with the past. The Rwandan government had, for example, the choice to adopt amnesty, a truth and reconciliation commission, a more selective prosecution or some combination or variations of those mechanisms. The above does not mean that all of these choices were equally appropriate or desirable. However, if prosecution either before the regular courts or the *gacaca* tribunals was not the only option available, then the reason why it is the most appropriate and desirable option must be argued rather than simply stated. Clarity on that issue can lead to a realization that there were at least several imperfect choices when it comes to the question “how” and that the problems faced in the Rwandan context may be consequences of the particular choice and measures adopted by the government.

The above brings us to the ethical debate on the justifications of punishment – why punish in the first place? That question is relevant to the range of assumptions made in relation to the *gacaca* experiment and the prosecution process as a whole.

The introduction of *gacaca* is an option that is in line with the government’s policy of trying a maximum number of suspects both in its design and effect. Underlying that policy and, in part, the international support it has enjoyed is the suggestive impulse and unarticulated conviction that there is a moral imperative requiring the punishment of past abuses at all costs. The challenge when it comes to building a logical and ethically respectable argument along this line consists in establishing the following constructs. One, there is an overarching moral reason for the government’s extraordinary determination to punish each and every alleged “genocidaire” irrespective of the consequences thereof, including renewed violations of human rights and ethnic tensions.<sup>[198]</sup> Two, the prosecutions are chiefly motivated by the said moral imperative. Three, the massive prolonged pretrial detentions and the irregularities in the judicial process that have allegedly necessitated the adoption of *gacaca* were the unavoidable consequences of the pursuit of such a moral imperative.

We will briefly review those propositions from the perspectives of the two main strands of normative ethics that are most relevant to the present discussion. These are retributivism, which is commonly placed within the category of deontological theories, and utilitarianism, which is a consequentialist theory.

### 3.3.1.1. Retributivism and the pursuit of the “genocidaires”

Retribution is a concept that is often employed to mean different things by different people. The term retributive justice is sometimes used as a synonym to criminal justice or the punitive aspect of it, as when people distinguish the latter from restorative justice and distributive justice. Retribution is likewise used to refer to revenge or punishment in general. In this article, however, the term retributivism or retributive theory refers to the ethical tradition that is concerned with the moral justification of punishment and not to an institution or a practice. As such, it may be broadly understood as a theory or a set of theories that aim at providing a deon-

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[198] For instance, the government’s explanation for the large number of detainees is that everyone accused of genocide must be punished. Yet, officials also admit many among the detainees (around 20 percent, according to one official) may be victims falsely accused by their neighbours. No one knows how many of the more than 11,000 prisoners who have reportedly died under pre-trial detention would have been found guilty. See *supra* notes 40, 41 and accompanying discussion.

tological moral justification for the infliction of punishment by looking at the offender's conduct and his culpability rather than the socially beneficial consequences that may ensue from them.

There has been little theoretical discussion on the ethical justification of punishment in the transitional/international criminal justice literature in general and in the literature on Rwanda's experiment. At first sight, the uncompromising support for the prosecution policy in Rwanda may seem to be inspired and supported by the retributive theory, since the latter is often thought to impose an absolute non-utilitarian moral duty to punish wrongdoers. That is not entirely correct, however.

First, the most emotionally compelling reasons offered in the Rwandan context refer to the need to prevent another genocide whether by "eradicating the culture of impunity", establishing the rule of law or promoting reconciliation, all of which are utilitarian in nature and will be addressed in the following section.

Second, it is important to note that, without going into discussions about the persuasiveness of retributive justifications in general<sup>[199]</sup>, even defenders of the most robust accounts of retributivism will find it difficult to justify the Rwandan government's practice of detaining and prosecuting so many Rwandans with the hope of punishing as many offenders as possible and at all costs. The retributive duty to punish does not authorize the maximization of the chances of punishing the guilty at the cost of the probable punishment of the innocent. In fact the prohibition of using the individual as a means to any end is the cardinal principle of retributivism. In this connection, the massive pretrial detentions in Rwanda and the attendant presumption of guilt, the arbitrariness of the procedures and rules employed particularly in the *gacaca* tribunals to determine guilt and punishment, can hardly be defended from the perspectives of the principles of individual criminal responsibility and proportionality. Thus, even if, by some miracle, the policy in place happened to affect only the guilty and only in proportion to their guilt, it is difficult to insist on the validity of uncompromising moral duty to punish transgressors at the expense of all other competing moral imperatives that Rwandan policy makers had to take into account.<sup>[200]</sup>

Third, the selective and inconsistent manner in which justice, victims' rights or international legal obligations are invoked in the Rwandan context shade doubts on the motivations of the authorities and undermine the credibility of any arguments proffered to justify the practice in Rwanda along those lines.

### 3.3.1.2. The Utilitarian Perspective

The utilitarian theory of punishment is a consequentialist doctrine prescribing that the morality of punishment ought to be judged by its consequences. It considers punishment as bad or evil, which can only be justified if it maximizes social utility or prevents more harm than the one that results from the imposition of punishment. The persuasiveness and respectability of the various utilitarian or utilitarian-leaning arguments offered to justify the policy pursued by the Rwandan government, including prevention and reconciliation can be gauged by employing a set of interrelated tests.

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[199] Retributive-leaning justifications for the punishment of human rights violation are often vaguely framed in terms of a duty owed to the victims, international legal obligation and/or simply as requirements of justice.

[200] Even Kant, who is widely seen as the father of retributivism, had to temper his injunction that "the last offender" ought to be punished even if society was to disintegrate, when dealing with a hypothetical scenario that bears some resemblance to post-genocide Rwanda. Kant (1999) (1797) *Metaphysical Elements of Justice*, 2d ed. John Ladd. Trans., Hackett Pub. Co.: 141.

The first one involves the question ‘what is the likelihood that the policy in question can produce the said desirable consequences. Here, the utility of contemporaneous investigation and punishment human rights violations in the above respects may be less debatable. Atrocities such as those that had occurred in Rwanda may not have taken place on such a scale if the first few offenders were promptly investigated and prosecuted. The link between the punishment of past abuses and the prevention of future atrocities or goals such as reconciliation, however, is not as straightforward as is sometimes assumed. The key towards the attainment of those and related objectives lies not in criminal justice, be it the modern criminal justice system or the *gacaca*, but in a political process aimed at building the institutions that can intervene to prevent and punish future abuses and provide the normative framework, incentives and forums for pacific settlement of political differences. The latter may involve the building of a democratic and inclusive institutional and normative framework. The prosecution and punishment of past abuses does not provide a shortcut to those although it may, at best, play a complementary role.

Secondly, it follows from the above that the extent to which the fulfillment of the requisites for the attainment of the morally respectable objectives such as the ones stated above constitute the priorities of the Rwandan government determines whether its prosecution policy was actually motivated by the same considerations. In this respect, the benefit of hindsight saves us from purely speculative assessments. Although reconciliation is frequently invoked as a paramount objective, the government has been unwilling to establish an inclusive political system, which is the more direct and effective way for pursuing the same. The International Crisis Group described the political and human rights environment in Rwanda in the following terms:

“whereas speeches by officials underline reconciliation, national unity and ensuring the rights of every one, for the last three years (which corresponds with the extension of the transition period), Rwanda has known a dangerous authoritarian rule.”<sup>[201]</sup>

The government has been unwilling to submit itself to competitive national elections for the first 9 years of its existence, local elections held during the same period and the 2003 nationwide elections were reported to be below minimum democratic standards and stage-managed by the RPF. Political activities by groups other than the ruling party are restricted, and dissidents are frequently harassed, imprisoned or forced into exile.<sup>[202]</sup> The political environment is invariably described as Not Free in each of the annual surveys published by Freedom House since 1995. Many observers also provide a very grim picture of the general human rights situation apart from the injustices arising from the prosecution policy. Moreover, the government’s routine invocation of the legacy of the genocide to justify ongoing abuses against its current adversaries and dissidents have invited widespread cynicism. All of these not only undermine the credibility of the argument that the pursuit of the genocidaire is motivated by any of its stated utilitarian objectives but also reinforce perceptions that the government is using moral arguments to achieve other less respectable and partisan political ends.<sup>[203]</sup>

Third, even assuming that the government’s prosecution policy is motivated by, and was likely to serve some of the stated positive ends, a utilitarian reasoning also requires that

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[201] ICG, *Fin de transition*, supra, note 14, at 10.

[202] See Reyntjens, supra, note 39.

[203] Mamdani warns, “[i]n the real world of state politics, however, the word genocidaire may be used to label any Hutu opponent, or even critic of Tutsi Power....The moral certainty about preventing another genocide impartss a moral justification to the pursuit of power with impunity.” Mamdani, at 271.

the latter outweigh the possible negative consequences. More than a hundred thousand Rwandans were held in prolonged pretrial detention under inhuman prison conditions and thousands among them have died before they have had their day in a court of law. The cost of the entire undertaking is also staggering in terms of time, energy and resources, which, given the country's limited resources should have better been directed at reconstruction efforts. All of these have negative repercussions on the prospects for reconciliation and political stability.

Although the question whether the above negative consequences were foreseeable at the outset is now a moot question, the consequences of a policy aimed at prosecuting a large proportion of the country's population for crimes ranging from theft to genocide, should have at least prompted a serious discussion on all the foreseeable alternative or complementary policy options. The problem was that considerations of security and expediency, and lack of experience in policy making stood in the way of serious aforethought. The government, for example, had rejected offhand the idea of the establishment of an International Commission of Inquiry envisaged under the Arusha Accord.<sup>[204]</sup> Other options included selective prosecutions that do not, for example, extend to minor assaults and property-related crimes, and the appointment of foreign judges, an option that was initially proposed by the government but was later abandoned. Prison overcrowding could also have been reduced if pretrial detention was made the exception rather than the rule and some of the detainees were conditionally released.

What is also important is that the Rwandan government has been unwilling to minimize the negative consequences of its prosecution policy, even after the latter were clearly known. In fact, as we have seen earlier, it had undertaken a host of measures that had the opposite effect, including abandoning the idea of preliminary screening of suspects and detainees and resorted frequent purges directed against judges and other forms of interference with the independence of the judiciary that led to the resignation of many magistrates. Finally, the *gacaca* experiment, which the government adopted as a solution to the problems faced in the judicial process only proved worse. This is true both in terms meeting international fair trial standards and easing social and political problems posed by the extraordinary number of detainees awaiting trials.

### 3.4. Summary Remarks on the Justifications for *gacaca*

To recap the main elements of the discussion on the necessity or desirability of the *gacaca* experiment, in order for the Rwandan government's policy to be justified on the basis of objectives such as the promotion of reconciliation, human right and the rule of law, the policy must be motivated by those concerns<sup>[205]</sup> and must not give rise to problems that risk dissipating the purported objectives. When judged by those standards, the records of the Rwandan government and the negative consequences of its prosecution policy shade grave doubts on both the motivations behind, and utility of the policy, thus creating the perception that it was intended to serve objectives other than those articulated.<sup>[206]</sup> The international law and victims-centered rationales offered as justifications, on the other hand are undercut by the government's staunch opposition to the idea of investigating the serious crimes allegedly committed by its members

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[204] The choice was not per se undesirable, as some have argued. See Cobban, *supra*, note 194, at 8.

[205] Claus Offe (1996) *Varieties of Transitions: The East European and East German Experience*, Cambridge, Polity Press: 109.

[206] In an essay that is otherwise sympathetic to the RPF-led government, Helena Cobban wrote "for all the Rwandan government's claims about seeking national reconciliation and ensuring respect for all citizen's human rights, their credibility on both these counts has been questioned by many who know the country best." *supra*, note 194, at 12.

while pursuing the predominantly Hutu suspects to the last person for crimes ranging from theft to genocide and the numerous injustices observed in the judicial process. The negative perceptions flowing from the implementation of such a policy are unlikely to help the quest for reconciliation, particularly when shared by the majority.

The inauguration of the *gacaca* experiment, on the other hand, reveals that the lessons learnt from the previous years were very few and selective. The emphasis on the purported efficiency of the *gacaca* tribunals suggested a renewed determination to prosecute the maximum number of suspects unhindered by due process and fair trial concerns. As has been discussed in some detail, the *gacaca* law has in effect preempted altogether the application of due process and fair trial standards. The arguments advanced to mute criticism along the above lines are unpersuasive. The new *gacaca* tribunals are not traditional courts but entities established by the state with all the powers of modern courts but none of the major constraints that go along with the exercise of such powers. The purportedly unique advantages of *gacaca* tribunals are also either grossly overestimated or outweighed by the disadvantages flowing from the system. Lastly, the claim that ‘the introduction of *gacaca* is not an option but a necessity’ arises out of an abiding sense that the punishment of all suspected offenders is an imperative - no matter how it is done, which is not grounded on clearly articulated utilitarian or retributivist rationales. On a more fundamental level, the Rwandan prosecutions, whether before the regular courts or the *gacaca* tribunals did not and could not promote reconciliation because they were not meant to tackle the underlying causes of past and present divisions in that country.

### 3.5. Conclusion: Memory, Power, and Legitimacy

The antecedent circumstances of the genocide and the post-1994 political and human rights environment suggests that, reconciliation and respect for the rule of law and human rights remain as elusive in Rwanda today as they were more than a decade ago. The problems facing Rwandans in those respects are both consequences and causes of the problem of legitimization of political power, which the government has yet to overcome and whose solution should better be sought in politics rather than in criminal justice. The single-minded pursuit of the latter has, in fact, been part of the problem rather than the solution.

The RPF seems to have sought to justify its assumption and exercise of power on the basis of the projected image of a movement that had stopped the genocide and was capable of preventing its recurrence. Accordingly, the culmination and horrible legacy of the genocide have been used as a defining moment and theme, respectively, of the new order. However, while the strategy might have initially earned the RPF-led government considerable support and ‘legitimacy’ internationally and helped discredit its opponents<sup>[207]</sup> it has proved counterproductive in terms of enhancing its domestic political authority in the long run.

In the first place, politically defining moments cannot be perceived as such and serve as effective tools for political mobilization where there are deep divisions over the significance of the relevant events. RPF’s assumption of political power in the aftermath of the genocide did not produce enough enthusiasm among the majority Hutu and, as such, the galvanizing potential of the event as a politically defining moment has been rather limited.

Secondly, the RPF tried to use the symbolism of the latter events beyond their natural limits, which tend to be temporary, even when otherwise effective. Successor regimes cannot

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[207] Joan Pottier asserts that the RPF has managed to translate “international feelings of guilt and ineptitude into” concessions to its “monopoly of knowledge construction”. Pottier, J. (2002) *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the late Twentieth Century*, Cambridge, Cambridge University Press: 202.



indefinitely continue to justify their authority in reference to momentous events that may have brought them to power. They must strive to build their authority on a more durable basis of legitimacy. As far as the RPF was concerned, the only way for achieving that was delivering its promise to validate its authority by submitting to the freely expressed consent of the majority of the population.

Having failed to satisfy the above test, the RPF has come to rely, almost exclusively, on the symbolic use of the genocide.<sup>[208]</sup> Accordingly, the memory of past victimization serves as a constant reminder of the perpetual danger of extermination facing the minority and the government's mandate to prevent that from happening. The latter mandate is taken to justify jailing and punishing each and every suspected "genocidaire" and proponent of "genocidal ideology" and – if necessary, invading neighbouring territories in the pursuit of those goals.<sup>[209]</sup> The legacy of the genocide is also a reference point for a range of other major policy decisions and newly created political and social structures and statuses<sup>[210]</sup>, and is one of the key Constitutional foundations of the new Republic.<sup>[211]</sup>

From a sociological perspective, the above scheme resembles a conscious effort at building a form of social solidarity out of the memory of past victimization along the lines of what Durkheim called mechanical solidarity.<sup>[212]</sup> Doubts about the possibility of or virtues of a conscious pursuit of such an objective aside, the memory of past victimization can only contribute to the cohesiveness of a society when it is commonly shared by the majority of its members. Such may be the case, for example, with small communities that have a shared experience of victimization in the hands of outsiders or foreign enemies. By contrast, the strategy is counter-productive for divided societies, such as Rwanda, where the composite groups have divergent claims of victimization and are, at the same time, destined to live together. In such cases, dwelling on the memory of the past is a recipe for division rather than solidarity and reconciliation. Accordingly, to the extent that the legacy of the Rwandan genocide has served the purposes of social solidarity, it may have contributed to the entrenchment of the two separate social identities whose internal cohesion is maintained by their hostility towards one another.

Politically, the above strategy has resulted in a veritable conundrum. On the one hand, as a movement dominated by elites from a minority ethnic group, the RPF realizes that it has to de-emphasize ethnicity if it was to gain the confidence of the majority and expand its authority across Rwanda's main ethnic fault line. Accordingly, ethnic identification is abandoned in favor of a legally sanctioned Rwandan national identity in official documents and lexicon. On the other hand, the decision to make the memory of the genocide a defining element of the post-

[208] Filip Reyntjens points to the international relations benefits of the legacy of the genocide stating that "the Rwandan has succeeded in avoiding condemnation by astutely exploiting the 'genocide credit' and by skilful information management." See Reyntjens, *supra*, note 33.

[209] President Kagame was asked in an interview to respond to allegations that "Rwanda and Uganda's Intervention in Congo was fuelled by a desire to establish a Tutsi hegemony in the Great Lakes Region. He responded saying "we are fighting for survival and you cannot think of building empires when you are fighting for survival". Michael Wakabi & Levi Ochieng (1999) "Kagame Interview", *The East African*, July 7-13.

[210] See Mamdani, at 266-67.

[211] The first two paragraphs in the preamble deal with the legacy of the genocide and stress the resolve of the Rwandan people "to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and other form of divisions". Secondly, although the horrible legacy of the genocide and the desire to prevent its recurrence may have understandably served as inspirations for the new Constitution, those themes have become too divisive in Rwanda to have the foundational significance that might have been intended. The exclusive reference to the genocide evokes the victimization of mainly Tutsis by Hutus, although the Constitution carefully avoids using those terms, employing instead "unworthy leaders and other perpetrators", as the culprits and "sons and daughter's of Rwanda", as the victims. Preamble, *The Constitution of the Republic of Rwanda*.

[212] Emile Durkheim (1991) *De la division du travail social*, 2e édition «quadrige», Paris, Presses Universitaires de France: 35-69

genocide political and social order seems to not only ossify the very ethnic dualism that the government sought to bridge but also further alienate the majority Hutu. One can't conceive of anything more divisive, in societies such as Rwanda, than a founding theme and governance strategy that, by design or default, emphasizes the victimization of one group over that of the other. The result is a political environment characterized by a reciprocal mistrust between the government and the majority of the population that it is determined to govern.<sup>[213]</sup>

Consequently, challenges to the authority of the government may come from three dimensions. First, the majority Hutu who perceive that they have no place in a political order that is dominated by the minority and whose founding mission makes them the exclusive and perpetual targets of rhetorical denunciation, detention and prosecution. The second dimension may include the victims, survivors and supporters of the government's policy who have come to entertain unrealistic expectations about the benefits (justice, security, healing, or indemnity) of the strategy chosen by the government. Its failure to deliver those benefits mainly as a result of the endlessness of the prosecutions, increased ethnic tensions and lack of resources risk eroding the level of support that the RPF might have enjoyed from those groups. The third source of challenge may be dissidents from among the diverse group of Rwandans who feel that the pursuit of the *genocidaire* is being used to divert attention from current governance and human rights issues or disagree over the conduct of proceedings.

Hence, to borrow the expression used by the OAU International Panel in a slightly different context, the RPF seems "caught in a vicious circle". The more it felt that it is unlikely to gain the majority's consent, the more it has come to rely on the pursuit of the *genocidaire* as the single, most important rationale for its continued hold on power. The more exclusively it has come to rely on the latter rationale, the more its authority was contested by increasing number of Rwandans not just by the Hutu, necessitating an even more expansive application of the rationale.

In order to come out of this predicament, the Rwandan government may need to work towards solving the problem of the legitimation of political power. It can start the beginning of the long journey by shifting from a perpetual pursuit of the *genocidaire* to the construction of an inclusive founding narrative and a socio-political order that reflect the shared experiences and aspirations of all Rwandans rather than their divisive past. Tackling the legacy of atrocities committed by all sides through a combination of prosecution, amnesty, and truth commissions, and recognizing the losses that Rwandans have suffered as a society can significantly contribute to the building of a new vision for a new Rwanda.

In order for this to happen, however, a radical rethinking of existing policies and readiness to share political power would be necessary. Goals such as reconciliation would remain distant aspirations as long as the reality of power relation in the country continues to contradict the rhetorical denial of the relevance of ethnicity by the authorities. Viewed from the contemporary order of things, however, the dominant group may be apprehensive of a power sharing arrangement, which it believes would alter the balance of power in favor of the subordinate group. But the current alternative does not guarantee the perpetuation of the existing balance of power for a sustainable period of time. Rather it would only mean an increased reliance on violence as a means of eliciting compliance from the majority, which, in turn, may destabilize not only Rwanda but also other countries in the region as the recent political history of Burundi, Uganda and Zaire demonstrates.

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[213] For a more poignant description of the conundrum, See *The Preventible Genocide*, Para. 18:60,

In the long run, the solution to that problem has to come from diminishing the political significance of Hutu - Tutsi identities.<sup>[214]</sup> However, the ground may need to be laid today while the minority group has the power to influence the course of events.<sup>[215]</sup>

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[214] Mamdani, at 281.

[215] As Mamdani aptly put it “Rather than think that power is the precondition for survival, the Tutsi will sooner or later have to consider the opposite possibility: that the prerequisite to cohabitation, to reconciliation, and a common political future may indeed be to give up the monopoly of power.” Id, at 279.

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